MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

June 26, 2014, through September 23, 2014

CORBIN R. DAVIS

REPORTER OF DECISIONS

VOLUME 306

FIRST EDITION

THOMSON REUTERS™

2015

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PEOPLE v HENDERSON

Docket No. 311864. Submitted June 4, 2014, at Grand Rapids. Decided June 26, 2014, at 9:00 a.m. Leave to appeal sought.

Jaquan Henderson was convicted in the Kalamazoo Circuit Court of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, being a felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. During the trial, the court, Pamela L. Lightvoet, J., did not give an instruction on duress in response to the jury's request for one. Defendant appealed, including among the arguments raised that the court had erred by failing to give the instruction.

The Court of Appeals *held*:

1. Duress is not a defense to homicide. The rationale underlying this common-law rule is that one cannot submit to coercion to take the life of an innocent third person, but should instead risk or sacrifice his or her own life. Because duress is not a defense to homicide, the trial court did not err by declining to instruct the jury in this regard with respect to defendant's murder charge.

2. Defendant also argued that the basic principle that duress is not a defense to homicide does not apply if the defendant did not actually commit the murder but was instead prosecuted as an aider and abettor to murder. If directly committing a homicide is not subject to a duress defense, however, assisting a principal in the commission of a homicide cannot be subject to a duress defense either, considering that an aider and abettor to murder is assisting in taking the life of an innocent third person instead of risking or sacrificing his or her own life.

3. Defendant further argued that an instruction on duress should have been given with regard to his conviction of assault with intent to commit murder. Application of a duress defense in the context of assault with intent to commit murder would be entirely incongruous with the principle underlying the common-law rule. It was only the fortunate fact of one victim's survival, not a difference in defendant's conduct, that rendered defendant guilty of assault with intent to commit murder rather than murder with respect to that victim. Given that a defendant

may not justify a homicide with a claim of duress, it logically follows that a defendant cannot similarly justify conduct intended to kill simply because he or she failed in the effort.

4. The elements of assault with intent to commit murder are (1) an assault (2) with an actual intent to kill (3) that, if successful, would make the killing murder. The elements of second-degree murder consist of (1) a death (2) caused by an act of the defendant (3) with malice and (4) without justification or excuse. Malice is the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of the behavior would be to cause death or great bodily harm. Aiding and abetting describes any type of assistance given to the perpetrator of a crime by words or deeds that were intended to encourage, support, or incite the commission of that crime. A defendant must have had the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses he or she specifically intended to aid or abet or had knowledge of, as well as the crimes that are the natural and probable consequences of those offenses. Therefore, the prosecution must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew that the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

5. There was sufficient evidence to support defendant's convictions and, in particular, to establish that he possessed the requisite intent for each offense. Intent may be inferred from circumstantial evidence. Because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish his or her state of mind. Intent to kill may be inferred from all the facts in evidence, including the use of a deadly weapon, a motive to kill, or flight and lying (which may reflect a consciousness of guilt).

Affirmed.

HOMICIDE — AIDING AND ABETTING — ASSAULT WITH INTENT TO COMMIT MURDER — DEFENSES — DURESS.

Duress is not a defense to homicide; a defendant charged with assault with intent to commit murder or aiding or abetting second-degree murder is similarly not entitled to a jury instruction on duress as a defense.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jeffrey S. Getting*, Prosecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for the people.

Mary A. Owens for defendant.

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

MURPHY, C.J. Following a jury trial, defendant appeals as of right his convictions for second-degree murder, MCL 750.317, assault with intent to commit murder (AWIM), MCL 750.83, being a felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 35 to 80 years' imprisonment for the murder and AWIM convictions, to 76 to 360 months' imprisonment for the felon-in-possession conviction, and to 2 years' imprisonment for each of the felony-firearm convictions. We affirm.

On appeal, defendant first argues that the trial court erred by declining to give a duress instruction in response to a request for such an instruction by the jury. Rather than instruct on duress, the trial court directed: "You must follow the instructions given to you. Duress is not a defense to homicide/murder." Defense counsel objected to the trial court's response to the jury, thereby preserving this issue for review. See MCR 2.512(C). "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

A defendant has the right to have a properly instructed jury consider the evidence against him or her, and it is the trial court's role "to clearly present the case to the jury and to instruct it on the applicable law." *Id.*; see also MCL 768.29. "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). When examining instructions to determine if an error has occurred, the instructions must be considered "as a whole, rather than piecemeal . . . ." *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). Even if imperfect, a jury instruction is not grounds for setting aside a conviction "if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Id*. at 501-502.

"Duress is a common-law affirmative defense." *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). To be entitled to an instruction on an affirmative defense, such as duress, a defendant asserting the defense must produce some evidence from which the jury can conclude that the essential elements of the defense are present. *Id*. at 246. Specifically, to merit a duress instruction, a defendant bears the burden of producing some evidence from which the jury could conclude the following:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

> D) The defendant committed the act to avoid the threatened harm. [*Id*. at 247.]

A threat of future injury is not sufficient; rather, "the threatening conduct or act of compulsion must be 'present, imminent, and impending . . . .' " *Id*., quoting *People v Merhige*, 212 Mich 601, 610; 180 NW 418 (1920). Moreover, the threat " 'must have arisen without the negligence or fault of the person who insists upon it as a defense.' " *Lemons*, 454 Mich at 247 (citation omitted).

Relevant to defendant's case, it is well established that duress is not a defense to homicide. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996); *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993); *People v Etheridge*, 196 Mich App 43, 56; 492 NW2d 490 (1992); *People v Travis*, 182 Mich App 389, 392; 451 NW2d 641 (1990). "The rationale underlying the common law rule is that one cannot submit to coercion to take the life of a third person, but should risk or sacrifice his own life instead." *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987). Because duress is not a defense to homicide, the trial court did not err by declining to instruct the jury in this regard with respect to defendant's murder charge. Defendant maintains that the principle that duress is not a defense to homicide is inapplicable when he did not actually commit the murder himself but was instead prosecuted primarily as an aider and abettor to murder. We fail to see the logic in this argument, and defendant provides no supporting authority that an aider and abettor to murder can employ a duress defense even though a principal is not entitled to do so. If directly committing a homicide is not subject to a duress defense, assisting a principal in the commission of a homicide cannot be subject to a duress defense either, considering that an

aider and abettor to murder is assisting in taking the life of an innocent third person instead of risking or sacrificing his or her own life. See *Dittis*, 157 Mich App at 41. The underlying rationale articulated in *Dittis* is equally sound and not distinguishable in the context of aiding and abetting murder. The court in *State v Dissicini*, 126 NJ Super 565, 570; 316 A2d 12 (NJ App, 1974), aff'd 66 NJ 411 (1975), in rejecting a similar argument, observed:

> Defendant does not dispute the general rule, but argues that it is applicable only to a defendant who is the actual perpetrator of the killing, and that the defense should be available to one such as he who did not directly kill but only aided and abetted. Authoritative discussion of the point is sparse . . . and this is undoubtedly so because the argument has little merit.

The California Supreme Court has stated that "because duress cannot, as a matter of law, negate the intent, malice or premeditation elements of a first degree murder, we further reject defendant's argument that duress could negate the requisite intent for one charged with aiding and abetting a first degree murder." *People v Vieira*, 35 Cal 4th 264, 290; 25 Cal Rptr 3d 337; 106 P3d 990 (2005). Even the United States Court of Appeals for the Ninth Circuit has noted that duress does not excuse murder and "in many jurisdictions, duress does not excuse attempted murder or aiding and abetting murder[.]" *Annachamy v Holder*, 733 F3d 254, 260 n 6 (CA 9, 2012). We are unaware of any Michigan precedent to the contrary in which the issue was directly confronted.

Defendant also contends on appeal that duress was available as a defense regarding his AWIM conviction.[1]

---

[1] Defendant concedes on appeal that the facts did not support an instruction on duress in regard to the felon-in-possession conviction.

However, defendant has not provided any authority for the proposition that a duress defense applies to AWIM, nor are we aware of any such rule. On the contrary, application of a duress defense in the context of AWIM would be entirely incongruous with the principle that "one cannot submit to coercion to take the life of a third person, but should risk or sacrifice his own life instead." *Dittis*, 157 Mich App at 41. AWIM is, by definition, an assault with the intent to kill, "which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (quotation marks and citation omitted). In other words, it is only the fortunate fact of the victim's survival—not a difference in the defendant's conduct—that renders the defendant guilty of AWIM as opposed to murder. Given that a defendant may not justify homicide with a claim of duress, it logically follows that a defendant cannot justify conduct intended to kill simply because he or she failed in the effort. Instead, for one faced with the choice between saving oneself and endeavoring to kill an innocent third person, the law recognizes that one "should risk or sacrifice his own life instead." See *Dittis*, 157 Mich App at 41; see also *State v Mannering*, 112 Wash App 268, 276; 48 P3d 367 (2002) (stating that allowing duress as a defense to attempted murder but not to murder would be absurd because just as "duress is not a defense to murder, it is also not a defense to attempted murder").

Defendant argues that by failing to instruct the jury on duress relative to the AWIM charge, the trial court effectively allowed for an AWIM conviction absent the need to establish an intent to kill. This argument lacks merit; the trial court specifically instructed the jury that the prosecution was required to prove beyond a reasonable doubt that there was an intent to kill with respect to the AWIM charge. And the lack of a duress

instruction in no way alleviated the prosecution's burden to establish an intent to kill. In sum, duress is not a defense to AWIM, and, accordingly, the trial court did not err by failing to instruct on duress.

Defendant next argues on appeal that the trial court erred by omitting an element of AWIM from the instructions, an error that defendant maintains amounts to structural error. However, by approving the jury instructions as given, defense counsel waived this argument. *Kowalski*, 489 Mich at 503-505. Additionally, the trial court's instruction on AWIM was consistent with CJI2d 17.3, now known as M Crim JI 17.3, except that the court did not include the following bracketed language: "the circumstances did not legally excuse or reduce the crime." Defendant contends that the failure to include this language eliminated the prosecution's obligation to prove that, had the assault with intent to kill been successful, it would have amounted to murder. Defendant ties the failure to instruct on the matter to the issue of duress, claiming that duress constituted a legal excuse. However, we have already rejected the duress argument, and defendant does not set forth any other mitigating basis that would have necessitated the instructional language that was not included by the court in instructing the jury. Accordingly, even assuming an instructional error on the single element, there was no prejudice and thus no need to reverse given that "[t]he trial court's instructions, when viewed as a whole, adequately protected defendant's rights." *People v Carines*, 460 Mich 750, 770-771; 597 NW2d 130 (1999).

Lastly, defendant challenges the sufficiency of the evidence supporting the second-degree murder and AWIM convictions. Appeals regarding the sufficiency of the evidence are reviewed de novo. *People v Lueth*, 253

Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Juries, and not appellate courts, hear the testimony of witnesses; therefore, we defer to the credibility assessments made by a jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). "It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The prosecution need not negate every reasonable theory of innocence, but need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime. *Carines*, 460 Mich at 757. We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Relevant to defendant's convictions, the elements of AWIM, once again, are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Ericksen*, 288 Mich App at 195-196 (quotation marks and citation omitted). The elements of second-degree murder consist of " '(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.' " *Reese*, 491 Mich at 143, quoting *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The term "malice" has been defined as "the intent to kill, the intent to cause great bodily

harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke*, 457 Mich at 464.

In defendant's case, the jury was also instructed on an aiding-and-abetting theory of criminal liability. See MCL 767.39. "The phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). To show that an individual aided and abetted the commission of a crime, the prosecution must establish

> "that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." [*Carines*, 460 Mich at 757 (citation omitted).]

With respect to the intent element, our Supreme Court in *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006), elaborated:

> We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the

charged offense was a natural and probable consequence of the commission of the intended offense.

On appeal, defendant focuses his sufficiency arguments on his state of mind and whether it was shown that he possessed the requisite intent to commit second-degree murder and AWIM. Relevant to his arguments, intent may be inferred from circumstantial evidence. *McGhee*, 268 Mich App at 623. Indeed, "because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind . . . ." *Kanaan*, 278 Mich App at 622. Intent to kill may be inferred from all the facts in evidence, including the use of a deadly weapon. See *Carines*, 460 Mich at 759. Minimal circumstantial evidence is sufficient to show an intent to kill, and that evidence can include a motive to kill, along with flight and lying, which may reflect a consciousness of guilt. *People v Unger*, 278 Mich App 210, 223, 225-227; 749 NW2d 272 (2008).

Viewing the evidence in this case in the light most favorable to the prosecution, it is plain that there was sufficient evidence to support defendant's convictions and, in particular, to establish that he possessed the requisite intent for each offense. The evidence showed that defendant and his accomplices, Steven Anderson and Robert Wright, believed that one of the victims had been involved in assaulting and robbing Wright a month before the present shooting. Defendant had previously told Wright that he would help him "whoop" those involved with the assault and, by defendant's own admission, he went to the murder scene intending to fight one of the victims in exchange for money. While claiming that he only intended a fistfight, defendant brought a .380 caliber handgun to the scene. He

brought this gun knowing that Wright wanted to kill those involved in his assault. Anderson and Wright also had guns. Further, defendant admitted that he was present at the shooting and that he, like Wright and Anderson, fired his gun. Consistent with this admission, police recovered six .380 caliber shells at the scene, a shotgun casing, and later, at another location, spent cartridges for the .44 caliber weapon that had been used by Wright and disposed of by Anderson. As a result of the shooting, one victim was fatally shot in the chest. The other victim suffered gunshot wounds to the leg. As indicated in *Robinson*, 475 Mich at 15, a "defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." The testimony rationally supported a finding that defendant intended to aid or abet a murder, that he had knowledge that a murder was going to be committed, or that he intended to aid and abet conduct or an offense for which the natural and probable consequence was a homicide.

Furthermore, defendant, like Wright and Anderson, fled after the shooting. Defendant then proceeded to disassemble his gun, and he disposed of all three guns in the Kalamazoo River. He also destroyed the cellular telephone that he had been using to communicate with Wright on the day of the shooting. He repeatedly lied to police about his involvement, notably withholding information about which gun he had fired until police deliberately misled him by indicating that the shotgun blast had killed the victim. Only when misinformed in this manner did defendant acknowledge that he fired the .380 caliber weapon, and, when asked why he withheld this information, he told police that he did not want to say anything until he knew which gun was

actually the murder weapon. From this evidence, a jury could reasonably infer that defendant feared that he might have fired the fatal shot, meaning that, contrary to defendant's claims, he did aim at the victims, intending to kill them. Overall, the evidence was sufficient to support defendant's convictions of second-degree murder and AWIM.

In arguing to the contrary on appeal, defendant maintains that he went to the scene at Wright's behest for a fistfight, not a shooting, and that he fired his weapon harmlessly into the air. These arguments do not entitle him to relief, however, because the credibility of these assertions was a question for the jury, and it was free to reject his testimony in this regard. See *Wolfe*, 440 Mich at 515. Defendant also again raises the question of duress, arguing that the jury should have been instructed on this defense and that, if properly instructed, the jury likely would have acquitted him. However, as discussed earlier, defendant was not entitled to a duress instruction and, consequently, his arguments in this regard lack merit. Ultimately, the jury disbelieved defendant's claims and concluded that the requisite intent to kill for AWIM and the requisite malice for second-degree murder had been proved. There was sufficient evidence to support the jury's conclusions in this regard, and reversal is unwarranted.

Affirmed.

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

CICHEWICZ v SALESIN

Docket No. 312806. Submitted March 12, 2014, at Detroit. Decided June 26, 2014, at 9:05 a.m.

Lori Cichewicz brought a medical malpractice action in the Oakland Circuit Court against Michael S. Salesin, M.D.; Salesin's professional corporation; and Walnut Lake OB/GYN, PLLC, asserting a claim of wrongful conception after she gave birth to a child with Down syndrome. Before plaintiff became pregnant, Salesin had attempted to perform two permanent sterilization procedures at her request; however, he was unable to complete either procedure because her fallopian tubes were blocked, a fact that he confirmed by performing a hysterosalpingogram. After considering plaintiff's history, which included years of unprotected sexual intercourse that did not result in pregnancy, Salesin advised her that she no longer needed to use birth control. Plaintiff alleged that this advice, along with Salesin's assurance that she could not become pregnant and his failure to provide her with an alternative method of birth control, constituted gross negligence. Defendants moved for summary disposition on the ground that plaintiff's claims were barred by MCL 600.2971 because Salesin's alleged conduct was neither intentional nor grossly negligent. The trial court, Rudy J. Nichols, J., denied the motion, ruling that the evidence raised a question of fact regarding whether Salesin's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury would result. After Walnut Lake OB/GYN was dismissed by stipulation, the remaining defendants applied for leave to appeal, which the Court of Appeals denied. The Supreme Court, in lieu of granting defendants' motion for leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted.

The Court of Appeals *held*:

1. The trial court correctly concluded that MCL 600.2971 does not prohibit a wrongful-conception claim based on gross negligence for damages related to raising a child to the age of majority. Claims alleging wrongful conception were allowed at common law, and they remain actionable after the enactment of MCL 600.2971. Although MCL 600.2971(3) prohibits a person from bringing a civil action that seeks damages related to the costs of raising the child for a wrongful-

pregnancy or wrongful-conception claim premised on ordinary negligence, MCL 600.2971(4) provides that these damages may be recovered for an intentional or grossly negligent act or omission.

2. The trial court erred by ruling that plaintiff had established a genuine issue of material fact regarding whether Salesin's conduct was grossly negligent. Applying the standard for gross negligence articulated in the governmental tort liability act, MCL 691.1401 *et seq*., even viewing the facts in the light most favorable to plaintiff and considering all legitimate inferences in her favor, Salesin's conduct was not so reckless as to demonstrate a substantial lack of concern for whether plaintiff would become pregnant.

3. Plaintiff was permitted to seek the recovery of traditional damages for her own injuries through her wrongful-conception claim based on a common-law theory of negligence, and the trial court erred by ruling that MCL 600.2971 prohibits wrongful-conception claims unless the alleged conduct was intentional or grossly negligent. However, defendants' motion for summary disposition was properly denied to the extent it was based on the argument that plaintiff could not seek the recovery of any damages for her wrongful-conception claim.

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

1. ACTIONS — NEGLIGENCE — MEDICAL MALPRACTICE — WRONGFUL CONCEPTION — DAMAGES.

A person may bring a civil action alleging wrongful conception based on gross negligence to recover damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority (MCL 600.2971(4)).

2. ACTIONS — NEGLIGENCE — MEDICAL MALPRACTICE — WRONGFUL CONCEPTION — GROSS NEGLIGENCE — STANDARD.

A defendant may be held liable for damages related to the expenses necessary to raise a child to the age of majority in a wrongful-conception action based on gross negligence if the act or omission at issue was so reckless as to demonstrate a substantial lack of concern for whether the plaintiff would become pregnant as a result (MCL 600.2971).

3. ACTIONS — NEGLIGENCE — MEDICAL MALPRACTICE — WRONGFUL CONCEPTION — DAMAGES.

A plaintiff may seek the recovery of traditional damages for her own injuries in a wrongful-conception action based on ordinary negligence as long as the applicable evidentiary burdens are satisfied.

Morgan & Meyers, PLC (by *Jeffrey T. Meyers*), for plaintiff.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Beth A. Wittman* and *William W. Vertes*) for defendants.

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM. This case is before the Court on order of our Supreme Court for consideration, as on leave granted, of a trial court order denying defendants' motion for summary disposition in this wrongful-conception medical malpractice case.[1] We affirm in part, reverse in part, and remand for further proceedings.

On August 8, 2011, plaintiff, Lori Cichewicz, filed a complaint against defendants Michael S. Salesin, M.D.; Michael S. Salesin, M.D., P.L.C.; and Walnut Lake OB/GYN, P.L.L.C., averring that she was advised by Salesin in September 2007 that her fallopian tubes were blocked and, therefore, it was no longer necessary for her to use contraceptives. However, in October 2010, plaintiff became pregnant and subsequently gave birth to her daughter, who has Down syndrome.

In Count I of her complaint, plaintiff brought a claim of "gross negligence/medical malpractice" against Salesin. Plaintiff alleged that the standard of care required Salesin "to refrain from informing [her] that it was impossible her [sic] to become pregnant," "to refrain from informing [her] that she no longer required birth control," and to "continue to provide [her] with birth control, given her sincere stated desire not to become pregnant." Plaintiff further alleged that Salesin

[1] *Cichewicz v Salesin*, 494 Mich 873 (2013). This order appears with the plaintiff's name misspelled as "Chichewicz."

"grossly violated the standard of care" by taking contrary actions. That is, plaintiff alleged, "Salesin's negligent actions and omissions, as outlined above, were so reckless as to demonstrate a substantial lack of concern, on the part of Salesin, for whether [plaintiff] would become pregnant as well as the ramifications of [plaintiff's] becoming pregnant." Plaintiff claimed that, as a direct and proximate result of Salesin's violations of the standard of care, she stopped using birth control and became pregnant; consequently, she "was entitled to damages as are deemed fair and just regarding the pregnancy and continuing attendant care of her child . . . ." Specifically, plaintiff sought damages for physical injury, emotional distress, mental anguish, medical expenses related to her pregnancy, incidental expenses resulting from her pregnancy, denial of social pleasures and enjoyments because of her pregnancy, emotional distress related to knowing she would deliver a child with Down syndrome, loss of wages and earning capacity, as well as medical, daily living, attendant care, and educational expenses, and all other expenses associated with raising her child.

In Count II of her complaint, plaintiff brought a claim of vicarious liability against Walnut Lake OB/GYN, alleging that Salesin was its agent or employee when the purported negligence occurred. In Count III, plaintiff brought a claim of vicarious liability against Michael S. Salesin, M.D., P.L.C., alleging that Salesin was its agent or employee when the purported negligence occurred.

In June 2012, defendants moved for summary disposition, arguing that plaintiff could not establish that a genuine issue of material fact existed with regard to whether any alleged act or omission of Salesin constituted gross negligence as required by MCL 600.2971 in

wrongful-conception cases. In particular, defendants noted that during 14 years of plaintiff's marriage, she did not use birth control while having sexual intercourse two or three times a week without getting pregnant. However, in 2005, after her divorce, she began taking birth control pills and remained on the medication at the time of her annual gynecological physical in June 2007, when she requested permanent sterilization. Thereafter, in August 2007, Salesin attempted a sterilization procedure known as an Essure procedure, which involved the implantation of a device in each fallopian tube that causes scarring and results in permanent blockage of the fallopian tubes. However, Salesin was unable to insert the device into either of plaintiff's fallopian tubes. He then attempted a laparoscopic tubal ligation, but was unable to perform the procedure. In September 2007, plaintiff underwent a hysterosalpingogram to determine whether her fallopian tubes were blocked. When the x-ray dye did not flow through plaintiff's fallopian tubes, it was determined that both of plaintiff's fallopian tubes were occluded. Consequently, Salesin advised plaintiff that birth control was not necessary because her fallopian tubes were blocked and that the blockage had the same effect as a tubal ligation. Salesin testified that in his more than 30 years of practicing, he had never had a similarly situated patient become pregnant with such blockages. Defendants argued that reasonable jurors could not honestly conclude that Salesin's conduct constituted gross negligence, i.e., " 'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.' " *Odom v Wayne Co*, 482 Mich 459, 469; 760 NW2d 217 (2008) (citation omitted). And because "MCL 600.2971 prohibits claims for wrongful conception, including claims for the cost of raising the child to the age of majority, regardless of the

child's health, unless the alleged wrongful conduct was intentional or grossly negligent," defendants argued that they were entitled to summary disposition of plaintiff's complaint.

Plaintiff responded to defendants' motion for summary disposition, arguing that MCL 600.2971 did not prohibit her claim for traditional medical malpractice damages, regardless of whether she could demonstrate gross negligence. Plaintiff further argued that she had, in fact, presented sufficient evidence to create a question of material fact regarding whether Salesin's conduct amounted to gross negligence.

Defendants replied that there was "no merit to plaintiff's argument that the plain language of MCL 600.2971 entitles plaintiff to recover damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority on a wrongful pregnancy or wrongful conception claim in cases of intentional or grossly negligent acts or omissions[.]" Defendants argued that MCL 600.2971 "specifically prohibits an action for damages in a wrongful conception case, and provides that the prohibition does not apply to a civil action for damages for an intentional or grossly negligent act or omission." Defendants asserted that this statute did not abrogate the "traditional common-law rule that a person may not recover damages in a wrongful conception action. . . . [T]he common law would apply to prohibit a wrongful conception action for damages until the child's age of majority." Further, defendants argued, plaintiff was not entitled to recover "damages in her own right as a result of her pregnancy, including her own medical expenses, pain and suffering, and lost wages" because, "[g]iven that [MCL 600.2971(3) and (4)] clearly prohibit[] 'a person' from bringing a wrongful pregnancy or wrongful con-

ception claim, plaintiff's claim in this case cannot go forward." Defendants also reiterated their argument that plaintiff had not established a question of fact on the issue of gross negligence.

Following oral argument, the trial court denied defendants' motion for summary disposition. After noting that defendants' motion was premised on MCR 2.116(C)(10), the trial court stated, "MCL 600.2971 prohibits claims for wrongful conception, including claims for the cost of raising a child to the age of majority, regardless of the child's health unless the alleged wrongful conduct was intentional or grossly negligent." The trial court recounted the underlying facts, including that Salesin advised plaintiff that, because her fallopian tubes were blocked, she would not be able to get pregnant and did not need birth control. The trial court then held:

> Based on this evidence and particularly the testimony of plaintiff that the chance of the pregnancy was impossible according to him; and that even if plaintiff wanted another child . . . she would not be able to do so; further, that she had testified she specifically asked Salesin about going back to birth control as a precautionary measure; and that he said there's no need for birth control as the tubes are blocked; his own testimony that he had seen tubes come unblocked once they're blocked, the Court finds that evidence exists creating a question of fact as to whether or not the defendant's act or omission was so reckless as to demonstrate a substantial lack of concern for whether an injury would result; and thus, should be decided by a trier-of-fact.

The trial court then entered an order denying defendants' motion for summary disposition. On April 10, 2013, the trial court entered a stipulated order for the dismissal of all claims against defendant Walnut Lake OB/GYN, P.L.L.C. Defendants then filed an application

for leave to appeal in this Court, which was denied. *Cichewicz v Salesin*, unpublished order of the Court of Appeals, entered May 16, 2013 (Docket No. 312806). Thereafter, defendants applied for leave to appeal in our Supreme Court, which, in lieu of granting leave to appeal, remanded the matter to us for consideration as on leave granted. *Cichewicz v Salesin*, 494 Mich 873 (2013).

On appeal, defendants argue that the trial court erred by ruling that MCL 600.2971 creates a cause of action for wrongful conception caused by gross negligence and permits recovery of the costs of raising a child to the age of majority.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo as a question of law issues of statutory interpretation. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

MCL 600.2971 addresses three types of claims: wrongful-life claims, wrongful-birth claims, and wrongful-conception (also known as wrongful-pregnancy) claims. It provides:

> (1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.
>
> (2) A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born.
>
> (3) A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived.

> (4) The prohibition stated in subsection (1), (2), or (3) applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition. The prohibition stated in subsection (1), (2), or (3) does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code, 1931 PA 328, MCL 750.1 to 750.568.

A wrongful-birth claim is brought by the parents of a child with a birth defect and generally alleges that the defendant's failure to inform them of the risk of the birth defect deprived them of the opportunity to avoid or terminate the pregnancy. *Taylor v Kurapati*, 236 Mich App 315, 322-323; 600 NW2d 670 (1999); *Rouse v Wesley*, 196 Mich App 624, 626-627; 494 NW2d 7 (1992). The *Taylor* Court abolished claims for wrongful birth. *Taylor*, 236 Mich App at 355-356. However, before the *Taylor* decision, a wrongful-birth cause of action was actionable. See *Proffitt v Bartolo*, 162 Mich App 35, 41, 46; 412 NW2d 232 (1987), citing *Eisbrenner v Stanley*, 106 Mich App 357; 308 NW2d 209 (1981).

A wrongful-life claim is brought by or on behalf of a child with a birth defect and alleges that, but for the defendant's negligence, the child would not have been born. *Taylor*, 236 Mich App at 336; *Rouse*, 196 Mich App at 627. At the time of this Court's decisions in *Taylor* and *Rouse*, a cause of action for wrongful life did not exist in Michigan. *Taylor*, 236 Mich App at 340-341; *Rouse*, 196 Mich App at 627; *Proffitt*, 162 Mich App at 58.

This case, however, is more analogous to a wrongful-conception medical malpractice case. Wrongful-conception claims generally contend that

> the defendant's negligent conduct failed to prevent the birth of a child in the following situations: (1) where a physician negligently performs a vasectomy or tubal liga-

> tion or when a physician, pharmacist, or other health professional provides any other type of ineffective contraception, the parents conceive, and the birth of a healthy, but unplanned, baby results; (2) where a physician negligently fails to diagnose a pregnancy, thereby denying the mother the choice of termination of the pregnancy at a timely stage, and the birth of a healthy, but unwanted, baby results; and (3) where a physician negligently attempts to terminate the pregnancy and the birth of a healthy, but unwanted, baby results. [*Taylor*, 236 Mich App at 325-326 (citations omitted).]

This case differs from the typical wrongful-conception case, however, in that plaintiff alleges that Salesin's grossly negligent advice regarding her ability to conceive, and failure to prescribe birth control pills, led to an unplanned, unwanted pregnancy. This case also differs in that plaintiff gave birth to a daughter with Down syndrome.

Unlike wrongful-birth and wrongful-life claims, wrongful-conception claims have consistently been permitted in Michigan; however, the types of damages recoverable in wrongful-conception cases have been disputed. See, e.g., *Rouse*, 196 Mich App at 627; *Rinard v Biczak*, 177 Mich App 287, 290, 296; 441 NW2d 441 (1989); *Bushman v Burns Clinic Med Ctr (After Remand)*, 83 Mich App 453, 461; 268 NW2d 683 (1978). For example, in *Troppi v Scarf*, 31 Mich App 240; 187 NW2d 511 (1971), a wrongful-pregnancy case, this Court held that the plaintiff could recover for the pain and anxiety of pregnancy and childbirth, lost wages, medical and hospital expenses, and the economic costs of rearing the child. *Id*. at 260-261. In *Rinard*, this Court agreed that the plaintiff could recover for the costs of pregnancy and childbirth, as well as "related damages for pain and suffering, medical complications caused by the pregnancy, mental distress, lost wages,

and loss of consortium," but concluded that recovery for the economic costs of raising a normal, healthy child was not permitted. *Rinard*, 177 Mich App at 294. In *Rouse*, this Court also held that a plaintiff in a wrongful-pregnancy action "may not recover the customary cost of raising and educating the child." *Rouse*, 196 Mich App at 632. Further, the *Taylor* Court, which abolished wrongful-birth claims, acknowledged that wrongful-conception claims were viable causes of action in Michigan and refused to consider whether such claims "remain tenable." *Taylor*, 236 Mich App at 336 n 35.

After the *Taylor* decision was issued in 1999, our Legislature passed 2000 PA 423, which became MCL 600.2971. Subsections (1) and (2) are consistent with the prevailing common law; civil actions for wrongful birth and wrongful life are generally not actionable in this state. See MCL 600.2971(1) and (2); *Taylor*, 236 Mich App at 341, 355. Subsection (3) is also consistent with the prevailing common law; civil actions for wrongful conception are actionable, but damages for the cost of raising the child to the age of majority are generally not recoverable. See MCL 600.2971(3); *Rouse*, 196 Mich App at 631-632. However, with the addition of subsection (4), the Legislature created exceptions to each prohibition set forth in the three previous subsections of MCL 600.2971. At issue here is the application of subsection (4) to subsection (3).

The rules of statutory interpretation are well established. "[O]ur purpose is to discern and give effect to the Legislature's intent." *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). We examine the plain language of the statute, assign words their plain and ordinary meaning, and, if the language is unambiguous, no further construction is

required or permitted; the statute must be enforced as written. *Id*. Further, we presume that the Legislature has knowledge of the common law when it acts. *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010). The common law remains in effect until modified, and abrogation is not lightly presumed. *Id*. Therefore, the Legislature " 'should speak in no uncertain terms' " when it chooses to modify the common law. *Id*., quoting *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

Because statutes must be read as a whole and in context, *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012), we again consider subsections (1), (2), and (3) of MCL 600.2971, which provide:

> (1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.
>
> (2) A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born.
>
> (3) A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived.

Contrary to subsections (1) and (2)—which prohibit civil actions premised on wrongful-birth and wrongful-life claims—subsection (3) does not prohibit civil actions premised on wrongful-pregnancy or wrongful-conception claims. Rather, subsection (3) prohibits a wrongful-pregnancy or wrongful-conception claim "for damages for daily living, medical, educational, or other

expenses necessary to raise a child to the age of majority." But subsection (4) provides for an exception that is applicable to each prohibition stated in subsection (1), (2), and (3). It provides, in relevant part:

> The prohibition stated in subsection (1), (2), or (3) does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code, 1931 PA 328, MCL 750.1 to 750.568.

The prohibition set forth in each subsection is denoted by the words "shall not." See *1031 Lapeer LLC v Rice*, 290 Mich App 225, 231; 810 NW2d 293 (2010) (holding that "the term 'shall not' may be reasonably construed as a prohibition"). Thus, applying subsection (4) to subsection (1), a person may bring a civil action on a wrongful-birth claim that, but for an intentional or grossly negligent act or omission of the defendant, a child or children would not or should not have been born. Applying subsection (4) to subsection (2), a person may bring a civil action for damages on a wrongful-life claim that, but for an intentional or grossly negligent act or omission of the defendant, the person bringing the action would not or should not have been born. Applying subsection (4) to subsection (3), a person may bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful-pregnancy or wrongful-conception claim that, but for an intentional or grossly negligent act or omission of the defendant, the child would not or should not have been conceived.

Contrary to defendants' argument, MCL 600.2971 did not "create" a cause of action for wrongful conception. As discussed earlier, claims for wrongful conception have long been actionable in this state, although plaintiffs could not recover as damages "the customary

cost of raising and educating the child." *Rouse*, 196 Mich App 631-632; see also *Taylor*, 236 Mich App at 335. MCL 600.2971(4) did not abrogate the common law related to the recovery of these types of damages in wrongful-conception claims premised on negligence. That is, a plaintiff asserting a wrongful-conception claim premised on a negligent act or omission of a defendant still cannot recover damages "for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority[.]" MCL 600.2971(3). But, under MCL 600.2971(4), a plaintiff is permitted to recover such damages for a wrongful-conception claim premised on an intentional or grossly negligent act. Thus, the types of damages recoverable in a wrongful-conception claim depend on whether the defendant's act or omission was merely negligent, or whether it was intentional or grossly negligent.

"Common-law rules apply to medical malpractice actions unless specifically abrogated by statute." *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 503 n 16; 791 NW2d 853 (2010). The Legislature has the authority to abrogate the common law and, if a statutory provision and the common law conflict, the statutory provision supersedes the common law. *Pulver v Dundee Cement Co*, 445 Mich 68, 75 n 8; 515 NW2d 728 (1994). We conclude that, through MCL 600.2971, the Legislature has spoken in no uncertain terms, and those terms state that wrongful-birth and wrongful-life claims are actionable in Michigan "for damages for an intentional or grossly negligent act or omission." MCL 600.2971(4). Further, wrongful-conception claims remain actionable in Michigan, and damages related to the costs of raising the child to the age of majority may be recovered on a showing of an intentional or grossly negligent act or omission. Accordingly, the trial court did not err when it held that MCL 600.2971 does not

prohibit a wrongful-conception claim seeking damages for daily living, medical, educational, and other expenses necessary to raise a child to the age of majority on the basis that, but for the grossly negligent act or omission of the defendant, the child would not or should not have been conceived.

Next, defendants argue that even if plaintiff can bring an action for wrongful conception caused by gross negligence, she failed to establish a genuine issue of material fact that Salesin's conduct was grossly negligent. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden*, 461 Mich at 118. The trial court considered defendants' motion for summary disposition as brought under MCR 2.116(C)(10). Such a motion tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*; see also MCR 2.116(C)(10). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

MCL 600.2971 does not define the term "grossly negligent," and there are no published cases defining the term in the context of MCL 600.2971. However, in

contexts where civil liability would only exist if a defendant's conduct was grossly negligent, Michigan courts have generally applied the standard articulated in the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., which defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a); see also *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994) (GTLA definition of gross negligence applies where Legislature intended to immunize emergency personnel from ordinary negligence, but not from gross negligence); *Xu v Gay*, 257 Mich App 263, 268-269; 668 NW2d 166 (2003) (GTLA definition of gross negligence applies in context of a contractual waiver of liability). Further, the GTLA definition of gross negligence has been incorporated into Michigan's model jury instruction defining gross negligence. M Civ JI 14.10.

We conclude that the definition of "gross negligence" set forth in the GTLA is the most appropriate standard to be applied in the context of MCL 600.2971. Similar to the GTLA, MCL 600.2971 provides immunity to potential defendants for ordinary negligence with regard to wrongful-birth and wrongful-life claims in subsections (1) and (2). MCL 600.2971 also prohibits the recovery of certain damages from a defendant in a wrongful-conception claim premised on ordinary negligence, § 2971(3), while permitting the recovery of those damages in a claim premised on gross negligence, § 2971(4). Therefore, while a plaintiff asserting a wrongful-conception medical malpractice claim may recover damages traditionally permitted if ordinary negligence is proved, to recover damages "for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority," the plaintiff must prove "an

intentional or grossly negligent act or omission." MCL 600.2971(3) and (4).

In this case, even considering that plaintiff is entitled to have the facts viewed in the light most favorable to her and to have all legitimate inferences considered in her favor, we conclude that plaintiff failed to establish a material question of fact regarding whether Salesin's conduct was grossly negligent. See *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). Under the circumstances of this case, informing plaintiff that she could not become pregnant and that she no longer required birth control, as well as failing to prescribe birth control pills, was not conduct so reckless as to demonstrate a substantial lack of concern for whether plaintiff would become pregnant.

Plaintiff's medical records indicated that during 14 years of her marriage she did not use any birth control methods and did not get pregnant, despite having an active sex life. Salesin testified that he attempted a sterilization procedure, through which devices would be implanted into each fallopian tube that would prevent pregnancy as effectively as a tubal ligation, but it could not be completed because both of plaintiff's fallopian tubes were occluded. Salesin also testified that he confirmed that plaintiff's fallopian tubes were occluded during a hysterosalpingogram procedure that was later performed. Salesin testified that, considering plaintiff's age and her history of infertility despite an active sex life, in conjunction with the results of both the failed sterilization procedure and the hysterosalpingogram, he advised plaintiff that no additional forms of sterilization or contraception were recommended. Although Salesin admitted in his deposition that he had seen blocked fallopian tubes become unblocked, he noted that there is also a failure rate with both tubal ligation

and birth control pills, but additional forms of birth control are not recommended in those instances even considering the failure rate. Moreover, in this case, because of plaintiff's history of infertility, as well as his visualization of plaintiff's occluded fallopian tubes both during the attempted sterilization procedure and during the hysterosalpingogram, he would not expect plaintiff's fallopian tubes to subsequently become unblocked and he had never seen such an occurrence in a similarly situated patient. That is, he had never seen a patient's fallopian tubes open up enough for the patient to get pregnant after he had "looked at the tubes, found them to be blocked, [and] had an x-ray test confirming that they were blocked, never." In fact, Salesin testified, the probability of pregnancy in the population of women who are 41 years old, without any known fertility issues, is less than one percent. Further, he stated that because the risks associated with birth control pills, although slight, were probably greater than the risk of plaintiff getting pregnant, they would not have been indicated even if she had requested them. Although plaintiff testified that Salesin told her it was impossible for her to get pregnant, Salesin denied that he would ever use the term "impossible" because "in medicine nothing is 100 percent." In any case, Salesin admitted that he was convinced "that it would be unnecessary to use any other form of birth control because [he] had lots of evidence to show . . . that she wasn't going to be able to get pregnant."

On the basis of the evidence presented to the trial court, we hold that no reasonable juror could conclude that Salesin's conduct was so reckless that it demonstrated a substantial lack of concern for whether plaintiff would get pregnant as a consequence of his advice regarding the need for contraception and his failure to

prescribe birth control pills. See *Maiden*, 461 Mich at 128; *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). As explained by this Court in *Tarlea v Crabtree*, 263 Mich App 80; 687 NW2d 333 (2004), the type of conduct that a defendant must engage in to be held liable for gross negligence involves

> almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Id*. at 90.]

In this case, Salesin's advice to plaintiff regarding the necessity of contraception was based on his more than 30 years of experience and grounded on several objective and persuasive factors that informed his medical judgment and subsequent actions, including plaintiff's age, her multiple-year history of infertility despite an active sex life with two different partners, Salesin's inability to place devices into either of plaintiff's fallopian tubes because of occlusion, and his visualization of the fallopian tube occlusions during the hysterosalpingogram. Accordingly, we reverse the trial court's order denying defendants' motion for summary disposition with regard to plaintiff's claim that, because of Salesin's gross negligence, she was permitted to seek recovery "for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority" on this wrongful-conception medical malpractice claim.

Next, defendants argue that plaintiff was not permitted to seek the recovery of even traditional damages on her wrongful-conception medical malpractice claim because neither MCL 600.2971 nor the common law allows for the recovery of such damages. We disagree.

In Michigan, as a general rule, plaintiffs are entitled to recover civil damages for medical malpractice, as long as they satisfy their evidentiary burdens. See MCL 600.2912a. Defendants have provided no authority holding that, in a wrongful-conception medical malpractice action, a plaintiff may not recover damages generally permitted in medical malpractice actions. And prior decisions of this Court have consistently held that a plaintiff in a wrongful-conception action is entitled to recover traditional damages, as discussed earlier. *Rinard*, 177 Mich App at 294; *Troppi*, 31 Mich App at 252-255; see also *Bushman*, 83 Mich App at 461.

Further, consistent with the common law, the language of MCL 600.2971 implies that such damages are compensable in a wrongful-conception action. "[A]lthough only an aid to interpretation, we note that the maxim *expressio unius est exclusio alterius* (the expression of one thing suggests the exclusion of all others) means that the express mention of one thing in a statutory provision implies the exclusion of similar things." *People v Carruthers*, 301 Mich App 590, 604; 837 NW2d 16 (2013). While MCL 600.2971(3) expressly limits a plaintiff's right to recover the expenses related to raising a child to the age of majority in a wrongful-conception medical malpractice action premised on negligence, listing these expenses in detail, the statute includes no language limiting a plaintiff's ability to recover traditional medical malpractice damages. Had our Legislature intended to restrict recovery for any and all damages in a wrongful-conception action, the Legislature could have done so, as it did in wrongful-life and wrongful-birth actions. See MCL 600.2971(1) and (2). The Legislature's language demonstrates an intention to limit recovery in a wrongful-conception action premised on negligence only to the extent that a plaintiff seeks damages related to the cost of raising the child

to the age of majority. See MCL 600.2971(3). Defendants' argument on appeal, if adopted, would prohibit a cause of action for wrongful conception premised on negligence, contrary to the plain language of MCL 600.2971(3). Accordingly, the trial court improperly held that MCL 600.2971 prohibits claims for wrongful conception unless the alleged conduct was intentional or grossly negligent. However, defendants' motion for summary disposition was properly denied to the extent it was based on the argument that plaintiff could not seek the recovery of any damages on her wrongful-conception medical malpractice claim. Thus, we affirm the trial court's decision in this regard, albeit on different grounds. See *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

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

M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ., concurred.

SCHMUDE OIL, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 313475. Submitted June 11, 2014, at Lansing. Decided July 1, 2014, at 9:00 a.m.

Schmude Oil, Inc, Wellmaster Exploration and Production Co, LLC, and Dennis Schmude sought review in the Ingham Circuit Court of a decision by the Department of Environmental Quality (DEQ), which had denied 9 of petitioners' 11 applications for permits to drill and operate wells, including a brine-disposal well, within the Pigeon River Country State Forest (PRCSF). In the 1970s, the Michigan Department of Natural Resources developed a formal plan to manage the hydrocarbon resources in the PRCSF. The plan was incorporated into a consent order between the state and the oil companies that held the bulk of the mineral rights in the area. Continuing litigation, however, led to negotiations between environmental groups, oil companies, and the state, which resulted in the Amended Stipulation and Consent Order (ASCO), which governs oil and gas development in the PRCSF. Petitioners' proposed well sites were located on the Song of the Morning Ranch, a privately owned 806-acre parcel located within the PRCSF. The court, William E. Collette, J., affirmed the decision of the DEQ, denying petitioners' permit applications. Petitioners appealed by leave granted.

The Court of Appeals *held*:

1. Part 619 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.61901 *et seq*., clearly and unambiguously adopts and incorporates the provisions of the ASCO. The ASCO designates a certain portion of the PRCSF as a nondevelopment region. The nondevelopment region includes all lands within the PRCSF designated as geographic Units II, III, and IV on a map in Appendix A of the ASCO. Because the ASCO uses the term "all," in defining the PRCSF land in the nondevelopment region, the nondevelopment region includes both public and private lands. Eight of petitioners' permit applications concerned property within the nondevelopment region. Therefore, the DEQ was required to deny those eight permit applications even though they concerned private land. Contrary to petitioners' assertions,

even if other parts of NREPA are read *in pari materia* with Part 619, there is no express policy in NREPA favoring drilling. A reading of NREPA as a whole demonstrates that oil and gas production is favored only when it is environmentally prudent and does not have a negative effect on other valuable natural resources.

2. The ASCO states that all land within Unit I of the PRCSF is a limited development region. Under the ASCO, no well sites may be placed within 1/4 mile of surface water in the limited development region. In this case, the DEQ denied one of petitioners' permit applications because the application sought a permit to drill within 1/4 mile of water in the limited development region. The plain language of the ASCO, which was adopted by and incorporated into Part 619 of NREPA, required the DEQ to deny the permit application.

3. The federal and state Constitutions proscribe the taking of private property for public use without just compensation. For a categorical taking to exist, there must be a denial of all economically beneficial or productive use of the land. When governmental action diminishes, but does not completely deprive the land of all value, the landowner cannot establish a categorical taking. Petitioners could not establish a categorical taking because the denial of their applications for permits did not completely deny petitioners of all economically beneficial or productive use of their oil and gas leases because petitioners could still operate wells in the limited development region and they could use horizontal drilling at other well locations. Regulatory-taking claims that do not rise to the level of a categorical taking are governed by the standard set out in *Penn Central Transp Co v New York City*, 438 US 104 (1978), which focuses on (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. In this case, the prohibition on drilling in the nondevelopment area did not single out petitioners to bear the burden for the public good. Instead it was a comprehensive scheme that applied to all landowners within the nondevelopment region. Further, although the outright prohibition of drilling or the required use of horizontal drilling would have a negative effect on petitioners' oil and gas leases, petitioners were not without some value in the leases. And petitioners had notice of the regulations at the time that they acquired their interests in the property. Given these facts, petitioners also failed to establish a regulatory taking.

4. The constitutional guarantee of equal protection ensures that people similarly situated will be treated alike, but it does not

guarantee that people in different circumstances will be treated the same. To be considered similarly situated, the challenger and his comparators must be prima facie identical in all relevant respects or directly comparable in all material respects. In this case, petitioners took umbrage with the fact that the ASCO divides the PRCSF into different development regions, but failed to argue that landowners in the nondevelopment regions were similarly situated to landowners in other regions of the PRCSF where drilling is permitted. But, even if the land in the nondevelopment region were similarly situated to the land in the limited development region, the classification meets the rational-basis test because it can be assumed that the different development regions faced different environmental concerns.

Affirmed.

ENVIRONMENT — MINES AND MINERALS — OIL AND GAS DEVELOPMENT — PIGEON RIVER COUNTRY STATE FOREST.

Part 619 of the Natural Resources and Environmental Protection Act, MCL 324.61901 *et seq*., clearly and unambiguously adopts and incorporates the provisions of the Amended Stipulation and Consent Order (ASCO) that governs oil and gas development in the Pigeon River Country State Forest; the nondevelopment region, as defined by the ASCO, includes all land—both public and private—within the PRCSF designated as geographic Units II, III, and IV in the ASCO; the limited development region, as defined by the ASCO, includes all land—both public and private—within the PRCSF designated as geographic Unit I in the ASCO.

Mika Meyers Beckett & Jones PLC (by *John M. DeVries* and *Nikole L. Canute*) for petitioners.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Daniel P. Bock*, Assistant Attorney General, for respondent.

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

PER CURIAM. On April 27, 2012, respondent, the Department of Environmental Quality (DEQ), denied applications for permits submitted by petitioners,

Schmude Oil, Inc., Wellmaster Exploration & Production Co., LLC, and Dennis Schmude to drill Antrim Shale[1] wells. Petitioners appealed respondent's denial of the permits in the Ingham Circuit Court, which affirmed respondent's decision. Petitioners now appeal the circuit court's decision by leave granted. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In December 2006, petitioners filed ten applications with respondent for permits to drill and operate Antrim Shale wells. On April 9, 2010, petitioners filed an additional application for a permit to drill a brine-disposal well. All 11 proposed well sites were located on the Song of the Morning Ranch (SOMR) property, an 806-acre parcel privately owned by Golden Lotus, Inc. The SOMR is located within the Pigeon River Country State Forest (PRCSF).

Oil and gas drilling in the PRCSF has previously been the subject of litigation in Michigan courts. This Court's opinion in *Hobson Petroleum Corp v Dep't of Quality Control*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2001 (Docket No. 222992), p 2, provides the following concise history of the PRCSF:

> Pigeon River was dedicated on December 7, 1973, and the Natural Resources Commission adopted "A Concept of Management for the Pigeon River Country." The primary purpose for the dedication was to create a unified management plan to address the potential for disruption wrought by oil and gas development. After the dedication, the then Michigan Department of Natural Resources [DNR], (now Department of Environmental Quality), developed a formal plan to manage the hydrocarbon resources in the

[1] The Antrim Shale is a sedimentary rock formation. It is a major source of natural gas production.

> Pigeon River area in addition to creating a comprehensive environmental impact statement. . . .
>
> In 1976, [this plan was] incorporated into a consent order and unit agreement with the major oil companies which held the bulk of mineral rights leases within Pigeon River. One year after the consent agreement, litigation arose over drilling exploratory wells within Pigeon River, which culminated in the Michigan Supreme Court issuing a permanent injunction prohibiting drilling of the wells in that area. See *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 760; 275 NW2d 538 (1979).
>
> In 1980, negotiations between environmental groups, oil companies, and the State, resulted in a second consent order [the Amended Stipulation and Consent Order (the ASCO)]. The second consent order was similar to the 1976 order . . . .
>
> Additionally, during this time, the Legislature passed an act incorporating the plan outlined by the consent orders which delineated the framework for all hydrocarbon development within the Pigeon River area. The act incorporated the provisions of the 1980 consent order which included a "nondevelopment region" where no drilling could occur.

The ASCO also created a "limited development region" where drilling could occur, subject to certain limitations. These regions were determined geographically as discrete units on a map of the PRCSF in appendices to the ASCO, with Unit I signifying the limited development region and Units II, III, and IV signifying the nondevelopment regions. The boundary between Units I and II bisects the SOMR property; 180 acres are in Unit I and 640 acres are in Unit II. In this case, eight of petitioners' proposed well sites were within Unit II, while the other three were in Unit I.

The DEQ Office of Geological Survey (OGS) responded to petitioners' permit applications and concluded that whether it would be unlawful for respon-

dent to issue some or all of the SOMR well permit applications depended on whether the Pigeon River Country State Forest hydrocarbon development act of 1980 (PRHDA), also referred to as Part 619 of the Natural Resources and Environmental Protection Act (NREPA),[2] applies to privately owned land within the boundaries of the PRCSF. The OGS concluded that the Part 619 applies to private lands, but suggested that horizontal wells could be a viable alternative to traditional vertical wells and would potentially be in compliance with the PRHDA. On July 10, 2007, respondent required petitioners to produce evidence of feasible and prudent alternatives, which petitioners did, under protest. Petitioners presented evidence that horizontal drilling would be high risk and economically unsound.

In a letter dated January 4, 2011, Harold R. Fitch, the assistant supervisor of wells for OGS, denied 9 of petitioners' 11 permit applications. Fitch stated that eight of the proposed wells were within the nondevelopment region and that the permits for those wells had to be denied. The three other wells were within the limited development region. Fitch denied the permit application for one of the wells in the limited development region because it was within 1/4 mile of the Pigeon River, and, therefore, "[did] not comply with Part 619." Fitch approved the permit applications for one Antrim Shale well and one brine-disposal well in the limited development region. Fitch also concluded that drilling horizontal wells from surface locations would comply with Part 619.

Petitioners appealed this decision to the director of the DEQ, Dan Wyant. Wyant concluded that Part 619 applied to both public and private lands within the PRCSF, and denied the appeal. Petitioners appealed

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[2] MCL 324.61901 *et seq*.

that decision in the Ingham Circuit Court, which subsequently affirmed Wyant's decision. The case is now before us on leave granted.

II. WHETHER THE ASCO APPLIES TO PRIVATE LAND

This case requires us to review the circuit court's review of an agency decision. "[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). The facts are not in dispute, and the only question is whether respondent violated the law in denying petitioners' well permit applications. Determining whether respondent's decision was authorized by law requires statutory interpretation. This Court reviews de novo issues of statutory interpretation. *Burleson v Dep't of Environmental Quality*, 292 Mich App 544, 548; 808 NW2d 792 (2011).

We first consider whether Part 619 adopted and incorporated the provisions of the ASCO, and conclude that it did. We begin by analyzing the sections of Part 619. MCL 324.61901 states:

> (1) The legislature finds that it is in the public interest to encourage and promote safe, effective, efficient, and environmentally prudent extraction of hydrocarbon resources in the Pigeon river country state forest; and that economic benefits to the state will result from the exploration for the production of energy resources due to the taxation of production of hydrocarbon deposits and the payment of royalties to the state from production of hydrocarbon deposits, which royalties among other things enable the state to acquire and develop property for the enjoyment of the outdoor recreationists of the state.

> (2) The legislature further finds that wise use of our natural resources essential for future energy needs requires that energy resource development must occur in harmony with environmental standards; and that the development of new industry and the expansion of existing industry to obtain the optimum safe production of the state's energy resources is an important concern to the economic stability of this state.

MCL 324.61902 provides:

> The Pigeon river country state forest as dedicated by the commission on December 7, 1973, is a valuable public resource. It is in the public interest to produce oil and gas as quickly as possible to minimize the duration of activities associated with hydrocarbon development in the Pigeon river country state forest. To expedite the development of oil and gas resources on certain lands presently under lease but undeveloped as of March 31, 1981 and for which the amended stipulation and consent order has been adopted and approved by the commission on November 24, 1980, and in consideration of the protracted nature of the controversy, *the legislature finds that this amended stipulation and consent order constitutes an appropriate hydrocarbon development plan for the purposes and within the intent expressed in section 61901.* [Emphasis added.]

MCL 324.61903, like § 61902, mentions the ASCO, and provides:

> The hydrocarbon activities within the Pigeon river country state forest *authorized by the plan referred to in section 61902* can be carried out without violation of law under terms of the amended stipulation and consent order referred to in section 61902. [Emphasis added.]

Further, MCL 324.61904 states:

> In light of the legislative findings in section 61901, the declaration of public interest in section 61902, and the determination that hydrocarbons can be developed in concert with law in section 61903, *the department shall imple-*

> *ment the approved hydrocarbon development plan for the Pigeon river country state forest not later than January 1, 1981*. [Emphasis added.]

The ASCO, which is referred to in §§ 61902 through 61904, designates certain lands in the PRCSF as the "nondevelopment region" when it states, in relevant part:

> The parties to this Amended Stipulation declare that an area within the Pigeon River Country State Forest, which is described as follows:
>
>> *all the lands within the boundaries of the Pigeon River Country State Forest designated on the map in Appendix A as: Unit IV; Unit II; and, Unit III, except sections and portions of sections 19, 20, 21, 22 and 23 in T33N, R1E.*
>
> (hereinafter referred to as the "nondevelopment" region) will not be subject to oil and gas development.

"The primary goal of statutory construction is to give effect to the Legislature's intent." *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). If the language of the statute is clear and unambiguous, "it is presumed that the Legislature intended the meaning expressed in the statute." *Id*. "Judicial construction of an unambiguous statute is neither required nor permitted." *Id*. at 191-192. "When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal." *Id*. at 192. (citations and quotation marks omitted).

MCL 324.61902 explicitly states that the "amended stipulation and consent order constitutes an appropriate hydrocarbon development plan[.]" This language

clearly and unambiguously indicates the Legislature's intent was to adopt the plan. And, when viewed in context with the other sections of Part 619, there can be no doubt of the Legislature's intent. Words and phrases in statutes must be read in context. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). Section 61903 refers to both the hydrocarbon development plan and the ASCO itself when it states that the hydrocarbon activities in the PRCSF "authorized by the plan referred to in section 61902 can be carried out without violation of law[.]" Further, § 61904 states that "the department [DEQ] shall implement the approved hydrocarbon development plan" for the PRCSF. Though the language of § 61902 is clear and unambiguous in its own right, when read in the context of the surrounding sections, there can be no doubt that the Legislature adopted the ASCO.

Having concluded that Part 619 expressly adopted the ASCO, we now turn to the language contained in the ASCO and determine whether the plain language of the ASCO required respondent to deny petitioners' permit applications. See *Jager v Rostagno Trucking Co*, 272 Mich App 419, 423; 728 NW2d 467 (2006) (explaining that when a statute adopts or incorporates by reference a rule or regulation, the adopted or incorporated provision becomes a part of the statute).

A. DENIAL OF THE PERMITS IN THE "NONDEVELOPMENT REGION"

The ASCO refers to a "nondevelopment region" that includes *all* lands within the boundary of the PRCSF designated as geographic Units II, III, and IV on a map in Appendix A. The word "all" is defined, in part, by *Random House Webster's College Dictionary* (2001) as follows: "**1.** the whole or full amount of . . . . **4.** any; any whatever . . . . **10.** everything . . . . **12.** the entire area,

place, environment, or the like[.]" By using the term "all," the ASCO clearly refers to the whole and full amount of lands, any lands, and the entire area of the lands within Units II, III, and IV designated on the map in Appendix A; the term is all-inclusive and indicates that everything within the boundaries of those units is within the nondevelopment region.[3] Therefore, the ASCO contains no differentiation between public and private lands, given that both types of lands fall under the plain meaning of "all."

In this case, it is undisputed that the SOMR is within the boundaries of the PRCSF as designated in the map in Appendix A to the ASCO, and that eight of the permits at issue were within the nondevelopment region. The ASCO makes no distinction between public and private lands. This leads to the conclusion that the pertinent section of the SOMR is in the nondevelopment region, even though it sits on private land. As previously noted, the ASCO states that the nondevelopment region "will not be subject to oil and gas development." Therefore, respondent was required to deny the eight applications for permits within the nondevelopment region.

Petitioners disagree that the restrictions contained in the ASCO apply to private lands, and argue that § 61902 is a definition section, which defines the land to which the nondevelopment region refers as strictly the land dedicated by the commission on December 7, 1973. This argument ignores the plain language of the statute that adopts the ASCO, and the express language of the ASCO. The sentence to which petitioners refer reads: "The Pigeon river country state forest as dedicated by the commission on December 7, 1973, is a valuable

[3] Only those sections and portions of sections specifically identified as being excepted from the general rule would be excluded.

public resource." MCL 324.61902. This sentence is not a part of a larger definition section, nor does it define the PRCSF. Rather, it simply states that the PRCSF is a "valuable public resource." Nothing within § 61902 appears to define the scope of the PRCSF; instead, as previously noted, the scope of the PRCSF is found within the plain language of the ASCO itself.

In addition, petitioners argue that the repeated use of the phrase "Pigeon River Country State Forest" in Part 619 and in the ASCO serves to limit the application of the restrictions pertaining to the nondevelopment region to state-owned lands, because, petitioners contend, only state-owned lands can constitute the PRCSF. We reject petitioners' argument because it ignores the plain language of the ASCO—namely, that the restrictions pertaining to the nondevelopment region apply to *all lands* within the boundaries of the PRCSF designated as Units II, III, and IV on the map in Appendix A of the ASCO, which is titled "Pigeon River Country State Forest."[4] It is undisputed that the SOMR is located within the boundaries of the map in Appendix A to the ASCO, and that the pertinent permits petitioners sought are within the nondevelopment region. Thus, the plain language of the ASCO compels the conclusion that respondent was required to deny petitioners' permit applications in the nondevelopment region, regardless of whether Part 619 and the ASCO use the phrase "Pigeon River Country State Forest" elsewhere. In order to adopt petitioners' argument, this Court would need to ignore the plain and unambiguous language of the ASCO, which it cannot do.

Next, petitioners assert that other sections of NREPA, specifically Parts 17 and 615, are *in pari materia* with Part 619. Therefore, petitioners argue, the

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[4] Capitalization altered.

Court must read Parts 17 and 615 together with Part 619 when interpreting Part 619. " '[T]he interpretive aid of the doctrine of *in pari materia* can only be utilized in a situation where the section of the statute under examination is itself ambiguous.' " *In re Indiana Mich Power Co*, 297 Mich App 332, 344; 824 NW2d 246 (2012), quoting *Tyler v Livonia Pub Schs*, 459 Mich 382, 392; 590 NW2d 560 (1999). In this case, the language of Part 619 is clear and unambiguous; therefore, we need not resort to the rule concerning statutes that are *in pari materia*. Additionally, even were we to read the statutes *in pari materia*, they do not, as petitioners argue, express a policy favoring drilling. MCL 324.61502 declares, in pertinent part:

> It has long been the declared policy of this state to foster conservation of natural resources so that our citizens may continue to enjoy the fruits and profits of those resources. Failure to adopt such a policy in the pioneer days of the state permitted the unwarranted slaughter and removal of magnificent timber abounding in the state, which resulted in an immeasurable loss and waste.

MCL 324.61901(1) provides:

> [I]t is in the public interest to encourage and promote safe, effective, efficient, and environmentally prudent extraction of hydrocarbon resources in the Pigeon river country state forest; and that economic benefits to the state will result from the exploration for the production of energy resources due to the taxation of production of hydrocarbon deposits and the payment of royalties to the state from production of hydrocarbon deposits, which royalties among other things enable the state to acquire and develop property for the enjoyment of the outdoor recreationists of the state.

As the circuit court stated, "A reading of the NREPA and its provisions as a whole demonstrates that oil and gas production is favored only where it is environmen-

tally prudent and does not have a negative effect on other valuable natural resources." The language in NREPA that deals with oil and gas production seeks a balance between Michigan's interest in protecting the environment and its interest in harvesting valuable hydrocarbon resources. Neither § 61502 nor § 61901 expresses, as petitioners argue, a clear public policy favoring drilling.

Concerning Part 17, there is no language whatsoever that supports a public policy favoring drilling. MCL 324.1701 creates a cause of action for NREPA violations. The "pollution, impairment, or destruction" language in § 1701(1) to which petitioners refer does not relate in any way to the approval or prohibition of permits; it only relates to the requirements to bring an action. Further, MCL 324.1705(2) simply states that "alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources" shall be determined in administrative, licensing, or other proceedings, and in the judicial review of such proceedings, as it was in this case. Nowhere in § 1705, nor anywhere else in Part 17, does it state that absent a finding of pollution, impairment, or destruction, an action such as a permit application must or shall be authorized. Nor does MCL 324.1705 state that even if there is a finding of pollution, impairment, or destruction that a permit application must be approved if there is no feasible and prudent alternative as petitioners suggest.

B. DENIAL OF THE PERMIT IN THE LIMITED DEVELOPMENT REGION

The plain language in the ASCO defining the limited development region also applies to respondent's denial of a permit located within the limited development region. The ASCO states that Unit I is a limited development region:

> The parties to this Amended Stipulation declare that an area within the Pigeon River Country State Forest, which is described as follows:
>
> > *all the lands within the boundaries of the Pigeon River Country State Forest designated on the map in Appendix A as Unit I*
> >
> > (hereinafter referred to as "the limited development region")
>
> is subject to oil and gas development pursuant to the limitations of this Amended Stipulation.

Concerning limitations on drilling in the limited development region, the ASCO states that

> *no well sites . . . will be placed within 1/4 mile of surface water in the limited development region* as identified in Appendix C. The Director, however, may allow encroachment in this 1/4 mile zone only upon a determination that environmental impacts can be significantly reduced in other areas by allowing the encroachment, and upon a determination that there will be no pollution of the surface waters.[5] [Emphasis added.]

In the case at bar, the DEQ denied one of petitioners' permit applications because the permit sought permission to drill within 1/4 mile of water in the limited development region. The plain language of the ASCO directed that the restrictions imposed in the limited development region apply to *all lands* within the

[5] Although the ASCO provides that no well sites may be placed within 1/4 mile of surface water in the limited development region, it states that the director of the DNR (now DEQ) may allow encroachment within the 1/4 mile zone upon a determination that environmental impacts can be significantly reduced in other areas, and upon a determination that the surface water will not be polluted. We note that the issue of whether the Director of the DEQ could review for encroachment was not raised by petitioner before the circuit court or this Court. Accordingly, we do not consider the issue. *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 4 n 3; 704 NW2d 69 (2005) (noting that Michigan's appellate courts do not generally address unbriefed issues).

boundaries of the PRCSF that constitute the limited development region. Using the same logic previously set forth in this opinion, the plain language of the ASCO required the DEQ to deny petitioners' permit application for a well located within 1/4 mile of a body of water in the limited development region.

III. CONSTITUTIONAL CLAIMS

Next, petitioners contend that the denial of their applications for drilling permits constituted a regulatory taking,[6] an issue we review de novo. See *Leelanau Co Sheriff v Kiessel*, 297 Mich App 285, 292; 824 NW2d 576 (2012). Petitioners allege a categorical taking as well as a taking under the balancing test set forth in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).[7]

"The federal and state constitutions both proscribe the taking of private property for public use without just compensation." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 272; 761 NW2d 761 (2008). "The constitutional requirement that the state provide just compensation for the taking of one's property is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and

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[6] Although the constitutional claims were not addressed below, we will consider them. See *Consumers Power Co v Ass'n of Businesses Advocating Tariff Equity*, 205 Mich App 571, 575; 518 NW2d 514 (1994).

[7] In addition, petitioners allege a taking because "the denial of [petitioners'] applications for drilling permits . . . fails to substantially advance a legitimate government interest . . . ." While our caselaw formerly recognized the "advance[s] a legitimate state interest" test as an additional test for determining whether a taking occurred, *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 585; 575 NW2d 531 (1998) (*K & K Constr I*), the United States Supreme Court has since repudiated that test, *Lingle v Chevron USA, Inc*, 544-545 US 528, 540-545; 125 S Ct 2074; 161 L Ed 2d 876 (2005).

justice, should be borne by the public as a whole." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 551-552; 705 NW2d 365 (2005) (citations and quotation marks omitted) (*K & K Constr II*).

A. CATEGORICAL TAKING

We first address petitioners' claim that the denial of their applications for drilling permits was a categorical taking. "For a categorical taking to exist, there must be a denial of *all* economically beneficial or productive use of land." *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 586; 575 NW2d 531 (1998) (citation and quotation marks omitted; emphasis added) (*K & K Constr I*). When the government action in question diminishes the value of the land, but does not completely deprive the land of all value, the landowner cannot establish a categorical taking. *Id*. at 587 n 13. In this case, petitioners cannot establish a categorical taking because the denial of their applications for permits did not completely deny petitioners of *all* economically beneficial or productive use of their oil and gas leases. Indeed, petitioners could still operate wells in the limited development region and they could utilize horizontal drilling at the other well locations.

In reaching this conclusion, we reject petitioners' claim that the instant case is comparable to this Court's decision in *Miller Bros v Dep't of Natural Resources*, 203 Mich App 674; 513 NW2d 217 (1994). In *Miller Bros*, the plaintiffs had one, and only one, interest and viable economic use in the land—the extraction of oil and gas. *Id*. at 679-680. The denial of permits denied the plaintiffs this only viable economic use; therefore, by exercise of regulatory power, the government so restricted the use of the plaintiffs' property that they were deprived of all economically viable use of the land.

Id. at 680. By contrast, petitioners can still operate wells in the limited development region. They can also utilize horizontal drilling. Although horizontal drilling will increase petitioners' costs, "[t]he Taking Clause does not guarantee property owners an economic profit from the use of their land." *Paragon Props Co v Novi*, 452 Mich 568, 579 n 13; 550 NW2d 772 (1996). When the land still has some economic value, even if a fraction of the economic value that could have been realized, there is no categorical taking. *K & K Constr I*, 456 Mich at 587 n 13.

B. TAKING UNDER THE *PENN CENTRAL* BALANCING FACTORS

"Regulatory taking claims that do not rise to the level of a categorical taking are governed by the standard set out in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)." *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010).

> The balancing test announced in [*Penn Central*] requires a reviewing court to engage in an ad hoc factual inquiry, focusing on "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." [*Id*., quoting *K & K Constr I*, 456 Mich at 577.]

Stated another way, if the regulation at issue:

> (1) is comprehensive and universal so that the private property owner is relatively equally benefited and burdened by the challenged regulation as other similarly situated property owners, and (2) if the owner purchased with knowledge of the regulatory scheme so that it is fair to conclude that the cost to the owner factored in the effect of the regulations on the return on investment, and (3) if, despite the regulation, the owner can make valuable use of

> his or her land, then compensation is not required under *Penn Central*. [*K & K Constr II*, 267 Mich App at 529.]

Regarding the first factor, we consider whether the government's action "singles [a] plaintiff[] out to bear the burden for the public good and whether the regulation being challenged is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally." *Chelsea Investment Group LLC*, 288 Mich App at 262 (citation and quotation marks omitted; alterations in original). In this case, the prohibition on drilling in the nondevelopment area did not single out petitioners to bear the burden for the public good. Rather, the prohibition was a comprehensive scheme that applied to all landowners within the nondevelopment region. See *K & K Constr II*, 267 Mich App at 559-560, 562-563. This factor does not weigh in petitioners' favor.

Concerning the second factor, the economic effect of the regulation on the property, we do not find that this factor weighs in petitioners' favor. Although the outright prohibition of drilling or the utilization of horizontal drilling will have a negative effect on petitioners' oil and gas leases, petitioners are not without some value in the leases. That this value was less than petitioners had originally hoped does not mean that the regulation amounts to a taking. *Chelsea Investment Group LLC*, 288 Mich App at 262-263. Indeed, on the evidence presented by petitioners, we do not find the reduction in economic value to be enough to weigh this factor in petitioners' favor. See *K & K Constr II*, 267 Mich App at 553-554.

Regarding the third factor, we must "examine the extent to which the regulation has interfered with the property owner's reasonable investment-backed expectations." *Id*. at 555 (citation and quotations marks

omitted). "A key factor is notice of the applicable regulatory regime . . . ." *Id*. Notice of the regulatory regime at the time the claimant acquires the property helps to determine the reasonableness of the claimant's investment-backed expectations. *Id*. at 556. Petitioners had notice of the regulations at the time they acquired their interests in the property because they acquired their interests in the oil and gas leases in 2006, well after the enactment of Part 619. Although petitioners sought a different interpretation of Part 619, they at least should have been aware of the plain language of the ASCO and its prohibitions against drilling. At the very least, the fact that the plain language of the statute was contrary to petitioners' position should have tempered petitioners' *reasonable* expectations when acquiring the oil and gas leases. Therefore, we find that the drilling prohibition in Part 619 has not interfered with petitioners' reasonable investment-backed expectations. See *id*. at 558.

Accordingly, we conclude that petitioners have failed to establish a regulatory taking under the *Penn Central* balancing test.

C. EQUAL PROTECTION

Lastly, petitioners allege that the regulations set forth in Part 619, through its adoption of the ASCO, amount to an equal protection violation because those regulations draw classifications between different groups of private landowners in the PRCSF by arbitrarily classifying certain lands as belonging to the nondevelopment region.

> The United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV, § 1. Likewise, the Michigan Constitution provides that "[n]o

> person shall be denied the equal protection of the laws . . . ." Const 1963, art 1, § 2. [*Grimes v Van Hook-Williams*, 302 Mich App 521, 532; 839 NW2d 237 (2013).]

"The constitutional guarantee of equal protection ensures that people similarly situated will be treated alike, but it does not guarantee that people in different circumstances will be treated the same." *Brinkley v Brinkley*, 277 Mich App 23, 35; 742 NW2d 629 (2007). "[E]qual protection does not require the same treatment be given those that are not similarly situated." *Champion v Secretary of State*, 281 Mich App 307, 325; 761 NW2d 747 (2008) (citation and quotation marks omitted; alteration in original). "To be considered similarly situated, the challenger and his comparators must be *prima facie* identical in all relevant respects or directly comparable . . . in all material respects." *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013) (citations and quotation marks omitted).

Petitioners take umbrage with the fact that the ASCO divides the PRCSF into different development regions. Petitioners make no effort to argue that landowners in the nondevelopment regions are similarly situated to landowners in other regions of the PRCSF where drilling is permitted. Indeed, they make no effort to argue that the characteristics of the land in each region are identical, or that the environmental concerns, if any, that are present in the different regions are identical. Because they make no effort to argue that they were similarly situated, we find that this issue is abandoned and could decline to review the claim. See *Ypsilanti Charter Twp*, 281 Mich App at 287.

However, even assuming petitioners could establish that landowners in the nondevelopment region are similarly situated to landowners in the limited development region, petitioners' claim would lack merit. Peti-

tioners acknowledge that the instant case does not involve a suspect classification, and that the rational basis test is the appropriate test to use for their equal protection claim. "Under the rational basis test, the statute will be upheld as long as the classification scheme is rationally related to a legitimate governmental purpose." *Brinkley*, 277 Mich App at 35. Under rational basis review, we presume that the challenged statute is constitutional, and the party challenging the statute has a heavy burden in rebutting that presumption. *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). "A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id*. at 259-260.

Part 619 declares that the Legislature "finds that it is in the public interest to encourage and promote safe, effective, efficient, and environmentally prudent extraction of hydrocarbon resources in the Pigeon river country state forest . . . ." MCL 324.61901(1). Part 619 further provides that "wise use of our natural resources essential for future energy needs requires that energy resource development must occur in harmony with environmental standards . . . ." MCL 324.61901(2). The ASCO, which was expressly adopted by Part 619, declares that "[t]he protection of the public health, safety and welfare and the preservation of the natural resources of the State of Michigan are paramount social concerns." It further declares that the plan set forth in the ASCO, which includes the creation of a nondevelopment region, was established "[i]n light of the aforementioned interests . . . ." Assuming, for the purpose of argument, that the land in the nondevelopment region on which petitioners' oil and gas leases is located is similarly situated to land in the limited development

region, we find that the classification meets the rational basis test. Given that the Legislature adopted a plan in the ASCO that created different types of development regions with the intended goal of protecting and preserving resources while at the same time promoting the wise use of natural resources, we can assume that the different development regions faced different environmental concerns. See *Crego*, 463 Mich at 259-260 (stating that a classification passes constitutional muster under rational basis review if it "is supported by any set of facts, either known or *which could reasonably be assumed*, even if such facts may be debatable") (emphasis added). Consequently, we find that the classification scheme, if any, created by Part 619 and the ASCO was rationally related to a legitimate governmental interest.

Because we conclude that Part 619 is controlling and that petitioners' constitutional claims lack merit, we need not address the remainder of petitioners' arguments.

Affirmed.

BORRELLO, P.J., and SERVITTO and BECKERING, JJ., concurred.

CVS CAREMARK v STATE TAX COMMISSION

Docket No. 312119. Submitted June 11, 2014, at Detroit. Decided July 1, 2014, at 9:05 a.m. Leave to appeal sought.

The March Board of Review of the city of Novi classified certain property of CVS Caremark as commercial property for the 2011 tax year. CVS filed an appeal of the classification in the State Tax Commission (STC), contending the property should be classified as industrial property. The STC denied the request to reclassify the property and affirmed the commercial classification. CVS appealed in the Oakland Circuit Court. The circuit court, Daniel P. O'Brien, J., reversed the decision of the STC and entered an order reclassifying the property as industrial property. The STC filed a delayed application for leave to appeal, alleging that the circuit court employed the wrong standard of review. The Court of Appeals granted the application for leave to appeal.

The Court of Appeals *held*:

1. The circuit court employed an appropriate standard of review. The circuit court did not improperly expand the record and its ruling properly took into account only the facts that the STC had found.

2. The review of property classification disputes according to MCL 211.34c(6) does not require a hearing. The plain statutory language contemplates that the STC must arbitrate a property classification dispute only on the basis of written submissions. Judicial review of the STC's classification determinations is limited to whether the determinations are authorized by law.

3. The circuit court erroneously interpreted MCL 211.34c(2)(d)(*ii*) to be applicable in this matter because the relevant language does not apply to property unless the property is used for utility-related functions. CVS failed in its burden to demonstrate that the property should be classified as industrial pursuant to MCL 211.34c(2)(d)(*i*) or (*ii*) because it did not submit evidence establishing how it used the property during the 2011 tax year. The STC properly denied the reclassification. The STC's denial was authorized by law. The circuit court incorrectly applied MCL 211.34c(2)(d)(*ii*) when it reversed the STC's classification ruling.

Reversed.

1. CONSTITUTIONAL LAW — ADMINISTRATIVE LAW — JUDICIAL REVIEW — HEARINGS.

Judicial review of the evidentiary support for a determination of an administrative agency is not proper when the administrative agency was not required to conduct a hearing when making the determination; judicial review in such cases is not review de novo and is limited in its scope to a determination whether the action of the agency was authorized by law (Const 1963, art 6, § 28).

2. CONSTITUTIONAL LAW — ADMINISTRATIVE LAW — TAXATION — PROPERTY CLASSIFICATION DISPUTES.

The procedure stated in MCL 211.34c(6) for the review of property classification disputes does not provide for or require a "hearing" in the constitutional sense; the procedure contemplates that the State Tax Commission must arbitrate a dispute only on the basis of written submissions; judicial review of the commission's classification determinations is limited to whether the determinations are authorized by law (Const 1963, art 6, § 28).

Honigman Miller Schwartz and Cohn LLP (by *Michael B. Shapiro* and *Jason Conti*) for CVS Caremark.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for the State Tax Commission.

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

PER CURIAM. We granted the delayed application for leave to appeal by respondent State Tax Commission (STC) regarding a circuit court order reversing a decision of the STC that denied petitioner's request to reclassify its real and personal property from commercial to industrial for the 2011 tax year. We reverse.

The STC challenges the standard of review the circuit court employed. The STC maintains that because this appeal did not arise from a contested case,

judicial review was limited to ascertaining whether the law authorized the STC's decision. According to the STC, the circuit court erred to the extent that it took into account facts beyond the administrative record in this case. The STC argues that the court should have struck petitioner's appellate brief, which referred to facts not part of the administrative record.

We must begin our review of the circuit court's review of an agency decision by determining whether the circuit court applied correct legal principles. *Monroe v State Employees' Retirement Sys*, 293 Mich App 594, 607-608; 809 NW2d 453 (2011), quoting *Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996). The first paragraph of Const 1963, art 6, § 28, delineates the scope of judicial review of agency decisions. It provides, in relevant part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

In *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 91-93; 803 NW2d 674 (2011), our Supreme Court held that an STC classification decision is reviewable under this constitutional provision because it embodies a final, quasi-judicial decision that affects private rights. Because no other review is "provided by law," a property owner may appeal a classification decision by the STC to the circuit court. *Id*. at 97-98, citing MCL 600.631.

Although petitioner has an avenue by which to obtain direct review of the STC's classification of property, the parties dispute the applicable scope of this review. This Court has explained that the proper scope of review depends on whether the STC held a hearing:

> Whether "a hearing is required" is determined by reference to the statute governing the particular agency. Where no hearing is required, it is not proper for the circuit court *or this Court* to review the evidentiary support of an administrative agency's determination. In such cases, [j]udicial review is not de novo and is limited in scope to a determination whether the action of the agency was authorized by law. [*Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998) (some quotation marks omitted; citations omitted).]

We conclude that the review procedure in MCL 211.34c(6) does not qualify as a hearing in the constitutional sense. The goal of the judiciary when construing Michigan's Constitution is to identify the original meaning that its ratifiers attributed to the words used in a constitutional provision. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). In performing this task, we employ the rule of common understanding. *In re Burnett Estate*, 300 Mich App 489, 497; 834 NW2d 93 (2013). Under the rule of common understanding, we must apply the meaning that, at the time of ratification, was the most obvious common understanding of the provision, the one that reasonable minds and the great mass of the people themselves would give it. *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010), quoting *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). "Words should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms can be appropriate." *In re Burnett Estate*, 300 Mich App at 497-498. According

to *Webster's Third New International Dictionary* (1965), the applicable definitions of "hearing" include: "a trial in equity practice"; "a listening to arguments or proofs and arguments in interlocutory proceedings"; "a trial before an administrative tribunal"; and "a session (as of a congressional committee) in which witnesses are heard and testimony is taken." These definitions contemplate an opportunity to present before a tribunal evidence and argument.

The review of property classification disputes afforded in MCL 211.34c(6) does not require a hearing. In pertinent part, MCL 211.34c(6) provides:

> An owner of any assessable property who disputes the classification of that parcel shall notify the assessor and may protest the assigned classification to the March board of review. An owner or assessor may appeal the decision of the March board of review by filing a petition with the state tax commission not later than June 30 in that tax year. *The state tax commission shall arbitrate the petition based on the written petition and the written recommendations of the assessor and the state tax commission staff*. [Emphasis added.]

The plain statutory language contemplates that the STC must arbitrate a property classification dispute only on the basis of written submissions. Consequently, judicial review of the STC's classification determinations is limited to whether they "are authorized by law." Const 1963, art 6, § 28.

> [I]n plain English, authorized by law means allowed, permitted, or empowered by law. Black's Law Dictionary (5th ed). Therefore, it seems clear that an agency's decision that is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious, is a

> decision that is *not* authorized by law. [*Northwestern Nat'l Cas Co*, 231 Mich App at 488 (quotation marks and citation omitted).]

We conclude that the circuit court employed an appropriate standard of review. Although the circuit court entertained some hypothetical arguments concerning whether the scope of petitioner's activities might qualify as either commercial or industrial under MCL 211.34c, the court did not make any findings on the basis of the hypothetical arguments. The court's ruling properly took into account only the STC's determinations that no manufacturing or processing took place on petitioner's property, but that some warehousing did. Because the circuit court's ultimate ruling took into account only the facts that the STC found concerning the absence of manufacturing or processing and the presence of a warehouse on petitioner's property, the court did not improperly expand the record.[1]

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[1] Petitioner suggests that if a more restrictive proceeding exists under which taxpayers may challenge STC classification decisions in MCL 211.34c(6), the existence of a broader avenue for Department of Treasury appeals of classification decisions in MCL 211.34c(7) violates petitioner's right to due process and equal protection. Subsection (7) envisions that "[t]he department of treasury may appeal the classification of any assessable property to the residential and small claims division of the Michigan tax tribunal . . . ." However, the Legislature might reasonably have wanted to provide the state a more expansive review procedure to enhance the state's ability to ensure that all Michigan property is classified properly for taxation purposes and to protect the income that the state derives from its tax base. *Crego v Coleman*, 463 Mich 248, 259-260; 615 NW2d 218 (2000) ("Under rational-basis review [of equal protection claims], courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. To prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute. A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts,

The STC also asserts that the circuit court misconstrued MCL 211.34c(2)(d)(*ii*) when it concluded that petitioner's property qualifies as industrial property. This Court reviews de novo issues of statutory interpretation underlying an administrative body's ruling. *Wexford Med Group v City of Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006).

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. [*Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks and citations omitted).]

MCL 211.34c(1) requires local assessors to annually "classify every item of assessable property according to the definitions contained in this section." The pertinent definitions appear in MCL 211.34c(2), which provides, in relevant part:

> (b) Commercial real property includes the following:
>
> (*i*) Platted or unplatted parcels used for commercial purposes, whether wholesale, retail, or service, with or without buildings.
>
> (*ii*) Parcels used by fraternal societies.
>
> (*iii*) Parcels used as golf courses, boat clubs, ski areas, or apartment buildings with more than 4 units.

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either known or which could reasonably be assumed, even if such facts may be debatable.") (quotation marks and citations omitted).

> (*iv*) For taxes levied after December 31, 2002, buildings on leased land used for commercial purposes.
>
> * * *
>
> (d) Industrial real property includes the following:
>
> (*i*) Platted or unplatted parcels used for manufacturing and processing purposes, with or without buildings.
>
> (*ii*) Parcels used for utilities sites for generating plants, pumping stations, switches, substations, compressing stations, warehouses, rights-of-way, flowage land, and storage areas.
>
> (*iii*) Parcels used for removal or processing of gravel, stone, or mineral ores.
>
> (*iv*) For taxes levied after December 31, 2002, buildings on leased land used for industrial purposes.
>
> (*v*) For taxes levied after December 31, 2002, buildings on leased land for utility purposes.

The circuit court concluded that because petitioner's property contained a warehouse, it qualified as industrial real property under MCL 211.34c(2)(d)(*ii*). The court accepted petitioner's argument that it had to construe the term "warehouses" in subsection (2)(d)(*ii*) in petitioner's favor in accordance with the proposition that ambiguities in tax statutes should be construed in the taxpayer's favor. We find nothing ambiguous in the language of subsection (2)(d)(*ii*). By its plain terms, the subsection defines as "Industrial real property" parcels utilized for a variety of utility-site-related purposes, including warehousing. We conclude that the circuit court incorrectly interpreted the language in subsection (2)(d)(*ii*), which does not apply unless petitioner's property is used for utility-related functions.

Although MCL 211.34c(6) does not expressly say so, petitioner had the burden to prove that the assessor improperly classified its property as commercial. See

Baker v Costello, 300 Mich 686, 689; 2 NW2d 881 (1942) (applying the general rule that the burden of proof lies with the proponent of an allegation). Because petitioner did not submit with its reclassification petitions documentary evidence establishing in what manner it used the property during the 2011 tax year, petitioner failed in its burden to demonstrate that the property should be classified as industrial pursuant to MCL 211.34c(2)(d)(*i*) or (*ii*). And because petitioner did not substantiate the manner in which it used the property during the 2011 tax year, the STC properly denied the reclassification petition. For purposes of petitioner's appeal in the circuit court, we find that the STC's denial of the petition was authorized by law; therefore, the circuit court incorrectly applied MCL 211.34c(2)(d)(*ii*) when it reversed the STC's classification ruling.

We reverse.

O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ., concurred.

KLEIN v HP PELZER AUTOMOTIVE SYSTEMS, INC

Docket No. 310670. Submitted February 11, 2014, at Detroit. Decided July 8, 2014, at 9:00 a.m. Leave to appeal sought.

Douglas J. Klein and Amy Neufeld Klein brought an action in the Oakland Circuit Court against HP Pelzer Automotive Systems, Inc., alleging breach of an express contract, breach of an implied contract, and promissory estoppel. During a restructuring of HP Pelzer in 2009 that resulted in layoffs of some of its employees, the company's chief executive officer (CEO) had sent letters to various key employees, including plaintiffs, that stated that if their employment with HP Pelzer was "terminated or ended in any manner in the future," they would be entitled to minimum severance pay equal to a full year's worth of compensation. Plaintiffs continued to work. Subsequently, in letters to plaintiffs in 2011, the company's president indicated that the terms of the November 2009 letters were rescinded, effective immediately. Plaintiffs' attorney sent a letter rejecting that rescission, and plaintiffs subsequently resigned from HP Pelzer, following which they brought this suit. Plaintiffs moved for summary disposition. The court, Rudy J. Nichols, J., concluded that the 2009 letters were clear and unambiguous offers to pay severance but also determined that summary disposition was premature and permitted additional discovery on the question of the CEO's actual authority to bind HP Pelzer to the alleged severance-pay contracts. After discovery was completed, both parties moved for summary disposition. The court held that a unilateral contract existed, concluding that the fact that plaintiffs had continued to work after the CEO's offer of severance payments to them constituted acceptance of his offers and that HP Pelzer was therefore precluded from subsequently revoking those offers. The court awarded plaintiffs damages and dismissed the breach-of-implied contract and promissory estoppel counts as moot. HP Pelzer appealed.

The Court of Appeals *held*:

1. The trial court erred by concluding that HP Pelzer breached an express contract to make severance payments to plaintiffs. A unilateral contract is one in which the promisor does not receive a promise in return as consideration. A typical employment contract can be

described as a unilateral contract in which the employer promises to pay an employee wages in return for the employee's work. In essence, the employer's promise constitutes the terms of the employment agreement and the employee's action or forbearance in reliance on the employer's promise constitutes sufficient consideration to make the promise legally binding. In those circumstances, there is no contractual requirement that the promisee do more than perform the act on which the promise is predicated in order to legally obligate the promisor. The 2009 letters did not create unilateral severance-pay contracts, however, because the letters did not require plaintiffs' action or forbearance in reliance on the company's promise. Although its CEO indicated that the purpose of the letters was to express the company's commitment to plaintiffs' continued employment, plaintiffs need not have continued their employment to collect the severance payments. The phrase "ended in any manner in the future" rendered the CEO's promise a gratuity rather than a unilateral offer of a contract. Plaintiffs were not required to work at all after receiving the letters and could have resigned immediately and collected the severance pay offered. Without sufficient consideration, the CEO's promise in the letters was not legally binding. Instead, the letters created a policy that could be modified or revoked. Absent a vested right to severance payments, HP Pelzer could revoke the policy as it did in the 2011 letters. Therefore, by the time plaintiffs resigned, the severance-pay policy had already been revoked and plaintiffs were not entitled to severance payments.

2. Although not reached by the trial court after the court found an express contract, plaintiffs' claim of breach of an implied contract could not have survived summary disposition. Plaintiffs' breach-of-implied-contract claim derived from the discharge-for-cause doctrine in *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579 (1980), which held that a provision of an employment contract providing that an employee would not be discharged except for cause is legally enforceable, even if the contract is indefinite or not for a definite term. The provision could become part of the contract (1) by express oral or written agreement or (2) as a result of an employee's legitimate expectations grounded in an employer's policy statements. The Supreme Court subsequently held, however, that a written discharge-for-cause personnel policy (an implied contract) could be unilaterally modified by an employer without explicit reservation of that right at the outset. The legitimate-expectations test has not been extended to severance-pay policies. While plaintiffs claimed that they rejected the 2011 letters revoking the severance-pay policy, no agreement for severance existed and HP Pelzer unilaterally made changes to the policy to best adapt it to changing business conditions. If

plaintiffs were displeased by the change in policy, they were free to resign, but they were not entitled to severance payments upon their resignation by virtue of an implied contract.

3. Again, while not reached by the trial court, plaintiffs' promissory estoppel claim could also not have survived summary disposition. The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances requiring that the promise be enforced to avoid injustice. The 2009 letters articulated a severance-pay policy that could be changed at will, not a promise.

Grant of summary disposition reversed, damages award vacated, and case remanded for entry of summary disposition on all counts in HP Pelzer's favor.

Michael J. Hamblin for plaintiffs.

Vercruysse Murray & Calzone (by *Robert M. Vercruysse* and *Gary S. Fealk*) for defendant.

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

WILDER, J. Defendant, HP Pelzer Automotive Systems, Inc., appeals as of right an order granting summary disposition to plaintiffs, Douglas J. Klein and Amy Neufeld Klein.[1] On appeal, defendant argues that the trial court erred by finding that defendant breached a contract to make severance payments to plaintiffs upon their resignation and therefore erred by granting summary disposition to plaintiffs. We reverse and remand for the trial court to enter an order in favor of defendant.

I

In 2009, during the "economic downturn," defendant undertook a radical restructuring of its business. The

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[1] Plaintiffs are married to each other.

restructuring resulted in layoffs of some of defendant's employees, and it was a stressful time for defendant's staff. However, defendant's chief executive officer and president, Dean Youngblood, wanted to retain some "key individuals," including plaintiffs, during the restructuring. Consistently with this desire, Youngblood sent a letter dated November 2, 2009, to plaintiffs, stating in relevant part:

> Amy Klein
>
> Amy, the purpose of this letter is to document to you the commitment of HP Pelzer Automotive Systems, Inc. for your continued employment with the company.
>
> In the next few weeks / months we will begin to restructure the company. This restructuring will result in the elimination of certain positions within the company.
>
> This letter acknowledges that you and your position will not be involved in the restructuring activities.
>
> This letter further acknowledges, if your employment with HP Pelzer Automotive Systems Inc is terminated or ended in any manner in the future you will be entitled to a minimum severance pay equal to 1 (one) full year compensation.
>
> The full year compensation will be based on the previous 12 months salary, bonus, etc from the previous 12 months.
>
> Thank you for your continued support.

Youngblood sent a virtually identical letter to Douglas Klein the same day. Plaintiffs continued to work for defendant during the restructuring. Subsequently, in a letter dated June 7, 2011, defendant's then president and chief operations officer, John Pendleton, stated the following to Amy Klein, in relevant part:

> Dear Amy,
>
> I am writing in connection with a letter you received from Dean Youngblood, dated November 2, 2009.

> As you know, in that letter, Mr. Youngblood addressed the fact that in the "next few weeks and months, HP Pelzer Automotive Systems would be restructuring the company and that certain positions would be eliminated". Although Mr. Youngblood informed you that you and your position would not be involved in the restructuring, he stated that if your employment was in fact terminated or otherwise ended, you would be granted a severance equal to one year of compensation.
>
> As you know, the restructuring referenced in Mr. Youngblood's November 2, 2009 letter has now occurred and the economic difficulties that prompted the restructuring have eased.
>
> Accordingly, please be advised that Mr. Youngblood's letter of November 2, 2009 and the severance terms outlined therein are hereby rescinded effective immediately.

Again, Douglas Klein received a virtually identical letter. At the conclusion of the letters to plaintiffs, Pendleton reminded them that defendant is an at-will employer.

On June 8, 2011, plaintiffs' counsel sent a hand-delivered letter to Pendleton and the corporate human resources manager at defendant, which provided in relevant part:

> . . . HP Pelzer agreed in writing that if either Mr. or Mrs. Klein's "employment with HP Pelzer Automotive Systems, Inc. is terminated or ended in any manner in the future you will be entitled to a minimum severance pay equal to 1 (one) full year compensation." The agreements for both Mr. and Mrs. Klein further state that "[t]he full year compensation will be based on the previous 12 months salary, bonus, etc. from the previous 12 months." Copies of the signed letter agreements for both Mr. and Mrs. Klein are enclosed for your ready reference.
>
> Mr. and Mrs. Klein have forwarded Mr. Pendleton's June 7, 2011 letter purporting to rescind the referenced

> letter agreements. Be advised that such a purported rescission is not legally binding and is hereby categorically rejected.

The June 8, 2011 letter also provided, "Mr. and Mrs. Klein are seriously considering retirement from HP Pelzer and would like a computation from the company of the amount of the severance payment they can each expect to receive based on the referenced letter agreements." On July 19, 2011, plaintiffs sent separate letters of resignation to Pendleton and the corporate human resources manager resigning from defendant and stating that their resignations were effective on August 2, 2011.

Plaintiffs filed a three-count complaint against defendant, alleging breach of express contract, breach of implied contract, and promissory estoppel. Plaintiffs' complaint alleged that, under Youngblood's 2009 letters, they were entitled to severance payments from defendant based on the "year" of earnings before their resignations.

Before the close of discovery, plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(10), alleging that there was no genuine issue of material fact, except for damages, with respect to Count I (breach of express contract). Plaintiffs argued that the 2009 letters were unilateral offers by defendant of severance payments, which they accepted by continuing to work after the offers were made. Citing *Cain v Allen Electric & Equip Co*, 346 Mich 568; 78 NW2d 296 (1956), plaintiffs argued that the alleged offers could not be revoked once they were accepted. Defendant opposed the motion for summary disposition, arguing *inter alia* that (1) because it did not terminate or end plaintiffs' employment, plaintiffs were not entitled to severance payments, (2) the 2009 letters

articulated a severance-pay policy that could be revoked or amended by defendant at any time and that the policy was revoked by the June 7, 2011 letters, and (3) Youngblood lacked actual authority to bind defendant to the alleged promises for severance payments, but further discovery was required regarding this factual question.

The trial court concluded that the 2009 letters were clear and unambiguous offers to make severance payments. However, the trial court also determined that summary disposition was premature and permitted additional discovery on the question of Youngblood's actual authority to bind defendant to the alleged severance-pay contracts.

After discovery was completed, both parties filed motions for summary disposition. In their second motion for summary disposition, plaintiffs argued that defendant had failed to produce any evidence that Youngblood lacked actual authority to bind defendant to the alleged severance-pay contracts. Defendant responded that Youngblood lacked actual authority to make an *irrevocable* promise to provide severance payments because he was obligated to follow defendant's policies, including the policy that compensation, benefits, and policies could be modified or revoked at any time.

In defendant's motion for summary disposition, defendant argued that the trial court had decided the first motion for summary disposition prematurely because plaintiffs' depositions were not part of the record at that time. Defendant cited plaintiffs' admissions in their depositions that Youngblood never promised they would receive severance payments if they resigned. Defendant further argued that the plain language of the 2009 letters did not allow for severance upon resigna-

tion and that it is clear that the 2009 letters were designed to encourage plaintiffs not to resign—not to encourage them to resign and collect severance pay. Defendant further argued that any benefits were only intended to be paid during the restructuring period and continued employment was a condition of the agreement, if any agreement existed, and that plaintiffs knew that their compensation and benefits could be revoked or changed at any time because the 2009 letters did not require performance. Defendant also contended that if plaintiffs could accept the severance provision in the 2009 letters by continuing to work, they also accepted the June 7, 2011 letters (rescinding the severance provision) by continuing to work. Finally, defendant again argued that Youngblood lacked actual authority to make an *irrevocable* promise on behalf of defendant to provide severance payments and that, with respect to their claim of promissory estoppel, plaintiffs did not forbear from resigning.

The trial court found that defendant had offered no evidence to refute plaintiffs' assertion that Youngblood had actual authority to bind defendant to pay the severance at issue, and once again concluded that Youngblood's 2009 letters to plaintiffs were promises to pay severance, which entitled plaintiffs to severance payments upon their resignations from defendant. Citing *Cain*, the trial court held that the fact that each plaintiff continued to work after Youngblood's offer of severance payments to them constituted acceptance of his offers and that defendant was therefore precluded from subsequently revoking the severance offers. In its May 30, 2012 order, the trial court awarded Amy $106,744.90 and Douglas $91,222.02. The trial court also dismissed Counts II (breach of implied contract) and III (promissory estoppel) as moot.

II

A

On appeal, defendant argues that the trial court erred by concluding that a unilateral severance-pay contract existed. We agree.

1

The existence and interpretation of a contract are questions of law, which this Court reviews de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). This Court also reviews de novo the trial court's grant of summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), which tests the factual sufficiency of the complaint. *Urbain v Beierling*, 301 Mich App 114, 122; 835 NW2d 455 (2013). In evaluating a motion for summary disposition brought under Subrule (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(G)(5); *Tienda v Integon Nat'l Ins Co*, 300 Mich App 605, 611-612; 834 NW2d 908 (2013). Summary disposition is properly granted if the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Tienda*, 300 Mich App at 611; MCR 2.116(C)(10).

2

" 'A contract must be interpreted according to its plain and ordinary meaning.' " *Wells Fargo Bank, NA v*

Cherryland Mall Ltd Partnership (*On Remand*), 300 Mich App 361, 386; 835 NW2d 593 (2013), quoting *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

> "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning." [*Wells Fargo*, 300 Mich App at 386, quoting *Holmes*, 281 Mich App at 594.]

Again, the trial court concluded, and plaintiffs maintain on appeal, that a unilateral severance-pay contract existed.

> "A unilateral contract is one in which the promisor does not receive a promise in return as consideration. 1 Restatement Contracts, §§ 12, 52, pp 10-12, 58-59. In simplest terms, a typical employment contract can be described as a unilateral contract in which the employer promises to pay an employee wages in return for the employee's work. In essence, the employer's promise constitutes the terms of the employment agreement; the employee's action or forbearance in reliance upon the employer's promise constitutes sufficient consideration to make the promise legally binding. In such circumstances, there is no contractual requirement that the promisee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor." [*Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 138 n 9; 666 NW2d 186 (2003), quoting *In re Certified Question*, 432 Mich 438, 446; 443 NW2d 112 (1989).]

Both parties and the trial court relied heavily on *Cain*, 346 Mich 568. In *Cain*, the employer issued a personnel

policy, which among other provisions included a termination policy that provided that "an 'executive' having 5 to 10 years employment should be entitled to 2 months termination pay." *Id*. at 571. The personnel policy also included the following caveat: " 'Of course such policies cannot be complete and are subject to change or amendments either through necessity created by laws or for other reasons that may come to our attention.' " *Id*. at 570. The employee plaintiff subsequently resigned, effective December 15, 1954. *Id*. at 571. On October 14, 1954, before the effective date of the employee's resignation, the employer fired the employee, effective immediately. *Id*. Then, the employer's board of directors passed a motion to deny termination pay to the employee. *Id*. at 572.

Our Supreme Court held that the termination policy was an offer of a contract, which the employee accepted by continuing employment beyond the five-year term required by the policy. *Id*. at 579-580. Because the employee accepted the offer, the company was called upon to perform, preventing the company from changing the policy as the board of directors tried to do with its motion to deny termination pay to the employee. *Id*. at 580.

In *Gaydos v White Motor Corp*, 54 Mich App 143, 146; 220 NW2d 697 (1974), employees were promised severance pay (in lieu of two weeks' termination notice) if they had more than six months of service with the employer. This Court concluded that, by the employees' continuing to work after the promulgation of the policy, "consideration was supplied for a unilateral contract, upon which the employees had the right to rely." *Id*. at 148.

The facts of this case are distinguishable from *Cain* and *Gaydos*. The 2009 letters at issue here did not create unilateral severance-pay contracts because the letters did not require plaintiffs' action or forbearance

in reliance on the employer's promise. *Sniecinski*, 469 Mich at 138 n 9. In *Cain*, the employee was required to work between 5 and 10 years to earn 2 years of termination pay. In *Gaydos*, the employees were required to work 6 months to earn severance pay. In this case, although Youngblood wrote that the purpose of the 2009 letters was to express defendant's commitment to plaintiffs' continued employment with defendant, plaintiffs need not have continued their employment to collect the severance payments. Again, the letters provided:

> This letter further acknowledges, if your employment with HP Pelzer Automotive Systems Inc is terminated or *ended in any manner in the future* you will be entitled to a minimum severance pay equal to 1 (one) full year compensation. [Emphasis added.]

The phrase "ended in any manner in the future" renders Youngblood's "promise" a gratuity and not a unilateral offer of a contract. As defendant correctly argues, plaintiffs were not required to work at all after receiving the letters. Rather, the plain language of the letters enabled plaintiffs to resign immediately and collect the severance pay offered.[2] The letters required no action or forbearance. Without sufficient consideration, defendant's promise in the letters was not legally binding. *Id*.

The facts of this case are similar to the facts in *Kolka v Atlas Chem Indus*, 13 Mich App 580; 164 NW2d 755 (1968). In *Kolka*, the plaintiff had been on disability leave for approximately one year when the employer instituted

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[2] We reject defendant's alternative argument that the 2009 letters would not allow an employee to resign and collect. Defendant claims that some action by it, such as termination, was required. The plain language of the 2009 letters is clear. The phrase "ended in any manner" includes resignation. No provision in the 2009 letters requires action by defendant to end the employment.

a separation-pay policy. *Id*. at 581. Although the plaintiff was on inactive payroll, he was in "no position to comply with or give consideration for an offer of" separation pay. *Id*. Absent sufficient consideration, this Court held that the plaintiff was not entitled to separation pay and that the trial court had properly granted summary disposition for the defendant employer. *Id*. The plaintiff on disability leave in *Kolka* could not provide consideration for the employer's promise, and plaintiffs here were not required to provide consideration.

In the instant case, defendant's severance-pay policy required no consideration (performance or forbearance) by plaintiffs. Because no consideration was required to accept the severance pay offered in the 2009 letters, no unilateral contract was formed. Instead, the 2009 letters created a policy that could be modified or revoked. As in *Kolka*, there was no event here, such as continued employment for a certain number of years, see *Cain*, 346 Mich at 571, that could result in the vesting of the right of severance payments. Absent a vested right to severance payments, defendant could revoke the policy as it did by letter on June 7, 2011.[3] Therefore, by the time plaintiffs resigned in July 2011, because the severance-pay policy had already been revoked by defendant, contrary to the trial court's conclusion, plaintiffs were not entitled to severance payments.[4]

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[3] We reject defendant's argument that the 2009 letters limited the severance-pay policy to the restructuring period. The plain language of the letters provided for severance if plaintiffs' employment "ended in any manner in the future." The phrase "in the future" is not limited to the restructuring period. Therefore, even though the 2009 letters were sent to retain key individuals during the restructuring and the restructuring was over, the policy arguably continued until Pendleton sent the June 7, 2011 letters, which ended the policy.

[4] Because of our conclusion that defendant could revoke the severance-pay policy at any time, we need not address defendant's argument that Youngblood lacked the actual authority to bind defendant to *irrevocable* severance-pay contracts.

B

The trial court found that an express contract existed and did not reach plaintiffs' claims in Count II (breach of implied contract) or Count III (promissory estoppel). This Court generally does not review an issue undecided by the trial court unless it is a question of law and all the facts needed for resolution are present. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). Because the interpretation of the 2009 letters is a question of law, this Court may review those claims also.

1

Plaintiffs' breach-of-implied-contract claim is derived from the discharge-for-cause doctrine enunciated by *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579; 292 NW2d 880 (1980). In *Toussaint*, the Michigan Supreme Court held that a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable, even if the contract is indefinite or not for a definite term. The provision could become part of the contract either (1) by express agreement, oral or written, which required negotiation, or (2) as a result of an employee's legitimate expectations grounded in an employer's policy statements. The Supreme Court in *Toussaint* held that both plaintiffs had presented sufficient evidence of an express agreement. For example, one plaintiff was told that if he was "doing the job," he would not be discharged. The Supreme Court further held that a jury could find that one of the two plaintiffs also had legitimate expectations (or an implied contract) grounded in his employer's written policy statements, set forth in the manual of personnel policies. *Id.* at 597-599.

In *Certified Question*, 432 Mich at 441, the Supreme Court next answered in the affirmative that a written discharge-for-cause personnel policy (an implied contract) could be unilaterally modified by an employer without explicit reservation of that right at the outset. The Supreme Court noted:

> [W]ritten personnel policies are not enforceable because they have been "offered and accepted" as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies.
>
> * * *
>
> Under the *Toussaint* analysis, an employer who chooses to establish desirable personnel policies, such as a discharge-for-cause employment policy, is not seeking to induce each individual employee to show up for work day after day, but rather is seeking to promote an environment conducive to collective productivity. [*Id*. at 453-454.]

The Supreme Court concluded that a policy should be a "flexible framework for operational guidance" rather than "a perpetually binding contractual obligation," which would allow businesses to be "adaptable and responsive to change," *id*. at 456, and as such, an employer may unilaterally make changes in a written discharge-for-cause policy, but "reasonable notice of the change must be uniformly given to affected employees," *id*. at 456-457. The Court noted that discharge-for-cause is not a right that can accrue or vest and suggested that employers may not so easily change policies that do accrue or vest. *Id*. at 457.

Our Supreme Court has since declined to extend *Toussaint*'s legitimate-expectations test to a compensation plan: "Were we to extend the legitimate-expectations claim to every area governed by company policy, then each time a policy change took place con-

tract rights would be called into question." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 531; 473 NW2d 652 (1991) (opinion by RILEY, J.).

Again, the trial court did not reach the question whether an implied contract existed. Michigan courts have not extended the legitimate-expectations test to severance-pay policies, and we decline to do so here. Employers should enjoy flexibility in modifying their policies. See *Certified Question*, 432 Mich at 456. But even if we were to conclude that plaintiffs had legitimate expectations of severance payments, defendant properly revoked the severance-pay policy with the June 7, 2011 letters. Pendleton explained that the economic downturn and restructuring that spurred the 2009 letters had ended, so the severance-pay policy was no longer necessary. There has been no allegation by plaintiffs that defendant failed to provide reasonable notice of the June 7, 2011 change. *Id*. at 457. In fact, when plaintiffs were originally hired by defendant, they signed personnel forms that provided that changes to employment, compensation, and benefits could be modified or eliminated at any time upon simple written notice, which they received from Pendleton.[5]

Plaintiffs claim that they rejected the June 7, 2011 letters revoking the severance-pay policy. But no agreement for severance pay existed, and as the Supreme Court in *Certified Question*, 432 Mich at 456, explained, employers may unilaterally make changes to employment policies so they can best adapt to changing business conditions. If plaintiffs were displeased by the change in policy, they were free to resign, but they were

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[5] A generalized personnel policy could not ordinarily defeat a definitive offer and acceptance for severance, but here, where no contract existed and the policy could be amended at any time, plaintiffs' awareness of such flexibility at the time of hire is notable.

not entitled to severance payments upon their resignation by virtue of an implied contract. Plaintiffs' claim in Count II (breach of implied contract) could not have survived summary disposition.

2

Just as plaintiffs had no legitimate expectations that the severance-pay policy would not be revoked, plaintiffs had no claim in promissory estoppel. The elements of promissory estoppel are

> (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. [*Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999).]

First, the 2009 letters articulated not a promise, but a severance-pay policy that could be changed at will. Moreover, even if defendant had made a promise by the 2009 letters, before revoking the severance-pay policy, defendant could not have reasonably expected that its revocation of the "promise" by the June 7, 2011 letters would induce plaintiffs to resign within a month and thereafter attempt to collect the severance pay referred to in the "promise." Therefore, plaintiffs' promissory estoppel claim could not have survived summary disposition.

III

In summary, no unilateral contract for severance pay existed, and defendant properly revoked the severance-pay policy on June 7, 2011. Thus, when plaintiffs subsequently resigned, they were not entitled to severance payments. The trial court erred by finding that

defendant breached an express contract to make severance payments to plaintiffs and granting summary disposition in favor of plaintiffs for that breach of contract. In light of the June 7, 2011 letters revoking the policy, plaintiffs' claims in Counts II (breach of implied contract) and III (promissory estoppel) also could not have survived summary disposition.

We reverse the trial court's grant of summary disposition to plaintiffs on Count I (breach of express contract), denial of defendant's motion for summary disposition, and dismissal of plaintiffs' remaining claims as moot. We vacate the trial court's award of damages to plaintiffs and remand to the trial court for entry of an order granting summary disposition in favor of defendant on all counts. We do not retain jurisdiction.

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

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

PEOPLE v DUENAZ

Docket No. 311441. Submitted May 13, 2014, at Detroit. Decided July 10, 2014, at 9:00 a.m. Leave to appeal sought.

A jury in the St. Clair Circuit Court, James P. Adair, J., convicted Robin S. Duenaz of three counts of first-degree criminal sexual conduct (CSC-I) (victim under 13 years of age), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC-II) (victim under 13 years of age), MCL 750.520c(1)(a). The court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 50 to 75 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 750.520j, evidence of all sexual activity by the complainant not incident to the alleged rape is barred, with two narrow exceptions. In this case, defendant sought to admit evidence that the victim's then stepfather had sexually assaulted her approximately one year before the charged offenses occurred. The evidence of the prior sexual assault did not fit within either of the narrow exceptions set forth in MCL 750.520j, and admission of the evidence was not necessary to preserve defendant's constitutional right of confrontation. The trial court did not abuse its discretion by excluding the evidence.

2. Under MRE 803(4), hearsay statements are not excluded by the general rule barring the admission of hearsay when the statements were made for the purpose of medical treatment or diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis or treatment. In cases of suspected child abuse, statements the child makes may be admitted under this exception when the totality of the circumstances surrounding the statements indicates that they are trustworthy. In this case, the court admitted statements the victim made to Dr. Harry Frederick that implicated defendant. The victim here was mature enough to relate the details to the doctor and others, the physician did not use leading questions to elicit the statements, the victim phrased her statements in child-

like terms, the examination was performed while the victim was still suffering emotional pain and distress from the incident, and the victim's identification of the defendant was reasonably necessary to the victim's diagnosis and treatment given that defendant was a family friend. In light of these facts, the court did not abuse its discretion by admitting the statements the victim made to Frederick.

3. Under MCL 768.27a, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. But although admissible under MCL 768.27a, evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. When applying MCL 768.27a and the balancing test of MRE 403, the propensity inference of the evidence must be weighed in favor of the probative value of the evidence. In this case, the court did not abuse its discretion by admitting evidence of defendant's 2009 Arizona conviction for attempted molestation of a child and testimony by defendant's former stepdaughter that he sexually assaulted her. The trial court correctly found that defendant's assault on his then stepdaughter was similar to the acts alleged in this case: both involved similar acts in the same location, with similar threats to the victims, and less than six months elapsed between the two crimes. This evidence was relevant and probative. Further, the acts alleged in this case were of the same general character as those supporting defendant's Arizona conviction because both involved sex crimes against children. While the Arizona conviction was prejudicial, it was not unfairly prejudicial.

4. Under MCL 767.40a, if requested by the defense, the prosecution or law enforcement must provide reasonable assistance to locate and serve process on witnesses. MCL 767.93(1) allows the court to issue a certificate to obtain the presence of an out-of-state material witness. In this case, defendant moved to compel the testimony of Dr. Duane Penshorn, who had examined the victim shortly after the allegations against defendant came to light. Defendant proposed to have Penshorn testify by telephone, but the court ruled that MCR 6.006 would not permit telephonic testimony because the court did not have two-way interactive video technology. In light of the court's ruling, the parties stipulated the admission of Penshorn's report. Assuming that the prosecution

was not duly diligent in producing Penshorn and that the court abused its discretion by not permitting Penshorn to testify by telephone, defendant failed to establish prejudice. Defendant made no argument regarding how questioning Penshorn in court or over the phone would have provided any more information to the jury than was already provided in his report. Error in the admission or exclusion of evidence does not warrant reversal if, in light of the other properly admitted evidence, it does not affirmatively appear more probable than not that a different outcome would have resulted without the error.

5. The Double Jeopardy Clause, US Const, Am V, protects against multiple prosecutions for the same offense after acquittal or conviction and against multiple punishments for the same conviction. When the Legislature has clearly expressed the intent for multiple punishments, the prohibition against double jeopardy is not violated by the imposition of multiple punishments. When that intent is not clearly expressed, the "same elements" test of *Blockburger v United States*, 284 US 299, 304 (1932), must be applied. The *Blockburger* test looks at the statutory elements of the offenses and asks whether each offense requires proof of a fact that the other does not. The elements of CSC-I in this case were (1) the defendant engaged in sexual penetration, (2) with a person under 13 years of age. Under MCL 750.520a(r), "sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight of any part of a person's body or any object into the genital or anal openings of another person's body. The elements of CSC-II were (1) the defendant engaged in sexual contact, (2) with a person under 13 years of age. The statutory definition, under MCL 750.520a(q), of "sexual contact," includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification, or done for a sexual purpose. Given the Legislature's definitions of "sexual penetration" and "sexual contact," CSC-I and CSC-II each require proof of a fact that the other does not. Sexual penetration is an element of CSC-I but not CSC-II. CSC-II requires that sexual contact be done for a sexual purpose, an element not included in CSC-I. Under *Blockburger*, conviction and punishment for both CSC-I and CSC-II does not violate double jeopardy.

6. Under the Interstate Agreement on Detainers (IAD), MCL 780.601, an inmate incarcerated in one state may be transported to another state for trial on charges in the receiving state. Under

Article III(a) of the IAD, whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, the prisoner shall be brought to trial within 180 days after he or she shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his or her imprisonment and his or her request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or the prisoner's counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. In this case, defendant's demand for disposition, accompanied by the required certificate, was not delivered to the prosecution until December 28, 2011, and defendant was properly brought to trial within 180 days after that date.

7. Offense Variable (OV) 11, MCL 777.41, concerns criminal sexual penetration. Defendant was assessed 50 points for OV 11, but the prosecution agreed that defendant should have been assessed only 25 points because there was only one additional penetration beyond the sentencing offenses. Correction of the error reduced the recommended minimum-sentence range. Accordingly, defendant was entitled to resentencing because a defendant is entitled to be sentenced on the basis of accurate information.

Defendant's convictions affirmed; case remanded for correction of the sentencing information report and resentencing.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — CRIMINAL SEXUAL CONDUCT.

The crimes of first-degree criminal sexual conduct for sexual penetration with a person under 13 years of age and second-degree criminal sexual conduct for sexual contact with a person under 13 years of age each contain an element that the other does not; the crimes are separate offenses for which a defendant may be

properly convicted and punished without violating the Double Jeopardy Clause protection against multiple punishments (US Const, Am V; Const 1963, art 1, § 15; MCL 750.520b(1)(a); MCL 750.520c(1)(a)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Michael L. Mittlestat* and *Malaika Ramsey-Heath*) for defendant.

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

PER CURIAM. Defendant appeals by right his convictions by a jury of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 50 to 75 years in prison. We affirm defendant's convictions but remand for correction of the sentencing information report and resentencing.

I. EVIDENCE OF PRIOR ASSAULT

Defendant first argues that the trial court abused its discretion by ruling inadmissible evidence regarding a sexual assault that the victim's then stepfather perpetrated on her about one year before the instant offenses. The stepfather had pleaded guilty to reduced charges of two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d, and one count of CSC-II, and was sentenced to 10-15 years in prison. The trial court reviewed the police reports in the instant case and those from the earlier case and ruled that under the rape-

shield statute, MCL 750.520j, the defense could not inquire into the prior case involving the victim.

Defendant argues that the evidence was admissible under exceptions to the rape-shield statute for sources of disease and to show an alternate source of the victim's age-inappropriate sexual knowledge. He also contends that the probative value of this evidence outweighed any prejudicial effect. Further, defendant asserts the trial court's ruling denied him his constitutional the right to present a defense and confront his accusers. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo both constitutional claims and preliminary questions of law regarding admissibility of evidence. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010); *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). We review the trial court's ultimate decision regarding admissibility of evidence for an abuse of discretion. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). An abuse of discretion occurs when trial court's decision is outside the range of principled outcomes. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011).

B. ANALYSIS

We conclude the proposed evidence was not relevant, MRE 401; therefore, it was not admissible, MRE 402. Moreover, the trial court did not abuse its discretion by excluding the evidence because any marginally probative value of the evidence was substantially outweighed by the danger of unfair prejudice or confusion of the issues. MRE 403; *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). Finally, defendant's consti-

tutional rights to present a defense and confront the witnesses against him were not violated. *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982) (stating that the right to confront and cross-examine witnesses does not include a right to cross-examine regarding irrelevant issues).

The rape-shield statute, MCL 750.520j, provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Similarly, MRE 404(a)(3) provides an exception to the general rule excluding character evidence for, in a case involving criminal sexual conduct (CSC), "evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease . . . ."

The rape-shield statute " 'bars, with two narrow exceptions, evidence of *all* sexual activity by the complainant not incident to the alleged rape.' " *People v Adair*, 452 Mich 473, 478; 550 NW2d 505 (1996), quoting *People v Stull*, 127 Mich App 14, 17; 338 NW2d 403 (1983). Because the statute excludes evidence that in most cases would be only minimally relevant, the statute's prohibitions do not deny or significantly di-

minish a defendant's right of confrontation. *Arenda*, 416 Mich at 11. Moreover, evidence of a complainant's sexual history also "is usually irrelevant as impeachment evidence because it has no bearing on character for truthfulness." *Adair*, 452 Mich at 481, citing MRE 608. This is especially so in this case, given that the evidence was not intended to show "bias, motive, or a pattern of false accusations . . . ." *Id*. at 481 n 5. Under the statutory language, if one of the exceptions in the statute applies, the trial court must determine whether the inflammatory or prejudicial nature of the evidence "outweigh[s]" its probative value. MCL 750.520j.[1]

The evidence defendant sought to admit concerning the victim's prior sexual experience did not fit within either of the narrow exceptions provided by the rape-shield statute. MCL 750.520j(1). The statute was enacted to prohibit inquiry into a victim's prior sexual encounters, which were historically used by defendants charged with CSC involving an adult in an effort to prove the defense of consent. The statute reflects a legislative policy determination that sexual conduct or reputation regarding sexual conduct as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant. *People v Hackett*, 421 Mich 338, 346; 365 NW2d 120 (1984). Although consent is not a relevant defense to a CSC charge involving an underage minor, Michigan courts have applied the rape-shield statute in cases involving child victims. See *Arenda*, 416 Mich at 6, 13; *Benton*, 294 Mich App at 197-199; *People v Morse*, 231 Mich App 424, 430; 586 NW2d 555 (1998); *People v Garvie*, 148 Mich App 444, 448-449; 384 NW2d 796 (1986).

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[1] This is in contrast to MRE 403, which provides that relevant evidence may be excluded if its probative value is "substantially outweighed" by prejudicial considerations. *Adair*, 452 Mich at 481.

Although the proffered evidence does not fit within one of the rape-shield exceptions, in limited situations evidence the statute excludes may nevertheless be relevant and admissible to preserve a defendant's constitutional right of confrontation. *Hackett*, 421 Mich at 348–349; *Benton*, 294 Mich App at 197. Our Supreme Court has directed that trial courts inform the exercise of their discretion in regard to such a constitutional claim by conducting an in camera hearing. *Hacket*, 421 Mich at 349. In this case, defendant asserts that evidence of the prior assault was relevant and admissible as an alternative explanation for the victim's inappropriate sexual knowledge. The trial court reviewed police reports of the earlier offenses and heard arguments of counsel at a bench conference and on the record. As the prosecution notes, the only similarity between the two cases was that both involved anal and vaginal penetration. The two cases were certainly not "significantly similar." See *Morse*, 231 Mich App at 437. In addition, defendant's theory of relevance was just that. The victim was 12 years old when she testified in this case about what occurred when she was almost 8 years old. It is pure speculation to suggest (1) that the victim's knowledge of sexual matters was inappropriate and (2) that the victim's knowledge of sexual matters derived from an experience in her life a year before the instant offenses. So, the evidence is not at all probative of the victim's credibility. Its admission would have only created "a real danger of misleading the jury" and "an obvious invasion of the victim's privacy." *Arenda*, 416 Mich at 12. In sum, the record indicates that the trial court balanced the rights of the victim and defendant, as required by *Morse*, 231 Mich App at 433, and its ruling excluding the evidence was well within the range of principled outcomes, *Benton*, 294 Mich App at 195.

II. HEARSAY

Defendant next argues that the trial court abused its discretion by admitting statements the victim made to Dr. Harry Frederick, a board-certified emergency physician and medical director of the Saginaw Child Advocacy Center. Frederick was qualified as an expert in emergency medicine and child sexual examinations. The instant offenses were alleged to have occurred between December 25, 2007, and January 1, 2008. Frederick examined the then eight-year-old victim on January 22, 2008. The victim made statements implicating defendant in the offenses while Frederick questioned her regarding her history. Defendant contends the statements were not necessary to medical diagnosis or treatment, and that the statements were not trustworthy. The prosecution disputes defendant's claims, and argues that if error occurred, it was harmless. We conclude that the trial court did not abuse its discretion by admitting the hearsay evidence.

A. STANDARD OF REVIEW

We review the trial court's decision to admit evidence for an abuse of discretion. *Burns*, 494 Mich at 110. But we review de novo preliminary questions of law regarding whether a statute or evidentiary rule applies. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The trial court's decision is an abuse of discretion when the result is outside the range of principled outcomes. *Benton*, 294 Mich App at 195.

B. ANALYSIS

MRE 803(4) provides an exception to the general rule excluding hearsay for statements made for purposes of medical treatment or medical diagnosis in connection

with treatment: "Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis or treatment" are not excluded by the hearsay rule.

All exceptions to the hearsay rule are justified because of the belief that the statements are made under circumstances in which they are both necessary and inherently trustworthy. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). The "rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *Id*. In cases of suspected child abuse, statements the child makes may be admitted under this exception when the totality of circumstances surrounding the statements supports that they are trustworthy. *Id*. at 323-324. Factors that may be part of a trustworthiness analysis include:

> (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to

> the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*Id*. at 324-325 (citations omitted).]

Applying the *Meeboer* factors to the present case supports admission of the victim's statements under MRE 803(4). Unlike the *Meeboer* companion case of *People v Craft*, in which the victim was four, the victim in this case was nearly eight when the abuse occurred and eight when Frederick examined her. She was mature enough to relate the details to the doctor and others. Frederick did not use leading questions to elicit the statements. The victim also phrased her statements in childlike terms such as, "Scott put his pee-pee in her, um, butt and in her private part, and that . . . it hurt." Although the prosecution initiated the examination and it may have been at least in part to investigate an alleged sexual assault, this factor is not dispositive. See *Meeboer*, 439 Mich at 333-334. Furthermore, Frederick's examination of the victim was done when the child was still suffering from emotional pain and distress from the incident. The examination was medical, not psychological. Nothing indicates that the victim mistook defendant's identity or had a motive to fabricate.

As discussed in *Meeboer*, 439 Mich at 329-330, statements of identification in child sexual abuse cases serve several important purposes. The doctor can assess and treat any pregnancy or sexually transmitted disease, make referrals for other treatment, including counseling, and structure the examination to the "exact type of trauma the child recently experienced." *Id*. at 329. The doctor can also assess whether the child will be returning to an abusive home. In this case, the attacker's identity was important because he was a family friend who managed to take the child with him more than once. Generally, identification of the assailant "can be

as important to the health of the child as treatment of the physical injuries that are apparent to the physician." *Id*. at 328. In this case, the "identification of the assailant was reasonably necessary to the victim's medical diagnosis and treatment." *Id*. at 334. Indeed, the victim's identification of defendant was an inseparable part of the examination when she volunteered it as her first statement to Frederick.

Finally, even if admission of the identification testimony were error, it does not require reversal. Frederick's testimony regarding the victim's out-of-court statement was cumulative of her in-court identification of defendant. "[T]he admission of a hearsay statement that is cumulative to in-court testimony by the declarant can be harmless error, particularly when corroborated by other evidence." *Gursky*, 486 Mich at 620. In this case, the possibility of prejudice is diminished because the hearsay was cumulative and because the victim-declarant was subject to cross-examination at trial. *Id*. at 621-623. Further, identity was not at issue in this case; defendant was the only person to take the victim and her cousin to his apartment to make cookies, and he was well known to the family. For all these reasons, even if Frederick's testimony regarding the victim's statements were admitted in error, reversal is not warrant. See *Lukity*, 460 Mich at 495-496 (stating that evidentiary error does not warrant reversal if, when assessed in the light of the other properly admitted evidence, it does not affirmatively appear more probable than not that a different outcome would have resulted without the error).

III. OTHER ACTS EVIDENCE

Defendant argues that he was denied due process and a fair trial when the trial court abused its discretion by

admitting evidence of defendant's 2009 Arizona conviction for attempted molestation of a child and testimony by defendant's former stepdaughter that he sexually assaulted her in July 2007 when she was 13 years old. Defendant contends that the evidence was not relevant or similar enough to show a common scheme, plan, or system, and that any minimal probative value was outweighed by its prejudicial effect. The prosecution disputes these arguments and contends that the trial court properly admitted the evidence under MCL 768.27a, which permits evidence of other offenses against minors. We conclude that the trial court did not abuse its discretion and that defendant was not denied a fair trial.

A. STANDARD OF REVIEW

We review the trial court's decision to admit evidence for an abuse of discretion. *Burns*, 494 Mich at 110. But we review de novo preliminary questions of law regarding whether a statute or evidentiary rule applies, or as defendant claims, constitutional protections require exclusion of evidence. *Benton*, 294 Mich App at 195. The trial court's decision is an abuse of discretion when the result is outside the range of principled outcomes. *Id*.

B. ANALYSIS

MCL 768.27a(1) provides in pertinent part:

> Notwithstanding section 27,[2] in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

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[2] Section 27, MCL 768.27, provides for the admission of other acts evidence using language similar to that of MRE 404(b)(1).

Our Supreme Court held in *People v Watkins*, 491 Mich 450, 455, 472; 818 NW2d 296 (2012), that MCL 768.27a and MRE 404(b)[3] irreconcilably conflict, but that the Legislature intended the statute, a valid enactment of substantive law, to supersede the court rule. *Watkins*, 491 Mich at 455, 471-475. Evidence relevant because it shows propensity is admissible under MCL 768.27a whereas evidence relevant only because it show propensity is excluded by MRE 404(b). *Watkins*, 491 Mich at 470-472. But the *Watkins* Court held that evidence otherwise admissible under MCL 768.27a still remains subject to the requirements of MRE 403. *Watkins*, 491 Mich at 481. MRE 403 states that although it is relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The *Watkins* Court provided guidance to trial courts in applying MCL 768.27a and the balancing test of MRE 403. First, the propensity inference of the evidence must be weighed in favor of the evidence's probative value. *Watkins*, 491 Mich at 486-487. Second, the Court provided an illustrative, nonexhaustive list of factors that may lead a trial court to exclude evidence under MRE 403:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts

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

> to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Watkins*, 491 Mich at 487-488.]

In the present case, the trial court applied the proper standard by asking whether the evidence was more prejudicial than probative. Considering defendant's July 2007 assaults on his stepdaughter, the trial court correctly found that these were similar to the present crimes. Defendant took the other victim to his apartment, asked her to watch a movie, and penetrated her anally and then vaginally. He also did this again a few days later. Defendant threatened both victims with harm to them or their families if they told. The difference in ages between the two victims (the other victim was thirteen), is not very material. Less than six months elapsed between the two crimes. The evidence of the similar assault against the other victim was very probative and important to the prosecution's case, especially because defendant was able to claim a lack of physical evidence of sexual assault based on Frederick's examination. Also, the passage of time had faded the victim's memory regarding some details. The challenged evidence was relevant because it tended to show that it was more probable than not that the minors were telling the truth. *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010). Our review of the record reveals that the trial court carefully weighed pertinent factors in deciding to admit the evidence. The court also gave a limiting instruction regarding evidence of other crimes. See CJI2d 20.28a. The trial court's decision was within the range of principled outcomes and therefore not an abuse of discretion. *Benton*, 294 Mich App at 195.

The trial court also did not abuse its discretion by admitting evidence of defendant's 2009 Arizona conviction for attempted molestation of a child. A certified copy of the conviction was admitted as an exhibit but details of the conviction were not provided. Clearly, the instant offenses and the Arizona conviction were "of the same general category," *People v Mardlin*, 487 Mich 609, 622-623; 790 NW2d 607 (2010), because they involve sex crimes (or attempted sex crimes) against children. Our Legislature has decided that evidence of other sexual assaults on children is relevant in a case in which a defendant is charged with committing a sexual offense against a minor. MCL 768.27a(1). Such allegations (or here, charged crimes and convictions) do tend to make the complainant's story more believable by showing propensity to commit the charged offense. See *Watkins*, 491 Mich at 492. The Arizona conviction was prejudicial but not unfairly prejudicial. There was no danger of confusion of the issues, misleading the jury, undue delay, or other considerations mentioned in MRE 403. Because defendant went to Arizona after committing the assaults in Michigan, the conduct underlying the 2009 Arizona conviction would not have been too far removed temporally from the instant offenses in Michigan. Further, because there was a conviction, there is no lack of reliability regarding the evidence. Thus, although the details of the crimes cannot be compared, we conclude that the trial court did not abuse its discretion by admitting the evidence in light of the various factors regarding admissibility under MCL 768.27a and MRE 403. *Watkins*, 491 Mich at 487-488.

On the basis of the foregoing, we conclude that the other acts evidence was properly admitted, and defendant was not denied his due process right to a fair trial.

IV. COMPULSORY PROCESS CLAIM

Defendant filed a pretrial motion to compel the testimony of Dr. Duane Penshorn, who examined the victim on January 13, 2008. Penshorn moved to Texas at some point before trial. The trial court directed the prosecution attempt to produce him, or his report could be admitted in evidence at trial. The defense also proposed to have Penshorn testify by telephone. Although Penshorn apparently agreed to testify by telephone, the prosecution noted that MCR 6.006 might not permit it. The trial court ruled that MCR 6.006 would not permit telephonic testimony because the court did not have two-way interactive video technology. In light of this ruling, the parties stipulated the admission of Penshorn's report.

A. STANDARD OF REVIEW

We review the trial court's decision regarding evidence for an abuse of discretion. *Burns*, 494 Mich at 110. We review de novo questions of law related to the admission or exclusion of evidence. *Id.*; *Benton*, 294 Mich App at 195. The trial court abuses its discretion when the result is outside the range of principled outcomes. *Benton*, 294 Mich App at 195.

B. ANALYSIS

Even if the trial court abused its discretion by not allowing Penshorn to testify by telephone, the error does not warrant reversal.

Defense counsel wanted Penshorn produced because he examined the victim on January 13, 2008, a week before Frederick examined her on January 22, 2008, and both doctors found no physical evidence of sexual abuse. Penshorn's report stated that he found "slight

diffuse redness" of the victim's external vulva, but no "obvious scarring or trauma."

Frederick testified at trial that during his examination of the victim he found a little nonspecific erythema, or redness, of the external genitalia. But these findings were not significant regarding sexual abuse. Frederick explained that after 7 to 10 days, redness would have no meaning because the tissue would heal very fast. The victim had no changes to her hymen indicative of sexual abuse, but Frederick noted the hymen could also heal relatively quickly, within four weeks, or it might be left with a "notch." Frederick found no indication of a healed injury. The victim's anal area was also normal, but any small tears to the anus would have healed quickly, within days. In sum, Frederick found no physical evidence of sexual abuse.

Frederick also testified that the absence of physical findings did not necessarily negate sexual abuse because physical evidence of abuse was found in less than 17% of victims, or as low as 4% after 7 to 14 days. Physical findings would be found in the anal area in only 1 in a 1,000 cases after a similar time lapse.

MCL 767.40a(1) requires that the prosecution attach to the information a list of eyewitnesses and witnesses who might be called at trial. If requested by the defense, the prosecution or law enforcement must provide reasonable assistance to locate and serve process on witnesses; prosecution objections must be raised in pretrial motions, and the trial court must hold a hearing to determine the reasonableness of the defense request. MCL 767.40a(5). See also *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). The trial court has discretion to fashion a remedy for the prosecution's noncompliance with the discovery statute. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991).

To warrant reversal, defendant must show that he was prejudiced by noncompliance with the statute. *Id*. at 59; *Burwick*, 450 Mich at 295-297; *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994).

MCL 767.93(1) allows the court to issue a certificate to obtain the presence of an out-of-state material witness. Further, MCL 767.40a(4) requires a showing of good cause for removing a witness from the prosecution's witness list. Forgetting to contact or subpoena a witness is likely not "good cause." Once a witness is endorsed under MCL 767.40a(3), the prosecution must use due diligence to produce the witness. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). If the court finds a lack of due diligence, the court may give a "missing witness" instruction stating that the jury may infer the witness's testimony would have been favorable to the defense. *Id*. In this case, the trial court made no finding regarding the prosecution's diligence. Furthermore, the defense did not request a "missing witness" instruction and instead agreed to allow admission of Penshorn's report. Finally, the trial court's ruling under MCR 6.006 was technically correct. For trials, the rule only allows the court to use two-way interactive video technology to take testimony with the consent of both parties. MCR 6.006(C)(2).

But assuming for the purpose of analysis that the prosecution was not duly diligent in producing Penshorn, and further assuming that the trial court abused its discretion by not permitting Penshorn to testify over the telephone, defendant has not established he suffered prejudice as a result. First, Penshorn's report that was admitted in evidence was favorable to the defense. Defense counsel was able to argue from it that Penshorn found no physical evidence of sexual assault at a point in time closer to the alleged assault than Freder-

ick's examination. Second, defendant makes no argument regarding how questioning Penshorn in court or over the telephone would have provided any more information to the jury than was provided in his report. Clearly, presenting live testimony is an important factor for determining whether or not a witness is credible, but here the information in Penshorn's report was undisputed. In sum, defendant has failed to establish the prejudice necessary to warrant reversal regarding the alleged failings of the prosecution under MCL 767.40a and the trial court's alleged abuse of discretion in fashioning a remedy. *Hana*, 447 Mich at 358 n 10; *Williams*, 188 Mich App at 58-59. Error in the admission or exclusion of evidence does not warrant reversal if, in light of the other properly admitted evidence, it does not affirmatively appear more probable than not that a different outcome would have resulted without the error. MCL 769.26; *Gursky*, 486 Mich at 619. Defendant has not established outcome-determinative error that warrants reversal.

V. DOUBLE JEOPARDY

Defendant argues that his conviction for CSC-II was not supported by the evidence and that it violated double jeopardy protections. The prosecution argues that because CSC-I and CSC-II each require proof of a fact that the other does not, the prohibition against double jeopardy is not violated by convicting a defendant of both. We review this claim de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

The Double Jeopardy Clause, US Const, Am V, protects against "(1) multiple *prosecutions* for the same offense after acquittal or conviction; and (2) multiple *punishments* for the same offense." *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). See also

Const 1963, art 1, § 15. In *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007), the Court held that when the Legislature has clearly expressed the intent for multiple punishments, the prohibition against double jeopardy is not violated. When no such intent is clearly expressed, the "same elements" test of *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932) should be applied. *Smith*, 478 Mich at 296, 316. The *Blockburger* test looks at the statutory elements of the offenses and asks whether each offense requires proof of a fact that the other does not. *Nutt*, 469 Mich at 576. This Court has previously applied the *Blockburger* test to a double jeopardy challenge of multiple CSC convictions of different grades. See *People v Garland*, 286 Mich App 1, 5-7; 777 NW2d 732 (2009) (holding that a single act of sexual penetration supported conviction of both CSC-I and CSC-III because each offense contains an element that the other does not).

Application of the *Blockburger* test to defendant's double jeopardy claim requires that we reject it. Defendant was convicted of three counts of CSC-I: two counts based on vaginal penetration and one count based on anal penetration. Defendant was also convicted of one count of CSC-II. The elements of CSC-I in this case are: (1) the defendant engaged in sexual penetration, (2) with a person under 13 years of age. MCL 750.520b(1)(a). "Sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(r). The elements of CSC-II are: (1) the defendant engaged in sexual contact, (2) with a person under 13 years of age. MCL 750.520c(1)(a). The statutory definition of "sexual contact," pertinent here, includes

"the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose . . . ." MCL 750.520a(q). "Intimate parts" includes "the primary genital area, groin, inner thigh, buttock, or breast . . . ." MCL 750.520a(f).

On the basis of the Legislature's definitions of "sexual penetration" and "sexual contact," CSC-I and CSC-II each require proof of a fact that the other does not. See *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997) (holding that CSC-II is a cognate but not lesser-included offense of CSC-I). The differing elements for the offenses of CSC-I and CSC-II demonstrate the Legislature's intent to authorize separate convictions and punishments for these offenses. "Sexual penetration" is an element of CSC-I but not CSC-II. CSC-II requires that "sexual contact" be done for a "sexual purpose," an element not included in CSC-I. Under *Blockburger*, conviction and punishment for both CSC-I and CSC-II does not violate double jeopardy.

Defendant's argument that the evidence did not support his conviction of CSC-II lacks merit. The same evidence that supported defendant's convictions of CSC-I would also support, on the facts of this case, conviction for CSC-II. The jury was properly instructed regarding the elements of each offense, and the evidence was sufficient to support multiple convictions.

VI. INTERSTATE AGREEMENT ON DETAINERS

Defendant argues that under the Interstate Agreement on Detainers (IAD), MCL 780.601, he should have

been brought to trial in Michigan within 180 days after he wrote to the prosecutor on May 17, 2010. The prosecution asserts it complied with the IAD by bringing defendant to trial on June 5, 2012, within 180 days after receiving the certificate required by the IAD on December 28, 2011. The interpretation and application of the IAD is a question of law that we review de novo. *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009).

The IAD provides that an inmate incarcerated in one state may be transported to another for trial on charges in the receiving state. The main purpose of the statute, stated in Article I, is to encourage speedy disposition of pending charges and prevent undue interference with treatment and rehabilitation programs. See *People v Wilden (On Rehearing)*, 197 Mich App 533, 535; 496 NW2d 801 (1992). Article III(a) of the IAD sets forth the procedure for a prisoner against whom a detainer is filed to notify the prosecutor in the detaining state of his place of imprisonment and to request final disposition of the charges. That subpart provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint *on the basis of which a detainer has been lodged against the prisoner*, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner *shall* be accompanied by a certificate of the appropriate official having custody of

> the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. [MCL 780.601, art III(a) (Emphasis added).]

In the present case, the charges were initiated in April 2008. Apparently while incarcerated in the state of Arizona, defendant sent a letter to the prosecutor asking what warrants were outstanding and how to take care of them.[4] The prosecution acknowledged receiving this letter from defendant on May 17, 2010, but apparently did not respond. Defendant then wrote to the warden of the Arizona prison where he was incarcerated on September 27, 2011. The deputy warden wrote back on September 29, 2011, that "[s]ince the case is for a probation violation and not untried charges the IAD does not apply."[5] Defendant then wrote to the prosecutor and the St. Clair County Clerk on November 2,

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[4] In discussing this issue, the parties do not state when or if Michigan authorities ever filed with authorities in Arizona a "detainer" regarding the instant charges. As the plain language of the IAD indicates, a detainer from the charging state is required to be filed with the custodial state for its provisions to apply. See *People v Gallego*, 199 Mich App 566, 574; 502 NW2d 358 (1993) ("A detainer must be lodged against a defendant for the IAD to apply.") A "detainer" is generally a "written notification filed with the institution in which a prisoner is serving a sentence advising that the prisoner is wanted to face pending charges in the notifying state." *Id*. Holds placed in the Law Enforcement Information Network are generally "insufficient to activate the IAD." *Id*. The certificate of inmate status filed by the Arizona Department of Corrections, which the prosecutor received in this case on December 28, 2011, provides no information regarding detainers Michigan filed with Arizona authorizes. We assume in analyzing this issue that a detainer regarding these charges was filed with Arizona authorities, thus implicating compliance with the IAD.

[5] We have not located evidence in the record that Michigan ever filed a detainer with Arizona authorities regarding these charges. See note 4 of this opinion.

2011, demanding final disposition of the charges under the IAD. This letter gave defendant's place of imprisonment and date of the alleged violations. Defendant also wrote to the deputy warden of the Arizona prison where he was incarcerated demanding under the IAD that the warden process the documents required to effectuate his IAD request. After an unsatisfactory response, defendant again repeated his request to prison authorities in correspondence dated December 8, 2011. Finally, on December 19, 2011, an Arizona prison official sent to the St. Clair prosecutor the necessary IAD forms, including the certificate referred to in Article III(a) of the IAD, which provided information regarding defendant's term of commitment, time served, time remaining, and good time earned. The Arizona letter transmitting the required IAD forms is date-stamped "received"[6] on December 28, 2011, by the St. Clair prosecutor.

Assuming that the IAD applies to this case, we note the prosecution correctly argues that commencing defendant's trial on June 5, 2012, complied with the 180-day time requirement of MCL 780.601, art III(a). *Swafford*, 483 Mich at 13-14. The plain language of the IAD provides that an "untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner . . . shall be brought to trial within one hundred eighty days after" the defendant "shall have *caused to be delivered* to the prosecuting officer . . . written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . . ." MCL 780.601, art III(a). However, the defendant's request for disposition "*shall* be accompanied by a certificate of the appropriate official having custody of the prisoner,

[6] Capitalization altered.

stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence," and other information required by Article III(a). In this case, defendant's demand for disposition of the untried information or complaint, accompanied by the Article III(a) certificate, was not "caused to be delivered" to the prosecutor until December 28, 2011. This is the date on which the 180-day timeframe of the IAD commenced. See *Fex v Michigan*, 507 US 43, 52; 113 S Ct 1085; 122 L Ed 2d 406 (1993) (holding "that the 180-day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him").

Our Supreme Court has similarly interpreted the nearly identical language, "causes to be delivered," found in Michigan's intrastate 180-day rule that is set forth in MCL 780.131 and MCR 6.004(D), regarding untried charges that are pending against Michigan prison inmates. *People v Lown*, 488 Mich 242, 260, 262; 794 NW2d 9 (2011) (holding that the 180-day period of MCL 780.131 begins "on the day after the prosecutor receives the required notice from the [Department of Corrections]"). See also *People v Williams*, 475 Mich 245, 256 n 4; 716 NW2d 208 (2006). Further, the "statutory trigger" of "notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges," applies equally to MCR 6.004(D). *Williams*, 475 Mich at 259-260.

Consequently, defendant's claim that he was not brought to trial within the time limit required by the IAD is without merit.

VII. SENTENCING ISSUES

A. STANDARD OF REVIEW

The interpretation of the sentencing guidelines and the application of facts to them are legal questions that we review de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). But a trial court's factual findings are reviewed for clear error and must be supported by a preponderance of the evidence. *Id*. Whether the facts, as found, are adequate to sustain a particular score is a question of statutory interpretation, reviewed de novo. *Id*. We review de novo constitutional challenges to the sentencing guidelines. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

B. OFFENSE VARIABLE 11

Defendant argues that the trial court improperly scored offense variable (OV) 11, MCL 777.41, at 50 rather than 25 points because evidence supported only one "additional" penetration beyond the sentencing offenses. The prosecution agrees that OV 11 should have been scored at 25 points, but asserts that resentencing is not required because the scoring error would not have altered the applicable minimum-sentence guidelines range. See MCL 777.62.

If the facts were as represented by the prosecution, we would agree that its concession of error regarding the scoring of OV 11 would not warrant remand for resentencing. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *Id*. But the sentencing information report in the trial court file and the transcript of the sentencing proceeding both indicate that defendant's total OV score was 120 points, including the 50 point

score for OV 11. Applying the stipulated correct OV 11 score of 25 points would reduce defendant's OV level from VI to V and change the guidelines' recommended minimum-sentence range to 225 months to 750 or life. MCL 777.62; MCL 769.12. While the 50 year (600 months) minimum sentence that the trial court imposed is within the corrected guidelines range, resentencing is still required because a defendant is entitled to be sentenced based on accurate information. *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010); *Francisco*, 474 Mich at 89-92. Although the record indicates that the trial court likely would have imposed the sentence it did regardless of any deviation in the guidelines scoring or recommended minimum-sentence range, the trial court did not clearly say so. See *Francisco*, 474 Mich at 89 n 8. Consequently, we must remand for resentencing based on corrected sentence guidelines. *Jackson*, 487 Mich at 793-794; *Francisco*, 474 Mich at 89-92.

C. SIXTH AMENDMENT CHALLENGE

Defendant argues, citing *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), that judicial fact-finding permitted by Michigan's sentencing guidelines violates the Sixth Amendment. He argues that the recommended minimum-sentence range derived from Michigan's sentencing guidelines is essentially a "mandatory minimum sentence" comparable to those struck down in *Alleyne*. We disagree.

In *People v Herron*, 303 Mich App 392, 399; 845 NW2d 533 (2013),[7] this Court rejected the claim that under *Alleyne* "judicial fact-finding using Michigan's

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[7] Our Supreme Court has held the defendant's application for leave to appeal in *Herron* in abeyance pending its decision in *People v Lockridge*, 496 Mich 852 (2014). See *People v Herron*, 846 NW2d 924 (2014).

sentencing guidelines . . . as a guide to determine a minimum term of an indeterminate sentence from a recommended range violates the Sixth and Fourteenth Amendments of the United States Constitution." Rather, judicial fact-finding and the sentencing guidelines inform the trial court's sentencing discretion within the maximum determined by statute and the jury's verdict. *Herron*, 303 Mich App at 403. Because judicial fact-finding under Michigan's sentencing guidelines does not establish a mandatory minimum sentence but only informs the exercise of judicial discretion, the fact-finding does not violate due process or the Sixth Amendment's right to a jury trial. *Id*. at 403-404. We must follow *Herron*, MCR 7.215(J)(1); consequently, we reject defendant's constitutional challenge to Michigan's sentencing guidelines.

VIII. SUMMARY

The trial court did not abuse its discretion by ruling inadmissible evidence of a sexual assault on the victim by her then stepfather that occurred about one year before the instant offenses, by admitting statements the victim made to Frederick, or applying MCL 768.27a and the balancing test of MRE 403 to admit evidence of defendant's Arizona conviction and testimony about a 2007 assault on another victim. Defendant was not denied his right to present a defense or confront his accusers; defendant received a fair trial.

With respect to the prosecution's alleged failure to comply with MCL 767.40a by not producing Penshorn in person and the trial court's alleged abuse of discretion in failing to permit Penshorn to testify by telephone at trial, we conclude that defendant has not established that these alleged errors were outcome determinative. Consequently, these claims do not warrant reversal.

Defendant's various constitutional and statutory claims also lack merit. Because CSC-I and CSC-II each require proof of a fact that the other does not, defendant's convictions of both on the same facts do not violate double jeopardy. The prosecution complied with the IAD by bringing defendant to trial within 180 days of receiving the necessary Article III(a) documents from Arizona authorities. And, judicial fact-finding under Michigan's sentencing guidelines does not violate the Sixth or Fourteenth Amendments of the United States Constitution.

Last, because the prosecution concedes that OV 11 was erroneously scored at 50 points rather than 25 points, and correction of this error reduces defendant's sentencing guidelines recommended minimum-sentence range to 225 to 750 months or life, we must remand for resentencing on the basis of accurate information.

We affirm defendant's convictions but remand for correction of the sentencing information report and resentencing. We do not retain jurisdiction.

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

PEOPLE v HUGHES

PEOPLE v HARRIS

PEOPLE v LITTLE

Docket Nos. 316072, 317158, and 317272. Submitted January 15, 2014, at Detroit. Decided July 15, 2014, at 9:00 a.m. Leave to appeal sought.

Following an incident in the city of Detroit during which Nevin Hughes, a Detroit police officer, allegedly assaulted a person and the investigation of the incident by the Detroit Board of Police Commissioners Office of the Chief Investigator (OCI), during which Hughes made statements under the threat of dismissal from his job, Hughes was charged in the 36th District Court with felony misconduct in office, misdemeanor assault and battery, and obstruction of justice. Two other Detroit police officers, Sean Harris and William Little, who had been standing nearby during the incident and had also made statements during the OCI investigation under the threat of dismissal from their jobs, were also charged in the district court with obstruction of justice. The district court dismissed the obstruction-of-justice charges against the three defendants, relying on US Const, Am V, and MCL 15.393, which concerns the use in criminal prosecutions of involuntary statements made by law enforcement officers. The Wayne Circuit Court, Bruce U. Morrow, J., affirmed the dismissal of the obstruction-of-justice charges. The Court of Appeals granted the applications by the prosecution for leave to appeal with regard to each defendant and consolidated the appeals.

The Court of Appeals *held*:

1. The Fifth Amendment did not bar the admission in the prosecutions for obstruction of justice of the false statements defendants made during the OCI investigation. The United States Supreme Court held in *Garrity v New Jersey*, 385 US 493 (1967), that the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. *Garrity* precludes use of public employees' compelled incriminating statements in a later prosecution for the

conduct under investigation. However, *Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it. The Fifth Amendment did not prohibit the use of defendants' statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it. The Fifth Amendment did not entitle defendants to swear falsely. The reasoning in *People v Allen*, 15 Mich App 387 (1968), which conflicts with this holding is expressly disavowed. The district court abused its discretion by relying on the Fifth Amendment to exclude defendants' false statements from evidence.

2. The district court also abused its discretion by excluding defendants' false statements under MCL 15.393, which precludes the use of a police officer's involuntary statement against that officer in a criminal prosecution. Although the broad language of MCL 15.393 appears to embrace any criminal proceeding, including prosecutions for the collateral offenses of perjury or obstruction of justice, the statute internally limits the phrase "involuntary statement" to include true statements only. Therefore, false statements and lies fall outside the scope of the statute's protection. An officer's lies and false statements do not qualify as involuntary statements under MCL 15.393 and may be used as evidence in a subsequent criminal prosecution. The plain language of MCL 15.391(a), which defines the phrase "involuntary statement," establishes that an involuntary statement includes only truthful and factual information. When an officer lies, he or she provides no "information." MCL 15.393 does not preclude the use of the officer's lies in a criminal proceeding. The district court abused its discretion by excluding defendants' false statements from evidence and dismissing the obstruction-of-justice charges against them. The circuit court erred by affirming the district court's rulings. The decisions of the district court and the circuit court in this regard are reversed and the matter is remanded to the district court for reinstatement of the obstruction-of-justice charges against all three defendants.

Reversed and remanded.

WILDER, J., concurring in part and dissenting in part, concurred with the majority's determination that the district court abused its discretion by excluding the use of defendants' statements under the Fifth Amendment but dissented from the majority's determination that the district court misinterpreted MCL 15.393 and abused its discretion by dismissing the charges of obstruction of justice against defendants. The Legislature, by using the phrase "a

criminal proceeding" in MCL 15.393 instead of the phrase "the criminal proceeding," expressed its intention to require a more generalized application of the statute than the narrower protection the Fifth Amendment would afford. Therefore, the statute bars the use of involuntary statements in subsequent prosecutions for perjury or obstruction of justice. In addition, the Legislature did not define "involuntary statement" to include only true statements. Because the term "misinform" is defined as giving false or misleading information to, the term "information" in MCL 15.393 must be interpreted to include the giving of "misinformation." The Legislature's failure to make a distinction between accurate and inaccurate information demonstrates its intent that MCL 15.393 broadly apply to defendants' involuntary statements, regardless of their accuracy. MCL 15.393 operates to bar the use of defendants' statements in their prosecution for obstruction of justice. The judgment of the circuit court should be affirmed.

1. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PERJURY.

The Fifth Amendment does not protect a defendant from a subsequent prosecution for perjury predicated on statements that the defendant made after being granted immunity from prosecution regarding the underlying crime; the Fifth Amendment privilege against self-incrimination grants a privilege to remain silent without risking contempt, but does not endow the person who testifies with a license to commit perjury; the right against self-incrimination only protects a witness from incriminating himself or herself for crimes already committed.

2. CONSTITUTIONAL LAW — SELF-INCRIMINATION — PERJURY.

The protection of the individual under the Fourteenth Amendment against coerced statements prohibits the use in subsequent proceedings of statements obtained under threat of removal from office; a public employee's compelled incriminating statements may not be used in a later prosecution for the conduct under investigation but may be used in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it.

3. CRIMINAL LAW — EVIDENCE — POLICE OFFICERS' INVOLUNTARY STATEMENTS.

MCL 15.393 precludes the use of a police officer's involuntary statement against the officer in a criminal prosecution; MCL 15.391(a) defines an "involuntary statement" as information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction by the law enforcement agency that employs the officer; MCL 15.393

internally limits the phrase "involuntary statement" to include true statements only; lies and false statements do not qualify as involuntary statements under MCL 15.393.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Lead Appellate Attorney, for the people.

Goldpaugh & Associates, PC (by *Donald H. Stolberg*), for Nevin Hughes.

Steven Fishman for Sean Harris.

Pamella Szydlak for William Little.

Before: METER, P.J., and JANSEN and WILDER, JJ.

JANSEN, J. In these consolidated appeals, the prosecution appeals by leave granted the circuit court's order denying its motion to reinstate the obstruction-of-justice charge against defendant Nevin Hughes,[1] as well as the circuit court's ruling affirming the district court's dismissal of the obstruction-of-justice charges against defendants Sean Harris and William Little.[2] For the reasons set forth in this opinion, we reverse and remand to the district court for reinstatement of the obstruction-of-justice charges against all three defendants.

I

These appeals arise out of a police-citizen interaction

[1] *People v Hughes*, unpublished order of the Court of Appeals, entered June 3, 2013 (Docket No. 316072).

[2] *People v Harris*, unpublished order of the Court of Appeals, entered August 15, 2013 (Docket No. 317158); *People v Little*, unpublished order of the Court of Appeals, entered August 15, 2013 (Docket No. 317272).

on November 19, 2009, involving Dajuan James Hodges-Lamar and defendants. Defendant Hughes, a Detroit police officer, approached Hodges-Lamar at a Detroit gas station and asked him questions regarding his license, registration, and the presence of drugs in his car. Hughes then opened the door of Hodges-Lamar's automobile, pulled Hodges-Lamar out by the collar, slammed Hodges-Lamar against the car, and searched him. Defendants Harris and Little, also Detroit police officers, were standing nearby. Hughes pushed Hodges-Lamar toward Harris and Little. Hughes subsequently punched Hodges-Lamar in the throat with an open hand, punched him again, pushed him to the ground, picked him up by the collar several times, slammed him onto the car, and finally pushed him back toward Harris and Little. Hodges-Lamar never alleged that Harris and Little assaulted him.

Defendants arrested Hodges-Lamar and searched his car. Hodges-Lamar received tickets for failure to wear a seatbelt, no proof of registration, and no proof of insurance. Eventually, the tickets were dismissed. Hodges-Lamar sought medical attention and another police officer took his statement at an area hospital.

The Detroit Board of Police Commissioners Office of the Chief Investigator (OCI) investigated the incident and interviewed defendants in July and August 2010. The OCI provided defendants with a standard departmental constitutional-rights form. The fourth paragraph of the form stated: "If I refuse . . . to answer questions . . . I will be subject to departmental charges which could result in my dismissal from the police department." The fifth paragraph stated: "If I do answer . . . neither my statements nor any information or evidence which is gained by reason of such statements can be used against me in any subsequent criminal

proceeding." Defendants also received a reservation of rights form, which provided, in relevant part:

> It is my further belief that this Statement and the Preliminary Complaint Report will not and cannot be used against me in any subsequent proceedings other than disciplinary proceedings within the confines of the Department itself. For any and all other purposes, I hereby reserve my Constitutional rights to remain silent under the FIFTH and FOURTEENTH AMMENDMENTS [sic] to the UNITED STATES CONSTITUTION, and Article I, Section 17 of the MICHIGAN CONSTITUTION.

Defendants made statements under the threat of dismissal from their jobs. Harris and Little denied that Hughes had any physical contact with Hodges-Lamar, with the exception of a pat-down search. Hughes admitted that he pulled Hodges-Lamar out of the car, but maintained that he did not use any force against Hodges-Lamar.

The investigation was closed. Hodges-Lamar hired an attorney, who ultimately obtained a video recording of the assault and battery from the security camera at the gas station. The video recording was provided to the Detroit Police Department Internal Affairs Section. The prosecution subsequently charged Hughes with felony misconduct in office, MCL 750.505, misdemeanor assault and battery, MCL 750.81, and obstruction of justice, MCL 750.505. The prosecution charged Harris and Little each with one count of obstruction of justice, MCL 750.505. The video recording was played for the district court by stipulation of the parties. The district court dismissed the obstruction-of-justice charges against all three defendants, relying on the Fifth Amendment of the United States Constitution and § 3 of the act concerning the disclosure of certain state-

ments by law enforcement officers,[3] MCL 15.393. The circuit court affirmed the district court's dismissals and declined to reinstate the obstruction-of-justice charges.

II

The prosecution argues that the district court should have admitted at the preliminary examination defendants' statements made during the OCI investigation because neither *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), nor MCL 15.393 prohibits the use of an officer's false denials in a subsequent obstruction-of-justice prosecution. We agree.

A

We review for an abuse of discretion the trial court's decision whether to admit evidence, but review de novo the trial court's decision on any preliminary question of law. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.' " *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), quoting *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012). "A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo . . . ." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). We similarly review de novo questions of constitutional law and statutory interpretation. *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011).

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[3] MCL 15.391 *et seq*.

B

The district court abused its discretion by excluding defendants' statements under the Fifth Amendment of the United States Constitution.

> The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This prohibition "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' " [*People v Wyngaard*, 462 Mich 659, 671-672; 614 NW2d 143 (2000), quoting *Minnesota v Murphy*, 465 US 420, 426; 104 S Ct 1136; 79 L Ed 2d 409 (1984), in turn quoting *Lefkowitz v Turley*, 414 US 70, 77; 94 S Ct 316; 38 L Ed 2d 274 (1973).]

To invoke the protection of the Fifth Amendment, a witness must only possess a reasonable belief that the evidence could be used against him or her in a criminal prosecution. *Maness v Meyers*, 419 US 449, 461; 95 S Ct 584; 42 L Ed 2d 574 (1975); *People v Bassage*, 274 Mich App 321, 324-325; 733 NW2d 398 (2007). "The state constitutional right against self-incrimination is interpreted no differently than the federal right." *Bassage*, 274 Mich App at 324.

In *Garrity*, 385 US at 494, the New Jersey attorney general's office interviewed police officers about "fixing" traffic tickets. Before the interviews, the attorney general's office warned the police officers that anything they said might be used against them in subsequent criminal proceedings and that they had the right to refuse to answer. *Id*. However, they were also warned that if they refused to answer, they would be subject to termination from their positions. *Id*. The attorney general's office later used the police officers' answers to

prosecute them for conspiracy to obstruct the administration of the traffic laws. *Id*. at 495. The United States Supreme Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office . . . ." *Id*. at 500.

Since its decision in *Garrity*, the United States Supreme Court has held that the Fifth Amendment does not protect a defendant from a subsequent prosecution for perjury predicated on statements that the defendant made on the stand after being granted immunity from prosecution regarding the underlying crime. See *United States v Wong*, 431 US 174, 178; 97 S Ct 1823; 52 L Ed 2d 231 (1977) (holding that "the Fifth Amendment privilege [against self-incrimination] does not condone perjury" and that "[i]t grants a privilege to remain silent without risking contempt, but it 'does not endow the person who testifies with a license to commit perjury' ") (citation omitted); see also *United States v Apfelbaum*, 445 US 115, 117, 131; 100 S Ct 948; 63 L Ed 2d 250 (1980) (holding that "proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely" and that "neither the immunity statute nor the Fifth Amendment precludes the use of [a defendant's] immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence").

Similarly, the United States Court of Appeals for the Sixth Circuit has observed that, as a general rule, "the Fifth Amendment permits the government to use compelled statements obtained during an investigation if the use is limited to a prosecution for collateral crimes

such as perjury or obstruction of justice." *McKinley v City of Mansfield*, 404 F3d 418, 427 (CA 6, 2005). "This rule applies with equal force when the statements at issue were made pursuant to a grant of *Garrity* immunity during the course of a public employer's investigation of its own." *Id*. In other words, "*Garrity* precludes use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation. However, *Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it." *Id*. (citation omitted).

This Court's precedent similarly instructs that we view a defendant's false statements as independent chargeable offenses, for which the allegedly false statements are not admitted to prove any underlying charge, but rather to prove the independent offense of lying. See *Bassage*, 274 Mich App at 325 (noting that "the right against self-incrimination only protects a witness from incriminating himself or herself *for crimes already committed*") (emphasis added). See also *Lefkowitz*, 414 US at 77.

We acknowledge that the case against Hughes differs from the cases against Harris and Little because the focus of the internal investigation was the assault and battery of Hodges-Lamar, which was committed exclusively by Hughes. Hodges-Lamar never accused Harris or Little of any assaultive behavior; Harris and Little were only interviewed as witnesses to Hughes's misconduct. At the same time, however, all three defendants could have reasonably believed that their statements during the OCI interviews might lead to criminal proceedings against them for various nonassaultive offenses, such as misconduct in office (including nonfea-

sance). See *Maness*, 419 US at 461; *Bassage*, 274 Mich App at 324-325; see also *Waterstone*, 296 Mich App at 126. For this reason, the officers' statements could not be used in any criminal prosecution against them "for crimes already committed," *Bassage*, 274 Mich App at 325, such as misconduct in office or assault and battery.

But, as noted previously, the Fifth Amendment did not prohibit the use of defendants' statements "in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it." *McKinley*, 404 F3d at 427. Nor did the Fifth Amendment entitle defendants to swear falsely. *Apfelbaum*, 445 US at 117; see also *Bassage*, 274 Mich App at 326. Thus, there was no Fifth Amendment bar to the admission of defendants' statements in the criminal proceedings (including the preliminary examination) pertaining to the independent obstruction-of-justice charges against them. See *McKinley*, 404 F3d at 427.

We recognize that our holding in this regard, as well as the post-*Garrity* federal caselaw, conflicts with this Court's decision in *People v Allen*, 15 Mich App 387, 388; 166 NW2d 664 (1968). In *Allen*, 15 Mich App at 396, this Court held that "the Fifth and Fourteenth Amendments' benefits of freedom from coerced waiver of the right to remain silent . . . must be respected," even in a subsequent perjury prosecution. In *Allen*, the defendant police officers, who were called to testify before a one-man grand jury about bribery, corruption, vice, and gambling involving the police department, were informed of their right to remain silent. *Id*. at 389-390. However, each of the defendants stated that he believed that if he invoked his right to remain silent, he would be suspended from the police department. *Id.* at 391. After being advised of their rights, the defendants

were asked whether they had accepted bribes, gifts, or gratuities from bar owners and liquor licensees in the city of Detroit. *Id*. at 389. The defendants denied that they had received any bribes, gifts, or gratuities. See *id.* at 389-390. After contrary testimony was received from the bar owners in question, the defendants were charged with perjury for having sworn falsely before the grand jury. *Id*. The defendants' grand-jury testimony, including their allegedly false denials, was admitted into evidence at their preliminary examinations. *Id*. The defendants were bound over for trial on charges of perjury. *Id*. at 390.

The *Allen* Court rejected the prosecution's argument that the principle announced in *Garrity* should not apply in prosecutions for perjury. *Id*. at 393-394. The Court held that the Fifth Amendment barred the admission of the defendants' grand-jury testimony in the subsequent perjury proceedings. *Id*. The *Allen* Court noted that the prosecution could not presume that the defendants' statements were false, and thereby escape the confines of *Garrity*, because the truth or falsity of a defendant's statement was ultimately an issue to be determined by the trier of fact in a perjury prosecution. *Id*. at 393.

Given the intervening developments in federal law, including *Apfelbaum*, 445 US at 117, and *McKinley*, 404 F3d at 427, the reasoning of *Allen* cannot stand. Even assuming that the prosecution treats a defendant's statements or denials as false from the inception of the investigation, the presumption of innocence remains intact and the prosecution is still required to prove the elements of perjury or obstruction of justice beyond a reasonable doubt. Moreover, the prosecution's decision to charge the officer with perjury or obstruction of justice does not run afoul of the Fifth Amendment

guarantee because the allegedly false or perjurious statements would be introduced for the limited purpose of proving perjury or obstruction of justice, not other underlying crimes. See *McKinley*, 404 F3d at 427. Finally, we reiterate that untruths and false denials, such as those provided by defendants in the instant cases, are not protected by the Fifth Amendment. *Apfelbaum*, 445 US at 117; *Wong*, 431 US at 178.

We are not bound to follow *Allen*, which was decided before November 1, 1990. MCR 7.215(J)(1); *People v Ford*, 262 Mich App 443, 452; 687 NW2d 119 (2004).[4] Indeed, in light of the post-*Garrity* caselaw permitting a witness's statements to be used against him or her in a subsequent criminal prosecution for a collateral offense such as perjury or obstruction of justice, we expressly disavow *Allen*'s reasoning.

The Fifth Amendment did not bar the admission of defendants' false statements in the instant prosecutions for obstruction of justice. The district court abused its discretion by relying on the Fifth Amendment to exclude defendants' false statements from evidence.

C

The district court also abused its discretion by excluding defendants' false statements under MCL 15.393, which precludes the use of a police officer's "involuntary statement" against that officer in a criminal prosecution. Specifically, MCL 15.393 provides:

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[4] We wish to make clear that the district court did not err insofar as it followed the reasoning of *Allen*. Lower courts are bound to follow this Court's published decisions unless and until they are overruled, vacated, or modified. MCR 7.215(C)(2); *People v Herrick*, 277 Mich App 255, 258; 744 NW2d 370 (2007).

> An involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding.

We recognize that whereas the Fifth Amendment only protects witnesses from incriminating themselves with respect to "crimes already committed," *Bassage*, 274 Mich App at 325, the broad language of MCL 15.393 appears to embrace *any* criminal proceeding, including prosecutions for the collateral offenses of perjury or obstruction of justice. However, we conclude that the statute internally limits the phrase "involuntary statement" to include true statements only, and that false statements and lies therefore fall outside the scope of the statute's protection.

The phrase "involuntary statement" is defined as "*information* provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer." MCL 15.391(a) (emphasis added). But when an officer is compelled to make a statement during an internal investigation, and provides only misinformation and lies, he or she has not provided any "information" at all within the commonly understood meaning of that word. Among other things, "information" is defined as "knowledge communicated or received concerning a particular fact or circumstance." *Random House Webster's College Dictionary* (1997). The word "knowledge," in turn, is defined as "the body of truths or facts accumulated in the course of time." *Id*. Because an officer's lies do not impart any truths or facts, they necessarily do not constitute "information." See MCL 15.391(a). In other words, an officer's lies and false statements do not qualify as "involuntary state-

ment[s]" under MCL 15.393, and consequently may be used as evidence in a subsequent criminal prosecution.

We conclude that the Legislature's manifest intent was to create a mechanism for facilitating internal police investigations and to provide an incentive for officers who cooperate by providing needed facts. The Legislature certainly did not intend to immunize police officers by precluding the use of their lies and false statements in criminal proceedings. Indeed, such a strained construction of MCL 15.393 would be wholly contrary to the Legislature's purpose in enacting the statute. In sum, the plain language of MCL 15.391(a) establishes that an "involuntary statement" includes only truthful and factual information. Quite simply, when an officer lies, he or she provides no "information." Accordingly, MCL 15.393 does not preclude the use of the officer's lies in a criminal proceeding.

Defendants' lies during the OCI investigation were not entitled to the protection of MCL 15.393. The district court abused its discretion by relying on MCL 15.393 to exclude defendants' false statements from evidence in the prosecutions for obstruction of justice.

III

In sum, the district court erred by misconstruing the Fifth Amendment guarantee as well as MCL 15.393. This error of law led the district court to abuse its discretion by excluding defendants' false statements from evidence and dismissing the obstruction-of-justice charges against them on this ground. The circuit court erred by affirming the district court's rulings. We reverse the decisions of the district court and the circuit court in this regard. We remand to the district court for reinstatement of the obstruction-of-justice charges against all three defendants.

Reversed and remanded to the district court for reinstatement of the obstruction-of-justice charges against all three defendants. We do not retain jurisdiction.

METER, P.J., concurred with JANSEN, J.

WILDER, J. (*concurring in part and dissenting in part*). I concur with the majority's determination in Part II(B) that the district court abused its discretion by excluding the use of defendants' statements under the Fifth Amendment. I respectfully dissent from the majority's determination that the district court misinterpreted MCL 15.393 and abused its discretion by dismissing the charges of obstruction of justice against defendants. I would conclude that defendants' statements were protected under MCL 15.393.

I

MCL 15.393 provides: "An involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding." The Legislature defined "involuntary statement" as "information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer." MCL 15.391(a).

The principles of statutory interpretation are well established. The "goal in interpreting a statute 'is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its

plain meaning and we enforce the statute as written.' " *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013), quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (citations omitted).

A

As is true with the Fifth Amendment, which, under *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), prohibits the state from using "the threat of discharge to secure incriminatory evidence against an employee," *id*. at 499, the protections of MCL 15.393 are triggered when law enforcement officers are faced with the choice "infected by . . . coercion," *id*. at 497, between their jobs and self-incrimination:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda* v. *Arizona*, 384 U.S. 436, 464-465[86 S Ct 1602; 16 L Ed 2d 694 (1966)], is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions. [*Id*. at 497-498.]

While the Fifth Amendment protects witnesses only from incriminating themselves with respect to crimes already committed, *Lefkowitz v Turley*, 414 US 70, 77; 94 S Ct 316; 38 L Ed 2d 274 (1973), the broad language of MCL 15.393 is not so limited. The Legislature used the indefinite article "a," not "the," to modify the phrase "criminal proceeding." " 'The' and 'a' have different meanings. 'The' is defined as 'definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the indefinite or

generalizing force of the indefinite article a or an). . . .' " *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010), quoting *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000) (citation omitted). By using the indefinite article, the Legislature did not limit the application of the statute to *the* criminal proceeding being investigated or *the* other crimes already committed. Rather, by choosing the phrase "a criminal proceeding," the Legislature expressed its intention to require a more generalized application of the statute than the narrower protection the Fifth Amendment would afford, and therefore the statute bars the use of involuntary statements in subsequent prosecutions for perjury or obstruction of justice. If the Legislature intended involuntary statements and information derived from them to be used in collateral proceedings for obstruction of justice or perjury, the Legislature could and would have expressly excluded those proceedings from the statute. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008) ("[P]rovisions not included in a statute by the Legislature should not be included by the courts . . . .").

B

Moreover, although the Fifth Amendment does not allow witnesses to swear falsely, *United States v Apfelbaum*, 445 US 115, 117, 131; 100 S Ct 948; 63 L Ed 2d 250 (1980), the Legislature did not define "involuntary statement" to include only true statements. MCL 15.393. On appeal, the prosecution, referring to the Legislature's definition of an "involuntary statement" as "information provided by a law enforcement officer . . . ," MCL 15.391(a), argues that defendants' false denials during their interviews by the Detroit Board of Police Commissioners Office of the Chief Investigator

(OCI) constituted misinformation that did not amount to "information" within the meaning of the statute. The majority agrees, relying on the *Random House Webster's College Dictionary* (1997), which defines "information" as "knowledge communicated or received concerning a particular fact or circumstance." The majority concludes that an officer's false denials do not impart any truths or facts, so they cannot constitute "information." I disagree.

The word "misinform" is defined as "giv[ing] false or misleading *information* to." *Random House Webster's College Dictionary* (1997) (emphasis added). Therefore, the term "information" as used in MCL 15.393 must be interpreted to include the giving of "misinformation." Our United States Supreme Court has ruled that similar language in the federal immunity statute, 18 USC 6002, "makes no distinction between truthful and untruthful statements made during the course of the immunized testimony." *Apfelbaum*, 445 US at 122. Section 6002 provides that "no testimony or other *information* compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (Emphasis added.)[1]

In addition to using the dictionary to give meaning to undefined statutory terms, we also look to the use by the Legislature of the same or similar terms in other statutes to divine Legislative intent. *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 118; 729 NW2d 883 (2006) ("Although the terms of one statute are not

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[1] Section 6002 differs from MCL 15.393 in that it requires a witness granted immunity to testify and precludes the witness from invoking the privilege against self-incriminations.

dispositive in determining the meaning of another, especially if the statutes were not designed to effectuate a common result, the terms of one statute may be taken as a factor in determining the interpretation of another statute."). We make every effort to interpret clear and unambiguous language in accordance with its plain meaning because "[c]ourts may not read or include provisions into a statute that the Legislature did not." *People v Haynes*, 281 Mich App 27, 32; 760 NW2d 283 (2008). "The omission of a provision in one statute that is included in another statute should be construed as intentional." *Underwood*, 278 Mich App at 338.

The Legislature has used the term "information" in a number of statutes. For example, in MCL 769.34(10), our Legislature provided that a sentence "within the appropriate guidelines sentence range" should be affirmed on appeal "absent an error in scoring the sentencing guidelines or *inaccurate information* relied upon in determining the defendant's sentence." (Emphasis added.) In MCL 750.492a(1) the Legislature provided that "a health care provider or other person, knowing that the *information is misleading or inaccurate*, shall not intentionally, willfully, or recklessly place or direct another to place in a patient's medical record or chart *misleading or inaccurate information* regarding the diagnosis, treatment, or cause of a patient's condition." (Emphasis added.) See also MCL 168.467b(6) (providing a right to equitable relief for a candidate receiving "*incorrect or inaccurate written information*") (emphasis added), MCL 487.2140(2) (providing for the correction of submitted information when the "*information* . . . is no longer *accurate*") (emphasis added), and MCL 791.235(1)(b) (providing that the parole board shall not consider "[*i*]*nformation* that is determined by the parole board to be *inaccurate or irrelevant*") (emphasis added). The Legislature's spe-

cific references to inaccurate or misleading information in the above-cited provisions demonstrate that the distinction between accurate and inaccurate information was relevant to those legislative schemes, and that when such a distinction is important to the Legislature to make, it will do so. The Legislature's failure to make a distinction between accurate and inaccurate information here demonstrates its intent that MCL 15.393 broadly apply to defendants' involuntary statements, regardless of their accuracy. *Underwood*, 278 Mich App at 338.

C

Our United States Supreme Court, in 1967 in *Garrity*, and this Court, in 1968 in *People v Allen*, 15 Mich App 387, 388; 166 NW2d 664 (1968), held that the Fifth Amendment barred the admission of police officers' statements in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws and perjury, respectively. These holdings remained binding law in Michigan until the United States Supreme Court ruled differently in *Apfelbaum* (1980), *United States v Wong*, 431 US 174; 97 S Ct 1823; 52 L Ed 2d 231 (1977), and *Lefkowitz* (1973). In addition, in *In re Investigative Subpoena re Morton*, 258 Mich App 507; 671 NW2d 570 (2003), this Court upheld an order requiring the production to the prosecutor of three *Garrity* statements by police officers, which resulted in concern that *Garrity* statements would be used in the determination whether to prosecute law enforcement officers. MCL 15.393 was enacted in the wake of *Morton*. See Senate Legislative Analysis, SB 647, February 20, 2007.[2] De-

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[2] Although legislative analyses are not "an official form of legislative record in Michigan," and I acknowledge that "legislative analyses should be accorded very little significance by courts when construing a statute,"

spite the narrowing of Fifth Amendment protections afforded to law enforcement officers as the result of these cases (and the Legislature is presumed to be aware of these cases),[3] our Legislature was nevertheless free to codify in Michigan law the more robust *Garrity* and *Allen* protections when it enacted MCL 15.393 in 2006.

D

When it crafted MCL 15.393, the Legislature used broad language that did not just protect factually true statements, but "involuntary statement[s]," and did not only protect statements made during the investigation of crimes already committed, but more generally, statements made "in a criminal proceeding."[4] MCL 15.393. Therefore, I would conclude that the Legislature intended MCL 15.393 to protect a law enforcement

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In re Certified Question, 468 Mich 109, 115 n 5; 659 NW2d 597(2003), I cite the Senate Legislative Analysis here for the limited purpose of demonstrating the likely link between this Court's decision in *Morton* and the Legislature's enactment of MCL 15.393.

[3] See *Lewis v LeGrow*, 258 Mich App 175, 183-184; 670 NW2d 675 (2003) ("We presume that the Legislature is aware of the common law that legislation will affect; therefore, if the express language of legislation conflicts with the common law, the unambiguous language of the statute must control.")

[4] The Legislature's enactment of MCL 15.395 in the disclosures by law enforcement officers act also demonstrates its intention to codify broader protections for officers' involuntary statements by making them confidential communications, except under limited circumstances. *Myers v City of Portage*, 304 Mich App 637, 641-642; 848 NW2d 200 (2014). That statute also distinguishes between criminal actions, in which I conclude involuntary statements cannot be used against officers, and civil actions, in which they can be used. A prosecutor or attorney general may obtain a confidential involuntary statement in a criminal case, but the prosecutor or attorney general "shall not disclose the contents." MCL 15.395(b). In contrast, in a civil action, "the court shall preserve by reasonable means the confidentiality of the involuntary statement" only "[u]ntil the close of discovery." MCL 15.395(d).

officer's false denials, even in a subsequent, collateral criminal proceeding such as for perjury or obstruction of justice, and that the district court did not abuse its discretion by excluding defendants' statements under MCL 15.393.

II

Although the Fifth Amendment did not bar the use of defendants' statements in their prosecution for obstruction of justice, I would conclude that MCL 15.393 does operate to bar such statements. I recognize it may seem an untenable result, to permit law enforcement officers to make false denials with impunity when giving involuntary statements under the threat of an employment sanction. The great majority of law enforcement officers, who perform their duties with honor and distinction, would neither need nor desire to take advantage of this anomaly in the law, which seems inconsistent with the design of our system of justice to seek out the truth. See *Polk Co v Dodson*, 454 US 312, 318; 102 S Ct 445; 70 L Ed 2d 509 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."). But we are bound to interpret the plain language set forth by the Legislature. We cannot rewrite the law and must apply the statutory text even if we disagree with the result. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002). Therefore, I would affirm the circuit court and urge the Legislature to revisit MCL 15.393 to address this anomaly. See *In re TALH*, 302 Mich App 594, 599; 840 NW2d 398 (2013).

HODGE v US SECURITY ASSOCIATES, INC

Docket No. 311387. Submitted February 11, 2014, at Detroit. Decided July 15, 2014, at 9:05 a.m. Leave to appeal sought.

Carnice Hodge brought an action in the Wayne Circuit Court to appeal the Unemployment Insurance Agency's determination that she was disqualified from receiving unemployment benefits under MCL 421.29(1)(b), a provision of the Michigan Employment Security Act (MESA) that disallows benefits for individuals discharged for work-related misconduct, after respondent U.S. Security Associates, Inc., terminated her employment as a security guard at Detroit Metropolitan Wayne County Airport. Claimant was fired for accessing publicly available flight departure information on a computer near her post at the request of a traveler in violation of respondent's policy regarding the unauthorized use of client equipment. Administrative Law Judge Lawrence E. Hollens affirmed the denial of benefits, as did the Michigan Compensation Appellate Commission (MCAC), but the Wayne Circuit Court, Robert L. Ziolkowski, J., reversed. The Court of Appeals granted respondent's application for leave to appeal.

The Court of Appeals *held*:

1. The circuit court did not err by reversing the MCAC's decision as a matter of law. The court did not determine whether the facts as found by the agency were supported by substantial evidence because the facts were undisputed, and the court assumed that the facts as found by the ALJ were true in reaching its conclusion. Even if the facts had been disputed, the interpretation and application of the statute to the facts would have been a question of law that was within the circuit court's authority to decide under Const 1963, art 6, § 28 and MCL 421.38(1).

2. The circuit court did not err by concluding as a matter of law that claimant's behavior was a good-faith error in judgment rather than misconduct under MCL 421.29(1)(b). There were no facts in the record demonstrating that claimant acted with a willful and wanton disregard for respondent's interests; rather, the facts indicated that claimant disregarded the rule prohibiting her use of the computer to further respondent's interests. Under these circumstances, claim-

ant's disregard of respondent's rule did not rise to the level of misconduct sufficient to disqualify her from receiving unemployment benefits.

Affirmed.

1. ADMINISTRATIVE LAW — UNEMPLOYMENT COMPENSATION — MICHIGAN EMPLOYMENT SECURITY ACT — STANDARD OF REVIEW.

When reviewing an agency's determination that an individual is disqualified from receiving unemployment benefits under MCL 421.29(1)(b) for work-related misconduct, the court must first determine whether the agency's conclusion of law, accepting for this purpose the agency's factual findings, was legally valid; if not, the court need not determine whether the factual findings were supported by the evidence and may decide the issue as a matter of law.

2. UNEMPLOYMENT COMPENSATION — MICHIGAN EMPLOYMENT SECURITY ACT — DISQUALIFICATION FOR BENEFITS — MISCONDUCT — DEFINITION.

The type of misconduct that disqualifies an individual from receiving unemployment benefits under MCL 421.29(1)(b) is conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior that the employer has the right to expect of an employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer; this does not include mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion.

Michigan Unemployment Insurance Project (by *Steve Gray*) for Carnice Hodge.

Howard & Howard Attorneys PLLC (by *Brian A. Kreucher* and *Alex G. Cavanaugh*) for US Security Associates, Inc.

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

WILDER, J. Respondent U.S. Security Associates, Inc.,

appeals by leave granted[1] a circuit court order reversing the decision by the Michigan Compensation Appellate Commission (MCAC) that claimant was disqualified from unemployment insurance benefits under MCL 421.29(1)(b). On appeal, respondent argues that the circuit court applied the incorrect standard when reviewing the agency's decision and that claimant should be disqualified from benefits for violating respondent's rules. We affirm.

I

Claimant worked for respondent as a security guard from September 21, 2008, to February 9, 2011, when respondent mailed her a notice of termination of employment for violating company rules and regulations on January 27, 2011.

Before the incident leading to her termination, on November 11, 2008, claimant signed an acknowledgement of respondent's "Security Officer's Guide," which provided, in relevant part, that the "[u]nauthorized use of client facilities or equipment, including copiers, fax machines, computers, the internet, forklifts and vehicles" may result in immediate termination.

While working at the Detroit Metropolitan Wayne County Airport in Concourse B, claimant was approached by an airline passenger seeking departure information. Claimant looked for that information on the computer near her post. Shortly after this incident, claimant received a call from the command center, and was informed that someone had anonymously complained about her use of the computer. Respondent drafted a disciplinary report, which claimant signed.

[1] *Hodge v US Security Assoc, Inc*, unpublished order of the Court of Appeals, entered March 15, 2013 (Docket No. 311387).

Then, respondent told claimant she would be reassigned. But later, respondent reevaluated the incident and instead terminated claimant's employment in the February 9 letter.

Claimant filed a claim for unemployment benefits, and a notice of determination denying her claim was issued on March 10, 2011. The notice provided:

> You were terminated from US Security on 1/28/11 for accessing the client's computer system which is a violation of company policy. You were aware of the policy.
>
> It is found that you were fired for a deliberate disregard of your employer(s) interest. You are disqualified for benefits under [MESA, MCL 421.29(1)(b)].

Claimant filed an appeal of this notice of determination, and a hearing was conducted on July 13, 2011, by Administrative Law Judge Lawrence Hollens (ALJ). Claimant and respondent's employment specialist, Aramis Brown, appeared at the hearing without counsel.

Brown first testified that claimant was terminated for accessing the client's computer for flight information, which violated respondent's rules and regulations. The ALJ asked claimant the following series of questions:

> *ALJ*: They say you used a client computer.
>
> *Claimant*: Yes.
>
> *ALJ*: Is that true?
>
> *Claimant*: Yes, it is.
>
> *ALJ*: Why would you do that?
>
> *Claimant*: I used the client computer to help a passenger out. I --
>
> *ALJ*: Was that your job?
>
> *Claimant*: To help the passengers, yes.

ALJ: And so you're saying as part of your job, you would normally access the computer?

* * *

Claimant: Yes, I do.

ALJ: That would be normal for you to do?

Claimant: No.

ALJ: So why did you do something abnormal, if you see my problem?

Claimant: I did it to assist a passenger. That was the closest thing --

ALJ: Is there anything in the policy that says it's okay to violate these rules so long as you're assisting a passenger?

Claimant: No.

* * *

ALJ: And you admit it was in flight information.

Claimant: It was -- yes, flight information.

Claimant further testified that she did not believe it was "a problem" to check on the departures and arrivals to help a passenger, and indicated that she had done so before this incident. The passenger could have found the same information on public boards, but the nearest board was down the hall.

The ALJ affirmed the agency's determination to deny unemployment benefits. In his reasoning and conclusions, the ALJ sets forth the following facts not in dispute:

> Both parties agree that there was a policy that indicated employees of [respondent] could not access or use the client's equipment.
>
> The Claimant was aware of that policy, but had disregarded it on some occasions in the past.

> The Claimant never received any instruction from management or any approval of her accessing flight data information on the client's computer.
>
> The Claimant acknowledged the use on January 27, 2011 . . . .

The ALJ also found that claimant accessed the computer to assist a passenger with flight arrivals and departures. The ALJ ruled that the employer met its burden of proof in establishing that claimant was discharged for reasons "which would constitute behavior beneath the standard the Employer had reason to expect of its employee."

Claimant appealed the ALJ's decision, arguing that her conduct did not rise to the level of disqualifying misconduct. The MCAC issued a decision affirming the ALJ's decision and ruled that the decision was in conformity with the facts as developed at the hearing and the ALJ properly applied the law to the facts.

Claimant then filed an appeal in the circuit court, arguing that her conduct did not rise to the level of disqualifying misconduct given that she was not acting against her employer's best interests and her behavior could be considered no more than an error in judgment. Respondent replied that claimant acknowledged that she violated a known rule that prohibited security officers from using the computer, and that the earlier decisions were supported by competent, material, and substantial evidence on the whole record. Following a hearing, the circuit court reversed the MCAC's decision, stating:

> Misconduct is limited to conduct evincing such willful or wanton disregard of an employee -- employer's interest and is found in deliberate violations or disregards of standards of behavior which the employer has the right to

> expect of his employee. Or the carelessness or negligence in such a degree or occurrence as to manifest equal culpability.
>
> Wrongful intent or evil design or to show an intentional and substantial disregard to the employer's interest or of the employee's duties and obligations to the employer.
>
> On the other hand, mere insufficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertence or ordinary negligence in isolated incidents or good faith errors in judgment or discretion are also not to be deemed misconduct within the meaning of the statute.
>
> I mean, that's what we have here. There's a woman . . . [c]onflicted with . . . two policy situations. You know, am I going to help somebody, some customer for the benefit of the company or I'm going to look in this computer and [sic] I'm told not to do? You sacrifice and she loses her job.
>
> [*Counsel for Respondent*]: If I may respond to that, I would be happy to offer a sentence or two.
>
> *The Court*: No. That's good enough. I've heard enough. So I'm going to reverse the decision. I'm going to -- I think this is a -- it fits under the latter of negligence as opposed to intentional negligence.[2]

The circuit court then entered an order reversing the MCAC "[f]or the reasons stated on the record." Respondent's application for leave to appeal followed and was granted by this Court.

II

A

The Michigan Employment Security Act (MESA) governs unemployment benefits. The purpose of the act is to "provide benefits for periods of unemployment . . .

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[2] We presume the trial court meant intentional disregard rather than intentional negligence.

[to] persons unemployed through no fault of their own[.]" MCL 421.2(1). Under the MESA, "[a]n individual is disqualified from receiving unemployment benefits if he or she . . . [w]as . . . discharged for misconduct connected with the individual's work . . . ." MCL 421.29(1)(b). The employer bears the burden of proving misconduct. *Korzowski v Pollack Indus*, 213 Mich App 223, 229; 539 NW2d 741 (1995).

In *Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961), the Michigan Supreme Court adopted the following definition of "misconduct" (which was cited by the circuit court below):

> "[C]onduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." [*Id*. (citation omitted).]

The Supreme Court's description of conduct that is not misconduct was also cited by the circuit court below:

> "On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute." [*Id*.]

Const 1963, art 6, § 28 provides, in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. *This review shall*

> *include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law*; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Emphasis added.]

Similarly, MCL 421.38(1) provides:

> The circuit court . . . may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission involved in a final order or decision of the Michigan compensation appellate commission, 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*. Application for review shall be made within 30 days after the mailing of a copy of the order or decision by any method permissible under the rules and practices of the circuit court of this state. [Emphasis added.]

B

As respondent argues on appeal, the circuit court was required to uphold the decision of the MCAC unless (1) its decision was contrary to law, or (2) the decision was not supported by competent, material, and substantial evidence. When a circuit court reviews whether a decision was supported by substantial evidence, it may not invade the province of the agency as fact-finder, resolve evidentiary disputes, or pass on witness credibility. See *Smith v Employment Security Comm*, 410 Mich 231, 260-261; 301 NW2d 285 (1981); *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005). We review a lower court's application of the substantial-evidence standard for clear error, *Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235;

559 NW2d 342 (1996), but we review de novo whether a circuit court applied correct legal principles in reviewing an administrative decision, *Mericka v Dep't of Community Health*, 283 Mich App 29, 35-36; 770 NW2d 24 (2009); see also *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 88; 832 NW2d 288 (2013) ("Courts review de novo questions of law, including whether an agency's action complied with a statute.").

When it reversed the MCAC's decision, the circuit court did not expressly state on the record whether its decision was based on a question of law or a lack of substantial evidence. Claimant maintains on appeal that the circuit court properly decided a question of law, and respondent maintains that the circuit court improperly invaded the province of the agency when reviewing the facts in evidence.

Claimant argues the circuit court was not required to make findings of fact in this case because the facts in the record were undisputed. And because the facts were undisputed, claimant argues that the circuit court decided a question of law regarding whether her conduct constituted misconduct. In *Laya v Cebar Const Co*, 101 Mich App 26; 300 NW2d 439 (1980),[3] the underlying facts were undisputed. The plaintiff, a plumber, was laid off and could not find work locally because of poor economic conditions. His local union directed him to Cincinnati, Ohio, 272 miles away, where he took a job. The great distance between home and work contributed to problems with the plaintiff's wife and children, so he quit after 25 days of work. This Court held, "Because

[3] "While cases decided before November 1, 1990 are not binding precedent pursuant to MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 303 Mich App 441, 453 n 4; 844 NW2d 727 (2013).

there is no dispute as to the underlying facts, the questions presented are questions of law." *Id*. at 29. The question of law was whether the plaintiff had left work "voluntarily" under MESA and was therefore disqualified from unemployment benefits. *Id*. at 29-30. Ultimately, this Court concluded that the plaintiff was not faced with a choice between alternatives that ordinary persons would consider reasonable, he did not leave work voluntarily, and he was entitled to benefits. *Id*. at 32-35.

Like the facts in *Laya*, the relevant facts were undisputed in this case. There was no question that claimant violated respondent's rules when she accessed the client's computer, but she testified that she had done so to help a passenger. The ALJ made this finding of fact in his decision. At the circuit court hearing, respondent attempted to create a question of fact by arguing that "being helpful" was not one of claimant's "job duties," but that argument was inconsistent with the record. Claimant had previously testified that it was her job to help passengers, and respondent presented no evidence to the contrary. Because the facts in the record were undisputed, claimant's argument is persuasive that because there were no disputed factual findings for the circuit court to test with the substantial-evidence standard, it must have decided a question of law.

C

But even if the facts were not undisputed, this Court has stated that the interpretation and application of the statute to the facts is a question of law. See *In re Wayne Co Treasurer Petition*, 265 Mich App 285, 290; 698 NW2d 879 (2005); see also *Natural Resources Defense Council*, 300 Mich App at 88. In *Wickey v Employment Security Comm*, 369 Mich 487, 490; 120 NW2d 181

(1963), our Supreme Court noted that it had "only rarely . . . made the sometimes difficult effort to distinguish between issues of fact, issues of law, and compound issues of fact and law." However, the Court stated that when a dispute involves an agency's "interpretation or application of a statute, our function is not restricted by the 'great weight' test in determining whether or not the agency's application of the statute to the facts found conforms with the law . . . ."[4] *Id.* at 492. The Court held that reviewing courts must first determine whether the agency's conclusion of law, "accepting for this purpose all of the findings of fact" of the agency, "was a legally valid conclusion." *Id.* at 493. If it was a legally valid conclusion, reviewing courts then determine whether the findings of fact were supported by the evidence. *Id.* at 493-494.

Just as in *Laya*, the question of law in *Wickey* was whether the claimant had voluntarily left his employment without good cause. *Id.* at 494. The claimant was a seaman who went ashore while off duty and returned to the ship late, after it had departed. *Id.* at 494-495. The Court concluded that this action did not "support even an inference of intentional, deliberate, voluntary desertion of his ship." *Id.* at 495. The claimant's subsequent conduct—traveling where the ship was next scheduled to dock—likewise demonstrated that the claimant did not intend to quit his job, but intended to resume it. *Id.* at 496. Because the Court concluded that the facts as found by the agency did not, as a matter of law, justify the claimant's disqualification from unemployment benefits, the Court found it unnecessary to

[4] The version of MCL 421.38 in effect at the time *Wickey* was decided allowed courts to reverse if the decision was contrary to the great weight of the evidence, as opposed to the substantial-evidence standard now prescribed. *Wickey*, 369 Mich at 490.

determine whether the findings of fact were supported by the evidence. *Id*. at 497-498.

D

The framework explained by our Supreme Court in *Wickey* applies here. Under Const 1963, art 6, § 28 and MCL 421.38(1), a circuit court must review the agency's factual findings under the substantial-evidence standard, but review the facts, as found, to determine whether they constitute "misconduct" under the statute.

The question before the circuit court, as framed by claimant at the hearing on her appeal from the agency decision, was whether the ALJ's and the MCAC's decisions were supported by law. Contrary to respondent's argument on appeal, we find nothing in the record to indicate that the circuit court analyzed whether the agency's findings of fact were supported by the record evidence. As our Supreme Court directed in *Wickey*, the circuit court assumed the facts found by the ALJ were true (noting that claimant had a choice between whether "to help somebody, some customer for the benefit of the company" or "to look in this computer" as she'd been "told not to do") and applied those facts to the law. The circuit court relied on the definition of misconduct in *Carter* to conclude that claimant's behavior was mere negligence. Determining whether an agency decision was authorized by law was within the circuit court's authority under Const 1963, art 6, § 28 and MCL 421.38(1) and was not error.

III

A

Given our conclusion that the circuit court analyzed whether claimant's behavior constituted misconduct as

a matter of law, we must next consider whether the circuit court erred in this determination. *Mericka*, 283 Mich App at 35-36. The principles of statutory interpretation are well established. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The statutory language is the best indicator of the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). Importantly, " '[s]tatutory language should be construed reasonably, keeping in mind the purpose of the act,' " and to avoid absurd results. *Draprop Corp v City of Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001), quoting *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997); see also *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010).

Again, our Supreme Court defined "misconduct" under MCL 421.29(1)(b) as

> conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute. [*Carter*, 364 Mich at 541 (citation and quotation marks omitted).]

"[W]hile misconduct may justify an employee's discharge for breach of company rules, not every such breach rises to the level of misconduct sufficient to disqualify the employee for unemployment benefits."

Tuck v Ashcraft's Market, Inc, 152 Mich App 579, 589; 394 NW2d 426 (1986), citing *Reed v Employment Security Comm*, 364 Mich 395; 110 NW2d 907 (1961).

In *Carter*, 364 Mich at 540, the claimant was instructed by his foreman to shovel a pile of lead dust into the furnace that the claimant operated. The claimant refused. When the foreman said he would shovel the dust, the claimant threatened to punch him in the nose. The court determined that the claimant's response was "both a wilful disregard of the employer's interests and a deliberate violation of standards of behavior which an employer has a right to expect of his employee." *Id*. at 542. The claimant's behavior was "fundamentally disruptive of orderly conduct of work . . . ." *Id*. The Court found no evidence in the record to support the claimant's contention that his foreman's instruction was unreasonable or that his refusal was motivated by fear. *Id*. at 543-544. Under these circumstances, the Court held that the claimant's behavior constituted misconduct under MESA. See also *Parks v Employment Security Comm*, 427 Mich 224; 398 NW2d 275 (1986) (holding that the claimant's failure to abide by city residency requirements and her attempt to sustain the appearance of residency in the city constituted a willful disregard of the employer's interest).

In *Tuck*, 152 Mich App at 582, the claimant worked in the meat department of a market. The store had a scrap barrel where unsaleable products were placed, and the claimant had been taking scrap from that barrel for several years for bear baiting. On a day when a manager was not present, the claimant discovered spoiled fish in the market (not the scrap barrel) and he loaded the fish directly into his truck. Only managers were authorized to determine the appropriate disposition of unsaleable goods, including whether to sell them

to restaurants or employees at a discount or to dispose of them in the scrap barrel. *Id*. at 582-584. There was no question that the claimant broke the rules and should have asked for permission to remove the fish. But this Court determined the claimant had not willfully and wantonly disregarded his employer's interests. His "determination that the fish was unsaleable was a good faith error in judgment and did not evidence an evil design or show a substantial disregard of the employer's interests." *Id*. at 590.

In *Razmus v Kirkhof Transformer*, 137 Mich App 311, 313; 357 NW2d 683 (1984), the claimant was terminated for two instances of "wasting time" and one violation of safety rules. This Court held that none of the violations amounted to misconduct under MESA. *Id*. at 316-317. This Court noted that the "safety violation, if anything, evinces an intent to further his employer's interest. [The claimant] removed his safety glasses because they kept falling off and interfering with his helping a new employee." *Id*. at 316. Moreover, the claimant only left his work station for personal business after he had finished his work (welding) and was waiting for the lead to cool. *Id*. at 317; see also *LaCharite v State of Florida*, 890 So 2d 354 (Fla App, 2004) (claimant who regularly administered saline IVs administered an IV to a coworker with permission from the office manager, but not from a doctor as the employer's rules provided, demonstrated a good-faith error in judgment, not egregious, willful, or wanton behavior that would warrant a denial of benefits).[5]

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[5] We are not bound by the decisions of other states, but we may consider them to be persuasive authority. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005).

B

Claimant disregarded respondent's rules when she used the computer, but the question before the circuit court was whether her breach rose to the level of misconduct, as defined by statute, that would be sufficient to disqualify her from benefits. *Tuck*, 152 Mich App at 589. We conclude that the circuit court did not err by determining that claimant's behavior was a good-faith error in judgment and not misconduct under MESA. *Mericka*, 283 Mich App 29, 35-36. Claimant was aware of the rule prohibiting her use of the computer, but she disregarded it to help a passenger, believing that helping passengers was one of her job responsibilities as a security guard at the airport.

There are no facts in the record demonstrating a willful and wanton disregard for respondent's interests. Unlike the claimant who threatened to punch his foreman in *Carter*, and the claimant who willfully lied about her residency in *Parks*, claimant's behavior was intended to further respondent's interests and assist, not disrupt, the passengers at the airport. In that respect, claimant's behavior is more akin to the violation of the safety rule in *Razmus*, which was committed to assist a coworker. Respondent notes that the rule prohibiting security guards' use of the computers was in place because the airport's computers contained sensitive information. But the fact that claimant merely accessed public flight information, not sensitive information, advances her claim that this was a good-faith error in judgment and not evil design. *Carter*, 364 Mich at 541.

We conclude that, as a matter of law, claimant's violation of the rules in this case did not constitute misconduct under MCL 421.29(1)(b). The circuit court did not err by addressing whether the agency's decision violated the law or by reversing the decision that

claimant committed misconduct and was therefore disqualified from unemployment benefits. *Mericka*, 283 Mich App 29, 35-36.

Affirmed. Claimant may tax costs pursuant to MCR 7.219.

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

GLAUBIUS v GLAUBIUS

Docket No. 318750. Submitted July 9, 2014, at Detroit. Decided July 15, at 9:10 a.m. Leave to appeal sought.

Jenny N. Glaubius (plaintiff) and John A. Glaubius (defendant) were divorced in the Macomb Circuit Court in February 2013. One child had been born during the time of their marriage. The parties had joint legal custody, and plaintiff had physical custody of the child. Plaintiff moved in June 2013 under the Revocation of Paternity Act, MCL 722.1431 *et seq*., to revoke defendant's paternity as a presumed father, specifically seeking a determination that the child had been born out of wedlock as defined in MCL 722.1441 and asking the court to vacate portions of the divorce judgment regarding custody, parenting time, and child support. Plaintiff asserted that Joseph Witt, a man with whom she had been sexually involved during her marriage to defendant, was actually the child's biological father. Plaintiff maintained that at the time of the divorce, she believed that defendant was the child's biological father and that it was only later that a DNA test established Witt's paternity. The court, Kathryn A. Viviano, J., denied plaintiff's motion, and plaintiff appealed.

The Court of Appeals *held*:

1. The Revocation of Paternity Act provides the methods for setting aside acknowledgments of paternity and determinations and judgments related to paternity, as well as the measures for overcoming the presumption of legitimacy. The proofs and circumstances necessary to revoke paternity differ depending on the classification of paternity at issue. MCL 722.1433 recognizes four classifications of fathers: (1) an acknowledged father (a man who has affirmatively held himself out as the child's father by executing an acknowledgment of parentage), (2) an affiliated father (a man who was determined in a court to be the child's father), (3) an alleged father (a man who by his actions could have fathered the child), and (4) a presumed father (a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth). The Revocation of Paternity Act details the methods applicable to the revocation of each specific type of paternity, but under MCL 722.1439(1) there is no

express provision for setting aside an order that established a man as an affiliated father when he participated in the court proceedings determining his paternity. The parties did not contend that defendant was an acknowledged father, and Witt, not defendant, was the alleged (that is, biological) father. The dispute concerned whether defendant was a presumed father, as plaintiff contended, or an affiliated father, as defendant contended. Plaintiff alleged that defendant's fatherhood arose by operation of the presumption of legitimacy, while defendant asserted that his status as the child's father had been determined in the divorce proceedings, that is, that the divorce judgment was an order of filiation. Because defendant participated in the divorce proceedings, he maintained that his paternity as an affiliated father could not be revoked under MCL 722.1439(1).

2. Given that defendant was married to plaintiff at the time of the child's conception and birth, he had the status of presumed father under MCL 722.1433(4). At issue, then, was whether defendant continued as a presumed father after the divorce or whether he obtained the status of an affiliated father by virtue of the divorce judgment. Under MCL 722.1433(2) and (5), to decide whether a man qualifies as an affiliated father requires consideration of whether he was determined in a court to be the child's father. An affiliated father exists when a dispute or question over a man's paternity was settled or resolved in a court of law and the court concluded, on the basis of reasoning or observation, that the man is the child's father. There must have been an actual determination of paternity, one in which there was a dispute or question presented regarding the man's paternity and the court in fact resolved the matter. Any judicial order establishing a determination in court that a man was a child's father could demonstrate the determination of an affiliated father within the meaning of MCL 722.1433(2) and (5). If a court made a determination regarding a man's paternity in the course of divorce proceedings and entered an order establishing that determination, the order would establish the man's status as an affiliated father. In this case, however, defendant's paternity was not an issue of dispute between the parties during the course of the divorce and was therefore not a question that the trial court actually resolved. Plaintiff did not allege, defendant did not assert or deny, and the trial court did not actually ascertain that defendant was in fact the child's father. Rather, plaintiff's complaint and the divorce judgment adhered to the presumption of legitimacy, treating defendant as the presumed father of the child and awarding visitation and custody in light of his capacity as a presumed father. If the parties to a divorce action proceed in keeping with this presumption of

legitimacy and do not contest the issue of paternity in the course of the divorce, the resulting divorce judgment of does not signify a determination in court that the husband is the father of the child for purposes of the Revocation of Paternity Act. Instead, on the facts of this case defendant qualified as a presumed father and did not become an affiliated father by operation of the divorce judgment.

3. Because defendant was a presumed father rather than an affiliated father, MCL 722.1441(1)(a) applied to plaintiff's efforts to revoke his paternity. That statute provides that a court may determine that the child was born out of wedlock for the purpose of establishing the child's paternity if (1) the mother files an action within three years after the child's birth, (2) the mother identifies the alleged father by name in the complaint or motion commencing the action, (3) the presumed father, the alleged father, and the mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child, and (4) either the court determines the child's paternity or the child's paternity will be established if the child is determined to have been born out of wedlock. An action under the Revocation of Paternity Act may be brought by a motion in the existing case at any stage of the proceedings. The trial court here retained continuing jurisdiction over child custody, child support, and parenting time, and plaintiff brought her motion in the parties' existing divorce case. Accordingly, the divorce judgment did not preclude plaintiff's efforts to establish that the child was born out of wedlock as defined in MCL 722.1441(1)(a).

4. The doctrine of res judicata bars a subsequent action when (1) the prior action was decided on the merits, (2) the judgment in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. Before the enactment of the Revocation of Paternity Act, a support order arising from a divorce judgment constituted an adjudication of paternity and, consequently, the doctrine of res judicata precluded a party to the divorce from later challenging paternity. The act, however, authorized postjudgment challenges to paternity in certain circumstances, including those in which paternity was or could have been litigated. Therefore, plaintiff's motion, as a continuation of the divorce proceedings and brought under the Revocation of Paternity Act, was not subject to res judicata.

Reversed and remanded for further proceedings.

1. PATERNITY — REVOCATION OF PATERNITY ACT — PRESUMED AND AFFILIATED FATHERS — DIVORCE JUDGMENT ESTABLISHING AFFILIATED-FATHER STATUS.

The Revocation of Paternity Act, MCL 722.1431 *et seq*., provides the methods for setting aside acknowledgments of paternity and determinations and judgments related to paternity; MCL 722.1433 recognizes four classifications of fathers: (1) an acknowledged father (a man who has affirmatively held himself out as the child's father by executing an acknowledgment of parentage), (2) an affiliated father (a man who was determined in a court to be the child's father), (3) an alleged father (a man who by his actions could have fathered the child), and (4) a presumed father (a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth); a man who was married to plaintiff at the time of the child's conception and birth and therefore had the status of presumed father under MCL 722.1433(4) may obtain the status of an affiliated father under MCL 722.1433(2) and (5) after a divorce if there was a dispute or question presented regarding the man's paternity, the court in fact resolved the matter and made an actual determination regarding the man's paternity in the course of the divorce proceedings, and the court entered an order or divorce judgment establishing that determination.

2. PATERNITY — REVOCATION OF PATERNITY ACT — CHILDREN BORN OUT OF WEDLOCK — POSTJUDGEMENT DETERMINATION.

MCL 722.1441(1)(a), a provision of the Revocation of Paternity Act, provides that a court may determine that a child was born out of wedlock for the purpose of establishing the child's paternity if (1) the mother files an action within three years after the child's birth, (2) the mother identifies the alleged father by name in the complaint or motion commencing the action, (3) the presumed father (the man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth), the alleged father (the man who by his actions could have fathered the child), and the mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child, and (4) either the court determines the child's paternity or the child's paternity will be established if the child is determined to have been born out of wedlock; an action under the Revocation of Paternity Act may be brought by a motion in a case at any stage of the proceedings, including after the entry of a divorce judgment.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), for Jenny N. Glaubius.

Scott Bassett for John A. Glaubius.

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

HOEKSTRA, J. In this action involving the Revocation of Paternity Act, MCL 722.1431 *et seq.*, plaintiff appeals as of right the trial court's order denying her motion to revoke defendant's paternity and determine that the minor child in question was born out of wedlock. Because defendant qualifies as a "presumed father" on the facts of this case and the parties' divorce judgment does not preclude an action to overcome the presumption of legitimacy, we reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant married on August 30, 2008. During their marriage, plaintiff became pregnant and subsequently gave birth to a daughter on May 18, 2011. On August 1, 2012, plaintiff filed for divorce, including in her complaint the allegation that the "parties have had one (1) child born of this marriage . . . ." Defendant, who had moved to Nebraska, acknowledged receipt of the complaint but failed to respond. As a result, at plaintiff's request, a default entered against defendant. On December 28, 2012, the parties entered into a settlement agreement relating to their divorce, and thereafter the parties appeared before the trial court for a hearing and both consented to the entry of a default divorce judgment. The divorce judgment, which the trial court entered on February 13, 2013, did not make express findings of fact but stated generally that the

complaint had "heretofore . . . been taken as confessed . . . ." Referring to the parties as "Plaintiff-Mother" and "Defendant-Father," the divorce judgment provided that legal custody of the minor child was granted to both parties, while physical custody remained with plaintiff. The divorce judgment also detailed the parties' arrangements for defendant's visitation with the minor child. Defendant's duty to pay child support was waived in exchange for his payment of all travel costs related to visitation with the minor child.

On June 10, 2013, plaintiff filed a motion to revoke defendant's paternity as a "presumed father" under the Revocation of Paternity Act. Specifically, plaintiff's motion sought a determination that the child had been "born out of wedlock" as defined in MCL 722.1441, and she asked the trial court to vacate portions of the divorce judgment regarding custody, parenting time, and child support. According to plaintiff's motion, the child's biological father was actually Joseph Witt, a man with whom plaintiff had been sexually involved during her marriage to defendant. Despite this extramarital relationship, plaintiff maintained that, at the time of her divorce, she believed defendant to be the child's biological father. It was only after the divorce, when a family member remarked on the lack of physical resemblance between the child and defendant, that plaintiff obtained a DNA test, which established with a 99.999% certainty that Witt was the child's biological father.

In support of her motion, plaintiff attached an e-mail from defendant in which defendant arguably acknowledged Witt's biological relationship to the child and stated that he believed the child should have the opportunity "to grow up knowing her real father as daddy . . . ." In this e-mail, defendant further stated that he was prepared to waive "any legal rights" to the child. In addition, plaintiff provided an affidavit in

which she attested that Witt had acknowledged his paternity and was desirous of establishing a relationship with the child.

Despite his remarks in the e-mail correspondence, defendant opposed plaintiff's motion to revoke his paternity. In opposing plaintiff's motion, defendant argued that plaintiff's characterization of defendant as a "presumed father" under the Revocation of Paternity Act was inaccurate because the divorce judgment established defendant as an "affiliated father." MCL 722.1433(2) and (4). As an affiliated father, defendant asserted that his paternity could not be revoked on the facts of this case because he had participated in the proceedings establishing him as an affiliated father. In a related argument, defendant further asserted, on the basis of principles of res judicata and equitable estoppel, that revocation of his paternity was improper because the default divorce judgment established defendant as the minor child's father.

Following a hearing, the trial court entered an order and opinion denying plaintiff's motion to revoke defendant's parentage. Plaintiff now appeals as of right.[1]

II. REVOCATION OF PATERNITY ACT

On appeal, plaintiff challenges the trial court's dismissal of her motion to determine that the minor child was born out of wedlock and is not, in fact, defendant's

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[1] On appeal, defendant argues, without citation to supporting authority, that this Court lacks jurisdiction over this case because "it is not clear that the trial court's order qualifies as an order affecting custody" under MCR 7.202(6)(a)(iii). Contrary to defendant's argument, plaintiff specifically requested that defendant's award of custody and parenting time as set forth in the divorce judgment be vacated. The trial court's order denying this request thus affects custody of a minor under MCR 7.202(6)(a)(iii), and this Court has jurisdiction over this appeal.

child. Specifically, she maintains defendant is a "presumed father" within the meaning of the Revocation of Paternity Act whose paternity may thus be challenged pursuant to MCL 722.1441, regardless of the fact that a divorce judgment establishing child custody, child support, and parenting time had previously been entered by the trial court.

A. STANDARDS OF REVIEW AND RULES OF INTERPRETATION

When reviewing a decision related to the Revocation of Paternity Act, this Court reviews the trial court's factual findings, if any, for clear error. *Parks v Parks*, 304 Mich App 232, 237; 850 NW2d 595(2014) (citation omitted). " 'The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake.' " *Id*. (citation omitted). In contrast, we review de novo the interpretation and application of statutory provisions. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013). To the extent necessary, interpretation of a divorce judgment is also reviewed de novo. *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012).

This case requires interpretation of the Revocation of Paternity Act. When interpreting a statute, we must give effect to the Legislature's intent, which we determine by examining first the language of the statute itself. *Tellin v Forsyth Twp*, 291 Mich App 692, 700-701; 806 NW2d 359 (2011). In doing so, we give effect to every word, phrase, and clause, avoiding a construction that would render part of the statute surplusage or nugatory. *Book-Gilbert*, 302 Mich App at 541. Undefined words are afforded their plain and ordinary meaning, and a dictionary may be consulted to ascertain the common meaning of a term. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 240; 615 NW2d 241 (2000).

"When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007).

B. CLASSIFICATIONS OF FATHERS

In 2012 PA 159, the Legislature enacted the Revocation of Paternity Act, which provides the methods for setting aside acknowledgments of paternity, and determinations and judgments related to paternity, as well as the measures for overcoming the presumption of legitimacy. See *In re Daniels Estate*, 301 Mich App 450, 458-459; 837 NW2d 1 (2013). Under the applicable provisions, the proofs and circumstances necessary to revoke paternity differ depending on the classification of paternity at issue, and, in some respects, depending on the individual seeking the revocation of paternity. Specifically, with regard to the type of paternity at issue, under MCL 722.1433, four classifications of fathers are recognized:

> (1) "Acknowledged father" means a man who has affirmatively held himself out to be the child's father by executing an acknowledgment of parentage under the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.
>
> (2) "Affiliated father" means a man who has been determined in a court to be the child's father.
>
> (3) "Alleged father" means a man who by his actions could have fathered the child.
>
> (4) "Presumed father" means a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth.

After identifying the classifications of fathers, the Revocation of Paternity Act details the methods applicable to the revocation of each specific type of paternity. For

example, MCL 722.1437 provides the methods for setting aside an acknowledgement of parentage. MCL 722.1441 governs an action to determine that a child has been "born out of wedlock" and is not in fact a presumed father's child. See *Grimes v Van Hook-Williams*, 302 Mich App 521, 527; 839 NW2d 237 (2013). Lastly, MCL 722.1439 details the process for setting aside an order of filiation, i.e., "a judicial order establishing an affiliated father," MCL 722.1433(5), if the affiliated father did not participate in the proceedings establishing his paternity. Notably, however, no express provision is made for setting aside an order establishing a man as an affiliated father when the man participated in the court proceedings determining his paternity. See MCL 722.1439(1).

C. ANALYSIS

In the present case, as an initial matter, we must decide what procedures apply to plaintiff's efforts to revoke defendant's paternity. In other words, we must first decide which statutory definition of "father" applies to defendant so that we may ascertain under which statutory provision, if any, plaintiff may seek revocation of defendant's paternity. The parties do not contend that defendant qualifies as an "acknowledged father," and there is no evidence that an acknowledgment of parentage has been signed in this case. See MCL 722.1433(1). Further, it appears that Witt, not defendant, is the "alleged" or biological father of the child. See MCL 722.1433(3). Thus, the specific definitional dispute at issue relates to whether defendant is a "presumed father," as contended by plaintiff, or an "affiliated father," as maintained by defendant. In particular, plaintiff alleges that defendant's fatherhood arose by operation of the presumption of legitimacy,

while defendant asserts that his status as the child's father was determined in the divorce proceedings, meaning that, in defendant's view, the divorce judgment is an order of filiation. Because defendant participated in the divorce proceedings, he maintains that his paternity as an affiliated father may not be revoked under MCL 722.1439(1).

As noted, "presumed father" refers to a man who is "presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." MCL 722.1433(4). Indeed, Michigan has long recognized that a child conceived or born during an intact marriage is presumed to be a child of the marriage. See *In re KH*, 469 Mich 621, 634-635; 677 NW2d 800 (2004); *People v Case*, 171 Mich 282, 284-285; 137 NW 55 (1912). Given that defendant was married to plaintiff at the time of the child's conception and birth, he plainly obtained the status of presumed father. See MCL 722.1433(4). The foremost issue before this Court thus becomes whether defendant continued as a presumed father after the parties' divorce or whether by virtue of the divorce judgment he obtained the status of an affiliated father.

Relevant to this determination, as noted, the phrase "affiliated father" refers to "a man who has been determined in a court to be the child's father." MCL 722.1433(2). As a related matter, an "order of filiation" in turn refers to "a judicial order establishing an affiliated father." MCL 722.1433(5). Thus, an order of filiation is a judicial order establishing that a man has been determined in a court to be a child's father. Ultimately, to decide whether a man qualifies as an affiliated father requires consideration of whether he has been determined in a court to be the child's father.

According to a basic dictionary definition, to "determine" is "**1.** to settle or resolve (a dispute, question, etc.) by an authoritative or conclusive decision [or] **2.** to conclude or ascertain, as after reasoning or observation." *Random House Webster's College Dictionary* (1992). Applying this basic definition, it follows that an affiliated father exists when, in a court of law, a dispute or question about a man's paternity has been settled or resolved and it was concluded by the court, on the basis of reasoning or observation, that the man is the child's father. Given this understanding, it seems plain that the Legislature intended to recognize the existence of an affiliated father when there was an actual determination of paternity; that is, when there was a dispute or question presented regarding the man's paternity and the matter was in fact resolved by a court. A judicial order establishing this determination would constitute an order of filiation for purposes of the Revocation of Paternity Act.

As plaintiff notes on appeal, determinations regarding a man's paternity might occur, and often do occur, in the context of an action under the Paternity Act, MCL 722.711 *et seq*. Indeed, the Paternity Act expressly provides for the entry of an order of filiation declaring paternity. See MCL 722.717. On appeal, plaintiff argues that it is only an order of filiation entered pursuant to the Paternity Act that qualifies as an order of filiation for purposes of the Revocation of Paternity Act.

Contrary to plaintiff's arguments in this respect, we do not believe that an order of filiation may only arise from the procedures prescribed in the Paternity Act. As defined in the Revocation of Paternity Act, an "order of filiation" is simply "a judicial order establishing an affiliated father"; this definition makes no reference to an order entered pursuant to the Paternity Act. See

MCL 722.1433(5). This general reference to a "judicial order" in MCL 722.1433(5), without reference to the Paternity Act, stands in marked contrast to the Revocation of Paternity Act's definition of an "acknowledged father" as one who executed an acknowledgment of parentage under the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*. See MCL 722.1433(1). Had the Legislature similarly intended to restrict affiliated fathers to those identified through paternity actions, the Legislature would have so specified. See *Book-Gilbert*, 302 Mich App at 542 ("The courts may not read into the statute a requirement that the Legislature has seen fit to omit.").[2] Absent any indication of such specificity, any judicial order establishing a determination in court that a man is a child's father could demonstrate the determination of an affiliated father within the meaning of MCL 722.1433(2). See also MCL 722.1433(5).

To be sure, paternity claims and determinations of paternity frequently arise during divorce or custody disputes, unrelated to actions under the Paternity Act. See *KH*, 469 Mich at 635; *Girard v Wagenmaker*, 437 Mich 231, 246; 470 NW2d 372 (1991). If, in the course of a divorce proceeding, the court makes a determination regarding a man's paternity and correspondingly enters an order establishing this determination, we see nothing in the plain language of MCL 722.1433(2) or (5) to suggest that such a determination in the context of divorce or custody proceedings would not establish a man's status as an affiliated father.

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[2] Indeed, elsewhere in its provisions, the Revocation of Paternity Act does in fact specifically refer to the Paternity Act and its procedures. See, e.g., MCL 722.1443(2)(d). This express reference to the Paternity Act in one provision of the Revocation of Paternity Act makes plain that its omission from the definitions of "order of filiation" and "affiliated father" was deliberate. See *Book-Gilbert*, 302 Mich App at 541-542.

Of course, not all divorce proceedings squarely address the question of a child's paternity. See, e.g., *Barnes v Jeudevine*, 475 Mich 696, 705-706; 718 NW2d 311 (2006). Whether a particular divorce proceeding resolved the question of paternity will depend on the facts of the particular case and the determinations expressed in the divorce judgment. Specifically, whether divorce proceedings and a resulting divorce judgment establish the man as an affiliated father within the meaning of MCL 722.1433(2) necessarily depends on whether there was a determination in court that the man was the child's father. That is, applying the plain language of the statute as discussed, for a man to have been "determined" in a court to be a child's father, there must have been a dispute or question about the issue of paternity and an actual resolution of the matter by the trial court, culminating in a judicial order establishing the man as the child's father.

On the present facts, we are persuaded that this particular divorce judgment was not a determination of defendant's fatherhood and thus not an order establishing him as an affiliated father. Specifically, in this case, the question of defendant's paternity appears never to have been an issue of dispute between the parties during the course of their divorce, and it was therefore not a question that the trial court actually resolved. Plaintiff alleged in her complaint that there had been one child "born of this marriage," a fact that the divorce judgment took to be "confessed." But nowhere did plaintiff allege, defendant assert or deny, or the trial court actually ascertain that defendant was in fact the minor child's father. Rather, fairly considered, plaintiff's complaint and the ultimate divorce judgment adhered to the presumption of legitimacy, treating defendant as the presumed father of the minor child and awarding visitation and custody in light of defen-

dant's capacity as a presumed father. See generally *KH*, 469 Mich at 635 (recognizing that the presumption of legitimacy remains intact and becomes conclusive if not rebutted during a divorce or custody dispute).

When the parties to a divorce action have proceeded in keeping with this presumption of legitimacy and do not contest the issue of paternity in the course of the divorce, in our judgment, the resulting divorce judgment does not signify a determination in court that the husband is the father of the child for purposes of the Revocation of Paternity Act. Rather, the divorce judgment merely recognizes the continued adherence to the presumption of legitimacy without answering the distinct question of whether the husband is the child's father. Cf. *Barnes*, 475 Mich at 705. Stated differently, in such cases paternity was established by operation of the presumption of legitimacy during the parties' marriage, and absent some challenge to paternity during the course of the divorce, the matter of paternity was simply not at issue in the divorce and not a question "determined" by the trial court's decision. Cf. *Sinicropi v Mazurek*, 273 Mich App 149, 174; 729 NW2d 256 (2006) ("Paternity was not an issue when [the acknowledged father] filed the motion for custody in 2001 because the acknowledgment of parentage had already established paternity."). Accordingly, on the facts of the present case, defendant qualifies as a presumed father and did not become an affiliated father by operation of the divorce judgment.

Given our conclusion that defendant qualifies as a presumed father rather than an affiliated father, it follows that MCL 722.1441(1)(a) applies to plaintiff's efforts to revoke defendant's paternity.[3] Specifically, MCL 722.1441(1)(a) provides:

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[3] A mother may also seek a determination that the child was born out of wedlock under MCL 722.1441(1)(b) when a presumed father has failed

> (1) 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 the child's mother and . . .
>
> (a) All of the following apply:
>
> (*i*) The mother identifies the alleged father by name in the complaint or motion commencing the action.
>
> (*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.

Considering this provision, nothing in the plain language of the statute required plaintiff to challenge the presumption of legitimacy in the divorce proceedings or prevents plaintiff from now seeking to challenge defendant's paternity after entry of the divorce judgment. Instead, the only time constraint decreed in this provision requires the filing of an action within 3 years after the child's birth, and this constraint does not apply to actions filed on or before 1 year after the effective date of the act. There is no suggestion in the statute that its provisions cannot apply after a divorce.

On the contrary, following the divorce proceedings, the trial court retained continuing jurisdiction over child custody, child support, and parenting time, and

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to support a child or lived apart from the child. The parties agree, however, that this provision is inapplicable in this case.

according to MCL 722.1443(1), when an action for the support, custody, or parenting time of the child exists, an action under the Revocation of Paternity Act may be brought at *any* stage of the proceedings by a motion in the existing case. And more specifically, an action to determine that a child was born out of wedlock may be brought "by a motion filed in an existing action . . . ." MCL 722.1441(5). By filing her motion in her existing divorce case, plaintiff has brought such a motion in the present case. Thus, in sum, in this case the divorce judgment does not preclude plaintiff's efforts to establish that the minor child was born out of wedlock, and on remand plaintiff may seek a determination under MCL 722.1441(1)(a) that the child was born out of wedlock.[4]

III. RES JUDICATA

Before the trial court, and again on appeal, defendant also argues that the doctrine of res judicata prohibits plaintiff from attacking a paternity determination that was made, or could have been made, in the course of their divorce proceedings. The applicability of the doctrine of res judicata presents a question of law that we review de novo. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

Res judicata prevents "multiple suits litigating the same cause of action." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Specifically, the doctrine bars a subsequent action when "(1) the prior action was

[4] On remand, the trial court may determine that the minor child was born out of wedlock if plaintiff has satisfied MCL 722.1441(1)(a). However, even if the requirements of MCL 722.1441(1)(a) are met, the trial court may, of course, refuse to make that a determination "if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4).

decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first." *Stoudemire*, 248 Mich App at 334. Res judicata has been broadly applied, barring "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 470 Mich at 121. Res judicata does not, however, apply to a continuation of a single legal action. *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999). Further, res judicata is a "judicially created" doctrine and "must not be applied when its application would subvert the intent of the Legislature." *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 630; 808 NW2d 471 (2010).

Before the enactment of the Revocation of Paternity Act, it had been repeatedly recognized that a support order arising from a divorce judgment constituted an adjudication of paternity and, consequently, the doctrine of res judicata precluded a party to the divorce from later challenging paternity. See *Hackley v Hackley*, 426 Mich 582, 585; 395 NW2d 906 (1986) (opinion by BOYLE, J.); *Hawkins v Murphy*, 222 Mich App 664, 671; 565 NW2d 674 (1997); *Rucinski v Rucinski*, 172 Mich App 20, 22; 431 NW2d 241 (1988); *Baum v Baum*, 20 Mich App 68, 74; 173 NW2d 744 (1969). Defendant now argues on appeal that these cases should continue to control and res judicata should accordingly prevent plaintiff from relitigating the question of paternity.[5]

[5] In a related argument, defendant maintains that this line of cases supports his claim that he is an affiliated father because they stand for the proposition that a child support order arising from a divorce is an adjudication of paternity. However, these cases involved the application of res judicata, not a discussion of who qualifies as an affiliated father within the meaning of the Revocation of Paternity Act. Again, MCL 722.1433(2) defines

However, these cases were decided before the enactment of the Revocation of Paternity Act, meaning they were decided on judicial principles of res judicata without consideration of whether the Revocation of Paternity Act legislatively authorized postdivorce challenges to paternity. Considering the Revocation of Paternity Act, we conclude that, in the particular circumstances described in the statute, the Legislature intended to authorize postjudgment challenges to paternity, including for cases in which paternity was or could have been litigated. Further, we are persuaded that this legislative intent would be improperly thwarted by the application of res judicata to bar actions otherwise authorized by the Revocation of Paternity Act.

To begin with, in broad terms, the title of the Revocation of Paternity Act states that it is "AN ACT to provide procedures to determine the paternity of children in certain circumstances; [and] to allow acknowledgments, determinations, and judgments relating to paternity to be set aside in certain circumstances . . . ."[6] 2012 PA 159, title. As the act title makes clear, central to the purpose of the Revocation of Paternity Act is the creation of the ability to revisit and set aside prior

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an affiliated father as one who "has been determined" to be the child's father. As we have discussed, this language clearly requires a determination regarding a man's paternity in a case in which the question of his paternity has truly been at issue; that is, there is no indication that a man becomes an affiliated father simply because the presumption of legitimacy went unchallenged during a divorce or a determination of paternity *could* have been made in the course of previous proceedings. In other words, in our view, the Legislature plainly intended an actual determination of paternity. It would thus subvert the Legislature's intent if we held that paternity "has been determined" in every case in which the issue of paternity *could* have been determined.

[6] While an act's title may not be considered authority for construing an act, it is useful for the interpretation of the statute's purpose and scope. *King v Ford Motor Credit Co*, 257 Mich App 303, 311-312; 668 NW2d 357 (2003).

determinations of paternity in specific circumstances. To effectuate this purpose, as we have discussed, the Revocation of Paternity Act allows for the revocation of acknowledgements of parentage, and the setting aside of judicial orders related to paternity. See MCL 722.1443(2). Through the enactment of methods for setting aside judicial determinations of paternity and other established classifications of paternity, the Legislature clearly evidenced an intent to allow relitigation or reconsideration of paternity in certain circumstances, provided that the statutory requirements are met. While we do not suggest that parties may repetitively litigate the question of paternity without end, it would nevertheless clearly subvert the Legislature's intent if we employed res judicata as a categorical bar to all litigation of paternity when paternity had been previously determined by a court, or could have been previously decided.

More specifically, the argument that a child custody determination or a child support order incident to a divorce should always bar later attempts to litigate paternity is particularly unavailing given the plain language of MCL 722.1443(1), which provides that an action under the Revocation of Paternity Act may be brought by motion "at *any* stage of the proceedings" in an action for support, custody, or parenting time. (Emphasis added.) See also MCL 722.1441(5) ("An action [to determine that a child was born out of wedlock] may be brought . . . by a motion in an existing action . . . ."). By its plain terms, this provision authorizes motions at *any* stage, thereby including proceedings after the entry of a divorce judgment. That is, even after the entry of a divorce judgment, a court has continuing jurisdiction over child custody and support determinations, *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), including the authority to revise, alter, or amend the

original divorce judgment, *Kelley v Hanks*, 140 Mich App 816, 821; 366 NW2d 50 (1985); MCL 552.17. The duly authorized filing of a motion under the Revocation of Paternity Act in relation to those proceedings may thus be construed as a continuation of the divorce action to which res judicata does not apply. See *Harvey*, 237 Mich App at 437 ("Because the present controversy is a continuation of the parties' original divorce action, and not a separate lawsuit, the doctrine of res judicata is inapplicable here."). Accordingly, plaintiff's motion in the present case, as a continuation of divorce proceedings, would not be subject to res judicata.

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

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

TRAVELERS PROPERTY CASUALTY COMPANY
OF AMERICA v PEAKER SERVICES, INC

Docket No. 315070. Submitted June 11, 2014, at Lansing. Decided July 22, 2014, at 9:00 a.m. Leave to appeal sought.

Travelers Property Casualty Company of America brought an action in the Livingston Circuit Court against Peaker Services, Inc., seeking a declaratory judgment regarding its contractual obligations to defend and indemnify Peaker Services under a commercial general liability (CGL) insurance policy. Peaker Services filed a counterclaim, seeking a declaratory judgment that Travelers was obligated to defend and indemnify it. The University of Michigan hired Peaker Services to install an electronic over-speed system at its central power plant in Ann Arbor. Included in the purchase-order agreement for the system was a clause stating that Peaker Services would be responsible for the costs to return university property to "as was" condition in the event that the power plant was damaged by Peaker Services personnel. In 2011, the university and its insurer commenced a breach-of-contract action against Peaker Services, alleging that the over-speed system was improperly calibrated, resulting in significant damage to the generator system. Peaker Services filed a claim with Travelers, asking Travelers to defend and indemnify it in the university's lawsuit. Travelers participated in the defense, but reserved the right to dispute coverage. Travelers commenced this action in 2012 to determine its obligation to defend and indemnify Peaker Services. Travelers moved for summary disposition, asserting that it did not have a duty to defend and indemnify Peaker Services in the university's lawsuit because Peaker Services's claim fell under the CGL policy's "contractual liability" exclusion. That exclusion provided that the policy did not provide coverage for bodily injury or property damage for which Peaker Services was obligated to pay damages by reason of an assumption of liability in a contract or agreement. The court, David J. Reader, J., granted summary disposition in favor of Peaker Services under MCR 2.116(I)(2), and subsequently entered an order granting judgment in favor of Peaker Services, holding that Peaker Services was entitled to coverage under the CGL policy. Travelers appealed.

The Court of Appeals *held*:

The contractual-liability exclusion precludes coverage for damages incurred by reason of the assumption of liability in a contract or agreement, but provides an exception to the exclusion when (1) the insured would have incurred liability irrespective of the contract or agreement, or (2) the insured assumed liability in an insured contract. The phrase "assumption of liability" plainly means the act of taking on the legal obligations or responsibilities of another, a conclusion that is supported by caselaw from other jurisdictions and relevant treatises. Assumed liability differs from liability arising from an insured's breach of his or her own contract in that the former connotes the taking on of additional liabilities in excess of those imposed on the insured under general law. Therefore, the contractual-liability exclusion does not bar coverage for all contract liability, but rather is limited to a special type of contract—one in which the insured has assumed the liability of another, i.e., a hold harmless or indemnification agreement. By agreeing to return the university's property to "as was" condition, Peaker Services did not enlarge its duty to exercise ordinary care in fulfilling its contract. Rather, it agreed to do no more than was imposed on it under general law. Therefore, the contractual-liability exclusion in the CGL policy did not preclude coverage, and the trial court reached the correct result.

Affirmed.

INSURANCE — COMMERCIAL GENERAL LIABILITY POLICIES — CONTRACTUAL-LIABILITY EXCLUSIONS — ASSUMPTION OF LIABILITY DEFINED.

The standard contractual-liability exclusion in a commercial general liability insurance policy precludes coverage for damages incurred by reason of the assumption of liability in a contract or agreement; the phrase "assumption of liability" means the act of taking on the legal obligations or responsibilities of another; the standard contractual-liability exclusion does not bar coverage for all contract liability, but rather is limited to a special type of contract—one in which the insured has assumed the liability of another, i.e., a hold harmless or indemnification agreement.

Plunkett Cooney (by *Jeffrey C. Gerish*, *Charles W. Browning*, and *Shannon L. H. Phillips*) for Travelers Property Casualty Company of America.

Clark Hill PLC (by *Jay M. Berger* and *Matthew Heron*) for Peaker Services, Inc.

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

BORRELLO, P.J. This appeal involves an insurance coverage dispute between plaintiff/counterdefendant, Travelers Property Casualty Company of America (plaintiff), and defendant/counterplaintiff, Peaker Services, Inc. (defendant). The trial court denied plaintiff's motion for summary disposition under MCR 2.116(C)(10) and granted summary disposition in favor of defendant under MCR 2.116(I)(2). The trial court held that plaintiff had a duty to defend and indemnify defendant in a separate breach-of-contract action pursuant to the commercial general liability (CGL) insurance policy that it issued to defendant. Plaintiff appeals as of right. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant is a corporation involved in the business of servicing commercial power-generation systems. Effective June 1, 2007, plaintiff issued a CGL policy to defendant wherein plaintiff agreed to provide liability coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."

In 2006, the University of Michigan contacted defendant seeking a quote for services at its central power plant in Ann Arbor. The power plant utilizes steam turbines that generate electricity by directing steam across fan blades mounted to a generator. The university hired defendant to install an "electronic over-speed system" to replace its mechanical over-speed system. An over-speed system is used to prevent the turbines from spinning too fast and causing damage to the equipment.

On July 18, 2006, the university signed a purchase-order agreement for defendant to install a ProTech 203 Digital Fault Tolerant Over-Speed Trip System (ProTech 203). The contract contained the following pertinent provisions:

> 4.0 Warranties and Representations of Supplier. Supplier acknowledges that the University is relying on these representations and warranties as essential elements to this Agreement, representing as they do, material inducements, without which the University would not have entered into this Agreement.
>
> 4.1 General Product Warranty. Supplier represents that all products and any support services provided under this Agreement (a) are new and unused . . . and free from defects in material and workmanship; (b) are of the quality, size, dimension and specifications ordered; (c) meets the highest performance and manufacturing specifications as described in documents or writings made available by the Supplier to the public or University . . . .
>
> 4.2 Qualifications. Supplier warrants that it, as well as its employees, agents and subcontractors engaged to provide the products or services under this Agreement . . . , has and will maintain all the skills, experience, and qualifications necessary to provide the services contemplated by this Agreement, including any required training, registration, certification or licensure.
>
> * * *
>
> 15.18 Supplier Damage to University Property. Without regard to any other section of the Agreement, Supplier shall be responsible for the costs to return to "as was" condition from any damage caused to the building, grounds, or other equipment and furnishings caused in whole or part by Supplier Personnel while performing activities arising under this Agreement. Supplier shall immediately report in writing the occurrence of any damage to the Building/Project Manager.

Defendant commenced work on the power plant in October 2007. Shortly after defendant completed the project, however, the power plant experienced problems. According to the university, defendant improperly calibrated the ProTech 203, causing one of the university's turbines to operate at twice the safe operational speed, resulting in significant damage to the generator equipment.

On March 17, 2011, the Regents of the University of Michigan and their captive insurer, Veritas Insurance Corporation (together referred to as "the Regents"), commenced a breach-of-contract action against defendant seeking in excess of $3 million in damages. The Regents alleged that defendant breached express warranties contained in the purchase-order agreement, breached the implied warranty of merchantability under the Uniform Commercial Code (UCC), MCL 440.1101 *et seq*., and breached "the prevailing industry standards and practices . . . ."

Defendant filed a claim with plaintiff under the CGL policy asking plaintiff to defend and indemnify it in the Regents' suit. Plaintiff participated in the defense, but reserved the right to dispute coverage.

On June 14, 2012, plaintiff commenced this lawsuit seeking a declaratory judgment regarding its contractual obligations to defend and indemnify defendant under the CGL policy.[1] Defendant filed a counterclaim, seeking a declaratory judgment that plaintiff was obligated to defend and indemnify defendant under the policy.

Plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that it did not have a duty to

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[1] Sometime thereafter, defendant reached a settlement agreement with the Regents.

defend and indemnify defendant, in part, because defendant's claim was excluded under the CGL policy's "contractual liability" exclusion. That exclusion provided, in relevant part, that the insurance contract did not cover bodily injury or property damage for which defendant was obligated to pay damages "by reason of the assumption of liability in a contract or agreement."

Plaintiff argued that defendant's claim fell within the contractual-liability exclusion because defendant was liable to the university by way of an assumption of liability. Specifically, plaintiff cited § 15.18 of the purchase-order agreement, wherein defendant agreed that, in the event the power plant was damaged, it would be "responsible for the costs to return [the property] to 'as was' condition . . . ." Plaintiff essentially argued that in this clause, defendant "assumed" its own liability and therefore was not covered for damages arising from breach of the contract.

Defendant responded, arguing the contractual-liability exclusion applied only to agreements wherein the insured assumed liability of a third party—i.e., indemnity or hold-harmless agreements. Defendant argued that it did not assume the liability of a third party, hence, there was no "assumption of liability" and plaintiff was obligated to provide coverage.

Following oral arguments, the trial court denied plaintiff's motion and granted summary disposition in favor of defendant pursuant to MCR 2.116(I)(2). The trial court did not clearly articulate the basis for its holding; rather, the court appeared to hold that the contractual-liability exclusion did not preclude coverage because "what we have -- there's potential tort liability and the fact that it's blocked by the statute of limitations I think is not decisive here. We look at the gravamen of the allegations, which are in fact negligence."

To obtain a final judgment and narrow the issues for appeal, plaintiff amended its complaint to, apart from the contractual-liability exclusion, "withdraw the other grounds for asserting a lack of coverage." The trial court entered a written order on February 14, 2013, granting judgment in favor of defendant and holding that defendant was entitled to coverage under the CGL policy. This appeal ensued.

II. STANDARD OF REVIEW

At issue in this case is the interpretation and application of an insurance contract, which presents a question of law that we review de novo. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001). Similarly, we review de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

III. ANALYSIS

Plaintiff argues that the trial court erred by holding that the contractual-liability exclusion did not preclude coverage. Resolution of this issue requires that we construe the relevant portions of the insurance policy.

A. PRINCIPLES OF INTERPRETATION

Similar to any other contract, "[a]n insurance policy must be enforced in accordance with its terms." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). "Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565

NW2d 839 (1997). "While [i]t is the insured's burden to establish that his claim falls within the terms of the policy, [t]he insurer should bear the burden of proving an absence of coverage." *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014) (quotation marks and citations omitted) (alteration in original). And, "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). "However, [i]t is impossible to hold an insurance company liable for a risk it did not assume, and, thus, [c]lear and specific exclusions must be enforced." *Hunt*, 496 Mich at 373 (quotation marks and citations omitted) (alteration in original).

B. GENERAL INSURANCE AGREEMENT

CGL policies are generally written on standardized forms developed by the Insurance Services Office, Inc. (ISO).[2] *American Family Mut Ins Co v American Girl, Inc*, 268 Wis 2d 16, 33; 2014 Wis 2; 673 NW2d 65 (2004). The CGL policy provides coverage for "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or '*property damage*' to which this insurance applies." (Emphasis added.) The policy defines "property damage" to include "[p]hysical injury to tangible property," or "[l]oss of use of tangible property," arising from an "occurrence" that occurs in the "coverage territory."

In this case, plaintiff does not argue that the university's property damage did not arise from an occurrence within the meaning of the CGL's general insurance agreement. Instead, plaintiff contends coverage was precluded

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[2] ISO is a "national insurance policy drafting organization . . . ." *State Auto Prop & Cas Ins Co v Travelers Indemnity Co of America*, 343 F3d 249, 255 n 9 (CA 4, 2003).

by the policy's contractual-liability exclusion. Therefore, we proceed by determining whether the contractual-liability exclusion applied to negate coverage.

C. CONTRACTUAL-LIABILITY EXCLUSION

The CGL policy provides a "broad statement of coverage, and insurers limit their exposure to risk through a series of specific exclusions." *American Family*, 268 Wis 2d at 34. The contractual-liability exclusion provides in pertinent part:

> **(2) Exclusions**
>
> This insurance does not apply to:
>
> * * *
>
> **b. Contractual Liability**
>
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages *by reason of the assumption of liability in a contract or agreement*. This exclusion does not apply to liability for damages:
>
> **(1)** That the insured would have in the absence of the contract or agreement; or
>
> **(2)** Assumed in a contract or agreement that is an "insured contract". . . . [Emphasis added.]

This clause contains two components: (1) a contractual-liability exclusion that excludes coverage for damages incurred "by reason of the assumption of liability in a contract or agreement," and (2) an exception to the exclusion that brings the insured's claim back into coverage when the insured would have incurred the liability irrespective of the contract or agreement, or the insured assumed liability in an "insured contract."[3] We proceed by

[3] The policy specifically defines "insured contract." Neither party contends that plaintiff's contract with the university was an insured contract.

first applying the contractual-liability exclusion before, if necessary, addressing the exceptions to the exclusion.

The critical language in the contractual-liability exclusion is the phrase, "assumption of liability," particularly, the term "assumption." Plaintiff argues that the term encompasses all contracts wherein the insured assumed any liability, including his or her own liability. Defendant, in contrast, argues that the term "assumption of liability" is generally understood to mean situations wherein an insured assumed the liability of a third party, such as an indemnity or hold-harmless agreement, and that assuming liability is wholly distinct from assuming a duty to perform a contract in a certain manner.

The CGL policy does not define the phrase "assumption of liability," and there is no published caselaw in Michigan defining the phrase in this context. Therefore, we turn to the dictionary. See *Pugh v Zefi*, 294 Mich App 393, 396; 812 NW2d 789 (2011) (stating that when a contract fails to define a term, "it is appropriate to consult a dictionary to determine the ordinary or commonly used meaning" of the term). *Black's Law Dictionary* (10th ed) defines "assumption" in relevant part as, "[t]he act of taking ([especially] *someone else's* debt or other obligation) for or on oneself . . . ." (Emphasis added.) "Liability," in turn, is defined as "[t]he quality, state, or condition of being legally obligated or accountable . . . ." *Id*.

Applying these definitions, when viewed in the context of a CGL policy as a whole—the purpose of which is to "protect[] business owners against liability to third-parties"[4]—the plain meaning of the phrase "assumption of liability" can reasonably be construed to

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[4] 3, Thomas & Mootz, New Appleman on Insurance Law Library Edition (September 2013 update), § 16.02[3][a], p 16-28.

mean the act of taking on the legal obligations or responsibilities of another. Notably, in defining the term "assumption" to mean the act of "taking . . . for or on oneself," *Black's Law Dictionary* states, "[especially] *someone else's*" obligation. (Emphasis added.) "Especially" means "to an exceptional degree," "particularly," "preeminently," or "specifically." *Random House Webster's College Dictionary* (1997). Thus, the meaning of the term "assumption" predominantly refers to the act of taking on "*someone else's*" obligations. Indeed, a review of relevant legal treatises and caselaw from other jurisdictions supports that, in the context of a CGL policy, "assumption of liability" refers to the assumption of another's liability. See, e.g., *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 472; 663 NW2d 447 (2003) (indicating that it may be appropriate to consult legal treatises when interpreting an ambiguous contract); *Mettler Walloon, LLC, v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008) (stating that while not binding, caselaw from sister states and federal courts may be considered persuasive authority).

" 'The key to understating [the contractual-liability exclusion] . . . is the concept of liability assumed.' " *American Family*, 268 Wis 2d at 47, quoting 2 Long, The Law of Liability Insurance (2002), § 10.05[2], pp 10-56, 10-57. Assumed liability differs from liability arising from an insured's breach of his or her own contract in that the former connotes the taking on of additional liabilities in excess of those imposed on the insured under general law. As the Wisconsin Supreme Court recently noted:

> Although, arguably, a person or entity assumes liability (that is, a duty of performance, the breach of which will give rise to liability) whenever one enters into a binding contract, in the CGL policy and other liability policies an 'assumed' liability is generally understood and interpreted

> by the courts to mean the liability of a third party, which liability one 'assumes' in the sense that one agrees to indemnify or hold the other person harmless. [*American Family*, 268 Wis 2d at 47-48 (quotation marks and citation omitted).]

Thus, the contractual-liability exclusion does not "bar *all* contract liability," but rather "is limited to a special type of contract—one in which the insured has assumed the liability of another, i.e., a hold harmless or indemnification agreement." 3 Thomas & Mootz, New Appleman on Insurance Law Library Edition (September 2013 update), § 18.03[3][a], p 18-43 (emphasis added).

The rationale behind excluding the contractually assumed liability of another from CGL coverage is that " 'liability assumed by the insured under a contract or agreement presents an uncertain risk' which cannot be determined in advance for the purpose of fixing premiums." *Gibbs M Smith, Inc v United States Fidelity & Guaranty Co*, 949 P2d 337, 342 (Utah, 1997), quoting 1 Long, Law of Liability Insurance (1997), § 1.07[2], p 1-42.1. Therefore,

> "[c]ontractual exclusion clauses which deny coverage for liability assumed by the insured under any contract or agreement not defined in the policy relieve the insurer from liability only in fact situations where the insured would not be liable to a third person except for the express assumption of such liability." [*Gibbs M Smith*, 949 P2d at 342, quoting 1 Long, § 1.07[2], p 1-44 (alteration in original) (emphasis omitted).]

In contrast, if the exclusion "excluded *all* liability associated with a contract made by the insured, commercial liability insurance would be severely limited in its coverage." *Gibbs M Smith*, 949 P2d at 342 (emphasis added).

Consistently with how legal treatises have addressed the issue, state and federal courts have held that the

contractual-liability exclusion applies to contracts involving assumption of the liability of a third party. For example, in *Olympic, Inc, v Providence Washington Ins Co of Alaska*, 648 P2d 1008, 1011 (Alas, 1982), in interpreting a contractual-liability exclusion similar to the one at issue in this case,[5] the Alaska Supreme Court distinguished between "*incurring* liability through breach of contract and specifically contracting to *assume* liability for another's negligence." The court explained that " '[l]iability assumed by the insured under any contract' refers to liability incurred when one promises to indemnify or hold harmless another, *and does not refer to the liability that results from breach of contract*." *Id*. at 1011 (emphasis added).

More recently, in *American Family Mut Ins Co v American Girl, Inc*, 268 Wis 2d at 48, the Wisconsin Supreme Court held that the contractual-liability exclusion in a standard CGL policy "applies where the insured has contractually assumed the liability of a third party, as in an indemnification or hold harmless agreement[.]" In rejecting the contention that the exclusion precluded coverage for all incidents involving the insured's contractual liability, the court explained that "[t]he term 'assumption' must be interpreted to add something to the phrase 'assumption of liability in a contract or agreement.' " *Id*. Otherwise, "[r]eading the phrase to apply to *all* liabilities sounding in contract renders the term 'assumption' superfluous." *Id*. (emphasis added). Furthermore, the court reasoned, limiting the exclusion to instances involving the assumed liability of another

> is consistent with the general purposes of liability insurance because it enables insurers to enforce the fortuity

[5] The exclusion provided that the CGL policy did not apply to " 'liability assumed by the insured under any contract or agreement except an incidental contract . . . .' " *Olympic*, 648 P2d at 1010.

> concept by excluding from coverage any policyholder agreements to become liable after the insurance is in force and liability is a certainty. . . . [Thus] further[ing] the goal of protecting the insurer from exposure to risks whose scope and nature it cannot control or even reasonably foresee. [*Id*.]

Consistently with *Olympic* and *American Family*, many other courts and legal authorities have concluded that the contractual-liability exclusion is limited to contracts wherein the insured assumes the liability of another. See, e.g., 46 CJS, Insurance, § 1413, pp 310-311 ("A provision in a liability insurance policy excluding coverage for liabilities assumed under any contract . . . does not apply to liabilities not within its terms. Such liability includes promises to indemnify or hold harmless another, but not liability resulting from a breach of contract.") (citations omitted).[6] We find these authorities persuasive and hold that "assumption of liability" in the context of a CGL policy's contractual-liability

[6] See also Anno: *Scope & Effect of Clause in Liability Policy Excluding From Coverage Liability Assumed by Insured Under Contract Not Defined in Policy*, 63 ALR2d 1122, §§ 1-3; *Indiana Ins Co v Kopetsky*, 11 NE3d 508 (Ind Ct App, 2014) ("Today we join those jurisdictions who have held that contractual liability exclusions in CGL policies bar coverage not for liability incurred by a contract breach but, rather, for liability assumed from a third party, which seems to be the majority position by a wide margin.") *Desert Mountain Props Ltd Partnership v Liberty Mut Fire Ins Co*, 225 Ariz 194, 205; 236 P3d 421 (Ariz Ct App, 2010) (holding that the exclusion "applies only to 'the assumption of another's liability' "); *Federated Mut Ins Co v Grapevine Excavation Inc*, 197 F3d 720, 726 (CA 5, 1999) (because the insured was not "being sued as the contractual indemnitor of a third party's conduct, but rather for its own conduct, the exclusion [was] inapplicable"); *Marlin v Wetzel Co Bd of Ed*, 212 W Va 215, 222; 569 SE2d 462 (2002) (" '[L]iability assumed by the insured under any contract' in an insurance policy . . . refers to liability incurred when an insured promises to indemnify or hold harmless another party . . . ."); *Gibbs M Smith*, 949 P2d at 340-342 (holding that "assumption of liability" refers to the assumption of a third-party's liability).

exclusion refers to those contracts or agreements wherein the insured assumes the liability of another. To conclude otherwise and construe "assumption" to encompass an insured's own liability for breach of contract renders the phrase "assumption of liability" surplusage. *American Family*, 268 Wis 2d at 48. This is because under general law an insured is inherently liable for damages arising from breach of its own contract. See, e.g., *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587 (2004), quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967) (" '[A]ccompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and . . . a negligent performance constitutes a tort as well as a breach of contract.' "). And, in the event that the insured is a seller of goods, the insured has additional inherent liabilities under the UCC. Specifically, MCL 440.2314 provides that "a warranty that . . . goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind," and MCL 440.2315 provides an implied warranty of fitness that generally attaches to the sale of goods. Thus, in a contract, an insured need not assume liability for something that the law already imposes—i.e., liability for damages arising from breach of that contract.

Plaintiff contends that the jurisdictions holding that the contractual-liability exclusion concerns the assumption of a third-party's liability have applied a "term of art" approach to interpreting the contractual-liability exclusion in a manner that does not comport with Michigan's "plain meaning" approach to contract interpretation. Plaintiff contends that *Gilbert Texas Constr, LP v Underwriters at Lloyd's London*, 327 SW3d 118 (Tex, 2010), should govern our analysis. According to plaintiff, in that case, the Texas Supreme Court cor-

rectly applied a plain-meaning approach to contract interpretation and held that the exclusion barred breach-of-contract claims arising from contracts wherein the insured assumed its own liability. Plaintiff's reading of *Gilbert*, however, is overly broad.

In *Gilbert*, Gilbert Texas Construction, LP contracted with the Dallas Area Rapid Transit Authority (DART) to construct a light-rail system. *Id*. at 121-122. Gilbert, as DART's contractor, enjoyed governmental immunity, *id*. at 122 n 4; however, in the contract, Gilbert agreed to "pay for damage to third-party property resulting from either (1) a failure to comply with the requirements of the contract, or (2) a failure to exercise reasonable care in performing the work." *Ewing Constr Co, Inc v Amerisure Ins Co*, 420 SW3d 30, 35 (Tex, 2014) (emphasis omitted), citing *Gilbert*, 327 SW3d at 127. During construction, heavy rains damaged an adjacent property and the property owner, RT Realty (RTR), sued Gilbert alleging breach of contract and other claims. *Gilbert*, 327 SW3d at 122-123. Gilbert filed a claim for defense and indemnity under its CGL policy issued by Underwriters at Lloyds London (Underwriters). *Id*. Meanwhile, the trial court dismissed all of the claims against Gilbert except for the breach-of-contract claim. *Id*. at 123. Underwriters then denied coverage on grounds that the CGL policy's contractual-liability exclusion (identical to the one at issue in this case) precluded coverage. *Id*. Gilbert sued Underwriters, claiming that Underwriters had a duty to indemnify it under the CGL policy. *Id*.

The central issue on appeal was whether the exclusion for contractually assumed liability was limited in scope to contracts wherein the insured assumed the liability of a third party. The Texas Supreme Court held

that the exclusion was not limited to contracts involving the assumption of the liability of another, explaining:

> [H]ad it been intended to be so narrow as to apply only to an agreement in which the insured assumes liability of another party . . . it would have been simple to have said so. . . .
>
> * * *
>
> . . . [T]he exclusion does not say it is limited to the narrow set of contracts by which the insured assumes the liability of another person; the exclusion's language applies without qualification to liability assumed by contract except for two situations: (1) specified types of contracts referred to as 'insured contracts,' including indemnity agreements by which the insured assumes another's tort liability, and (2) situations in which the insured's liability for damages would exist absent the contract—in other words, situations in which the insured's liability for damages does not depend solely on obligations assumed in the contract. [*Id*. at 127-128 (emphasis omitted).]

At first blush, *Gilbert* appears to sweep with great breadth. Indeed, the court acknowledged precedent from other jurisdictions and expressly stated that it disagreed "by and large, with courts' and treatises' conclusions that the language of the contractual liability exclusion before us applies only to indemnity or hold-harmless agreements . . . ." *Id*. at 131. However, upon closer review, *Gilbert* is not as sweeping as it may appear. The *Gilbert* Court did not hold that the exclusion barred *all* claims involving the insured's contractual liability. See, e.g., *id*. at 128 ("We do not hold that the exclusion in Coverage A precludes liability for all breach of contract claims."). Instead, the court held that the exclusion barred claims arising under a contract wherein the insured assumed

greater liability than that which the insured would have incurred under general law. Specifically, the court explained as follows:

> Independent of its contractual obligations, Gilbert owed RTR the duty to comply with law and to conduct its operations with ordinary care so as not to damage RTR's property, and absent its immunity it could be liable for damages it caused by breaching its duty. In its contract with DART, however, Gilbert undertook a legal obligation to protect improvements and utilities on property adjacent to the construction site, *and to repair or pay for damage to any such property "resulting from a failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work."* (emphasis added). The latter obligation—to exercise reasonable care in performing its work—mirrors Gilbert's duty to RTR under general law principles. The obligation to repair or pay for damage to RTR's property "resulting from a failure to comply with the requirements of this contract" *extends beyond Gilbert's obligations under general law and incorporates contractual standards to which Gilbert obligated itself*. [*Id*. at 127 (emphasis altered).]

In a subsequent case, the Texas Supreme Court articulated *Gilbert*'s holding as follows:

> Gilbert did not contractually assume liability for damages within the meaning of the policy exclusion *unless the liability for damages it contractually assumed was greater than the liability it would have had under general law* . . . . [*Ewing*, 420 SW3d at 36 (emphasis added).]

In short, under *Gilbert* when an insured would be liable at general law for damages arising from its breach of contract, the contractually assumed liability does not preclude coverage, but when an insured takes on additional legal obligations and liabilities beyond those imposed at general law, coverage is barred by the contractual-liability exclusion.

Our reading of *Gilbert* aligns with *Ewing Constr Co, Inc v Amerisure Ins Co*, 420 SW3d 30, wherein the Texas Supreme Court clarified the scope of *Gilbert*. In that case, Ewing Construction Company, Inc., contracted with a school district to construct tennis courts. *Ewing*, 420 SW3d at 31. In the contract, Ewing agreed to perform the work in "a good and workmanlike manner . . . ." *Id*. at 36. Shortly after construction was complete, the tennis courts began flaking, crumbling, and cracking and were unusable for their intended purpose. *Id*. at 31. The school district sued Ewing, alleging breach of contract and negligence. *Id*. at 31-32. Ewing filed a claim with Amerisure Insurance Company, its CGL provider, seeking defense and indemnity. *Id*. at 32. Amerisure denied coverage, and Ewing filed a complaint for declaratory judgment. *Id*.

Citing *Gilbert*, Amerisure argued, in part, that coverage was precluded under the CGL policy's contractual-liability exclusion because Ewing had assumed liability for damages by contracting with the school district to perform work in a good and workmanlike manner. *Id*. at 32, 36. Ewing countered, arguing that "its express agreement to perform the construction in a good and workmanlike manner did not enlarge its obligations and was not an 'assumption of liability' within the meaning of the policy's contractual liability exclusion." *Id*. In agreeing with Ewing, the Texas Supreme Court clarified its holding in *Gilbert*, explaining, "we . . . determined in *Gilbert* that 'assumption of liability' means that the insured has assumed a liability for damages that exceeds the liability it would have under general law. . . . Otherwise, the words 'assumption of liability' are meaningless and are surplusage." *Id*. at 37, citing *American Family*, 268 Wis 2d at 48. The court held that Ewing did not assume liability for damages that exceeded the liability it had under general

law and, therefore, its claim was not precluded by the contractual-liability exclusion. *Ewing*, 420 SW3d at 37. Ewing had a "common law duty to perform its contract with skill and care" as that duty "accompanies every contract . . . ." *Id*. (quotation marks and citation omitted). The court concluded:

> [A] general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, *does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not 'assume liability' for damages arising out of its defective work* so as to trigger the Contractual Liability Exclusion. [*Id*. at 38 (emphasis added).]

Contrary to plaintiff's argument, *Gilbert* does not support the proposition that defendant's claim for CGL coverage was barred by the contractual-liability exclusion. Rather, under the rationale articulated in *Gilbert* and *Ewing*, the exclusion does not apply in this case. By warranting that its goods and services were "free from defects in material and workmanship," and by agreeing to return the university's property to "as was" condition in the event that defendant damaged property during completion of the contract, defendant did not "enlarge its duty to exercise ordinary care in fulfilling its contract . . . ." *Ewing*, 420 SW3d at 38. General principles of law required that defendant's goods be fit and merchantable for their intended use so as not to cause damages to the university's property and for defendant to perform the contract with good and ordinary care. See *Fultz*, 470 Mich at 465 ("[A]ccompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done . . . .") (quotation marks and citation omitted). See also MCL 440.2314 and MCL 440.2315. In this case, like the general contractor in *Ewing*, by agreeing to return the university's property to "as was" condition, defendant

agreed to no more than what was imposed upon it under general law. Therefore, like in *Ewing*, defendant did not " 'assume liability' for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion." *Ewing*, 420 SW3d at 38.

Plaintiff also contends that *Envision Builders, Inc*, *v Citizens Ins Co of America*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2012 (Docket Nos. 303652 and 303668), stands for the proposition that the contractual-liability exclusion applies to contracts wherein the insured assumes its own liability for breaching the contract.

In *Envision Builders*, the Macomb County Road Commission contracted with Envision Builders, Inc., to perform construction work, including the erection of roof trusses. *Id*. at 3. The contract provided that " '[a]ny trusses that are damaged during delivery or erection shall be replaced at no extra cost to the Owner.' " *Id*. at 4 (alteration in original). Envision hired a subcontractor to install the trusses. *Id*. at 3. During installation, the subcontractor failed to install temporary bracing, and before the roof work was complete, a wind storm caused the trusses to collapse, causing damage at the construction site. *Id*. Envision filed a claim for coverage under a standard CGL policy. *Id*. On appeal, this Court held that Envision was not entitled to coverage under the policy because the damages did not arise from an occurrence within the meaning of the policy. *Id*. at 3-4.

After concluding that there was no occurrence under the policy, this Court stated, "Even if there was coverage under the contract," the CGL policy's contractual-liability exclusion precluded coverage. *Id*. at 4. This Court reasoned that under Envision's contract with the road commission, Envision was obligated to replace any trusses that were damaged during completion of the

construction project. *Id*. This Court concluded, "Because Envision was obligated to pay damages for property damage by reason of its assumption of liability in its contract with the [road commission], the damage to the trusses is excluded from coverage." *Id*. This Court rejected the trial court's conclusion that the contractual-liability exclusion was limited to indemnity agreements, explaining:

> [U]nder [the contractual-liability exclusion,] indemnity agreements as well as the assumption of liability in a contract or agreement are excluded . . . . [T]he trial court failed to recognize that the contractual liability exclusion also applied to the assumption of liability in a contract like the one between Envision and the [road commission,] in which Envision assumed liability for damage to the trusses. [*Id*.]

We decline plaintiff's invitation to adopt the analysis set forth in *Envision Builders*. Initially, we note that *Envision Builders*, is an unpublished opinion and is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1); *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2004). Moreover, we do not find *Envision Builders* persuasive. This Court's discussion of the contractual-liability exclusion in that case was limited and came after the Court concluded that the underlying event did not constitute an occurrence. Therefore, the analysis was not necessary to resolve the central issue in the case, and this Court did not need to engage in in-depth analysis of the contractual-liability exclusion. This Court did not provide any analysis of relevant legal authorities interpreting the exclusion and because it was not necessary to do so, this Court did not define the meaning of the words "assumption of liability" in the context of the CGL policy as a whole. Therefore, we do not find *Envision Builders* to be of value to our analysis in this case.

Finally, plaintiff contends that by failing to apply the contractual-liability exclusion, the trial court expanded the scope of the CGL policy to include contract claims when the policy was meant to be limited to potential tort liability. Plaintiff essentially argues that coverage under the policy turns on the form of the injured party's underlying complaint. This argument is not persuasive.

The CGL policy does not limit coverage for property damage arising from defendant's tort liability. Instead, in relevant part, the coverage applies to "property damage," caused by an "occurrence." Defective workmanship that damages a customer's property can constitute an occurrence, within the meaning of a CGL policy. See *Radenbaugh v Farm Bureau Gen Ins Co*, 240 Mich App 134, 145-148; 610 NW2d 272 (2000). Moreover, "the duty to defend and the duty to indemnify are not determined solely on the basis of the terminology used in a plaintiff's pleadings." *United States Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 493; 506 NW2d 527 (1993). "Instead, a court must focus on the cause of the injury to ascertain whether coverage exists." *Id*. at 494. "It is the substance rather than the form of the allegations in the complaint which must be scrutinized." *Id*.

In this case, while the Regents brought a breach-of-contract action, the substance of the claim sounded in negligent performance of the purchase-order contract that could have given rise to either a tort or contract claim. The Regents alleged in part that defendant breached "the prevailing industry standards and practices . . . ." As our Supreme Court has previously explained, "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and . . . *a negligent*

performance constitutes a tort as well as a breach of contract." *Fultz*, 470 Mich at 465 (quotation marks and citation omitted). Accordingly, merely because the Regents brought a breach-of-contract action as opposed to a tort action is not dispositive regarding whether coverage existed under the CGL policy. Rather, the policy's initial grant of coverage turned on whether the property damage arose from an occurrence, and plaintiff abandoned any argument regarding whether an occurrence caused the university's property damage in this case.[7]

IV. CONCLUSION

In the context of a CGL policy, "assumption of liability" means assuming the legal obligations or responsibilities of another. In this case, defendant did not assume the legal obligations or responsibilities of another when it contracted with the university to provide goods and services of a particular quality and to return the university's property to "as was" condition in the event the university's property was damaged during completion of the contract. Therefore, the contractual-liability exclusion in the CGL policy did not preclude coverage in this case, and the trial court reached the correct result, albeit for different reasons. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").[8]

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[7] In its brief on appeal, plaintiff states that after the trial court's ruling, it amended its complaint to "withdraw the other grounds for asserting a lack of coverage."

[8] Given our resolution of this issue, we need not address whether the exceptions to the contractual-liability exclusion applied or whether plaintiff was estopped from asserting the exclusion.

Affirmed. Defendant having prevailed, may tax costs. MCR 7.219(A). We do not retain jurisdiction.

SERVITTO and BECKERING, JJ., concurred with BORRELLO, P.J.

RONNISCH CONSTRUCTION GROUP, INC v LOFTS ON THE NINE, LLC

Docket No. 314195. Submitted July 17, 2014, at Detroit. Decided July 24, 2014, at 9:00 a.m. Leave to appeal sought.

Ronnisch Construction Group, Inc., brought an action in the Oakland Circuit Court against Lofts on the Nine, LLC, and others, alleging breach of contract and unjust enrichment and seeking foreclosure of a lien. The contract between plaintiff and defendants involved the construction of a loft-style condominium building in Ferndale, Michigan, and required that any claim arising out of or related to the contract be submitted to arbitration. Because of a deficiency in payment, plaintiff had filed a claim of lien under the Construction Lien Act, MCL 570.1101 *et seq*., in the Oakland County Register of Deeds. The parties stipulated to stay the proceedings in the circuit court and proceeded with arbitration, at which Lofts on the Nine asserted claims of its own related to faulty or incomplete work. The arbitrator awarded damages to both plaintiff and Lofts on the Nine, resulting in a net award to plaintiff. Lofts on the Nine shortly thereafter paid plaintiff the net award amount plus interest. Plaintiff then moved for confirmation of the arbitration award and sought attorney fees and costs under MCL 570.1118(2) as a prevailing lien claimant. Lofts on the Nine argued that plaintiff's motion should be denied in full because it had already satisfied the arbitration award by paying plaintiff and that no attorney fees were warranted because once plaintiff's breach-of-contract claim had been settled, its lien-foreclosure claim became moot. The court, Shalina Kumar, J., denied plaintiff's motion. With respect to attorney fees, the court held that because Lofts on the Nine had paid plaintiff the amount owed under the arbitration award and neither the court nor the arbitrator had adjudicated plaintiff's lien-foreclosure claim, plaintiff was not a prevailing lien claimant and the court did not have discretion to award plaintiff attorney fees and costs under the Construction Lien Act. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 570.1118(2) provides that in an action to enforce a construction lien through foreclosure, the court must determine the amount, if any, due to each lien claimant and may allow reasonable

attorney fees to a lien claimant who is the prevailing party. The Construction Lien Act is remedial in nature and sets forth a comprehensive scheme aimed at protecting the rights of lien claimants to payment for expenses and the rights of property owners not to pay twice for these expenses. It is to be liberally construed to secure the beneficial results, intents, and purposes of the act. *Bosch v Altman Constr Corp*, 100 Mich App 289 (1980), held that it would violate the spirit of the act to permit a lienee to force a lienor to accept payment of a lien claim just before the commencement of a lien foreclosure trial and thereby avoid a possible assessment for attorney fees. Under that rule, a lienee could drag a lienor through costly pretrial proceedings in the hope of gaining a beneficial settlement without putting the lienee in jeopardy of paying attorney fees. The purpose of MCL 570.1118(2) is to avoid such a situation. As in *Bosch*, plaintiff in this case filed both a breach-of-contract claim and a claim for foreclosure of a lien, the amount that was owed under the contract/lien was established in a proceeding distinct from any actual lien foreclosure proceeding, and defendant paid the amount ultimately determined to be owed under the contract before any lien foreclosure proceeding commenced. Contrary to the circuit court's holding, plaintiff's substantially prevailing on the amounts it sought under the claim of lien made it a prevailing party under the Construction Lien Act, and the court had the discretion under MCL 570.1118(2) to award attorney fees.

2. The fact that no foreclosure ever occurred was not pertinent. MCL 570.1118(2) distinguishes between an action based solely in contract and one based on a construction lien. Those actions are distinct and separate and may be pursued simultaneously. Plaintiff did not seek recovery solely on a breach of contract claim; its complaint included both a contract claim and a foreclosure-of-lien claim. The fact that the amount owed on the contract, and consequently the proper amount of the lien, was determined in a separate proceeding was of no consequence. Nor did the fact that the arbitrator rather than a court or jury established the lien amount require a different conclusion.

3. It was necessary to vacate the portion of the circuit court's order denying plaintiff's request for attorney fees because the court erroneously believed that it lacked discretion to award them. On remand, however, the circuit court would not be required to award attorney fees. Rather, the court was directed to exercise its discretion under MCL 570.1118(2) in deciding whether to award them.

Vacated in part and remanded.

LIENS — CONSTRUCTION LIENS — PREVAILING PARTIES — ATTORNEY FEES — ARBITRATION AWARDS.

MCL 570.1118(2), part of the Construction Lien Act, MCL 570.1101 *et seq*., provides that in an action to enforce a construction lien through foreclosure, the court must determine the amount, if any, due to each lien claimant and may allow reasonable attorney fees to a lien claimant who is the prevailing party; a lien claimant may be a prevailing party even if (1) the lien claimant brought both a breach-of-contract claim and a claim for foreclosure of a lien, (2) the amount owed under the contract/lien was established in a proceeding distinct from any actual lien foreclosure proceeding (such as arbitration or a separate action), and (3) the defendant paid the amount ultimately determined to be owed under the contract before any lien foreclosure proceeding commenced.

Deneweth, Dugan & Parfitt, PC (by *Ronald A. Deneweth* and *Mark D. Sassak*), for Ronnisch Construction Group, Inc.

Seyburn Kahn (by *Joel H. Serlin*, *Ronald L. Cornell, Jr.*, and *Gregory M. Krause*), for Lofts on the Nine, LLC.

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

DONOFRIO, J. Plaintiff appeals as of right[1] the circuit court's order denying its request for attorney fees under the Construction Lien Act, MCL 570.1101 *et seq.* Because the circuit court erroneously concluded that it was precluded from considering awarding attorney fees under MCL 570.1118(2), we vacate the portion of the order dealing with attorney fees and remand the case.

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[1] Plaintiff filed its claim of appeal on January 8, 2013, but our review of the record indicates that the final order in this case was not entered until January 23, 2013. Thus, plaintiff filed its claim of appeal prematurely. In the interest of judicial economy, we treat the claim of appeal as an application for leave to appeal, which we grant. *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

I. BASIC FACTS

This case arises from a construction contract that was entered into between plaintiff and defendant Lofts on the Nine, L.L.C., in May 2007.[2] The contract called for the construction of a loft-style condominium building in Ferndale, Michigan, for the price of approximately $6 million and provided that "[a]ny Claim arising out of or related to the Contract" was to be submitted to arbitration. Plaintiff last provided labor or materials on April 24, 2009. Defendant had paid plaintiff almost $5.5 million, resulting in a deficiency of $626,163.73. As a result, plaintiff filed a claim of lien in the Oakland County Register of Deeds in June 2009.

Because of the deficiency, on November 25, 2009, plaintiff filed a complaint against defendant in circuit court, alleging three counts: breach of contract, foreclosure of lien, and unjust enrichment. Additionally, because the contract required that claims be submitted to arbitration, the parties stipulated to stay the proceedings at circuit court and proceeded with arbitration. At arbitration, defendant asserted claims of its own, alleging that it had incurred between $1.1 million and $1.5 million in damages because of faulty or incomplete work done by plaintiff.

On January 26, 2012, the arbitrator issued his ruling. The arbitrator awarded plaintiff $626,163.72[3] for "[d]irect damages for work performed under the Construction Contract" and $9,895 for "[r]eimbursement for additional Faucet Claim." Thus, the total awarded on

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[2] The other defendants are not implicated in this appeal, so our use of the term "defendant" will refer only to Lofts on the Nine, L.L.C.

[3] It is not apparent why there was a $0.01 discrepancy between this amount and the amount noted on the claim of lien.

plaintiff's claims was $636,058.72. However, the arbitrator specifically declined to address plaintiff's request for attorney fees as a prevailing lien claimant under MCL 570.1118(2) and expressly "reserved for the Circuit Court" that issue. On defendant's counterclaims, the arbitrator awarded defendant $185,238.36, resulting in a net award of $450,820.36 to plaintiff. Defendant shortly thereafter paid the net award amount plus interest to plaintiff.

On February 21, 2012, plaintiff filed a motion to lift the stay and confirm the arbitration award and requested attorney fees and costs under MCL 570.1118(2). Plaintiff asserted that it was a prevailing lien claimant and was entitled to attorney fees and costs totaling $310,125.25.

Defendant filed a response and argued that the motion should be denied in total because, at the outset, it already had satisfied the arbitration award by paying plaintiff shortly after the arbitrator made his ruling. Furthermore, defendant argued that no attorney fees were warranted because once plaintiff's breach-of-contract claim was settled, it rendered plaintiff's lien-foreclosure claim moot. Defendant also argued that plaintiff could not be considered as prevailing in arbitration because defendant had reasonably disputed paying the final 10% of the contract price because of numerous contract breaches on plaintiff's behalf. Defendant noted that the $450,820.36 plaintiff ultimately was awarded was less than 70% of what plaintiff had claimed was owed in the claim of lien.[4]

The circuit court denied plaintiff's motion in an opinion and order issued on April 24, 2012. With respect to the request for attorney fees, the circuit court rea-

[4] While defendant asserted that the amount awarded was less than 70% of the amount listed on the lien, our review shows that the amount awarded was actually 72% of the amount listed on the lien ($450,820.36/$626,163.73 = 0.720).

soned as follows:

> As [defendant] paid [plaintiff] the amount [defendant] owed pursuant to the Arbitration Award on February 16, 2012 and [plaintiff's] lien foreclosure claim was not adjudicated by this Court or the Arbitrator . . . , [plaintiff] cannot be deemed to be a prevailing lien claimant in this matter. Therefore, the Court does not have the discretion to award [plaintiff] its attorney fees and costs under the Michigan Construction Lien Act.

II. STANDARD OF REVIEW

This Court reviews a circuit court's decision on whether to award attorney fees under the Construction Lien Act for an abuse of discretion. *C D Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 425; 834 NW2d 878 (2013). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Likewise, a court 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).

> This Court also reviews issues of statutory interpretation de novo. The primary goal of judicial interpretation of statutes is to discern the intent of the Legislature by examining the plain language of the statute. The starting point in every case involving construction of a statute is the language itself. . . . The court must consider the object of the statute in light of the harm it is designed to remedy and apply a reasonable construction that best accomplishes the purposes of the statute. [*C D Barnes*, 300 Mich App at 407-408 (citations omitted).]

III. ANALYSIS

Generally, attorney fees are not recoverable unless a statute, court rule, or common-law exception to this

general prohibition exists. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004).

Plaintiff sought to recover attorney fees under the Construction Lien Act. Specifically, MCL 570.1118(2) provides, in relevant part:

> In an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities. The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party.

The Construction Lien Act is remedial in nature and "sets forth a comprehensive scheme aimed at 'protecting the rights of lien claimants to payment for expenses and . . . the rights of property owners from paying twice for these expenses.' " *Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor, LLC*, 291 Mich App 403, 406-407; 804 NW2d 898 (2011) (citation omitted). As such, it is to be "liberally construed to secure the beneficial results, intents, and purposes of this act." MCL 570.1302(1).

The circuit court determined that it could not award attorney fees under this statute because plaintiff could not be considered a prevailing lien claimant. The court relied on the belief that the lien-foreclosure claim was not adjudicated by it or the arbitrator and concluded that it did "not have the discretion to award [plaintiff] its attorney fees and costs under the Michigan Construction Lien Act." We disagree.

We conclude that this case is analogous to the situation presented in *Bosch v Altman Constr Corp*, 100 Mich App 289; 298 NW2d 725 (1980), in which this Court affirmed the award of attorney fees under the

mechanics' lien act.[5] In *Bosch*, the plaintiff filed a lien for $8,215.08 for money owed on a construction contract. *Id*. at 292. A year later, the plaintiff filed an action in the circuit court to foreclose on the lien. *Id*. A few months after that, the plaintiff filed another suit against the defendant in the district court—this time alleging breach of contract. *Id*. at 293. Following a jury trial on the breach-of-contract claim, judgment was entered in favor of the plaintiff for $6,013.67. *Id*. After this judgment, the defendant tendered payment, but the plaintiff refused because he thought he was entitled to attorney fees as well. *Id*.

The *Bosch* circuit court then ordered the plaintiff to execute a discharge of the lien upon payment of the district court judgment, and on the morning of the circuit court trial, the defendant tendered a check to the plaintiff in the amount of the district court judgment plus interest. Consequently, the plaintiff signed a satisfaction of judgment and a discharge of the lien. In the circuit court, the plaintiff still asserted that he was owed attorney fees. The defendant argued that, because the lien was satisfied before trial commenced, the circuit court lacked the authority to award any attorney fees. *Id*. This Court disagreed with the defendant and stated:

> We believe it would clearly violate the spirit of the mechanics' lien statute to permit a lienee to force a lienor to accept payment of a lien claim just before the commencement of a lien foreclosure trial and thereby avoid a possible assessment for attorney fees. Under such a rule, a lienee could drag a lienor through costly pretrial proceedings in the hope of gaining a beneficial settlement without putting himself in jeopardy of paying the attorney fees of the lienor.

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[5] The former mechanics' lien act, MCL 570.1 *et seq*., preceded the current Construction Lien Act. *Jeddo Drywall, Inc v Cambridge Inv Group, Inc*, 293 Mich App 446, 451; 810 NW2d 633 (2011).

> Many a materialman, lacking in deep financial resources, would be seriously hampered in pursuing his legal remedies. The purpose of MCL 570.12 [the predecessor of MCL 570.1118(2)] is to avoid such a situation. [*Id.* at 296 (citation omitted).]

The facts in the instant case are remarkably similar to those in *Bosch*. Like the *Bosch* plaintiff, plaintiff here filed both a breach-of-contract claim and a claim for foreclosure of a lien against defendant. And as in *Bosch*, the amount that was owed under the contract/lien was established in a proceeding distinct from any actual lien-foreclosure proceeding. Notably, in both *Bosch* and our case, the amount finally determined to be owed was less than the initial amount claimed on the lien.[6] And finally, the defendants in both cases paid the amount determined to be ultimately owed under the contract before any lien-foreclosure proceedings commenced. As a result, we conclude that the instant case is entitled to the same outcome as *Bosch*. Specifically, contrary to the circuit court's view, plaintiff's substantially prevailing on the amounts it sought under the claim of lien made it a prevailing party under the Construction Lien Act, and the circuit court had the discretion under MCL 570.1118(2) to award attorney fees.

The fact that no foreclosure ever occurred is not pertinent. In addition to *Bosch*, this Court has already rejected this position in *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368; 652 NW2d 474 (2002). In *Solution Source*, the defendants argued that because the plaintiff had attempted to satisfy its judgment through garnishment instead of through foreclosure, the plaintiff could not use MCL 570.1118(2) to

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[6] In *Bosch*, the plaintiff received a judgment for $6,013.67, which was 73.2% of the amount it claimed on the lien. In our case, as noted earlier, plaintiff's arbitration award was 72.0% of the amount claimed on its lien.

recover attorney fees. *Id*. at 377. This Court disagreed and, while noting that the statute is to be construed liberally in order to carry out its intended purpose of protecting lien claimants, determined that MCL 570.1118(2) "was not meant to be read in such a restrictive manner." *Id*. at 378. The Court explained:

> In stating that a lien claimant who is a prevailing party in an action to enforce a construction lien through foreclosure is entitled to attorney fees, we believe that MCL 570.1118(2) is simply distinguishing between an action based *solely* in contract and one based on a construction lien. These actions are distinct and separate and may be pursued simultaneously. [*Id*. (emphasis added).]

In this case, plaintiff did not *solely* seek recovery on a breach of contract claim: plaintiff's complaint listed both a contract claim and a foreclosure-of-lien claim. As explained previously, the fact that the amount owed on the contract, and consequently the proper amount of the lien,[7] was determined in a separate proceeding is of no consequence.

We agree with the *Solution Source* Court, which, while relying on the reasoning in *Bosch*, noted that the entire purpose of the Construction Lien Act could be thwarted if lienors were able to fight valid liens in the hope that the lien claimants would run out of resources to continue their pursuit and then only pay right before

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[7] The amounts owed on a contract and on a lien are inextricably linked. MCL 570.1107(1) provides that "[a] construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract." See also *C D Barnes*, 300 Mich App at 419, 427-428. And MCL 570.1107(6) provides that

> [i]f the real property of an owner or lessee is subject to multiple construction liens, the sum of the construction liens shall not exceed the amount the owner or lessee agreed to pay the person with whom he or she contracted . . . less payments made by or on behalf of the owner or lessee . . . .

trial in an attempt to circumvent the attorney-fee provision of MCL 570.1118(2). *Solution Source*, 252 Mich App at 380-381. Accordingly, not allowing the award of attorney fees just because a lienor paid off a lien before a court actually ruled on a lien claimant's claim of foreclosure would be contrary to the purpose of the act. See *id*. at 381 (stating that "satisfaction of a lien does not bar a lien claimant who is the prevailing party from recovering its appellate and postjudgment attorney fees incurred in connection with enforcement of its lien"); *Bosch*, 100 Mich App at 296.

Defendant's and the circuit court's reliance on *H A Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007), is misplaced. In an order, our Supreme Court ruled in *Decina* that the subcontractor plaintiffs were not able to recover attorney fees under the Construction Lien Act because they did not "prevail on [their] lien foreclosure action." *Id*. at 988. But the facts in *Decina* are easily distinguishable because the subcontractors had liens that *never attached to the property*. *H A Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 424, 431; 670 NW2d 729 (2003), vacated in part 471 Mich 925 (2004).[8] The liens could not attach because the homeowners, who contracted with the general contractor, had paid the entire contract amount. *Decina*, 258 Mich App at 424; see also MCL 570.1107(1) and (6) (indicating that any lien amount cannot exceed the amounts owed on the original construction contract). Accordingly, the Supreme Court aptly concluded that in light of no lien legally being able to attach to the property, it was impossible for the subcontractors to have prevailed on their lien claims, which is a prerequisite for being able to collect attorney fees under MCL 570.1118(2).

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[8] The Supreme Court's order did not provide the background facts, so we refer to this Court's prior opinion.

In the present case, it is undisputed that the landowner, defendant, did not pay the full amount of the contract price to the general contractor, plaintiff. Thus, these facts are distinguishable from those in *Decina*, and there was no question that plaintiff's lien had, indeed, attached to the property. Thus, we conclude that the Supreme Court's decision in *Decina* simply is not applicable.

Therefore, we hold that pursuant to *Bosch* and *Solution Source*, plaintiff was a prevailing lien claimant under MCL 570.1118(2). The fact that the lien amount was established by an arbitrator instead of a court or jury does not compel us to reach a different conclusion. As a result, we vacate the portion of the circuit court's opinion and order denying plaintiff's request for attorney fees because the circuit court erroneously believed that it lacked discretion to award attorney fees. However, contrary to plaintiff's view, the circuit court is not *required* to award attorney fees on remand. Instead, on remand, the circuit court simply is to exercise its discretion in deciding whether to award attorney fees. MCL 570.1118(2) states that "[t]he court *may* allow reasonable attorneys' fees to a lien claimant who is the prevailing party." (Emphasis added.) It is well established that the use of the word "may" connotes permissive, not mandatory, action. *AFSCME v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005).

The portion of the circuit court's order denying plaintiff's request for attorney fees is vacated, and we remand this case for proceedings consistent with this opinion. We do not retain jurisdiction. No costs awarded, as neither party prevailed in full on appeal. MCR 7.219.

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

NICHOLS v HOWMET CORPORATION (ON REMAND)

Docket No. 303783. Submitted May 15, 2014, at Lansing. Decided July 24, 2014, at 9:05 a.m. Leave to appeal sought.

Edwin A. Nichols injured his cervical spine in 1989 and reinjured it in 1993 while working for Howmet Corporation. Pacific Employers Insurance Company/CIGNA was Howmet's workers' compensation insurer at those times. In 1998, a magistrate found that the 1993 injury partially disabled Nichols and that he could return to light-duty work. The magistrate determined that Nichols's average weekly wage on January 28, 1993, was $635. Nichols returned to work at a lower wage than he earned before the 1993 cervical-spine injury. In 1998, Nichols injured his low back while engaged in light-duty work. At that time, Howmet was known as Cordant Technologies and American Manufacturers Mutual Insurance was Cordant's workers' compensation insurer. Following the low-back injury, a magistrate awarded Nichols an open award of wage-loss benefits. The magistrate found that Nichols's average weekly wage at the time of his 1998 low-back injury was $567.70. The Workers' Compensation Appellate Commission ordered that American must pay benefits related to the low-back injury and Pacific must pay benefits related to the cervical-spine injury, including wage-loss benefits. Howmet and Pacific appealed and Nichols cross-appealed. Pacific contended that, if it is liable for wage-loss benefits, it is only obligated to pay the difference above the wage loss attributable to the 1998 low-back injury. The Court of Appeals affirmed, concluding that it could not reach the issue because Pacific did not raise the issue before the commission and the commission did not address it. *Nichols v Howmet Corp*, 302 Mich App 656 (2013). The Michigan Supreme Court, in lieu of granting leave to appeal, determined that Pacific did raise the issue before the commission and that the commission had implicitly rejected Pacific's argument. The Supreme Court vacated that portion of the Court of Appeals' opinion and remanded the matter to the Court of Appeals, ordering the Court to address whether Pacific is only obligated to pay differential wage-loss benefits beyond those that American must pay for the wage loss attributable to the 1998 low-back

injury. *Nichols v Howmet Corp*, 495 Mich 988 (2014). The Michigan Property & Casualty Association was substituted for American on appeal. For the sake of clarity, the Court of Appeals continued to refer to the defendant insurance carriers as Pacific and American in its opinions.

On remand, the Court of Appeals *held*:

1. The Court of Appeals may order the allocation of liability or reimbursement if either is warranted in this case. Although the Legislature has provided rules for allocating liability for wage-loss benefits, this case involves none of the specific circumstances addressed by the rules.

2. MCL 418.301(5)(e), as constituted at the time applicable to this case, provides that a disabled employee who works less than 100 weeks and loses his or her job for whatever reason shall receive compensation based on his or her wage at the original date of injury.

3. Pacific is only liable for the wage-loss benefits above those that American should pay for the 1998 low-back injury.

4. The commission erred when it declined to hold American liable for wage-loss benefits related to the 1998 low-back injury. The commission correctly determined that Pacific was liable to pay benefits based on Nichols's wages at the time of the original injury. The commission should have considered general principles of workers' compensation law to determine whether allocation was appropriate.

5. To hold the first insurer liable for the employee's entire amount of wage-loss benefits under MCL 418.301(5)(e), as constituted at the time applicable to this case, when a second disabling injury causes the employee to lose his or her job defies principles of causation in workers' compensation law for two reasons. First, an employee's entitlement to wage-loss benefits from an employer is based on the employee's reduction in wage-earning capacity. Nichols's 1993 cervical-spine injury did not cause the vast majority of his wage loss. His 1998 low-back injury caused much of his wage loss. Second, an employee's postinjury earnings or ability to earn operates as a credit and mitigates the employer's liability to pay wage-loss benefits. Nichols's earnings after his 1993 cervical-spine injury mitigated Pacific's liability to pay wage-loss benefits. Nichols's 1998 low-back injury caused his involuntary removal from the work-force and ended the mitigation of Pacific's liability to pay wage-loss benefits. American was the workers' compensation insurer for any injury at that time. It is logical that American

should reimburse Pacific when Nichols's 1998 low-back injury ended the mitigation of Pacific's liability to pay wage-loss benefits.

6. Under the circumstances of this case, American is responsible for Nichols's wage loss attributable to his 1998 low-back injury and second disability and Pacific remains liable for wage-loss benefits from the partial disability caused by the 1993 cervical-spine injury. The order of the commission allocating liability solely to Pacific is vacated and the matter is remanded to the commission for the allocation of liability in accordance with this opinion.

Vacated and remanded.

McCroskey Law (by *Michael J. Flynn*) and *John A. Braden* for Edwin A. Nichols.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg*, *Calvin J. Sterk*, and *Thomas R. Tasker*) for Howmet Corporation and Pacific Employers Insurance Company/CIGNA.

Conklin Benham, PC (by *Martin L. Critchell*), for Cordant Technologies and the Michigan Property & Casualty Association (substituted for American Manufacturers Mutual Insurance).

ON REMAND

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

PER CURIAM. This case, which involves a dispute between two insurance carriers of a single employer, Howmet Corporation, returns to this Court on remand from the Michigan Supreme Court. The Michigan Supreme Court has directed this Court to address whether liability for Edwin A. Nichols's wage-loss benefits should be allocated between defendant Pacific Employers Insurance Company/CIGNA (Pacific) and defendant American Manufacturers Mutual Insurance (American). The Michi-

gan Property & Casualty Association was substituted for American on appeal,[1] but for the sake of clarity, we will continue to refer to the carriers as Pacific and American. We conclude that, when a first injury partially disables an employee, that employee resumes working, but then suffers a second disabling injury, the first insurance carrier is not liable for wage-loss benefits attributable to the second disabling injury. Therefore, we vacate the Workers' Compensation Appellate Commission's allocation of liability for wage-loss benefits solely to Pacific and remand to the commission for allocation of liability in accordance with this opinion.

I. FACTS

A. BACKGROUND FACTS

This Court's previous opinion fully states the facts of this case.[2] To briefly summarize, Nichols injured his cervical spine in 1989 and reinjured it in 1993. At those times, Pacific was Howmet's workers' compensation insurer. In 1998, a magistrate found that Nichols's 1993 cervical-spine injury partially disabled him and that he could return to light-duty work. The magistrate found that Nichols's average weekly wage was $635 on January 28, 1993.

Nichols returned to work at a lower wage than he had earned before his 1993 cervical-spine injury. In December 1998, while engaged in light-duty work, Nichols injured his low back. At that time, Howmet was known as Cordant Technologies. American was Howmet's workers' compensation insurer. After Nichols's 1998 low-back injury, a magistrate awarded Nichols an open

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[1] *Nichols v Howmet Corp*, 495 Mich 988 (2014).

[2] *Nichols v Howmet Corp*, 302 Mich App 656; 840 NW2d 388 (2013), vacated in part 495 Mich 988 (2014).

award of wage-loss benefits. The magistrate found that Nichols's average weekly wage at the time of his 1998 low-back injury was $567.70. The commission ordered that "[American] must pay benefits related to plaintiff's low back injury. [Pacific] must pay benefits related to plaintiff's cervical injury including wage loss benefits."

B. PROCEDURAL HISTORY

On appeal, Pacific contended that, if it is liable for wage-loss benefits, it is only obligated to pay the difference above the wage loss attributable to Nichols's 1998 low-back injury. This Court concluded that we could not reach the issue because Pacific did not raise the issue before the commission and the commission did not address it.[3] The Michigan Supreme Court determined, however, that Pacific did raise the issue before the commission and that the commission implicitly rejected Pacific's argument.[4] Accordingly, the Michigan Supreme Court vacated that portion of this Court's opinion and remanded to this Court, ordering this Court to address whether Pacific "is only obligated to pay differential wage loss benefits beyond those defendant American . . . must pay for the plaintiff's wage loss due to that later injury."[5]

II. ALLOCATION OF LIABILITY

A. STANDARD OF REVIEW

This Court reviews de novo questions of law related to a final order of the commission.[6]

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[3] *Nichols*, 302 Mich App at 673.

[4] *Nichols*, 495 Mich at 988.

[5] *Id*.

[6] *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000).

B. THIS COURT'S POWER TO ORDER ALLOCATION OR REIMBURSEMENT

In its supplemental brief, American contends that this Court cannot allocate liability in this instance because specific statutory sections provide for the allocation of wage-loss benefits. We disagree.

Generally, it is true that "[t]hat which is expressed puts an end to or renders ineffective that which is implied."[7] But we conclude that this rule of statutory interpretation does not apply in this case. The Legislature has provided rules for allocating liability for wage-loss benefits.[8] The specific circumstances addressed by the rules are exactly that—*specific*—and this case involves none of those specific circumstances. Rather, this case fits into the more general framework of MCL 418.301(5).[9] In that subsection, the Legislature has set out *when* an employee is entitled to wage-loss benefits but has not set out *who* must pay benefits or *whether* one insurance carrier is entitled to reimbursement from another. The Legislature's decision not to specifically authorize allocation or reimbursement does not prevent this Court from ordering allocation or reimbursement.[10]

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[7] *Sebewaing Indus, Inc v Village of Sebewaing*, 337 Mich 530, 545; 60 NW2d 444 (1953). See *Johnson v Recca*, 492 Mich 169, 176 n 4; 821 NW2d 520 (2012).

[8] See, e.g., MCL 418.372(1)(b) (allocating liability when an employee has two employers); MCL 418.921 (allocating liability of an employer of an employee with a vocational disability).

[9] MCL 418.301 was amended effective December 19, 2011, and the relevant provisions of Subsection (5) are now contained in Subsection (9) of the statute. References in this opinion to Subsection (5) are to Subsection (5) as constituted at the time applicable to this case.

[10] *Stewart v Saginaw Osteopathic Hosp*, 100 Mich App 502, 510; 298 NW2d 911 (1980) (reimbursement). See *Arnold v Gen Motors Corp*, 456 Mich 682, 691-692; 575 NW2d 540 (1998) (allocation).

Stated another way, MCL 418.301(5)(e) does not prohibit allocation or reimbursement because it does not address the issue. Nor has the Legislature prohibited, by negative implication, allocating liability between insurance carriers when a partially disabled employee suffers another injury while performing reasonable employment. We conclude that we may order allocation or reimbursement, if either is warranted.

American also argues that MCL 418.301(5)(e) provides that the employer is liable for wage loss based on the original date of injury and thus establishes that Pacific cannot allocate that liability. We find this argument unpersuasive because MCL 418.301(5)(e) does not allocate liability among insurance carriers,[11] but instead is simply silent on the issue.

C. DIFFERENTIAL WAGE-LOSS BENEFITS

1. LEGAL STANDARDS

An employee is disabled when the employee experiences a disability covered under the workers' compensation act that results in a reduction in wage-earning capacity.[12] But an employee who is only partially disabled retains a partial capacity for work.[13] The employer is not liable for the employee's partial capacity, and his or her "[p]ost-injury earnings, during periods of partial disability, operate as a credit, and in mitigation of, an employer's wage indemnity liability."[14] The Legislature has partially

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[11] *Nichols*, 495 Mich at 988.

[12] *Sington v Chrysler Corp*, 467 Mich 144, 155; 648 NW2d 624 (2002).

[13] See MCL 418.361 as constituted at the time applicable to this case; *Sweatt v Dep't of Corrections*, 468 Mich 172, 181; 661 NW2d 201 (2003).

[14] *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 473; 673 NW2d 95 (2003) (quotation marks and citation omitted).

codified the favored-work doctrine in the act's reasonable employment provision.[15] Reasonable employment is

> work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence.[16]

MCL 418.301(5)(e) provides that a disabled employee who works less than 100 weeks and loses his or her job "for whatever reason . . . shall receive compensation based upon his or her wage at the original date of injury."[17] In *Arnold*, the Michigan Supreme Court held that under such circumstances, "the original employer is to pay benefits computed using wages at the time of the original injury."[18] But the Court declined to address whether the original employer might be entitled to reimbursement when the employee loses his or her job because he or she is disabled while performing reasonable employment.[19]

2. APPLYING THE STANDARDS

Pacific contends that it should only be liable for the wage-loss benefits above those that American should pay for Nichols's 1998 low-back injury. We agree.

Here, Pacific paid wage-loss benefits for Nichols's 1993 cervical-spine injury. That injury partially disabled Nichols, but he remained capable of earning an average weekly wage of $567.70. In December 1998,

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[15] *Derr v Murphy Motor Freight Lines*, 452 Mich 375, 383; 550 NW2d 759 (1996).

[16] MCL 418.301(9) as constituted at the time applicable to this case.

[17] MCL 418.301(5)(e).

[18] *Arnold*, 456 Mich at 691.

[19] *Id*. at 692 n 9.

Nichols suffered a second, distinct injury to his low back while performing reasonable employment. He was then fully disabled.

We conclude that the commission erred when it declined to hold American liable for wage-loss benefits related to Nichols's 1998 low-back injury. The commission correctly determined that Pacific, the first insurance carrier, was liable to pay benefits on the basis of Nichols's wages at the time of the original injury.[20] But the commission should not have declined to order reimbursement for Pacific simply because the Michigan Supreme Court did not address the issue in *Arnold*. Accepting as we must the Michigan Supreme Court's determination that Pacific raised this issue before the commission, we conclude that the commission should have considered general principles of workers' compensation law to determine whether allocation was appropriate.

To hold the first insurer liable for the employee's entire amount of wage-loss benefits under MCL 418.301(5)(e) when a second disabling injury causes the employee to lose his or her job defies principles of causation in workers' compensation law for two reasons. First, an employee's entitlement to wage-loss benefits from an employer (or insurance carrier) is based on his or her reduction in wage-earning capacity.[21] Here, Nichols's 1993 cervical-spine injury did not cause the vast majority of Nichols's wage loss. Rather his 1998 low-back injury caused much of that wage loss. Nichols's ability to continue to earn $567.70 a week while performing reasonable employment after his 1993 cervical-spine injury illustrates this point precisely. To reiterate, Nichols's 1998 low-back injury separately caused much of the reduction in his

[20] See *Arnold*, 456 Mich at 691.

[21] See *Sington*, 467 Mich at 155; *Sweatt*, 468 Mich at 186.

wage-earning capacity.[22]

Second, an employee's postinjury earnings or ability to earn operates as a credit and mitigates the employer's liability to pay wage-loss benefits.[23] Even after Nichols's 1993 cervical-spine injury, he retained some capacity to work.[24] His earnings mitigated Pacific's liability to pay wage-loss benefits.[25] Nichols's 1998 low-back injury caused his involuntary removal from the workforce and ended the mitigation of Pacific's liability to pay wage-loss benefits. At that time, American was the worker's compensation insurer for any injury. It is logical that American should reimburse Pacific when Nichols's 1998 low-back injury ended the mitigation of Pacific's liability to pay wage-loss benefits.

We conclude that, under the circumstances of this case, American, as the insurer at the time of Nichols's 1998 low-back injury, is responsible for Nichols's wage loss attributable to his 1998 low-back injury and second disability but that Pacific, as the insurer at the time of the commission's partial disability determination, should remain liable for wage-loss benefits from the partial disability caused by Nichols's 1993 cervical-spine injury. Our conclusion is consistent with general disability principles concerning causation and with reasonable employment principles.

III. CONCLUSION

We conclude that Pacific is only liable for wage loss related to Nichols's 1993 cervical-spine injury and par-

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[22] *Nichols*, 302 Mich App at 672. See *Sington*, 467 Mich at 155.

[23] *Schmaltz*, 469 Mich at 473; *Perez v Keeler Brass Co*, 461 Mich 602, 611; 608 NW2d 45 (2000); MCL 418.301(5)(a).

[24] See *Sweatt*, 468 Mich at 181.

[25] See *Schmaltz*, 469 Mich at 473.

tial disability, and American is liable for wage loss related to Nichols's 1998 low-back injury. We vacate the commission's allocation of liability solely to Pacific and remand for the commission to allocate liability in accordance with this opinion. We do not retain jurisdiction. No costs under MCR 7.219 because an issue of public interest is involved.

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

In re LAMPART

Docket No. 315333. Submitted May 15, 2014, at Traverse City. Decided July 31, 2014, at 9:00 a.m.

Robby Lampart entered a plea of admission to arson in the Family Division of the Gogebic Circuit Court. The court ordered restitution in the amount of $28,210. The court ordered Lampart's mother, Diana Alexandroni, to make payments toward the restitution obligation in the amount of $250 a month. The court further ordered Alexandroni's employer to withhold $62.50 from her weekly wages to satisfy her restitution obligation. Alexandroni subsequently suffered a heart attack and became unemployed. She averred in an affidavit that her only source of income was $730 a month in Social Security disability insurance (SSDI) benefits. She asserted that any attempt by the court to enforce the restitution order would violate 42 USC 407(a), which provides that Social Security benefits are not subject to execution, levy, attachment, garnishment, or other legal process. The court, Joel L. Massie, J., concluded that it could consider the SSDI benefits as income and enforce the restitution order against Alexandroni after the income was in her possession through the court's contempt powers, but lowered Alexandroni's monthly payment obligation to $150 a month. Alexandroni moved for relief from the judgment. The court denied the motion. Alexandroni appealed by delayed leave granted.

The Court of Appeals *held*:

Under 42 USC 407(a), the right of any person to any future payment under 42 USC 401 through 42 USC 434, including SSDI benefits, shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under those sections shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. The protection afforded to money received as Social Security benefits extends before and after the benefits are received. The fact that benefits have been paid and may be on deposit in a recipient's bank account does not shed them of that protection until they are in some way converted into some other kind of asset. The terms "execution," "levy," "attachment," and "garnishment" refer to formal procedures by which one

person gains a degree of control over property otherwise subject to the control of another and generally involve some form of judicial authorization. The term "other legal process" should be understood to be a process much like the processes of execution, levy, attachment, and garnishment. At a minimum, "other legal process" (1) requires the use of some judicial or quasi-judicial mechanism, (2) by which control over property passes from one person to another, (3) in order to discharge or secure discharge of an existing or anticipated liability. In this case, a judicial mechanism was being used to discharge an existing liability. If the trial court were to use its contempt powers so as to cause Alexandroni to satisfy her restitution obligations from her SSDI benefits, the court's actions would constitute the use of a judicial mechanism to pass control over those benefits from one person to another in violation of 42 USC 407(a), because the process employed would fall within the definition of "other legal process." To the extent the trial court's consideration of Alexandroni's SSDI benefits as income resulted in an order of restitution that could only be satisfied from those benefits, the use of the court's contempt powers to enforce the restitution order would violate 42 USC 407(a). The mere specter of a contempt order, however, does not necessarily constitute other legal process under the statute, and might serve a legitimate purpose by providing a mechanism by which an obligor's assets and income can be determined. Alexandroni would be entitled at any contempt hearing, however, to use 42 USC 407(a) as a personal defense if ordered to pay her payments to someone else, or if her payments were ordered to be taken by legal process. If it were determined on remand that Alexandroni's only asset or source of income is her SSDI benefits, 42 USC 407(a) would prohibit the use of legal process, including by a finding of contempt, from reaching those benefits to satisfy the restitution order. If Alexandroni were found to have income or assets aside from her SSDI benefits, that income and assets could be used to satisfy the restitution award. The restitution order itself remained valid. Because Alexandroni may have assets or receive income from other sources in the future, the trial court did not err by refusing to cancel or modify the restitution obligation.

Trial court determination that using the power of contempt to enforce a restitution order would not constitute "other legal process" under 42 USC 407(a) reversed; trial court decision denying Alexandroni's motion to cancel or modify her restitution obligation affirmed; case remanded for further proceedings.

RONAYNE KRAUSE, J., dissenting, would have affirmed the decision of the trial court. The majority's conclusion eliminates the

distinction between the kinds of legal processes that the United States Supreme Court has explained are contemplated by 42 USC 407(a) and other legal processes of any kind. As a result, trial courts will be hamstrung and SSDI recipients will have free rein to scoff at any law unless the violation thereof necessitates incarceration. The term "other legal process" must be read narrowly to mean a process in the nature of garnishment. Accordingly, not all legal processes or legal means of enforcing compliance with some court-ordered obligation will run afoul of the protections of 42 USC 407(a). The power to punish contempt is inherent in the courts and essential to the exercise of their functions. A holding of civil contempt is not an exercise by the court of direct control over the contemnor's money, but rather a personal sanction imposed on the contemnor. Exercising authority over a person is in the nature of something entirely different from garnishment. The protections of 42 USC 407(a) do not extend to precluding courts from exercising their contempt powers to compel compliance with their orders.

CONTEMPT — FAILURE TO COMPLY WITH RESTITUTION ORDER — SOCIAL SECURITY BENEFITS — OTHER LEGAL PROCESS.

Under 42 USC 407(a), the right of any person to any future payment under 42 USC 401 through 42 USC 434, including Social Security disability insurance benefits, shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under those sections shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law; the protection afforded under 42 USC 407(a) to money received as Social Security benefits extends before and after the benefits are received; the term "other legal process" refers to (1) the use of some judicial or quasi-judicial mechanism, (2) by which control over property passes from one person to another, (3) in order to discharge or secure discharge of an existing or anticipated liability; to the extent that a trial court's consideration of Social Security benefits as income results in an order of restitution that can only be satisfied from those benefits, the use of the court's contempt powers to enforce the restitution order would violate 42 USC 407(a).

A. Dennis Cossi Law Office (by *A. Dennis Cossi*) for Diana Alexandroni.

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J. Appellant Diana Alexandroni, the mother and supervisory parent of juvenile respondent Robby Lampart, appeals by delayed leave granted[1] the trial court's order denying her motion to modify or cancel a restitution obligation. We reject certain portions of the trial court's reasoning, and therefore reverse that order in part, and remand for further proceedings. We also affirm the order in part, because we at this time agree with the trial court's decision not to cancel or modify the restitution obligation, inasmuch as Alexandroni may have assets, or may in the future have sources of income, other than her Social Security disability insurance (SSDI) benefits, from which her restitution obligation can be satisfied.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 2007, Lampart, a juvenile at the time, entered a plea of admission to arson. Restitution was ordered in the total amount of $28,210. The trial court subsequently ordered Alexandroni, on behalf of Lampart, to pay restitution, pursuant to MCL 712A.30(15), in the amount of $250 per month. See also *In re McEvoy*, 267 Mich App 55, 57-58; 704 NW2d 78 (2005). The trial court further ordered Alexandroni's employer to withhold $62.50 from her wages each week in order to satisfy the restitution obligation.

In September 2009, Alexandroni suffered a heart attack. Her resultant heart condition left her unemployed. At the time of her heart attack, the unpaid restitution totaled $22,960. Because Alexandroni was unemployed, the wage garnishment of $62.50 that was originally ordered by the trial court terminated.

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[1] *In re Lampart*, unpublished order of the Court of Appeals, entered November 1, 2013 (Docket No. 315333).

On April 18, 2011, the trial court held a reimbursement hearing regarding Alexandroni's obligation under the restitution order in light of the fact that garnishment of her wages was no longer available. In an affidavit, Alexandroni averred that she was unemployed and that her only source of income was $730 per month in SSDI benefits.[2] Alexandroni argued that under 42 USC 407(a), which provides an antiattachment provision for Social Security benefits, the SSDI benefits were exempt from attachment, garnishment, or other court-imposed obligation. 42 USC 407(a) provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Alexandroni argued that any attempt to enforce the restitution order would constitute "other legal process" under 42 USC 407(a), and that such attempt would be barred by the statute.

In an opinion and order dated April 27, 2011, the trial court concluded that enforcing a restitution order under the juvenile code, MCL 712A.1 *et seq*., did not constitute "execution, levy, attachment, garnishment or other legal process." The trial court concluded that it could consider Alexandroni's SSDI benefits as "income" and enforce the restitution order against Alexandroni personally, through the power of contempt, after the income was in her possession. The trial court reasoned that to hold otherwise would have the effect of making Alexandroni exempt from making payments under the

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[2] Lampart received an additional $545 per month.

restitution order.[3] The court therefore indicated that it would "consider the family's income of $1275" and, noting that "circumstances have changed and the current order may need to be reassessed," that it would schedule a new reimbursement hearing "to determine an equitable payment." That order was not appealed.

On May 12, 2011, the trial court entered an order for reimbursement requiring Alexandroni to pay $150 per month beginning on June 1, 2011, and continuing until the balance was paid in full. That order also was not appealed.

In 2012, Alexandroni filed a motion for relief from judgment under MCR 2.612(C)(1)(d) and (f), seeking to modify or cancel the obligation to make restitution payments. In an opinion and order dated January 25, 2013, the trial court denied that motion, noting that "[t]he crux of this case boils down to whether the Court's action in enforcing a restitution order subject to contempt is 'other legal process' " under 42 USC 407(a). Citing *Washington State Dep't of Social & Health Servs v Guardianship Estate of Keffeler*, 537 US 371; 123 S Ct 1017; 154 L Ed 2d 972 (2003), the trial court applied a narrow definition of the term "other legal process," and observed that it had "not pursued garnishment or attachment like actions in enforcement." Aside from applying a narrow definition of "other legal process," the trial court stated a policy justification for its decision:

> [T]he Court cannot reconcile the arguments with a common sense result. That is, how can a Social Security Disability recipient (as opposed to a recipient of SSI, which is minimal and means tested) be exempt when often their income is greater than the working poor who are subject to

[3] The trial court made a similar finding regarding Lampart's Social Security benefits.

> enforcement. The guidelines promulgated by the collection statute for juvenile courts, MCL 712A.18(6), specifically mention Social Security Disability benefits as income that can be considered. Those guidelines also start collecting SOMETHING on incomes as low as $100 per week. To allow the exemption argued for would mean that no individual with any court obligation, no speeder, no drunk driver, no felon whose only income was Social Security Disability would ever have to pay restitution or court costs or fines of any nature. That result simply does not make sense. [Citation omitted.]

The trial court denied the motion to modify or cancel Alexandroni's restitution obligation. Noting that Alexandroni had suffered a reduction in household income because of the fact that Lampart was then in placement, such that his SSDI benefits were being received by the state, the trial court indicated that it would "again review the monthly payment status at the next review hearing." It is this order that is the subject of this appeal.

On appeal, Alexandroni requests that this Court "amend[]" the trial court's April 27, 2011 order "to provide that the Social Security benefits of [Alexandroni and Lampart] are exempt," and that the "obligation requiring payment of restitution be canceled" because Alexandroni's sole source of income is her SSDI benefits.

II. ANALYSIS

Resolution of this issue involves an issue of statutory interpretation, which we review de novo. *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012).

A. RESTITUTION STATUTE

Under the Michigan Constitution, crime victims are entitled to restitution. Const 1963, art 1, § 24. Under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et*

seq., it is mandatory, not discretionary, for trial courts to order convicted defendants to "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction . . . ." *People v Fawaz*, 299 Mich App 55, 65; 829 NW2d 259 (2012), quoting MCL 780.766(2).[4] The defendant's ability to pay is irrelevant; only the victim's actual losses from the criminal conduct are to be considered. *Id*. at 65; *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001) ("Since June 1, 1997, MCL 780.767; MSA 28.1287(767) no longer includes the defendant's ability to pay among the factors to be considered when determining the amount of restitution.").

Under the juvenile code, MCL 712A.1 *et seq*., restitution also is required, and many of its provisions are substantively identical to those of the CVRA. *In re McEvoy*, 267 Mich App at 63. "The juvenile code, MCL 712A.30, provides for restitution of a loss sustained by a victim of a juvenile offense[.]" *Id*. at 60. An order of restitution under the juvenile code is "a judgment and lien against all property of the individual ordered to pay restitution for the amount specified in the order of restitution." MCL 712A.30(13). If a juvenile is or will be unable to pay a restitution order, "the court may order the parent or parents having supervisory responsibility for the juvenile . . . to pay any portion of the restitution ordered that is outstanding." MCL 712A.30(15). When ordering a parent to pay restitution, however, the trial court "shall take into account the financial resources of the parent and the burden that the payment of restitution will impose, with due regard to any other moral or legal financial obligations that the parent may have."

[4] MCL 780.766 concerns restitution following conviction of a felony. MCL 780.794 is the similarly mandatory statute in the CVRA pertaining to juvenile adjudications.

MCL 712A.30(16). Regarding enforcement, MCL 712A.30(13) provides that "[a]n order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien."

B. 42 USC 407(a)

Alexandroni contends that 42 USC 407(a) prohibits a state court from enforcing the restitution order against her because her sole income is her SSDI benefits. 42 USC 407(a) acts as an antiattachment statute for Social Security benefits, and provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The protection afforded to money received as Social Security benefits extends before and after the benefits are received. *Philpott v Essex Co Welfare Bd*, 409 US 413, 415-417; 93 S Ct 590; 34 L Ed 2d 608 (1973). See also *State Treasurer v Abbott*, 468 Mich 143, 155; 660 NW2d 714 (2003); *Whitwood, Inc v South Blvd Prop Mgt Co*, 265 Mich App 651, 654; 701 NW2d 747 (2005). The fact that the payments have been made does not make them lose their character as Social Security benefits or make them subject to legal process. To the contrary, the protections of 42 USC 407(a) apply, by their terms, to "moneys *paid* or payable" (emphasis added); the fact that benefits have been paid and may be on deposit in a recipient's bank account does not shed them of that protection until they are in some way

converted into some other kind of asset. *Philpott*, 409 US at 415-417. Thus, even after a recipient receives SSDI benefits and deposits them into a bank account, the SSDI benefits are still protected by 42 USC 407(a). *Whitwood*, 265 Mich App at 654. When a state court order attaches to Social Security benefits in contravention of 42 USC 407(a), the attachment amounts to a conflict with federal law, and such a conflict is one "that the State cannot win." *Bennett v Arkansas*, 485 US 395, 397; 108 S Ct 1204; 99 L Ed 2d 455 (1988). Other jurisdictions have held that a state court[5] cannot order restitution to be paid from a defendant's Social Security benefits. See, e.g., *State v Eaton*, 323 Mont 287, 294; 2004 Mont 283; 99 P3d 661 (2004).[6]

C. OTHER LEGAL PROCESS

In the case at bar, it appears undisputed that, at least as of the trial court's April 27, 2011 order, Alexandroni's only income came from her SSDI benefits. It is also undisputed that Alexandroni's SSDI benefits were not

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[5] 18 USC 3613(a) provides:

> The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined[.]

This provision also applies to the United States when it seeks enforcement of restitution orders. 18 USC 3613(f). Accordingly, although state courts may not enforce restitution orders or fines against an individual's Social Security benefits, "[*t*]*he United States may enforce*" fines or restitution orders against an individual's Social Security benefits. 18 USC 3613(a) and (f) (emphasis added).

[6] When interpreting federal statutes, we may look to decisions from other jurisdictions for guidance. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

subject to direct execution, levy, attachment, or garnishment, nor did the trial court employ any of those mechanisms. Rather, the issue is whether the trial court's decision to consider Alexandroni's SSDI benefits, after they were received, as income reachable through enforcement of the restitution order under the court's powers of contempt, amounted to "other legal process" and thus violated 42 USC 407(a).

In *Keffeler*, 537 US at 382-386, the United States Supreme Court had occasion to interpret the phrase "other legal process" as it is used in 42 USC 407(a). Before doing so, the Court examined the terms " 'execution, levy, attachment, [and] garnishment,' " and explained that "[t]hese legal terms of art refer to formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involve some form of judicial authorization." *Id*. at 383. Noting that the term "other legal process" followed the use of those more specific terms, the Court concluded that 42 USC 407(a) uses the term "other legal process" restrictively. *Id*. at 384. The Court employed the interpretive canons of *noscitur a sociis* and *ejusdem generis*, under which when "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id*. at 384 (citations and quotation marks omitted). Thus, the Court concluded, the term "other legal process"

> should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure

> discharge of an allegedly existing or anticipated liability. [*Id*. at 385.]

The Court explained that its definition was consistent with definitions of "other legal process" that were contained in the Social Security Administrator's Program Operations Manual System (POMS). *Id*. One such definition explained "other legal process" as " 'the means by which a court (or agency or official authorized by law) compels compliance with its demand; generally, it is a court order.' " *Id*., quoting POMS GN 02410.001 (2002). Elsewhere, the POMS defined "other legal process" as " 'any writ, order, summons or other similar process *in the nature of garnishment*.' " *Id*.[7]

In applying *Keffeler*, it is important to note the particular circumstances that were presented in that case. Specifically, Washington's Department of Social

[7] The Supreme Court in *Keffeler* made clear that its definition of "other legal process" was a product of *statutory* interpretation, which was merely "confirmed" by the "legal guidance" in the POMS. *Keffeler*, 537 US at 385. Obviously, revisions over time to the POMS do not alter the statute, or the Supreme Court's interpretation of it in *Keffeler*. We note, in any event, that the current version of POMS GN 02410.200 (2006) (entitled "Garnishment"), which relates to a specific statutory exception for enforcing child support or alimony obligations, defines "legal process" for that purpose as "any writ, order, summons, or notice to withhold . . . or other similar process in the **nature of garnishment**." Also, POMS GN 02410.001 (2014) (entitled "Assignment of Benefits") applies generally to the statute's sections that "prohibit the transfer of control over money to someone other than the beneficiary, recipient, or the representative payee." Whereas that provision formerly defined "legal process" as quoted in *Keffeler*, 537 US at 385, the current version reflects no definition, but instead states generally that, apart from certain exceptions that are not applicable here, 42 USC 407(a) "protect[s] payments as long as we can identify them as [Social Security benefits]." *Id*. The provision cites as an example "a situation in which [Social Security benefits] are the only direct deposit payments in the account," and notes that a "beneficiary or recipient can use [42 USC 407(a)] as a personal defense if ordered to pay his or her payments to someone else, or if his or her payments are ordered to be taken by legal process." *Id*.

and Health Services provided foster care for children who were in need of such care, some of whom were recipients of Social Security benefits. The department was the "representative payee" for those children and, as such, the department directly received the children's Social Security benefits. The suit alleged that the department's use of those benefits to reimburse itself for the costs of foster care violated 42 USC § 407(a).

After defining the term "other legal process," the Supreme Court rejected the notion that the department's "efforts to become [the children's] representative payee and its use of [their] benefits in that capacity" fit within the definition. *Id*. at 386. Rather, "the department's reimbursement scheme operates on funds already in the department's possession and control, held on terms that allow the reimbursement." *Id*.

It is significant that the alleged "legal process" in *Keffeler* involved no resort whatsoever to the judicial process. For that reason, the Court contrasted the situation before it with one where there was "utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." *Id*. at 385. As the Supreme Court ruled, "other legal process" (1) requires the use of some judicial or quasi-judicial mechanism, (2) by which control over property passes from one person to another, (3) in order to discharge or secure discharge of an existing or anticipated liability.

Unlike in *Keffeler*, we find that a judicial mechanism is being used here. Indisputably, resort is being made to the courts to secure payment. We further find that the judicial mechanism is being used to secure the discharge of an existing liability, i.e., restitution. The

question, therefore, is whether it is being used to pass control over property from one person to another, in a manner that runs afoul of 42 USC 407(a).

We find that the reasoning of the trial court, if effectuated through its contempt powers so as to cause Alexandroni to satisfy her restitution obligations from her SSDI benefits, would be the use of a judicial mechanism to pass control over those benefits from one person to another. Thus, it would constitute "other legal process" that is prohibited under 42 USC 407(a). The process by which the trial court would enforce the restitution order would be the employment of its civil-contempt powers. Civil contempt is defined as "[t]he failure to obey a court order that was issued for another party's benefit." *Black's Law Dictionary* (9th ed), p 360. "A civil-contempt proceeding is coercive or remedial in nature." *Id*.

When used in this manner, the court's use of its civil-contempt powers to enforce a restitution order would act as a process much like the processes of execution, levy, attachment, and garnishment, because in that context, the process would involve a formal procedure by which the restitution victim, through the trial court, would gain control over Alexandroni's SSDI benefits. See *Keffeler*, 537 US at 383-385. Indeed, *Keffeler* noted that the POMS defined "legal process" as it was used in 42 USC 407(a) as "the means by which a court . . . compels compliance with its demand; generally, it is a court order." *Id*. at 385 (citation and quotation marks omitted).[8] In this case, the court's

[8] As noted, the current version of the POMS does not expressly use this definition, but it continues to describe 42 USC 407(a) as generally providing protection to Social Security benefits, and as allowing the recipient to use 42 USC 407(a) "as a personal defense if ordered to pay his or her payments to someone else, or if his or her payments are ordered to be taken by legal process." POMS GN 02410.001 (2014).

demand was the restitution order, and the court would compel compliance with that demand through its civil-contempt powers. Consequently, if the trial court were in fact to use its contempt powers in a manner as would compel Alexandroni to satisfy her restitution obligations using her SSDI benefits, we would find that the process employed falls within the definition of "other legal process" as the term is used in 42 USC 407(a).

In this case, it appears undisputed that Alexandroni's only source of income, at least as of the April 27, 2011 trial court order, was her SSDI benefits. The trial court clearly was aware of this, and nonetheless decided to consider her SSDI benefits as income for purposes of fashioning a restitution order subject to contempt. While we find no error merely in the trial court's consideration of Alexandroni's SSDI benefits as income, because 42 USC 407(a) does not directly proscribe such consideration, we hold that, to the extent the trial court's consideration of those benefits results in an order of restitution that could only be satisfied from those benefits, the use of the court's contempt powers then would violate 42 USC 407(a). As noted, the protection afforded to SSDI benefits extends after those benefits are received. *Philpott*, 409 US at 415-417; *State Treasurer*, 468 Mich at 155; *Whitwood*, 265 Mich App at 654. See also *United States v Smith*, 47 F3d 681, 684 (CA 4, 1995) (holding, under a federal statute employing similar language to 42 USC 407(a), that a court could not order restitution against benefits after they were received because "[t]he government should not be allowed to do indirectly what it cannot do directly[,]" meaning that it could not require the defendant "to turn over his benefits as they are paid to him"). As we explained in *Whitwood*, 265 Mich App at 654:

> Plainly, pursuant to 42 USC 407(a), money received as social security benefits is not subject to execution or garnishment even after received and deposited by the recipient. Therefore, the trial court clearly erred when it found that the protection against garnishment ended when the social security proceeds were deposited into defendants' account.

It appears to us that the trial court carefully avoided holding Alexandroni in contempt, yet came perilously close to using the threat of its contempt powers to compel Alexandroni to satisfy her restitution obligations from her SSDI benefits, which would violate 42 USC 407(a). On remand, the trial court should be careful to avoid any order that in fact would compel Alexandroni to satisfy her restitution obligation from the proceeds of her SSDI benefits. That said, the current record does not reflect whether Alexandroni possesses any assets, other than as generated by her SSDI benefit income, from which her restitution might be satisfied. Nor does the record reflect whether Alexandroni's income remains solely her SSDI benefits, as her income and income sources conceivably could change over time. Those are matters that the trial court should explore on remand.

We note that it could be argued that, in imposing a civil contempt, a court does not touch a contemnor's money directly, but rather imposes a personal sanction on the contemnor that will be lifted if the contemnor chooses to comply. In other words, civil contempt imposes a *choice*; perhaps a choice in which neither alternative is appealing, but nonetheless a choice that the contemnor is in fact free to make. However, we find this argument not to be compelling when the circumstances are such that a contempt finding necessarily requires a contemnor to satisfy the legal obligation that is the subject of the contempt order by invading a monetary source that the court is not

allowed to reach directly. In those circumstances, the contempt order would be the functional equivalent of an order directly reaching the funds, such that labeling the order as one of "contempt" rather than "garnishment" would exalt form over substance and ignore the reality of the circumstances. See *In re Bradley Estate*, 494 Mich 367, 387-388; 835 NW2d 545 (2013) (holding that the substance of an action labeled a civil-contempt indemnification action was a claim for tort liability despite its label).

Given that the trial court in this case has not yet held Alexandroni in contempt, has not made a determination with regard to whether she has any other assets (apart from any that are proceeds of her SSDI benefits) from which restitution may be satisfied, and has not made any recent determination of her income sources to ascertain whether any exist apart from her SSDI benefits, we decline to determine whether circumstances exist that might warrant a contempt order at this time. However, on remand, the trial court should follow our direction in this opinion, to appropriately (and perhaps periodically) ascertain Alexandroni's assets and sources of income, perhaps through a contempt hearing,[9] and to enter further orders as appropriate, while avoiding any directive, either explicit or otherwise, that will in fact cause Alexandroni to have to invade her SSDI benefits (or the proceeds thereof) to satisfy her continuing restitution obligation.

Finally, we note the differing approaches of other state and federal circuit courts regarding whether the mere threat of contempt (as arguably already exists in

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[9] A contempt hearing can be a proper mechanism for ascertaining a person's assets or income for the purpose of satisfying a legal obligation. See, e.g., *Causley v LaFreniere*, 78 Mich App 250, 251; 259 NW2d 445 (1977); *Moncada v Moncada*, 81 Mich App 26, 27-28; 264 NW2d 104 (1978).

this case) itself amounts to "other legal process" under 42 USC 407(a). For example, in *Chambliss v Buckner*, 804 F Supp 2d 1240, 1255-1256 (MD Ala, 2011), the United States District Court for the Middle District of Alabama determined that the plaintiff, Dexter A. Chambliss, from whom the Alabama Department of Human Resources sought child support payments, could not cite 42 USC 407(a) as a means to avoid a contempt hearing. In that case, Chambliss sought to avoid the hearing altogether and merely alleged, without providing support, that Social Security benefits were his only source of income. *Id*. Similarly, in *Danielson v Evans*, 201 Ariz 401, 412-413; 36 P3d 749 (Ariz App, 2001), the court held that a contempt order requiring the defendant, Donald Evans, to pay attorney fees to the plaintiff, Susan Danielson, did not violate 42 USC 407(a). Significantly, however, the court did not expressly require Evans to satisfy his obligations with his SSDI benefits. *Id*.

By contrast, the court in *Becker Co Human Servs v Peppel*, 493 NW2d 573, 575 (Minn App, 1992), concluded that "an implied or express threat of formal legal sanction constitutes a 'legal process' within the meaning of section 407(a)." The trial court in that case had issued a child support order based on "the only source of income available to [the mother]: her [Supplemental Security Income (SSI)] benefits of $407 per month,"[10] and its order expressly stated that the mother "would be held in contempt if she failed to comply." *Id*. at 574. Consequently, the appellate court held that the trial court's "threat to hold [the mother] in contempt cer-

[10] Although 42 USC 407(a) does not itself distinguish between SSDI benefits and SSI benefits, the *Becker* Court stressed that SSI benefits (unlike SSDI benefits, as the trial court in this case correctly noted) are intended to protect indigent persons. *Becker*, 493 NW2d at 574.

tainly qualifies as a legal process under section 407(a)." *Id*. at 575. See also *Fetterusso v New York*, 898 F2d 322, 328 (CA 2, 1990) (stating in dicta that "Congress intended the words 'or other legal process' to embrace not only the use of formal legal machinery but also resort to express or implied threats and sanctions"); *First Nat'l Bank & Trust Co of Ada v Arles*, 816 P2d 537, 541; 1991 Okla 78 (Okla, 1991) ("The contempt action was the procedure by which the court was attempting, through legal channels, to obtain jurisdiction over [the defendant] and force repayment of a . . . debt. As such, it is a 'legal process' forbidden by Section 407(a).").

Although we find that a contempt order that would cause Alexandroni to satisfy her restitution obligations from her SSDI benefits would be the use of "other legal process" in contravention of 42 USC 407(a), we decline to conclude that the mere specter of a contempt hearing necessarily constitutes such "other legal process." That is, although we recognize that there is some level of threat and coercion inherent in a prospective contempt proceeding itself, the specter of contempt also can serve the legitimate purpose of providing a mechanism by which an obligor's assets and income can be determined. See *Causley v LaFreniere*, 78 Mich App 250, 251; 259 NW2d 445 (1977); *Moncada v Moncada*, 81 Mich App 26, 27-28; 264 NW2d 104 (1978). As noted in the current version of the POMS, Alexandroni is entitled at any contempt hearing to use 42 USC 407(a) "as a personal defense if ordered to pay . . . her payments to someone else, or if . . . her payments are ordered to be taken by legal process." POMS GN 02410.001 (2014).

We also note that the trial court found, as a matter of policy, that SSDI benefits should be used to satisfy restitution or court-imposed fines because SSDI ben-

efits are not awarded on the basis of need. The trial court determined that SSDI benefits should not be exempt from satisfying costs or fines because, unlike a recipient of SSI benefits, an SSDI recipient's benefits are not based on need, and may in certain instances be "greater than the working poor who are subject to enforcement." The trial court correctly recognized that SSDI benefits, unlike SSI benefits, are not based on need. *Mathews v Eldridge*, 424 US 319, 340-341; 96 S Ct 893; 47 L Ed 2d 18 (1976). However, the trial court's reasoning is flawed. 42 USC 407(a) represents a clear choice by Congress to exempt *all* Social Security benefits, whether from SSDI or SSI, from any legal process, save for a few enumerated exceptions not at issue in this case. See *Bennett*, 485 US at 398 (explaining that 42 USC 407(a) demonstrates Congress's "clear intent . . . that Social Security benefits not be attachable"); *Philpott*, 409 US at 417 (explaining that 42 USC 407(a) acts as a "broad bar against the use of any legal process to reach *all social security benefits*") (emphasis added). Accordingly, regardless of whether Alexandroni's SSDI benefits were based on need, those benefits could not be used to satisfy court-ordered restitution.

Although the trial court questioned the "sense" of that result, policymaking, whether sensible or not, is the province of the legislative branch of government, not the judicial. See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 581; 702 NW2d 539 (2005). Consequently, the "sense" of the policy, from a policymaking perspective, is not ours to judge.

If it were determined that Alexandroni's only asset, or source of income, is and remains from SSDI benefits, 42 USC 407(a) prohibits the use of legal process—including by a finding of contempt—from reaching those benefits to satisfy the restitution order. See

Philpott, 409 US at 417. If, however, Alexandroni is found to have income aside from her SSDI benefits, or other assets that are derived from other sources, that income or those assets could be used to satisfy the restitution award. The restitution order itself remains valid. Indeed, Alexandroni's receipt of SSDI benefits does not immunize her from the restitution order; rather, it merely prohibits the trial court from using legal process to compel satisfaction of the restitution order from those benefits. Because it is possible that Alexandroni may have assets or may receive income from other sources in the future, we affirm the trial court's refusal to cancel or modify Alexandroni's restitution obligation.

The trial court's contempt powers similarly remain a valid tool in enforcing the restitution order, and our decision today should not be read otherwise. Again, a contempt hearing can be an appropriate vehicle for determining income and assets from which the restitution order may properly be enforced. See *Causley*, 78 Mich App at 251; *Moncada*, 81 Mich App at 27-28. However, the trial court may not compel Alexandroni to satisfy her restitution obligation out of her SSDI benefits, by a contempt finding or other legal process, because Alexandroni is entitled to the protections of 42 USC 407(a).

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

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

RONAYNE KRAUSE, J. (*dissenting*) I respectfully dissent and would affirm the trial court. I believe that the majority's conclusion eliminates the distinction be-

tween the kinds of legal processes that the United States Supreme Court has explained are contemplated by 42 USC 407(a) and other legal processes of any kind, and as a result trial courts will be hamstrung and Social Security Disability Insurance (SSDI) recipients will have essentially free rein to scoff at any law unless the violation thereof necessitates incarceration. I do not believe the plain language of the statute reflects an intent by Congress to achieve such an absurd result, so I would not create it.

The majority's recitation of the facts and the relevant statutes and caselaw requires no repetition. Where I part ways is with the majority's conclusion that 42 USC 407(a) reflects a choice to exempt SSDI benefits from *any* legal process not explicitly enumerated as an exception. The United States Supreme Court emphatically explained that the term "other legal process" in that statute would be a way in which a court compels compliance with some requirement, but also that any such process would be " '*in the nature of garnishment*,' " *Washington State Dep't of Social & Health Servs v Keffeler*, 537 US 371, 385; 123 S Ct 1017; 154 L Ed 2d 972 (2003), quoting the Social Security Administration's Program Operations Manual System (POMS) GN 02410.200 (2002). The United States Supreme Court further opined that "other legal process" should be defined narrowly rather than "in abstract breadth." *Keffeler*, 537 US at 385.

As the majority correctly notes, under 42 USC 407(a), "moneys *paid*" (emphasis added) are also not subject to "execution, levy, attachment, garnishment, or other legal process"; the fact that such paid benefits are on deposit in a recipient's bank account does not shed them of that protection until they are in some way converted into some other kind of asset. *Philpott v*

Essex Co Welfare Bd, 409 US 413, 415-417; 93 S Ct 590; 34 L Ed 2d 608 (1973). The protection against legal processes under 42 USC 407(a) therefore continues after the benefits are paid. *In re Vary Estate*, 401 Mich 340, 346-348; 258 NW2d 11 (1977).

Nevertheless, the United States Supreme Court observed that the terms " 'execution, levy, attachment, [and] garnishment' "are "legal terms of art" referring to "formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involve some form of judicial authorization." *Keffeler*, 537 US at 383. It concluded that "other legal process" should therefore refer to the same kinds of processes. *Id*. at 384-385. Indeed, the Court emphasized that simply because some manner of legal process is involved does *not* mean that "other legal process" *within the meaning of 42 USC 407(a)* is at issue. *Id*. at 384. In view of this "restrictive understanding of 'other legal process,' " *id*. at 386, it is clear that not all legal processes or legal means of enforcing compliance with some court-ordered obligation will run afoul of the protections of 42 USC 407(a). The consistent theme is that courts may not directly assume control over the money that comes into a person's possession and control through SSDI payments, whether before or after those moneys are transferred.

The majority accurately notes that the factual scenario in *Keffeler* did not entail a party resorting to judicial process. That does not, in my opinion, invalidate any of the Court's reasoning. Beyond that, the majority apparently makes an end run around the Court's straightforward construction by concluding that *any* process that would have the ultimate result of conveying any portion of a recipient's SSDI proceeds

into the hands of a court must be in the nature of garnishment. I simply cannot agree with that conclusion. The exercise of a trial court's contempt power is not in the same nature as the "other legal process" contemplated by 42 USC 407(a).

The power to punish contempt has always been considered inherent in courts and "essential to the exercise of their functions" or "the laws would be partially and imperfectly administered." See *United States v Sheldon*, Case No. 1315 (Mich Terr Sup Ct, 1829) (opinion by CHIPMAN, J.), in 5 Blume, Transactions of the Supreme Court of the Territory of Michigan 1825-1836, pp 337, 344-345. This power was regarded as being "inherent in, and as ancient as, courts themselves," and, critically, in the nature of "attachment *of the offender* . . . ." *In re Chadwick*, 109 Mich 588, 596-597; 67 NW 1071 (1896) (citation and quotation marks omitted) (emphasis added). A holding of contempt calculated to induce compliance with a court order—the situation at bar—is civil contempt, as distinguished from criminal contempt, which would be intended to punish some manner of misconduct. *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 160-161; 192 NW2d 347 (1971). As the majority notes, a holding of civil contempt is not an exercise by the court of direct control over the contemnor's money, but rather is a personal sanction imposed on the contemnor him- or herself that the contemnor holds the power to lift upon payment.

Unlike the majority, however, I do not believe this distinction to be semantic pettifoggery without real-world relevance. The legal processes listed in the statute and discussed by the United States Supreme Court involved processes that either bypassed the SSDI recipient entirely or otherwise assumed control over the

money itself. Exercising authority over a person is in the nature of something entirely different from garnishment. Under a narrow reading of what 42 USC 407(a) means by "other legal process," as the United States Supreme Court has held is appropriate, the protections of that statute do not extend to precluding courts from exercising their contempt powers to compel compliance with their orders.

That being said, I wish to emphasize that the trial court apparently determined that Alexandroni is indigent and consequently waived or suspended her payment of fees pursuant to MCR 2.002(D). Although ability to pay is not a consideration for determining the obligation to pay restitution, present income and resources *are* considerations under the guidelines for making actual payments thereon. See MCL 712A.18(6); *In re Juvenile Commitment Costs*, 240 Mich App 420, 441-443; 613 NW2d 348 (2000). Incarceration for civil contempt is limited to the extent the contemnor is actually able to comply with the order or otherwise purge the contempt. *Shillitani v United States*, 384 US 364, 371; 86 S Ct 1531; 16 L Ed 2d 622 (1966); *People v Johns*, 384 Mich 325, 333; 183 NW2d 216 (1971) (stating that the opportunity to punish someone held in civil contempt for refusing to answer the questions of a grand jury expires with the grand jury). Although *Shillitani* and *Johns* discussed civil contempt holdings used to enforce compliance with grand juries, the same principle applies here: if a person subject to a financial obligation to the court is unable to make payments because of destitution, the court can no more subject the person to contempt than require payments. If that individual claims destitution, he or she is entitled to a hearing and determination thereof, and payments cannot be required unless or until the person is actually able to pay them. Put another way, the purpose and

function of civil contempt is to deter *refusals* to comply with orders, not necessarily mere failures to comply. *In re Moroun*, 295 Mich App 312, 339-341; 814 NW2d 319 (2012) (opinion by K. F. KELLY, J.). SSDI recipients are in no greater danger of debtors' prison than any other potential contemnor, which is to say, they are not in any such danger.

Consequently, the trial court may not compel payments in the instant case at this time by using its contempt power, because insofar as I am aware, Alexandroni would not be able to comply. An inability to survive on the funds remaining after payment is, in my opinion, functionally identical to a lack of the funds altogether under any legal system that purports to have any concern for justice. However, the mere fact that her sole source of income is SSDI payments does not *per se* immunize her from the theoretical possibility of being ordered to make payments on pain of contempt. To hold otherwise would be essentially to neuter an inherent function of the courts and immunize recipients of SSDI benefits—even if they have funds to make payments—from having to pay traffic tickets, parking tickets, fines for misdemeanors, and indeed a great many other fees and financial obligations. Payment of SSDI benefits is not based on indigency. And it is incompatible with justice to prevent the courts from being able to require persons who can comply with court orders from doing so. Victims in any case, and perhaps here in this case, may be on SSDI. I simply refuse to hold that victims should pay for crimes committed against them if a defendant has the ability to pay. The law does not require that result, and I will not impose that result on the victims of crime in this state.

I would therefore affirm.

In re CASEY ESTATE

Docket Nos. 314209 and 314728. Submitted May 7, 2014, at Detroit. Decided July 31, 2014, at 9:05 a.m.

Everett and Mary Alice Casey had two children during their marriage, Kathryn and Kirk Casey. Mary Alice predeceased Everett. In 1997 Everett executed a will and trust, naming in his trust Kathryn and Kirk as his only children. After Everett died in 2012, Kathryn filed a petition for probate in the Oakland County Probate Court and sought to admit Everett's 1997 will to probate. Gerald Rossi was named special personal representative of the estate. Renee and Bruce Keene filed demands for notice and objections to the petition for probate, claiming that Everett was their biological father. Renee and Bruce alleged that Everett and their mother, Corinne Keene, had had an extramarital affair while Corinne was married to Robert Keene, the man listed as Renee and Bruce's father on their birth certificates. Robert had died in 1966 and Renee and Bruce had not sought to establish Everett's paternity until the present probate action. The probate court, Linda S. Hallmark, J., granted Kathryn's motions for summary disposition on the grounds that Renee and Bruce were not interested persons, the 1997 will was valid and unrevoked, and there was no genuine issue of material fact that Everett did not gift the contents of a certain safe to Bruce. The court admitted the will to probate and ordered an evidentiary hearing to determine the amount of money that had been in Everett's safe at the time of his death. Renee and Bruce each appealed. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The Estates and Protected Individuals Code, MCL 700.1101 *et seq*., governs the question presented in this case.

2. For purposes of intestate succession, a child is to take from his or her natural parent regardless of their marital status. MCL 700.2114(1).

3. The parents of children born during a marriage are presumed to be the natural parents of those children. MCL 700.2114(1)(a).

4. If a child is born or conceived during a marriage but is not the issue of that marriage, the court can determine whether the alleged father is the child's natural one under the procedures of the Paternity Act, MCL 722.711 *et seq*. MCL 700.2114(1)(b)(*v*).

5. The Legislature's use of "if" in the first and second clauses of MCL 700.2114(1)(b) sets forth the alternative conditions under which the rest of that subsection is premised. Absent satisfaction of one of these conditions, the remainder of subsection (1)(b) does not come into play.

6. MCL 700.2114(5) provides the exclusive means by which the presumption of natural parenthood set forth in MCL 700.2114(1)(a) may be overcome. It specifies that the only person holding the right to challenge the presumption is the presumptive natural parent. The right to attempt to overcome the presumption ends when the presumed parent dies. Therefore, the exclusive right to disprove the presumption that Renee and Bruce are Robert's natural children has terminated.

7. Three elements must be satisfied for a gift to be valid. First, the donor must possess the intent to transfer title gratuitously to the donee. Second, there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession. Third, the donee must accept the gift. Delivery must be unconditional and must place the property within the dominion and control of the donee. An inter vivos gift must be fully consummated during the donor's lifetime and must invest ownership in the donee beyond the power of recall by the donor. Before his death, Everett not only retained control over the safe, but also retained the power of recall. There was no delivery of a gift to Bruce.

Affirmed.

SHAPIRO, J., concurring, concurred with the result and the reasoning of the majority but disagreed with the majority to the extent that the majority's decision may be read as turning upon a particular definition contained within a particular edition of a particular dictionary. In the absence of a legislative designation of a particular dictionary's use, it cannot be said that one dictionary is the best, let alone conclusive, determiner of legislative intent.

Prince Law Firm (by *Shaheen I. Imami* and *Amber N. Atkins*) for Kathryn Casey.

Smith & Mabley, PLC (by *John D. Mabley*), for Kirk Casey.

LoPrete & Lyneis, PC (by *Mary M. Lyneis* and *Jonathan R. Nahhat*), for Gerald Rossi, special personal representative of the estate of Everett R. Casey, deceased.

Hubbell DuVall PLLC (by *Clinton J. Hubbell* and *Dylan J. DuVall*) for Renee Keene.

Bruce Keene *in propria persona*.

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

MURRAY, P.J. This is an inheritance dispute between the natural children of Everett and Mary Alice Casey, Kathryn and Kirk Casey, and Renee and Bruce Keene, who claim to be the offspring of Everett and their mother's (Corinne Keene) adulterous affair in the 1960s. Everett and Corinne were both married during their alleged affair. In these consolidated appeals, appellants, Renee and Bruce Keene, appeal as of right the order granting summary disposition in favor of appellee Kathryn Casey. Kathryn Casey filed three separate motions for summary disposition below and argued: (1) neither Renee nor Bruce were interested persons or heirs of the decedent, Everett; (2) the decedent's 1997 will is valid and unrevoked; and (3) the decedent did not gift the contents of the safe located at his company's office to Bruce before his death. Renee and Bruce challenge the probate court's determination that they are not interested persons or heirs of the decedent. Bruce also challenges the probate court's determination that the decedent did not gift the contents of his safe to him. We affirm.

I. FACTS AND PROCEEDINGS

The decedent, Everett Casey, and his wife, Mary Alice, who predeceased him, had two children during

their marriage, Kathryn and Kirk Casey. During the latter part of the decedent's lifetime, Bruce worked for the decedent's company, Precision Standard Inc. (PSI). In July 1997, the decedent executed a will and trust, naming in his trust Kathryn and Kirk as his only children.[1] After the decedent's death on March 24, 2012, Kathryn filed a petition for probate and sought to admit the decedent's 1997 will to probate. Renee and Bruce filed demands for notice and objections to the petition for probate, claiming that the decedent was their biological father. Renee and Bruce alleged that the decedent and their mother, Corinne Keene, had an extramarital affair while she was married to Robert Keene, the man listed as Bruce and Renee's father on their birth certificates. Robert Keene died in 1966, and Renee and Bruce did not seek to establish the decedent's paternity until the present action.

The probate court issued a thorough written opinion and order granting Kathryn's motions for summary disposition on the grounds that (1) Renee and Bruce were not interested persons, (2) the 1997 will was valid and unrevoked, and (3) no genuine issue of material fact existed that the decedent did not gift the contents of the safe to Bruce. The decedent's 1997 will was admitted to probate and the court ordered an evidentiary hearing to determine the amount of money in the decedent's safe at the time of his death.

With respect to the interested-person determination, the probate court ruled that MCL 700.2114(1)(b)(*v*) was inapplicable because the plain language of the statute requires an initial finding either that Renee and Bruce were born out of wedlock or that they were born or conceived during the marriage but were not the issue of

[1] The decedent's will left certain property to his children, but did not explicitly state their names.

the marriage before the court could make a natural-parent determination under MCL 700.2114(1)(b)(*v*). The court reasoned that because Corinne and Robert Keene were married when Bruce and Renee were born, Robert Keene is the presumed father and "there has been no determination that the children were not an issue of the marriage," and thus, Renee and Bruce were not interested persons.

II. ANALYSIS

A. INTERESTED PERSONS

Renee and Bruce contend that the probate court erred in its interpretation and application of MCL 700.2114(1)(b)(*v*) and improperly granted summary disposition in favor of Kathryn on this basis. This challenge involves questions of statutory interpretation and standing, which we review de novo. *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999); *Mich Ed Ass'n v Superintendent of Pub Instruction*, 272 Mich App 1, 4; 724 NW2d 478 (2006). Additionally, this Court reviews de novo a probate court's decision on a motion for summary disposition. *Wortelboer v Benzie Co*, 212 Mich App 208, 213; 537 NW2d 603 (1995). In reviewing a motion brought under MCR 2.116(C)(5) (regarding whether a party lacks the capacity to sue), this Court considers the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim as pleaded, and all factual allegations and reasonable inferences supporting the claim are taken as true. *Id*.

"The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature."

Omelenchuk v City of Warren, 466 Mich 524, 528; 647 NW2d 493 (2002) (citation and quotation marks omitted). "To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009) (citation and quotation marks omitted). "In construing a statute, this Court should give every word meaning, and should seek to avoid any construction that renders any part of a statute surplus or ineffectual." *In re Turpening Estate*, 258 Mich App 464, 465; 671 NW2d 567 (2003). It is well established that "to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). Provisions not included by the Legislature should not be included by the courts. *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010).

At the time of the decedent's death in 2012, the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., was in effect, and accordingly governs the question before us.[2] See *In re Adolphson Estate*, 403 Mich 590, 593; 271 NW2d 511 (1978) ("Determinations

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[2] Throughout these proceedings the parties have operated under the correct understanding that MCL 700.1105, which relates to intestate succession, applies to this issue despite the decedent's having a valid will at the time of his death. That is because EPIC describes who is entitled to notice to challenge a will, and the statutory definitions lead us to the intestate-succession provisions of MCL 700.2114. Specifically, notice must be given to all interested persons, MCL 700.1401, and interested persons is defined to include a "child," MCL 700.1105(c), and child is in turn defined as "an individual entitled to take as a child under this act by intestate succession from the parent whose relationship is involved." MCL 700.1103(f). That definition thus requires application of MCL 700.2114.

of heirs are to be governed by statutes in effect at the time of death, and an adoption statute in effect at the time of death is controlling.") (citation omitted). That statute defines "interested person"—the category of people entitled to notice of probate proceedings—to include a child or heir, among others. MCL 700.1105(c). Because Renee and Bruce claim to be interested persons as the biological children of the decedent, the parties focused their attention on MCL 700.2114, which sets forth the framework for establishing the parent-child relationship for purposes of intestate succession. That section provides, in relevant part:

> (1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:
>
> (a) *If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession.* A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and a woman participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their child for purposes of intestate succession.
>
> (b) If a child is born out of wedlock or *if a child is born or conceived during a marriage but is not the issue of that marriage*, a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:
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> * * *

> (*v*) Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.
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> * * *
>
> (5) Only the individual presumed to be the natural parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent. [MCL 700.2114 (emphasis added).]

As a preliminary matter, we recognize that the statute clearly provides that, for purposes of intestate succession, a child is to take from his or her natural parent, "regardless of their marital status." MCL 700.2114(1). The statutory language also could not more clearly establish that the parents of children born during a marriage *are presumed* to be the natural parents of those children. MCL 700.2114(1)(a). The statute then provides that the parent-child relationship with *the alleged natural parent* can be established in a number of ways. Relevant to this case, the statute provides that (1) "if" a child is born or conceived during a marriage but is not the issue of that marriage, then (2) the court can determine whether the alleged father is the child's natural one under the procedures of the Paternity Act, MCL 722.711 *et seq*. MCL 700.2114(1)(b)(*v*). In other words, "if" a person can establish that he was born or conceived during a marriage but is not the issue of that marriage (and therefore has disclaimed that the *presumed natural father* is not the natural father), the court can then proceed to the next step of DNA testing under the Paternity Act to determine

whether the *alleged father* (here the decedent) is the natural parent of Renee and Bruce.

The Legislature's use of the word "if" at the start of the subsection and the relevant clause is critical. *The Random House Webster's College Dictionary* (2001) offers several definitions of "if," the more pertinent being: "1. in case that; granting or supposing that; on condition that[.]" See *Hottmann v Hottmann*, 226 Mich App 171, 178; 572 NW2d 259 (1997) (a dictionary definition is appropriately used to construe undefined statutory language according to common and approved usage).[3] Thus, the use of "if" in the first and second clauses of MCL 700.2114(1)(b) sets forth the alternative conditions upon which the rest of that subsection is premised. Absent satisfaction of one of those conditions, the remainder of subsection (1)(b) does not come into play.

Under these provisions, a presumption exists that Bruce and Renee are the children of Corinne and

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[3] In response to our concurring colleague, we simply state that although there may be more than one dictionary definition of a term, this does not render the statute ambiguous, *Lash v Traverse City*, 479 Mich 180, 189 n 12; 735 NW2d 628 (2007), for when faced with multiple definitions the courts must look to the context in which the word is used in the statute before determining the correct definition to apply, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 684 n 62; 719 NW2d 1 (2006). Both the state and federal courts long ago concluded that utilizing dictionaries is a proper and objective means to define undefined words, with the context of the word being important in those circumstances in which various definitions of the same word exist. See *Taniguchi v Kan Pacific Saipan, Ltd*, 566 US ___, ___; 132 S Ct 1997, 2002-2003; 182 L Ed 2d 903, 912-913 (2012) (canvassing numerous dictionaries for the common understanding of an undefined statutory term), *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503, 516; 821 NW2d 117 (2012), and *Feyz*, 475 Mich at 684 n 62. In any event, the definition of "if" we utilize today is certainly a common and ordinary one as reflected in several different dictionaries. See, e.g., *The American Heritage College Dictionary* (1994) and *Oxford American Dictionary* (1980).

Robert Keene, as they were married when Bruce and Renee were conceived (a fact established by their birth certificates). MCL 700.2114(1)(a). Because of that undisputed fact, Renee and Bruce established that they were born during a marriage. But what of the proof that they were not the issue of that marriage? Bruce and Renee claim that DNA evidence purportedly showing that they are the biological children of the decedent accomplishes that task.

However, the plain language of MCL 700.2114(5) provides the exclusive means by which the presumption of natural parenthood set forth in MCL 700.2114(1)(a) may be overcome, and it specifies that the *only* person holding the right to challenge the presumption is the presumptive natural parent, and the right to attempt to overcome the presumption ends when the presumed parent is deceased. Here, that person is Robert Keene. However, since Robert Keene has already died, the *exclusive* right to disprove the presumption that Renee and Bruce are his natural children has terminated. Accordingly, Renee and Bruce do not satisfy the express criteria of MCL 700.2114(1)(b). To hold otherwise would effectively allow an additional method to rebut the presumption of paternity provided in subsection (5) and render the relevant portion of subsection (1)(b) superfluous. That we cannot do. *Turpening Estate*, 258 Mich App at 465.[4]

Before moving on, we make two additional points. First, appellants' reliance upon *In re Daniels Estate*, 301 Mich App 450, 453-454; 837 NW2d 1 (2013), is of no moment. In that case our Court ruled that MCL 700.2114(1)(b) did not first require an underlying find-

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[4] Based on this conclusion, Renee and Bruce lack standing to challenge the admission of the decedent's 1997 will to probate. Kathryn's argument that this issue has been abandoned on appeal is therefore moot.

ing that a child is the biological child of the decedent before MCL 700.2114(1)(b)(*i*) through (*vi*) come into play. *Id*. at 459. That argument is not being made here. Moreover, the child in that case was undisputedly born out of wedlock. *Id*. at 452. Accordingly, one of the conditions of MCL 700.2114(1)(b) was satisfied before the Court proceeded to analyze MCL 700.2114(1)(b)(*i*) through (*vi*). In contrast, because Renee and Bruce cannot rebut the presumption of natural parentage of Robert Keene, we can proceed no further under subsection (1)(b). Our holding is fully consistent with *Daniels* and, just as importantly, the statute.[5]

Second, we reject Bruce and Renee's assertion that the subsection of the statute allowing for testing under the paternity act (MCL 700.2114(b)(*v*)) to determine who the natural parent is would have no meaning if there was an initial requirement to show (under MCL 700.2114(b)) that the child was born out of wedlock (which presumably is accomplished by DNA testing as it is under the paternity act). What that argument glosses over is the different purposes of each showing. It is one thing to prove that a child's presumed parent is not the natural parent; it is a wholly separate thing to prove that another person is the child's natural parent. These are separate issues, and our reading of the statute is that the Legislature has conditioned proof of the former as being required before a child can proceed to proof of the latter.

B. GIFT

Finally, we reject Bruce's contention that a genuine issue of material fact exists regarding whether the

[5] The probate court should have relied exclusively on the statutory language, as the citation to *In re Quintero Estate*, 224 Mich App 682; 569 NW2d 889 (1997), was misplaced. See *In Re Daniels Estate*, 301 Mich App at 459.

decedent made an inter vivos gift of the contents of his safe to Bruce. Our review of this issue implicates 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). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Review is limited to the evidence that was presented to the probate court at the time the motion was decided. *Innovative Adult Foster Care*, *Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v A P Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citations omitted). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

"[F]or a gift to be valid, three elements must be satisfied: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession, and (3) the donee must accept the gift." *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997). "A gift *inter vivos* is not only immediate, but absolute and irrevocable." *In re Reh's Estate*, 196 Mich 210, 217; 162 NW 978 (1917). Delivery must be unconditional and must place the property within the dominion and con-

trol of the donee. *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965). Additionally, an inter vivos gift "must be fully consummated during the lifetime of the donor and must invest ownership in the donee beyond the power of recall by the donor." *Id*.

Here, as the probate court found, Bruce's affidavit fails to establish delivery. Indeed, although Bruce claims the decedent provided him the combination to the safe and indicated that the contents of the safe belonged to him, it was the decedent who retained dominion and control over the safe and its contents. The safe was located in the decedent's office at PSI, a company exclusively owned by the decedent. In addition, the decedent retained control of the combination, which he could change at any time, thereby precluding Bruce's access to the safe's contents. This means the decedent retained not only control, but the power of recall. There was no delivery. *Id*.

Affirmed.

No costs will be allowed on appeal. MCR 7.219(A).

JANSEN, J., concurred with MURRAY, P.J.

SHAPIRO, J. (*concurring*). I concur with the majority's affirmance and reasoning. I write separately only to note my belief that this Court is capable of construing the meaning of the word "if" without consulting a lay dictionary. See *ADVO-Systems, Inc v Dep't of Treasury*, 186 Mich App 419, 424; 465 NW2d 349 (1990) ("recourse to the dictionary is unnecessary when the legislative intent may be readily discerned from reading the statute itself").

I do not disagree with the general principle that we may consult dictionaries as an aid in interpreting statutory language. See, e.g., *Hottmann v Hottmann*,

226 Mich App 171, 178; 572 NW2d 259 (1997). However, to the extent that the majority's decision may be read as turning upon a particular definition contained within a particular edition of a particular dictionary, I disagree. The Legislature does not have an official dictionary nor has it directed Michigan appellate courts to any particular dictionary or edition thereof. Accordingly, it is the responsibility of this Court, to the best of its ability and using all the available tools and data, to determine the Legislature's intent in using a certain word or phrase.

While it is proper that we consult both legal and lay dictionaries in the execution of that responsibility, we should not construe a particular definition in a particular edition of a particular dictionary as the definitive interpretation of the meaning of a statute or even of a particular word in that statute. Indeed, *once recourse to any aid*—including a dictionary—outside the bare legislative text, is deemed required, the statutory language cannot fairly be viewed as plain and unambiguous on its face and so must be interpreted in accordance with all the rules of statutory construction rather than only the one that allows consultation of a dictionary. Otherwise, we risk the possibility that a court may simply justify its own policy preferences by reference to a selected definition in a selected edition of a selected dictionary, followed by a claim that no further analysis of legislative intent is needed or even permitted. In the absence of a legislative designation of a particular dictionary's use, it cannot be said that one dictionary is the best, let alone conclusive, determiner of legislative intent, which, as always, is the indisputable touchstone of statutory interpretation. See Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 NYU J Legis & Pub Pol'y 401 (2003).

JANET TRAVIS, INC v PREKA HOLDINGS, LLC

Docket No. 315560. Submitted June 4, 2014, at Detroit. Decided July 31, 2014, at 9:10 a.m.

Janet Travis, Inc., brought an action in the Macomb Circuit Court against Preka Holdings, LLC, for trademark infringement under MCL 429.42. Plaintiff owns a restaurant and has used the surname "Travis" as a mark in connection with its business since the 1940s. It registered the "TRAVIS" mark with the state in 1996 under MCL 429.34. This dispute arose in 2011, when defendant began to operate a restaurant called "Travis Grill," serving what it called the "famous Travis Burger," in the same geographical area as plaintiff's restaurant and licensees. Defendant moved for summary disposition, arguing that because plaintiff's mark was a surname, plaintiff was required to establish that it had acquired secondary meaning by showing that the public associated plaintiff's products or services with that surname. The court, Edward A. Servitto, J., granted an injunction under MCL 429.43 against defendant's further use of "Travis"-related marks. Defendant appealed.

The Court of Appeals *held*:

The trial court properly granted plaintiff's request for an injunction against defendant's use of "Travis"-related marks under MCL 429.43. Because plaintiff's "TRAVIS" mark was registered, the burden was on defendant to show that the mark was invalid, which it failed to do, and plaintiff showed that it had priority in the mark, that defendant's marks confused consumers, and that defendant used the confusing mark in the sale or advertising of services rendered in Michigan. Although the trial court did not analyze the case in this manner, it reached the correct result.

Affirmed.

1. TRADEMARKS AND TRADE NAMES — STATUTES — INFRINGEMENT — INJUNCTIONS.

A plaintiff who brings a trademark infringement action under MCL 429.42 must demonstrate that (1) the mark that the plaintiff claims to hold is valid, in that the mark actually functions as a trademark, (2) the plaintiff used the mark before the defendant

and thus holds priority in the mark, (3) consumers are likely to confuse the defendant's mark with the plaintiff's mark, and (4) the defendant used the allegedly infringing mark.

2. TRADEMARKS AND TRADE NAMES — REGISTRATION OF TRADEMARK — EVIDENCE OF VALIDITY.

In a trademark infringement action under MCL 429.42, the fact that the trademark was registered under MCL 429.34 is prima facie evidence that the mark is valid.

3. TRADEMARKS AND TRADE NAMES — REGISTRATION OF SURNAME AS TRADEMARK — EVIDENCE OF VALIDITY — SECONDARY MEANING — BURDEN OF PROOF.

In a trademark infringement action under MCL 429.42 to enjoin the use of a surname that the plaintiff has registered as a mark, the burden is on the defendant to show that the mark has failed to acquire secondary meaning and is therefore invalid.

Aidenbaum Schloff and Bloom PLLC (by *Jay M. Schloff*) for plaintiff.

Anthony Della Pelle for defendant.

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

SAAD, J. Defendant appeals the trial court's order that denied its motion for summary disposition and granted plaintiff's request for a permanent injunction. For the reasons stated below, we affirm.

I. NATURE OF THE CASE

This action is a trademark-infringement suit. Michigan courts have protected trademark rights since the nineteenth century, initially under the common law of unfair competition. Michigan law has offered this protection for the benefit of two related groups: business owners, and the consuming public. Business owners, who invest significant amounts of money and effort to convince consumers to identify their marks with their products and services, needed a remedy against com-

petitors who sought to free ride on this accumulated goodwill by copying or pirating already established marks.[1] Consumers, who associated and expected a certain level of service and quality with certain marks, needed protection from imposters who copied or pirated already established marks to "pass off" their goods and services as those of the business associated with the marks.[2] For this reason, trademark law has always involved the advancement of two distinct but related interests: the private right of the trademark holder to prevent others from using its mark to pass off their goods or services as its own, and the public right to protection from this deceptive practice.[3]

Accordingly, Michigan courts have defined a "trademark" as any "peculiar . . . device" or symbol used by a manufacturer or service provider to distinguish its goods or services from those of others.[4] And courts protected a manufacturer or service provider's exclusive right to use a trademark "to protect [its] good will against the sale of another's product as [its own]" and "to prevent confusion of the public regarding the origin of goods of competing vendors."[5]

These interests inform the nature of plaintiff's action and the necessary proofs to protect its trademark. In actions for trademark infringement, courts require a plaintiff to show that (1) its mark was valid (i.e., was being used in the market and was "distinctive," in that consumers associated the mark at issue with plaintiff's

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[1] See Restatement Unfair Competition, 3d, § 9, comment *c*, pp 77-78; and comment *d*, pp 79-81.

[2] *Id*.

[3] *Shakespeare Co v Lippman's Tool Shop Sporting Goods Co*, 334 Mich 109, 113-114; 54 NW2d 268 (1952).

[4] *Smith v Imus*, 57 Mich 456, 474; 24 NW 830 (1885).

[5] *Shakespeare Co*, 334 Mich at 113.

business), (2) plaintiff had priority in the mark (i.e., had used it before defendant), (3) defendant's allegedly infringing mark was likely to confuse consumers as to the source of defendant's products or services, and (4) defendant used the allegedly infringing mark.[6] Through these requirements, courts ensure that only words, devices, and symbols that function as trademarks—that is, those that consumers actually identify with a certain business owner's products or services—receive legal protection.[7] Those words, devices, and symbols that consumers do not identify with a particular business owner's products or services are left unprotected, so that new competitors and entrepreneurs could use these brand and trade names to fairly describe their products and services.

As American business became more sophisticated and new technologies enabled marketing and branding to take place at a national level, several states and the federal government codified the common law of trademarks. These statutes generally retain the common-law doctrines and principles on which they were based, and do not ordinarily disturb or eliminate the common law of trademarks as a remedy,[8] but they also create registration schemes for trademarks for better organization and ease of dispute resolution in the courts.[9] And, consistent with the national trend toward codifying trademark law, the Michigan Legislature enacted the Trademark Act ("the Act") in 1970, MCL 429.31 *et seq*., and it is this statute that concerns our Court today.

In this case, plaintiff owns a restaurant and has used a surname, "Travis," as a mark in connection with the

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[6] See, generally, Restatement Unfair Competition, 3d, § 9, comment *g*, pp 82-83, and § 20, p 208.

[7] See *id*., comment *d*, p 80.

[8] *Id*., comment *e*, p 81.

[9] *Id*.

food-service industry since the 1940s. It registered the "TRAVIS"[10] mark with the state in 1996 under MCL 429.34. This dispute arose in 2011, when defendant began to operate a restaurant called "Travis Grill" in the same geographical area as plaintiff's restaurant and licensees. Plaintiff sued defendant for trademark infringement under MCL 429.42 in Macomb Circuit Court, and the court granted an injunction under MCL 429.43 against defendant's further use of "Travis"-related marks. Defendant appealed its loss in our Court, and argues that the injunction should be reversed because plaintiff's trademark is not valid.

As at common law, a plaintiff who alleges trademark infringement under MCL 429.42 must show: (1) its mark is valid, (2) it has priority in the mark, (3) it is likely consumers will confuse defendant's mark with its own, and (4) defendant used the allegedly infringing mark. Because multiple individuals can possess the same surname, and thus might need use of the surname in a business capacity, Michigan courts generally do not give legal protections to surnames used as marks.[11] However, if a surname-mark acquires "secondary meaning"—i.e., if the consuming public comes to associate the mark with "the product of some particular person or factory or business" (for example, "McDonald's")—the surname-mark may be entitled to protection under MCL 429.42.[12] As noted, the burden of showing a mark's validity usually falls on the plaintiff, but if the plaintiff registers its mark under the Act,

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[10] The mark's registration is in all capital letters, but this distinction is insignificant in this case.

[11] *Buscemi's Inc v Anthony Buscemi Delicatessen & Party Store, Inc*, 96 Mich App 714, 717; 294 NW2d 218 (1980). See also MCL 429.32(d) and (e).

[12] *Buscemi's*, 96 Mich App at 717; MCL 429.32(e).

then the burden shifts to the defendant to demonstrate that the plaintiff's surname-mark is not valid.

In this case, plaintiff's mark was registered, and, therefore, defendant has the burden of showing that plaintiff has either not used the "Travis" mark or that it is not distinctive because it lacks secondary meaning to consumers.

Because defendant provides no convincing evidence that plaintiff's mark is not valid, and because plaintiff offers the remaining evidence necessary to show infringement under MCL 429.42, we reject defendant's appeal and affirm the order of the trial court.

II. FACTS AND PROCEDURAL HISTORY

This dispute involves marks used in connection with the promotion of plaintiff and defendant's respective restaurant and food-service businesses. Plaintiff and its predecessors have used the mark "TRAVIS" in connection with the advertising and operation of various family-owned restaurants since 1944. Plaintiff registered the mark with the state in 1996, and the registration remains valid through 2016. In 2011, defendant bought a restaurant licensed to use plaintiff's "TRAVIS" mark, but defendant purchased only the restaurant—it did not negotiate with plaintiff to retain the license to use the "TRAVIS" mark. It is unclear whether defendant checked with the Michigan trademark office before or at the time it purchased its restaurant, as defendant could have easily discovered plaintiff's registration of the "TRAVIS" mark in connection with the restaurant industry. Instead, defendant filed a certificate of assumed name with the state, changed the name of the restaurant from "Travis of Chesterfield" to "Travis Grill," and used the latter

name on its menus and advertising.[13] It also advertised a "famous Travis burger" on its menu, with the implicit admission that the "Travis" name has identifiable value in the restaurant business.

After plaintiff discovered defendant's use of the "Travis Grill" and "famous Travis burger" marks, it filed suit against defendant for trademark infringement under MCL 429.42. Specifically, it alleged that its "TRAVIS" mark was distinctive and possessed secondary meaning to consumers, and that defendant's use of the "Travis Grill" and "famous Travis burger" marks thus confused consumers, who would wrongly believe that defendant's restaurant was owned, operated, licensed, or otherwise affiliated with plaintiff. In addition to evidence of its registration and longstanding use of the "TRAVIS" mark, plaintiff also submitted affidavits from consumers, which stated that they believed defendant's restaurant was affiliated in some way with plaintiff's. Plaintiff asked the trial court to enjoin defendant's use of the "TRAVIS"-related marks.

Defendant responded with a motion for summary disposition, and claimed that the plain language of MCL 429.42 allowed a distinction between use of plaintiff's admittedly protected "TRAVIS" mark and defendant's "Travis Grill."[14] It also argued that the "TRAVIS" mark had not acquired "secondary meaning," and thus did not constitute a valid trademark under MCL 429.31 *et seq*.

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[13] Defendant uses alternative spellings of the word "Grill" and "Grille," in its advertising, menus, and business name, apparently interchangeably.

[14] Defendant also erroneously claimed that it obtained a contractual right to use the name "Travis Restaurant Chesterfield—Gratiot" from the prior owner. However, it has abandoned this "contractual" argument on appeal, and we therefore do not address it in our opinion.

In February 2013, the trial court correctly held that the "TRAVIS" mark had acquired secondary meaning and was thus a valid trademark under MCL 429.31 *et seq*. It accordingly denied defendant's motion for summary disposition and granted plaintiff's request for a permanent injunction against defendant's use of the marks, a decision we affirm.

III. STANDARD OF REVIEW

A. SUMMARY DISPOSITION

A trial court's decision on a motion for summary disposition is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NWd 520 (2012). If the trial court does not specify under which specific subrule it granted or denied a motion for summary disposition, and it considered material outside the pleadings, we review the decision under MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). 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). "This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Auto Club Group Ins Ass'n v Andrzejewski*, 292 Mich App 565, 569; 808 NW2d 537 (2011).

Summary disposition "is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "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 could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012).

B. INJUNCTIONS

MCL 429.43 explicitly states that "[a]ny owner of a mark registered under [MCL 429.31 *et seq*.] may proceed by suit to enjoin" defendant's infringement. MCL 429.43(1). A trial court's decision to grant or deny injunctive relief is reviewed for an abuse of discretion. *Wiggins v City of Burton*, 291 Mich App 532, 558-559; 805 NW2d 517 (2011) (citations omitted). Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there is a real and imminent danger of irreparable injury. *Id*. The decision to grant injunctive relief must be tailored to the facts of the particular case. *Soergel v Preston*, 141 Mich App 585, 590; 367 NW2d 366 (1985).

Our Court weighs the following factors when it determines whether the trial court properly issued a permanent injunction:

> (a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment. [*Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1, 28; 836 NW2d 279 (2013), lv gtd 495 Mich 983 (2014) (citation and quotation marks omitted).]

Courts balance the benefit of an injunction to a requesting plaintiff against the damage and inconve-

nience to the defendant, and will grant an injunction if doing so is most consistent with justice and equity. *Wayne Co Retirement Sys*, 301 Mich App at 28-29.

C. THE TRADEMARK ACT

Matters of statutory interpretation are reviewed de novo. *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013). When a court interprets a statute, it seeks to ascertain and implement the intent of the Legislature. *Huron Mountain Club v Marquette Co Road Comm*, 303 Mich App 312, 323; 845 NW2d 523 (2013). The Legislature's intent is best expressed through the plain meaning of the statute's language. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

The Trademark Act is based on the common law, and it is therefore appropriate, when interpreting the statute, to consider federal and state cases that apply the common law of trademark. See MCL 429.44 (stating that "[n]othing contained in this act shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law") and *Ed Subscription Servs, Inc v American Ed Servs, Inc*, 115 Mich App 413; 320 NW2d 684 (1982) (entertaining a corporate-name dispute brought at common law after passage of Trademark Act). It is also "appropriate to look to federal case law when interpreting a state statute which parallels its federal counterpart,"[15] as it appears the Michigan Trademark Act does the federal Lanham Act.[16] See *Leelanau Wine Cellars, Ltd v Black*

[15] *State Employees Ass'n v Dep't of Mgt and Budget*, 428 Mich 104, 117; 404 NW2d 606 (1987).

[16] It is unclear whether the Legislature intended the Trademark Act to be a direct copy of the Lanham Act, but it was enacted after the Lanham Act, and its structure and language clearly parallel the initial version of the Lanham Act. Congress passed the Lanham Act in 1948; the Legisla-

& Red, Inc, 502 F3d 504, 521 (CA 6, 2007) (holding that Michigan statutory and common law uses the same likelihood-of-confusion test for trademark infringement as under federal law); and *Goscicki v Custom Brass & Copper Specialties*, *Inc*, 229 F Supp 2d 743, 756 (ED Mich, 2002) (ruling that Michigan common law uses "the same . . . tests for federal trademark infringement and federal unfair competition").

IV. ANALYSIS

A. TRADEMARK INFRINGEMENT UNDER MCL 429.42

In Michigan, there are three sources of trademark law: common law, the state Trademark Act, and the federal Lanham Act. A plaintiff may bring separate trademark-related claims under each body of law. This case is brought under Michigan's Trademark Act, which is codified at MCL 429.31 *et seq*. The Act states that a "mark" is "any trademark or service mark,"[17] and defines "trademark" as "any word, name, symbol, or device, or any combination thereof, other than a trade name in its entirety, adopted and used by a person to identify goods made or sold by him or her and to distinguish them from similar goods made or sold by others." MCL 429.31(a).

The Act details a system of registration for trademarks, and also creates a remedy for holders of Michigan trademarks that have been infringed. Specifically, MCL 429.42 states that "any person who shall"

ture passed the Trademark Act in 1970. The Trademark Act's structure and much of its language bear a striking resemblance to the Model State Trademark Bill, which is patterned after the Lanham Act. 3 McCarthy, Trademarks and Unfair Competition, § 22.7; see also *id*. at § 22.5 (observing that the Model Bill is used in all states except West Virginia, Hawaii, Wisconsin, and New Mexico).

[17] MCL 429.31(f).

> (a) Use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a mark registered under this act in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or
>
> (b) Reproduce, counterfeit, copy or colorably imitate any such registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used upon or in connection with the sale or other distribution in this state of such goods or services; is liable to a civil action by the owner of the registered mark for any or all of the remedies provided in [MCL 429.43] . . . .

MCL 429.43 also states that "[a]ny owner of a mark registered under this act" may bring suit against a trademark infringer, and that the plaintiff may ask a court to "enjoin the manufacture, use, display or sale of any counterfeits or imitations" of its mark by the defendant. MCL 429.43(1).

As mentioned earlier, trademark law thus advances two interests—the private right of the trademark holder to prevent others from using his mark to reap monetary reward, and the public right to protection from deceptive practices—and seeks to align those interests so that the private trademark holder will pursue infringers, thereby protecting the broader public from fraudulent trade practices. See *Hanover Star Milling Co v Metcalf*, 240 US 403, 412-413; 36 S Ct 357; 60 L Ed 713 (1916), and *Shakespeare Co*, 334 Mich at 113.

Accordingly, a plaintiff who brings a trademark-infringement suit under MCL 429.42 must demonstrate that (1) the mark the plaintiff claims to hold is valid, in

that it actually functions as a trademark,[18] (2) the plaintiff holds priority in the mark, i.e., the plaintiff used the mark before the defendant,[19] (3) consumers are likely to confuse the defendant's mark with the plaintiff's mark,[20] and (4) the defendant used the allegedly infringing mark.[21] As noted earlier, if the mark is registered with the state, the registration is prima facie evidence that the plaintiff's mark is valid, and the burden of production shifts to the defendant to demonstrate that the mark is not valid. MCL 429.34(3).[22] If these four elements are established, any court "of competent jurisdiction" may issue an injunction to "restrain" the defendant from "[the] manufacture, use, display or sale" of "any counter-

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[18] See *Boron Oil Co v Callanan*, 50 Mich App 580, 583; 213 NW2d 836 (1973).

[19] *United Drug Co v Theodore Rectanus Co*, 248 US 90, 100; 39 S Ct 48; 63 L Ed 141 (1918); *Interstate Brands Corp v Way Baking Co*, 403 Mich 479, 481; 270 NW2d 103 (1978); MCL 429.31(a) and (h); and MCL 429.42(a).

[20] *Boron Oil Co*, 50 Mich App at 584.

[21] MCL 429.42(a).

[22] See also the corresponding provision of the Lanham Act, 15 USC 1057(b), which states that

> [a] certificate of registration of a mark . . . shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.

Federal courts have interpreted this provision to mean that registration of a mark relieves the mark holder of the burden of proving validity and secondary meaning and "shifts the burden of proof to the contesting party, who must introduce sufficient evidence to rebut the presumption of the holder's right to protected use." *Qualitex Co v Jacobson Prod Co, Inc*, 13 F3d 1297, 1301 (CA 9, 1994), rev'd on other grounds 514 US 159 (1995).

feits or imitations" of the plaintiff's marked goods or services. MCL 429.43(1). We address each issue in turn.

B. VALIDITY

1. LEGAL PRINCIPLES

Under the Trademark Act and at common law, trademarks only receive legal protection when they are (1) used in connection with the sale and advertising of products or services, and (2) distinctive, in that consumers understand the mark to designate goods or services as the "product of a particular manufacturer or trader." *Shakespeare Co*, 334 Mich at 113. In other words, a "distinctive" mark serves as a source identifier to consumers. *Wal-Mart Stores, Inc v Samara Bros, Inc*, 529 US 205, 212; 120 S Ct 1339; 146 L Ed 2d 182 (2000).

"The right to a trademark grows out of its use, and covers the area in which it is used." *Interstate Brands Corp v Way Baking Co*, 403 Mich 479, 481; 270 NW2d 103 (1978). In Michigan, a mark is used when it is

> placed in any manner on the goods or their containers or on the tags or labels affixed thereto and such goods are sold or otherwise distributed in this state, and on services when it is used or displayed in this state in the sale or advertising of services and the services are rendered in this state. [MCL 429.31(h).][23]

[23] This commonsense interpretation of "used" is consistent with (and clearer than) the Lanham Act's requirement that a mark be "use[d] in commerce," meaning that a mark must be used when the goods are sold or transported in commerce—i.e., in the ordinary course of trade—to be a valid trademark. 15 USC 1127. See also *Central Mfg, Inc v Brett*, 492 F3d 876, 882-883 (CA 7, 2007) (holding that manufacturer did not have trademark on mark "Stealth" for baseballs when it could not show that it had ever sold any baseballs under that mark).

Courts assess a mark's distinctiveness using the "now-classic test"[24] formulated by Judge Henry Friendly in *Abercrombie & Fitch Co v Hunting World, Inc*, 537 F2d 4 (CA 2, 1976). Drawing on the common law of trademark to assess a mark's validity under the Lanham Act, Judge Friendly identified a taxonomy of marks that courts had used to determine whether a mark was "distinctive" and thus eligible for trademark protections. *Abercrombie*, 537 F2d at 9. Under the classification scheme, there are four types of marks: "(1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful." *Id*. "Arbitrary or fanciful"[25] and "suggestive"[26] marks are "inherently distinctive," in that they "distinguish a good as coming from a particular source." *Abercrombie & Fitch Stores, Inc v American Eagle Outfitters, Inc*, 280 F3d 619, 635-636 (CA 6,

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[24] *Wal-Mart*, 529 US at 210.

[25] In plain English, an "arbitrary" mark takes a word that is already in common usage and applies it to a product or service that has nothing to do with its ordinary meaning. See *Abercrombie*, 537 F2d at 11 n 12. An arbitrary mark is thus mismatched to a particular product or service, because its commonplace meaning has no relationship with that product or service. Examples include "Ivory" soap and "Lucky Strike" cigarettes. *Abercrombie*, 537 F2d at 9 n 6; *American Eagle*, 280 F3d at 635.

A "fanciful" mark is a coined term that has no commonplace meaning whatsoever, and is "completely fabricated by the trademark holder[]." *Kellogg Co v Toucan Golf, Inc*, 337 F3d 616, 624 (CA 6, 2003). Examples include "Kodak" film, "Exxon" oil, and "Clorox" bleach. *Id*.; *Exxon Corp v XOIL Energy Resources, Inc*, 552 F Supp 1008, 1014 (SD NY, 1981); *Clorox Chem Co v Chlorit Mfg Corp*, 25 F Supp 702, 705 (ED NY, 1938).

[26] "Suggestive" marks are somewhat descriptive and only indirectly convey an impression of the goods or services on offer. " 'A term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of goods.' " *Abercrombie*, 537 F2d at 11 (citation omitted). Examples include "Tide" laundry detergent, "Citibank" bank, or "Snuggle" fabric softener. *American Eagle*, 280 F3d at 635; *Citibank, NA v Citibanc Group, Inc*, 724 F2d 1540, 1547 (CA 11, 1984); *Lever Bros Co v Mattel, Inc*, 609 F Supp 1395, 1400 (SD NY, 1985).

2002). Accordingly, arbitrary or fanciful and suggestive marks are considered valid trademarks for the purposes of trademark law. *Id*.

By contrast, "descriptive ('Soft Soap') or generic ('soap') terms do not inherently distinguish a good as coming from a particular source," and therefore may not generally serve as trademarks. *American Eagle*, 280 F3d at 635. Generic marks "refer[], or [have] come to be understood as referring, to the genus of which the particular product is a species." *Abercrombie*, 537 F2d at 9.[27] In other words, a generic term is one that is commonly used as the name or description of a class of goods. As such, generic terms are unable to function as a source identifier to consumers and can never serve as trademarks.

Likewise, marks that are "merely descriptive"[28] cannot serve as trademarks, MCL 429.32(e), because they are unable to distinguish a good as originating from a particular source. Moreover, because descriptive marks simply describe a product or service, trademark law

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[27] Generic terms can thus be synonymous with the good or service itself ("apple" is generic when used by an apple orchard) or may describe a broader category to which the particular good or service belongs ("fruit" is also generic when used by an apple orchard). See also *Kellogg Co v Nat'l Biscuit Co*, 305 US 111, 116-117; 59 S Ct 109; 83 L Ed 73 (1938) (Brandeis, J.) (holding the mark "shredded wheat" to be generic because it "is the term by which the biscuit in pillow-shaped form is generally known by the public"). Other examples of a generic mark would include "cola," "cereal," and "toothpaste." Note that a term that is otherwise generic ("apple" for an apple orchard) can be arbitrary if used in a different context ("apple" for a computer company). See *Abercrombie*, 537 F2d at 9 n 6 (" 'Ivory' would be generic when used to describe a product made from the tusks of elephants but arbitrary as applied to soap.").

[28] Descriptive marks describe a particular characteristic quality, or function, "of the product in a way that does not require any exercise of the imagination." *George & Co LLC v Imagination Entertainment Ltd*, 575 F3d 383, 394 (CA 4, 2009). Examples of a descriptive mark include "After Tan" post-tanning lotion and "5 Minute glue." *Id*.

refuses to grant a monopoly on the descriptive mark to the manufacturer or service provider—those descriptive words must remain available to competitors to describe their products and services. Surnames that are used as marks are classified as descriptive marks for both reasons: they merely describe the mark user's identity, and they interfere with the right of other business owners with the same surname to use that surname to advertise their products and services. *Buscemi's Inc v Anthony Buscemi Delicatessen & Party Store, Inc*, 96 Mich App 714, 717; 294 NW2d 218 (1980). See also MCL 429.32(d) and (e).

Descriptive marks differ from generic marks in one crucial respect, however: it is possible for descriptive marks to become source identifiers, and thus valid trademarks. A descriptive mark gains source-identifying capacity when it acquires "secondary meaning," which occurs when a descriptive mark has "become associated in the minds of purchasers or customers with the source or origin of goods or services rather than with the goods or services themselves." *Burke v Dawn Donut Sys, Inc*, 147 Mich App 42, 46; 383 NW2d 98 (1985) (citations and quotation marks omitted). Like other descriptive marks, a surname-mark can become a valid trademark if it acquires secondary meaning. *Buscemi's*, 96 Mich App at 717. To determine whether a plaintiff's mark has acquired secondary meaning, a court considers the "length of use of the symbol or mark, nature and extent of popularizing and advertising the symbol, and the efforts expended by plaintiff in promoting the connection in the minds of the general public of his mark or symbol with a particular product." *Boron Oil Co*, 50 Mich App at 583-584.[29]

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[29] See *Wolf Appliance, Inc v Viking Range Corp*, 686 F Supp 2d 878, 887 (WD Wis, 2010), for a more recent summation of the factors federal

2. APPLICATION

In this case, plaintiff registered its mark "TRAVIS" in connection with the restaurant and food-service industry in 1996, and the registration remains good through 2016. Plaintiff's registration serves as prima facie evidence that the mark is valid, and the burden of production thus shifts to defendant to show that it is not. MCL 429.34(3). Defendant notes that plaintiff's mark is a surname, and therefore must acquire secondary meaning to be a valid trademark—something defendant asserts the mark has not done. It also claims that plaintiff's evidence of secondary meaning is not actual evidence of secondary meaning. Defendant accordingly asks us to reverse the trial court's decision, which held that the "TRAVIS" mark possessed secondary meaning and was a valid trademark.

Defendant correctly identifies plaintiff's mark as a surname and argues that, because surname-marks are descriptive, "TRAVIS" must possess secondary meaning to be a valid trademark. *Buscemi's*, 96 Mich App at 717. However, as noted, because plaintiff's mark is registered, it is defendant's burden to show that "TRAVIS" lacks secondary meaning, which defendant fails to do. MCL 429.34(3). Instead of introducing such evidence, defendant inexplicably emphasizes the totally irrelevant fact that plaintiff does not provide food products to its business. This assertion, while it may be literally true—in that plaintiff is not the actual source of the food products defendant sells—has nothing to do with secondary meaning, which is rooted in consumer

courts consider when assessing whether a product has acquired secondary meaning (listing the factors as "(1) direct consumer testimony and consumer surveys; (2) exclusivity, length and manner of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) established place in the market; and (6) proof of intentional copying").

perception: here, the perception (encouraged by defendant's use of the "Travis Grill" and "famous Travis burger" marks) that plaintiff is associated in some way with defendant's business.

And, though plaintiff was not required to prove validity under the statute, it nonetheless gave evidence that its mark possessed secondary meaning, in the form of (1) the 60-year span over which plaintiff or its predecessors have used the "TRAVIS" mark in the restaurant business, (2) defendant's use of the "famous Travis burger" on its menu, the same wording plaintiff's licensee uses (and has used) to describe its hamburger, and (3) affidavits from customers who patronized defendant's restaurant and believed it to be operated by or under the authority of plaintiff. As noted, a plaintiff can show the existence of secondary meaning through the "length of use of the symbol or mark" and "direct consumer testimony and consumer surveys." *Boron Oil Co*, 50 Mich App at 583; *Wolf Appliance*, 686 F Supp 2d at 887.

Because defendant has not shown that plaintiff's mark lacked secondary meaning, it has failed to show that plaintiff's mark is invalid under the Trademark Act, and we affirm the trial court's holding that plaintiff's mark is valid.

C. PRIORITY

"Trademark rights arise out of appropriation and use. Generally, the right belongs to one who first appropriates and uses the mark." *Interstate Brands Corp v Way Baking Co*, 79 Mich App 551, 555; 261 NW2d 84 (1977), rev'd on other grounds 403 Mich 479. In this case, it is undisputed that plaintiff used the mark in commerce earlier than defendant: plaintiff's predecessors have used the "TRAVIS" mark in connec-

tion with restaurants since 1944, and defendants do not claim they used the "Travis Grill" or "famous Travis burger" marks before that date. Plaintiff thus has priority in the "TRAVIS" mark.

D. LIKELIHOOD OF CONFUSION

After a trademark-infringement plaintiff demonstrates that its mark is valid (or, as here, the defendant fails to demonstrate that the plaintiff's mark is invalid) and possesses priority over the defendant's mark, the plaintiff must show that the defendant's mark is so similar to its own that it is likely to create confusion among consumers as to the source of defendant's goods or services. MCL 429.42(a); *Boron Oil Co*, 50 Mich App at 584. "Actual confusion of customers, clients, or the public at large does not need to be shown; it is sufficient if the acts of the defendant indicate that probable confusion will occur." *Boron Oil Co*, 50 Mich App at 584; see also *220 Bagley Corp v Julius Freud Land Co*, 317 Mich 470, 475; 27 NW2d 59 (1947).

Courts assess the likelihood of confusion by considering the particular facts of each case. *Boron Oil Co*, 50 Mich App at 584. Prior factors courts have found relevant when assessing the likelihood of confusion include the (1) strength of the plaintiff's mark, (2) relatedness of the plaintiff's and the defendant's services, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used, (6) likely degree of customer's care and sophistication, (7) intent of the defendant in selecting the mark, and (8) likelihood of expansion of the product lines using the marks. *Homeowners Group, Inc, v Home Mktg Specialists, Inc*, 931 F2d 1100, 1106 (CA 6, 1991). This list of factors is "not exhaustive," as "any factor that is likely to influence the impression conveyed to prospective purchas-

ers" by the use of a mark is relevant when assessing the likelihood of confusion. Restatement Unfair Competition, 3d, § 21, comment *a*, p 227. Nor should the list of factors be applied as a rote test, with plaintiff required to show each factor listed above to prevail—the factors "are simply a guide to help determine whether confusion is likely. . . . Each case presents its own complex set of circumstances and not all of these factors may be particularly helpful in any given case." *Id*. at 1107. "The ultimate question remains whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way." *Id*.

To analyze the strength of a mark, a court " 'focuses on the distinctiveness of a mark and its recognition among the public.' " *Express Welding, Inc v Superior Trailers, LLC*, 700 F Supp 2d 789, 797 (ED Mich, 2010) (citation omitted). Plaintiff's mark "TRAVIS" is descriptive and has acquired secondary meaning. It is accordingly not as strong as an "arbitrary or fanciful" or "suggestive" mark,[30] yet the consumer affidavits and the length of the mark's use suggest that it is widely recognized in Macomb County. The name of defendant's

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[30] As explained earlier, "arbitrary or fanciful" and "suggestive" marks are inherently distinctive, in that they "distinguish a good as coming from a particular source." *American Eagle Outfitters, Inc*, 280 F3d at 635-636. If they acquire public recognition, arbitrary or fanciful and suggestive marks are thus the strongest type of mark because they function as ready-made designators of the good or service's origin. Descriptive marks that have acquired secondary meaning are usually weaker by comparison, because a descriptive mark begins as a term that describes the product or service on offer, and thus does not function as a ready-made designator of the good or service's origin. Of course, a descriptive mark with secondary meaning can acquire great strength over time—for example, "McDonald's" restaurants. See *Quality Inns Int'l, Inc v McDonald's Corp*, 695 F Supp 198, 211-212 (D Md, 1988). "Travis" and the "famous Travis burger," however, are hardly as widely recognized among consumers as "McDonald's" and the "Big Mac."

restaurant, "Travis Grill," is almost identical to plaintiff's mark. See *Ed Subscription Serv, Inc*, 115 Mich App at 421 (stating that "[c]orporate names are confusingly similar when the first two words of a compound name are identical and in the same sequence"). In what amounts to a telling admission, defendant again used an almost identical mark to plaintiff's mark—"the famous Travis Burger"—on its menu to advertise its food products. And plaintiff, through its customer affidavits, also introduced evidence that defendant's mark actually confused consumers, who believed that defendant was owned, operated, licensed, or otherwise affiliated with plaintiff in some way.

When these factors are weighed against defendant's mere unsupported statement that no likelihood of confusion exists,[31] it is apparent that plaintiff has shown that a likelihood of confusion (and, indeed, actual confusion) exists with respect to its mark and defendant's.

E. DEFENDANT'S USE OF THE INFRINGING MARK

To be liable for infringement, a defendant must "use" the allegedly infringing mark. MCL 429.42(a). As noted, a mark is "used" under the Trademark Act when

> it is placed in any manner on the goods or their containers or on the tags or labels affixed thereto and such goods are sold or otherwise distributed in this state, and on services when it is used or displayed in this state in the sale or advertising of services and the services are rendered in this state. [MCL 429.31(h).]

[31] "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

In this case, it is undisputed that defendant used the marks "Travis Grill" and "famous Travis burger" "in the sale or advertising of services" that were "rendered" in the state of Michigan. Defendant has thus used the allegedly infringing mark under MCL 429.42(a).

V. CONCLUSION

The trial court properly granted plaintiff's request for an injunction against defendant's use of the "Travis Grill" and "famous Travis burger" marks under MCL 429.43 because defendant failed to show that plaintiff's "TRAVIS" mark was invalid, and plaintiff showed that (1) it had priority in the trademark, (2) defendant's marks confused consumers and suggested that defendant's business was associated with plaintiff, and (3) defendant used the confusing mark in the sale or advertising of services rendered in Michigan. Though the trial court did not analyze the case in the precise method outlined above, it reached the correct result,[32] and we accordingly affirm its order that granted plaintiff's request for an injunction. Plaintiff may tax costs as the prevailing party.

Affirmed.

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

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[32] "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

PEOPLE v GAINES

Docket Nos. 310367, 310368, and 310369. Submitted April 1, 2014, at Lansing. Decided August 5, 2014, at 9:00 a.m. Leave to appeal sought.

Logan S. Gaines was convicted following a jury trial of three consolidated cases in the Saginaw Circuit Court, Janet M. Boes, J., of accosting, enticing, or soliciting a child (CP) for immoral purposes, third-degree criminal sexual conduct (CSC-III) (sexual intercourse with AW, a victim 13 to 15 years old), three other counts of CSC-III (digital penetration with MM, a victim 13 to 15 years old), and accosting a child (MM) for immoral purposes. Defendant appealed separately with regard to each case. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. A reasonable trier of fact could conclude from the evidence that AW was 15 years old when she had sexual intercourse with defendant. The trial court did not abuse its discretion by denying defendant's motion for a new trial that alleged that the prosecution failed to prove that AW was under 16 years of age for purposes of the CSC-III conviction regarding AW under MCL 750.520d(1)(a).

2. Any error in the charging documents regarding the dates of the second and third acts of CSC-III involving MM did not affect defendant's substantial rights. Defendant presented a defense and did not demonstrate prejudice from the alleged imprecision regarding the exact dates of the offenses.

3. Defendant failed to demonstrate plain error affecting his substantial rights from any imprecision regarding the time during which the accosting regarding MM and CP was alleged to have occurred.

4. Defendant failed to establish prejudice from defense counsel's failure to object with regard to any imprecision concerning the applicable dates stated in the charging documents.

5. The trial court did not abuse its discretion by admitting evidence of other charged and uncharged acts by defendant under MCL 768.27a. The statute does not preclude the prosecution from

incorporating the disclosure of the evidence by reference to the other acts recounted in police reports and disclosed in discovery when the prosecution filed its notice of intent to offer the evidence. Any error in the disclosure was harmless. It was not error to conclude that the probative value of the other-acts evidence was not substantially outweighed by the danger of unfair prejudice.

6. Offenses are related for purposes of MCR 6.120(B)(1)(c) when the evidence indicates that the defendant engaged in ongoing acts constituting parts of the defendant's overall scheme or plan. The trial court did not err by ruling that the charged offenses were related. The trial court did not abuse its discretion by holding that joinder of the three cases was appropriate. Joinder of the three cases did not affect defendant's constitutional right to remain silent.

7. Although the trial court improperly excluded as hearsay AW's testimony regarding whether the police intimidated her and forced her to testify, the error was harmless and did not affect defendant's substantial rights.

8. Defendant failed to establish prejudice with regard to the parties' stipulation to dismiss one of two counts of accosting with regard to MM after the jury was selected and informed of the charges.

9. The prosecutor erred by asking defendant to comment regarding the credibility of several witnesses' testimony. A timely objection could have cured the error. Defendant failed to establish that the questions affected his substantial rights.

10. The prosecutor did not suggest in his closing arguments that he had personal knowledge that his witnesses were worthy of belief while defendant was not.

11. The prosecutor did not improperly appeal to the jury to sympathize with the victims because of their young age.

12. Defendant failed to provide evidentiary support to overcome the presumption that his counsel employed trial strategy when counsel failed to object to the cross-examination of defendant regarding the credibility of the prosecutor's witnesses.

13. Defendant waived any error regarding the jury instructions for the accosting charges. Because there was overwhelming evidence that defendant intended to induce the victims to send naked photographs to him, defense counsel's failure to object to the absence of the specific-intent element of the "accosts, entices, or solicits" prong of the offense did not prejudice defendant. Defendant was not denied the effective assistance of counsel.

14. The trial court's statement to the prospective jurors that characterized the cases as "kind of related" was not improper and did not indicate that the judge was not impartial.

15. The trial court did not plainly err when it responded to the jury's request for further clarification regarding the CSC-III instruction. Defense counsel was not ineffective for failing to object to the trial court's response.

16. Absent any showing that the identities of any other alleged recipients of naked photographs from the victims had any particular relevance, defendant's right of confrontation was not denied when the trial court precluded testimony about the identities of others the victims may have sent naked photographs.

17. Both MM and AW were "victims" for purposes of MCL 750.520j because they alleged that they were subjected to criminal sexual conduct. MCL 750.520a(s). Evidence of any instances of sexual contact MM and AW may have had with other boys was inadmissible under MCL 750.520j. Regardless whether MM and AW were testifying to support their own case or to provide other-acts evidence under MCL 768.27a for the other cases, they still alleged that they were subjected to criminal sexual conduct and were "victims" under MCL 750.520a(s).

18. Because, in his defense to the accosting charges, defendant claimed that the victims first initiated sending naked photographs to him and that they sent naked photographs to others, whether the victims had sexual contact with others was not relevant to defendant's defense to those charges. Defendant had no right to confrontation regarding irrelevant issues.

19. MCL 750.145a is not unconstitutional on its face. The statute is neither vague nor overbroad.

20. The trial court erred by ordering defendant to pay restitution for the general costs of investigating and prosecuting his criminal activity. Such costs did not constitute direct financial harm to the governmental entities resulting from defendant's crimes. The portion of the judgment of sentence ordering restitution is vacated and the cases are remanded to the trial court for entry of an amended judgment of sentence.

Convictions affirmed, order of restitution vacated, and remanded for entry of an amended judgment of sentence.

1. CRIMINAL LAW — EVIDENCE — NOTICE.

MCL 768.27a provides that in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a

minor is admissible and may be considered for its bearing on any matter to which it is relevant; the statute requires a prosecuting attorney who intends to offer such evidence to disclose the evidence to the defendant at least 15 days before trial but does not preclude the prosecutor from incorporating the disclosure of the evidence in the notice of intent by reference.

2. APPEAL AND ERROR — CUMULATIVE EFFECT OF ERRORS.

Only "actual errors" are aggregated when reviewing a claim that the cumulative effect of prosecutorial errors warrants reversal.

3. CONSTITUTIONAL LAW — STATUTES — ACCOSTING CHILD FOR IMMORAL PURPOSES.

The provisions of MCL 750.145a are neither unconstitutionally vague nor overbroad.

4. SENTENCES — RESTITUTION — COSTS OF INVESTIGATING AND PROSECUTING CRIMES.

A trial court errs by ordering a defendant to pay restitution to a governmental entity for the general costs of investigating and prosecuting the defendant's criminal activity; such costs do not constitute direct financial harm to the governmental entity resulting from the defendant's crime (MCL 780.766(1)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

John F. Royal for defendant.

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

WILDER, P.J. Defendant appeals as of right his convictions following a jury trial of three consolidated cases. We consolidated the appeals. In Saginaw Circuit Court Docket No. 10-035017-FH, defendant was convicted of accosting, enticing, or soliciting a child (CP) for immoral purposes, MCL 750.145a, and sentenced to 13 months to 4 years in prison. In Docket No. 10-035018-FH, defendant was convicted of third-

degree criminal sexual conduct (CSC-III) involving AW, MCL 750.520d(1)(a) (sexual intercourse with a victim 13 to 15 years old), and sentenced to 4 to 15 years in prison. In Docket No. 10-035019-FH, defendant was convicted of three counts of CSC-III involving MM (digital penetration with a victim 13 to 15 years old) and accosting a child (MM) for immoral purposes, and was sentenced to 4 to 15 years in prison for the CSC-III convictions and 13 months to 4 years in prison for the accosting conviction. We affirm defendant's convictions, vacate the portion of the judgment of sentence ordering restitution, and remand to the trial court for entry of an amended judgment of sentence.

I

The cases against defendant arose out of his interactions with AW, CP, and MM in his senior year of high school (2008-2009) and the year following his graduation, when he was 18 or 19 years old. In defendant's senior year, he met AW. AW testified that she really got to know defendant during the 2009 track season, when she was 15 years old. They both attended a bonfire, which defendant testified was in May 2009. According to AW, they left the bonfire, went to defendant's parents' house, and had "consensual" sexual intercourse in defendant's basement bedroom. Defendant claimed they only "made out."

MM met defendant in October 2009 after defendant had graduated. MM was 13 or 14 years old. MM testified that she and defendant exchanged text messages and that, at first, their text messages were not personal. MM testified that in November or December 2009, defendant asked for photographs of MM and that, later, defendant asked for photographs with her clothes off. MM explained that she first sent photographs of her buttocks and

stomach, but when defendant asked for photographs of her breasts and vagina, she sent them.[1]

The record demonstrated that MM also visited defendant's parents' house on several occasions. MM testified that, in May 2010, defendant "fingered" MM in his basement by putting his finger in her vagina for three to five minutes. About a week later, MM asked defendant to hang out. He picked up MM and her friend, Sarah Cramer. MM testified that defendant digitally penetrated her when Cramer went to the bedroom to talk on the phone. Although Cramer came out of the bedroom while defendant was digitally penetrating her, MM testified that she did not think Cramer knew what was happening because defendant's back was to Cramer and the lights and television were off.[2] MM testified that she told Cramer what defendant did to her after they got home. Although Cramer told the police that MM had said "nothing happened," Cramer testified at trial that she was afraid of getting in trouble and that MM had actually said that defendant "fingered" her. MM testified that, around June 10, 2010, she visited defendant's parents' house again and he digitally penetrated her on his bed. Defendant offered contrary testimony from his friend, who testified that he was present during this visit and never left MM and defendant alone.

Although he never tried to have sexual intercourse with MM, defendant texted MM, "I wanna f*** you if you weren't so young." According to MM, defendant also told her not to tell others about their relationship because he knew their age difference was "illegal."

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[1] MM testified that defendant was not the first person to whom she had sent naked photographs.

[2] Defendant's sister testified, however, that she went downstairs repeatedly under the guise of doing laundry to check up on the children and that whenever she went downstairs, the lights and television were on.

Defendant met and started texting CP in the spring of 2010 when she was 14 years old[3] and on the track team. Defendant had graduated, but was practicing at the high school track to prepare for college track tryouts. At the same time, he helped some students, including CP, on the track team. CP testified that defendant asked for naked photographs,[4] which she sent from about May 2010 to July 2010. CP testified that, if she refused to send photographs, defendant would threaten not to talk to her or help her with track. CP also testified that defendant told her not to tell anyone what was happening.

In the summer of 2010, MM's father discovered her communications with defendant and contacted the police. In August 2010, Detective Jason Wise interviewed defendant. Detective Wise testified that defendant initially denied that MM had sent him naked photographs, but after the detective showed him the photographs on a computer, defendant admitted that she had sent him photographs of her buttocks, lower body, and breasts. Detective Wise testified that defendant also admitted that he used his finger to penetrate MM's vagina on at least two occasions.

Throughout trial, defendant testified that he did not have sexual intercourse with any of the victims. Contrary to Detective Wise's testimony, defendant specifically denied penetrating MM with his finger. Defendant testified that he only told MM to send him photographs that she had already sent to at least two other boys. Similarly, defendant testified that CP had originally suggested sending him pictures and that he had merely persisted in asking for them afterward.

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[3] Defendant testified that he thought CP was 16 years old.

[4] On cross-examination, CP testified that she could have first sent defendant a picture.

II

Defendant first challenges the sufficiency of the evidence to support his conviction of CSC-III with regard to AW. Defendant further claims this conviction was against the great weight of the evidence and the trial court abused its discretion when it denied his motion for a new trial. We disagree.

A challenge to the sufficiency of the evidence in a jury trial is reviewed de novo, viewing the evidence in the light most favorable to the prosecution, to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). The trial court's decision regarding defendant's motion for a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 642, 644; 576 NW2d 129 (1998).

In challenging his conviction of CSC-III with regard to AW, defendant only alleges that the prosecutor failed to prove that AW was under 16 years of age for purposes of MCL 750.520d(1)(a)[5] when she and defendant had sexual intercourse. The prosecutor established that AW met defendant when she was a freshman and he was a senior. AW further testified that she encountered defendant at a bonfire, which they left to go to defendant's parents' house, where they had sexual intercourse in his basement bedroom. We agree with defendant that AW did not testify when the bonfire occurred. But defendant testified that the bonfire occurred in May 2009. Given evidence in the record that AW was born in December 1993, a reasonable trier of fact could con-

[5] MCL 750.520d(1)(a) provides: "A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person" and the "other person is at least 13 years of age and under 16 years of age."

clude that AW was 15 years old at the time of the May 2009 bonfire, when she had sexual intercourse with defendant.

The trial court denied defendant's motion for a new trial, holding that the great weight of the evidence supported a finding that AW was 15 years old at the time of the offense. None of the exceptional circumstances that would warrant a conclusion that the finding was against the great wright of the evidence, as expressed in *Lemmon*, 456 Mich at 643-644, are present in this case. Thus, nothing warrants a conclusion that this verdict is contrary to the great weight of the evidence. The evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The trial court did not abuse its discretion by denying the motion for a new trial.

III

Defendant next claims he was denied his constitutional rights to due process and notice of the accosting charges and two of the charges of CSC-III with regard to MM because there was no evidence that those offenses occurred on or about May 1, 2010, as set forth in the charging documents. We disagree. Defendant's unpreserved constitutional claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

"The Due Process Clause of the Fourteenth Amendment mandates that a state's method for charging a crime give a defendant fair notice of the charge against the defendant, to permit the defendant to adequately prepare a defense." *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009); see *Chambers v Mississippi*,

410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Prejudice is essential to any claim of inadequate notice." *Chapo*, 283 Mich App at 364.

MCL 767.45(1)(b) provides that the indictment or information shall include: "The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.51 provides:

> Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge.[6]

In *Turner v People*, 33 Mich 363, 378 (1876), the facts did not allow the prosecutor to "state positively and certainly the exact day" of the offense. But our Michigan Supreme Court ruled:

> This, however, was not important so long as the facts and incidents precluded all doubts respecting the identity of the transaction to be prosecuted, and so long as it was manifest that the act was recent enough to be subject to prosecution, and that a preliminary examination in regard to it had been had. Time is not an ingredient of the offense in any such sense as to make it necessary to charge it according to the truth. The information or indictment may state one time and the proof show a different one without involving an objectionable variance. [*Id*.]

"[I]n *People v Howell*, 396 Mich 16, 27 n 13; 238 NW2d 148 (1976), the Supreme Court suggested that an im-

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[6] Defendant did not make such a request under MCL 767.51.

precise time allegation would be acceptable for sexual offenses involving children, given their difficulty in recalling precise dates." *People v Naugle*, 152 Mich App 227, 234 n 1; 393 NW2d 592 (1986) (the child victim in *Naugle* was molested from age 8 to 13, a detective testified that children have difficulty remembering the exact dates of individual assaults, and this Court held "it is conceivable that specific dates would not stick out in her mind") *id*. at 235.

The prosecutor alleged in the charging documents that the three acts of CSC-III involving MM occurred on or about May 1, 2010, but defendant argues that the second and third acts must have occurred subsequently. Like the abuse that occurred in *Naugle*, the criminal sexual conduct involving MM was repeated and MM had difficulty remembering the exact dates. *Naugle*, 152 Mich App at 234 n 1. The prosecutor made a good-faith effort to establish the dates with MM's text messages, which reflected when she visited defendant at his parents' house, where the offenses occurred. Furthermore, defendant was not prejudiced in preparing a defense because, at the preliminary examination, MM testified regarding the time frame during which the criminal sexual conduct occurred and, at trial, defendant offered specific testimony from several witnesses about this time frame. Because defendant presented a defense and has demonstrated no prejudice from the imprecise allegations regarding the time of the second and third acts of CSC-III involving MM, any error in the charging documents did not affect defendant's substantial rights.

The bases for the allegations of accosting that occurred on or about May 1, 2010, were text messages from defendant to MM and CP requesting naked photographs. CP testified at the preliminary examination

that she sent the photographs defendant requested during the 2010 track season. MM testified that, in November or December 2009, defendant started asking for naked photographs. Defendant was aware of the allegations by MM as early as his August 2010 interview with the police and, during discovery, he received copies of all the text messages. Defendant admitted that he "studied" the text messages "several times." He testified at trial that "there's a lot of missing texts" and that MM and CP actually offered to send him photographs before he asked for them. Because defendant had pretrial notice of the text messages and presented a defense to the accosting charges accordingly, he cannot demonstrate plain error affecting his substantial rights from the imprecision regarding the time during which the accosting was alleged to have occurred.[7]

Defense counsel was not ineffective for failing to object to the charging documents. Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To demonstrate ineffective assistance, defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). "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." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

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[7] Any related claim regarding the sufficiency or great weight of the evidence does not require reversal because time is not an element of the offenses. See *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007); MCL 750.145a.

The result would not have been different if defense counsel had objected to the charging documents. *Id*. Defense counsel had advance notice of the applicable dates of the charged offenses following the preliminary examination and was prepared with a defense, including witness testimony regarding those specific dates. Defendant does not argue that his defense would have been any different if the charging documents had been more specific. Therefore, defendant cannot establish prejudice from defense counsel's failure to object. *Grant*, 470 Mich 485-486.

IV

Defendant also claims that the trial court abused its discretion by admitting evidence of other charged and uncharged acts under MCL 768.27a. We disagree.

The prosecutor offered evidence of the following other acts at trial:

• Charged offenses: The evidence supporting the charges in each victim's case was offered under MCL 768.27a in the other victims' cases.

• Uncharged offenses: Testimony that AW stated, in a previous interview, that defendant asked her for photographs. Testimony that defendant stated he wanted to have sexual intercourse with MM. Testimony that defendant invited CP to sleep with him at his college.

MCL 768.27a provides, in pertinent part:

> (1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days

> before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

Defendant claims that notice was not provided properly because the prosecutor filed the notice of intent and, rather than listing the other acts in the document, referred defendant to the other acts recounted in the police reports and other discovery. As the trial court found, the statute only requires the prosecutor to "disclose the evidence to the defendant at least 15 days" before trial. The statute does not preclude a prosecutor from incorporating the disclosure of the evidence in the notice of intent by reference. Furthermore, as the trial court found, any error in the prosecutor's disclosure was harmless because defendant does not allege that he was unaware of the other-acts evidence. MCR 2.613(A).

Moreover, it was not error to conclude that the probative value of the other-acts evidence was not substantially outweighed by the danger of unfair prejudice.[8] Our Supreme Court has explained that there are several considerations that may lead a court to exclude other-acts evidence.

> These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the

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[8] Defendant claims the trial court failed to conduct its balancing of prejudicial effect and probative value under MRE 403 on the record, but a trial court need not state on the record how it balanced the prejudicial effect and probative value. *People v Smith*, 243 Mich App 657, 675; 625 NW2d 46 (2000). The trial court is presumed to know the law, see *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988), and it ruled that MRE 403 applied to this evidence. Defense counsel was not ineffective for failing to making a futile objection to the trial court's failure to conduct balancing under MRE 403 on the record. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

> infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*People v Watkins*, 491 Mich 450, 487-488; 818 NW2d 296 (2012).]

Defendant claims that the other charged acts were dissimilar because he engaged in sexual penetration with AW and MM, not CP, and he obtained naked photographs from MM and CP, not AW. But in each case defendant formed a relationship with a much-younger girl at his high school. They used cell phones and text messaging to communicate. Defendant's pursuit of all three victims occurred close together in time—during his senior year of high school and the year following. The other-acts evidence was also reliable because much of it was confirmed by the messages exchanged between defendant and the victims. The other acts did not "stir such passion" that the jury was unable to consider the merits of the case. *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011). Therefore, the probative value—showing the nature of the relationship between defendant and the victims and assisting the jury in assessing the credibility of the victims—substantially outweighed any unfair prejudice. The trial court did not abuse its discretion when it admitted the other-acts evidence under MCL 768.27a.[9]

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[9] Defendant's claim that the admission of other-acts evidence violates due process is moot because the admission of the evidence was subject to the MRE 403 balancing test. *Watkins*, 491 Mich at 456 n 2. Moreover, defendant argues that the trial court erred by failing to instruct the jury about other-acts evidence with CJI2d 20.28a. But this argument is waived because defense counsel stated on the record that he had no objection to the jury instructions. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). Furthermore, defendant has not provided any evidentiary support to overcome the presumption of strategy

V

Defendant argues that joinder of the three cases was an abuse of discretion, which affected his constitutional right to remain silent. We disagree.

Whether joinder is appropriate is a mixed question of fact and law. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). "To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *Id*. This Court reviews a trial court's factual findings for clear error and its interpretation of a court rule, which is a question of law, de novo. *Id.* However, the ultimate decision on permissive joinder of related charges lies "firmly within the discretion of trial courts." See *People v Breidenbach*, 489 Mich 1, 14; 798 NW2d 738 (2011). This Court reviews de novo questions of constitutional law. *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007).

MCR 6.120 provides, in relevant part:

> (B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

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with respect to defense counsel's waiver. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

Our Supreme Court has stated that offenses are "related" for purposes of MCR 6.120(B)(1)(c) when the evidence indicates that the "defendant engaged in ongoing acts constituting parts of his overall scheme or plan . . . ." *Williams*, 483 Mich at 235.

The evidence demonstrated that defendant engaged in ongoing acts related to his scheme of preying upon young, teenage girls from his high school. In each case, defendant used text messages to communicate with the victims and encouraged them to keep their communications secret. In at least two cases, defendant requested naked photographs from the victims and, if they refused, threatened to cut off ties with them. He also used his parents' basement to isolate two of the young girls and sexually penetrate them.

The facts were not complex and presented little potential for confusion. Because defendant's actions against each victim were admissible in each case pursuant to MCL 768.27a, each victim would have been required to testify in each trial if the cases were tried separately. Joinder offered convenience to the victims, who had already suffered harassment in their communities as a result of these cases.

Finally, defendant's claim that joinder affected his constitutional right to remain silent has no merit. The trial court did not clearly err when it found incredible defendant's claim that he would have testified only in MM's case if the three cases were tried separately. Rather, because MM would have offered the same testimony in all three trials under MCL 768.27a, the trial court found that defendant would have also testified in response in all three trials.

In sum, we conclude the trial court did not err by ruling that the offenses were related and joinder was not an abuse of discretion.

VI

Defendant argues that the trial court improperly excluded as hearsay AW's testimony regarding whether the police intimidated her and forced her to testify. Defendant argues that as a result of the exclusion of the testimony, he was deprived of his rights to confront witnesses, to present a defense, and to a fair trial. We agree that the challenged testimony was improperly excluded as hearsay, but conclude that the exclusion of the testimony was harmless. Defendant preserved this claim for appeal by arguing that it was not hearsay, but defendant did not argue that the exclusion of the evidence affected his constitutional rights. Therefore, the trial court's exclusion of the evidence is reviewed for an abuse of discretion, *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012), and the constitutional claims are reviewed for plain error affecting substantial rights, *Carines*, 460 Mich at 763, 774.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). An out-of-court statement in-

troduced to show its effect on a listener, as opposed to proving the truth of the matter asserted, does not constitute hearsay under MRE 801(c). See *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998), overruled in part on other grounds in *Molloy v Molloy*, 247 Mich App 348, 349-350 (2001). Such statements are "not offered for a hearsay purpose because [their] value does not depend upon the truth of the statement[s]." *People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974).

Defense counsel asked AW, "Did anyone indicate to you what would happen if you didn't come [to testify]?" When she responded affirmatively, defense counsel asked, "And that would be that you would be taken to jail?" This question was not offered to prove that AW would, in fact, go to jail if she refused to testify, but instead to prove why AW was testifying against her will. Therefore, the trial court erred by ruling that the question called for inadmissible hearsay. In any event, it was clear from other testimony in the record that AW did not want to testify and she did not want defendant to get in trouble. Defendant was not precluded from questioning AW's credibility and, in closing argument, defense counsel maintained that AW only testified against defendant because she wanted the police "off her back." Even though the trial court erred by excluding the challenged evidence, the error was harmless and did not affect defendant's substantial rights.

VII

Defendant claims that the prosecutor improperly dismissed an accosting charge after the jury was selected, questioned him about the credibility of other witnesses, commented about the credibility of witnesses in closing argument, and appealed to the jury to sympathize with the victims because of their young age.

Defendant failed to object to the prosecutor's alleged errors. Therefore, his unpreserved claims are reviewed for plain error affecting substantial rights. *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994).

First, defendant argues that the stipulation by the parties to dismiss one of two counts of accosting with regard to MM—after the jury had been selected and informed of the charges—constitutes error. But when this claim was raised in the posttrial motion for a new trial, the trial court found no impropriety or bad motive in the prosecutor's decision to dismiss this charge. Whether to charge defendant was within the prosecutor's discretion. *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). Moreover, defendant cannot establish prejudice. Even though the prosecutor dismissed the second accosting charge, the jury was nevertheless aware of defendant's repeated requests of MM for naked photographs.

Second, we agree that the prosecutor erred by asking defendant to comment on the credibility of several witnesses' testimony. The Supreme Court has held that it is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses because his or her opinion "is not probative of the matter." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). But a timely objection could have cured this error, *id.*, and in its closing instructions to the jury, the trial court advised the jury that it was the "only judge[] of the facts" and it "must decide which witnesses [to] believe." Therefore, defendant cannot establish that the prosecutor's questions affected his substantial rights.

Third, contrary to defendant's claim on appeal, the prosecutor did nothing in closing argument to suggest that he had personal knowledge that his witnesses were

worthy of belief while defendant was not. Rather, the prosecutor argued that, based on the facts already in evidence, his witnesses were credible. Likewise, the prosecutor attacked defendant's credibility on the basis of the unlikelihood that all of the witnesses had collaborated to lie. *People v Couch*, 49 Mich App 69, 72; 211 NW2d 250 (1973). Because the prosecutor did not insinuate that he had some special knowledge regarding whether defendant was testifying truthfully, but instead relied on the facts in the record, defendant cannot establish plain error. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Moreover, even if the prosecutor relied on his improper questioning of defendant, no prejudice resulted because the trial court instructed the jury that the attorneys' closing arguments were not evidence. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Fourth, we conclude that the prosecutor did not improperly appeal to the jury to sympathize with the victims because of their young age. Rather, as the trial court found, age was at issue in the cases. The prosecutor was entitled to latitude in arguing his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), particularly because the victims testified that they participated in the charged conduct willingly with defendant and they did not want him to get in trouble, but the Legislature has enacted the age-based CSC and accosting statutes to protect children who are not capable of consenting to participate. See *People v Armstrong*, 490 Mich 281, 292 n 14; 806 NW2d 676 (2011), quoting *People v Cash*, 419 Mich 230, 247-248; 351 NW2d 822 (1984) (" '[T]here is no issue of consent in a statutory rape charge because a victim below the age of consent is conclusively presumed to be legally incapable of giving his or her consent to sexual intercourse.' ").

Reversal is not required because there is no basis to conclude that the prosecutor's charging decision, questioning, or argument resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Defendant argues that the cumulative effect of the alleged prosecutorial errors warrants reversal even if the individual errors do not. But only "actual errors" are aggregated when reviewing a cumulative-error argument. *Bahoda*, 448 Mich at 292 n 64. Here, only the prosecutor's cross-examination of defendant, requiring him to comment on the credibility of the prosecutor's witnesses, constituted error. Again, this error, alone, did not affect defendant's substantial rights and does not require reversal.

Defendant cannot establish that he was denied the effective assistance of counsel from the failure to object to the cross-examination of defendant regarding the credibility of the prosecutor's witnesses. Defendant failed to provide any evidentiary support to overcome the presumption of trial strategy. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Moreover, in light of the overwhelming evidence presented at trial, the failure to object was not outcome-determinative. Any objection to the remaining claims of prosecutorial error would have been futile. *Thomas*, 260 Mich App at 457.

VIII

Next, defendant argues that the trial court erred by providing an incorrect instruction for the accosting charges and that defense counsel was ineffective for failing to object to the instruction. We disagree. Defendant's claim of instructional error is waived because defense counsel stated on the record that he had no

objection to the jury instructions. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). Moreover, even if the instruction was erroneous, defendant cannot establish that defense counsel's failure to object so prejudiced him that he was deprived of a fair trial. *Grant*, 470 Mich at 485-486. MCL 750.145a provides:

> A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both.

In *Kowalski*, the trial court explained the elements of the crime of accosting a child:

> Because the Legislature used the disjunctive term "or," it is clear that there are two ways to commit the crime of accosting a minor. A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act. Alternatively, a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act. Taken as a whole, the statute permits conviction under two alternative theories, one that pertains to certain acts and requires

> a specific intent and another that pertains to encouragement only and is silent with respect to *mens rea*. [*Kowalski*, 489 Mich at 499.]

The trial court in *Kowalski* instructed the jury correctly with respect to the "encourages" prong, but the Supreme Court concluded that it erroneously omitted the *actus reus* element of the "accosts, entices, or solicits" prong of the offense. *Id*. at 502. In any event, the defendant's attorney waived this error by stating that he had no objections to the instructions. *Id*. at 503-505. The Court further held that the defendant's attorney was not ineffective because the jury would have convicted the defendant on the basis of the evidence regardless of the instructional error. *Id*. at 507, 510 n 38.

Here, too, defendant alleges that the trial court omitted the requirement that he intended to induce or force a child to commit a proscribed act in the "accosts, entices, or solicits" prong of the offense. The instruction provided, in relevant part:

> First, that the defendant intended to accost, entice, or solicit a child . . . . Second, that the child was less than 16 years of age. Third, that the defendant intended to encourage [MM/CP] to do any of the following: A, commit an immoral act. B, submit to an act of gross indecency. C, any other act of depravity or delinquency.

Just like in *Kowalski*, defense counsel waived this claim of instructional error and was not ineffective because the jury would have convicted defendant on the basis of the evidence regardless of the instructional error. Defendant testified that he texted "dirty" messages to MM because she liked it and did not deny that he "persistently" requested that MM and CP send him naked photographs. The victims also testified that, if they did not send the photographs, defendant would ignore them

or threaten to end their relationship—according to CP, defendant told her he would stop coaching her in track. Defendant told the victims not to reveal their relationships with him to others. Because there was overwhelming evidence that defendant intended to induce the victims to send naked photographs to him, defense counsel's failure to object to the absence of the specific-intent element of the "accosts, entices, or solicits" prong of the offense did not prejudice defendant. Defendant was not denied the effective assistance of counsel.

IX

Defendant also argues that a statement by the trial court during voir dire amounted to vouching and denied him the right to an impartial judge. We disagree.

In its voir dire instructions to the prospective jurors, the trial court explained:

> The Information - - or, actually, there's a couple of Informations in this case, because we've combined several files. But the Informations in these cases charge the defendant, Logan Gaines, with the crimes of accosting a child for an immoral purpose and criminal sexual conduct, third degree. We have three separate Informations. They have been combined because they're kind of related, as you'll learn through the course of this trial.

Defense counsel did not object to the characterization of the cases as "kind of related." A trial court is presumed to be fair and impartial. *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). Thus, defendant has a heavy presumption of impartiality to overcome. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Absent deep-seated favoritism or antagonism making the exercise of fair judgment impossible, judicial rulings or opinions are not valid grounds for alleging bias. *People v Jackson*, 292 Mich

App 583, 598; 808 NW2d 541 (2011). In reviewing challenged remarks, "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Looking at the remarks as a whole, the instruction to the prospective jurors that the cases were "kind of related" was merely an attempt by the trial court to explain why three separate cases were being tried together. We concluded in Part V that the cases were in fact related to defendant's overall scheme or plan of preying on young, teenage girls. Therefore, the trial court's characterization was not improper and, contrary to defendant's claim, the statement does not indicate that he was denied an impartial judge. Because the trial court's characterization was not improper, any objection by defense counsel would have been futile. Therefore, defendant cannot establish that defense counsel was ineffective for failing to object. *Thomas*, 260 Mich App at 457.

X

Defendant argues that the trial court foreclosed the jury from requesting further clarification about the CSC-III instruction. We disagree.

During deliberations and after meeting with counsel at the bench, the trial court advised the jury:

> Ladies and gentlemen, I received your most recent note which says we need clarity on the third degree criminal sexual conduct. You have the instructions on that, so I would suggest you refer to those. And with that, I will excuse you at this time to go back and continue your deliberations.

Defendant relies on the line of cases regarding a jury's request for transcripts. That authority provides that the trial court errs by completely foreclosing the possibility of later reviewing the testimony. See *People v Holmes*, 482 Mich 1105 (2008); *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000); *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996). Defendant's reliance on this authority is misplaced, but in any event, the trial court did not completely foreclose further inquiry. The trial court had previously indicated on the record that it would be receptive to questions and would respond appropriately. Here, the trial court referred the jury to its initial instruction on CSC-III, which defendant does not allege was improper. *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001) (a trial court is not obligated to repeat previously given instructions as long as the "court's supplemental instruction was responsive to the jury's request and did not serve to mislead the jury in any manner"). Therefore, reviewing the instructions as a whole, *People v Henderson*, 306 Mich App 1, 4; 854 NW2d 234(2014), we conclude that the trial court did not plainly err. Absent any error, defense counsel was not ineffective for failing to object to the trial court's response to the jury's question. *Thomas*, 260 Mich App at 457.

XI

Defendant argues that he was denied his constitutional right to confront witnesses because two lines of inquiry were precluded: (1) the *identities* of other boys the victims sent naked photographs, and (2) whether the victims had similar sexual contact with other boys.

A primary interest secured by the Confrontation Clause is the right of cross-examination. *Delaware v Van Arsdall*, 475 US 673, 678; 106 S Ct 1431; 89 L Ed 2d

674 (1986); *Douglas v Alabama*, 380 US 415, 418; 85 S Ct 1074; 13 L Ed 2d 934 (1965). "[L]imitation[s] on cross-examination that prevent[ ] a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). However, "[t]he right of cross-examination does not include a right to cross-examine on irrelevant issues . . . ." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). " '[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about . . . interrogation that is repetitive or only marginally relevant.' " *Id.*, quoting *Van Arsdall*, 475 US at 679.

First, defendant claimed that the victims had actually suggested sending naked photographs to him. To support this defense, testimony that the victims sent photographs to others was arguably relevant and thus permissible at trial. But the identities of the other alleged recipients would not have had any significant tendency to make the defense more or less probable. MRE 401. Absent any showing that the identities of the other alleged recipients had any particular relevance, defendant's right of confrontation was not denied when the trial court precluded testimony about the identities of other boys the victims may have sent naked photographs. *Adamski*, 198 Mich App at 138.

Second, defendant claims that evidence of the victims' sexual activity with others of the "same type" alleged to have occurred with him should have been admitted. Only MM and AW alleged that they had any sexual contact with defendant. Accordingly, the question before this Court is whether defendant should have

been allowed to offer evidence that MM and AW had similar sexual contact with other boys. MCL 750.520j provides, in relevant part:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

A "victim" is defined in MCL 750.520a(s) as "the person alleging to have been subjected to criminal sexual conduct." Here, MM testified that defendant repeatedly digitally penetrated her vagina and AW testified that she had sexual intercourse with defendant. Therefore, MM and AW were victims under MCL 750.520j because they alleged that they were subjected to criminal sexual conduct. Evidence of any instances of sexual contact they had with other boys was inadmissible.

Defendant claims evidence of the other instances of sexual contact should have been admissible because the victims were not just testifying as victims in their own cases, but were testifying as witnesses in the other cases; defendant claims that victims, not witnesses, are protected by MCL 750.520j. Defendant's argument is unpersuasive because, regardless whether MM and AW were testifying to support their own case or to provide other-acts evidence under MCL 768.27a for the other cases, they still alleged that they were "subjected to

criminal sexual conduct" and were "victims" under MCL 750.520a(s).

Defendant also claims that even if evidence of the other instances of sexual contact was inadmissible in the prosecution for CSC-III, the evidence should have been admitted in the prosecution for accosting; accosting is not protected by MCL 750.520j. Again, in his defense to the accosting charges, defendant claimed that the victims first initiated sending naked photographs to him and that they sent naked photographs to others. Whether the victims had sexual contact with others was not relevant to his defense to those charges. MRE 401. Defendant had no right of confrontation with regard to irrelevant issues. *Adamski*, 198 Mich App at 138. Moreover, even if the evidence was somehow relevant, the trial court did not clearly err by determining, in response to the motion for a new trial, that the proposed testimony raised "concerns about harassment, prejudice, confusion of the issues . . . ." Defendant was not denied his constitutional right of confrontation.

XII

Defendant argues that MCL 750.145a is unconstitutional on its face, claiming it is both vague and overbroad. We disagree. Again, this Court reviews de novo questions of constitutional law. *Harper*, 479 Mich at 610.

Again, MCL 750.145a provides:

> A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of

> sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both.

There is a presumption that a statute is constitutional, and this Court will construe it this way unless its unconstitutionality is "clearly apparent." *People v Hubbard (After Remand)*, 217 Mich App 459, 483-484; 552 NW2d 493 (1996). A statute can be unconstitutionally vague if it: (1) fails to provide fair notice to the public of the proscribed conduct, (2) gives the trier of fact unstructured and unlimited discretion to determine if an offense has been committed, or (3) is overbroad and impinges on First Amendment rights. *People v Nichols*, 262 Mich App 408, 409-410; 686 NW2d 502 (2004). To evaluate a vagueness challenge, a court must examine the entire text of the statute and give the words of the statute their ordinary meanings. *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007). Vagueness challenges must be considered in light of the facts at issue. *Id*. "A statute is unconstitutionally vague if persons of ordinary intelligence must necessarily guess at its meaning." *People v Pierce*, 272 Mich App 394, 398-399; 725 NW2d 691 (2006). A "statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *People v Lueth*, 253 Mich App 670, 676; 660 NW2d 322 (2002).

The dictionary definition of "immoral" is "violating moral principles" or "licentious; lascivious." The term

"licentious" is defined as "sexually unrestrained" and the term "lascivious" means "arousing sexual desire." "Indecent" means "offending against standards of morality or propriety" and "deprave" means "to make morally bad or evil; vitiate; corrupt." Finally, "delinquency" is defined as "wrongful, illegal, or antisocial behavior." *Random House Webster's College Dictionary* (2001). Persons of ordinary intelligence need not guess at the meaning of these terms in MCL 750.145a because, when read in context with the rest of the statute, the language refers to criminal acts and is intended to protect children from being induced, forced, or encouraged to commit such acts.

Contrary to defendant's claim on appeal, read in context, the statute provides fair notice to the public of the proscribed conduct and does not give a trier of fact unstructured and unlimited discretion to determine whether an offense has been committed. No reasonable person would have to guess whether asking 13- or 14-year-old girls for photographs of them naked, particularly of their breasts and vaginas, is immoral conduct under the statute. Therefore, defendant's vagueness challenge must fail because he cannot establish that no circumstances exist under which the statute would be valid. *People v Abraham*, 256 Mich App 265, 280; 662 NW2d 836 (2003) ("The challenger to the face of a statute must establish that no circumstances exist under which it would be valid.").

A statute is overbroad when it precludes or prohibits constitutionally protected conduct in addition to conduct or behavior that it may legitimately regulate. *People v McCumby*, 130 Mich App 710, 714; 344 NW2d 338 (1983). Under the overbreadth doctrine, a defendant may "challenge the constitutionality of a statute on the basis of the hypothetical application of the

statute to third parties not before the court." *People v Rogers*, 249 Mich App 77, 95; 641 NW2d 595 (2001). Defendant argues that the statute regulates both speech and conduct. Therefore, defendant must demonstrate that the overbreadth of the statute is both real and substantial—there is a " 'realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.' " *Id*. at 96, quoting *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984). The statute will not be found to be facially invalid on overbreadth grounds, however, "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.

MCL 750.145a proscribes accosting or encouraging children for the purpose of inducing them to engage in criminal activity. This statute does not pose realistic dangers to First Amendment protections. Because the statute is aimed at criminal activity, it does not apply to defendant's scenarios, such as a mother's recommending an abortion to her child or skipping mass on Sundays. Therefore, MCL 750.145a is not facially overbroad. Defendant's constitutional challenge to MCL 750.145a is without merit.

XIII

Defendant claims that the cumulative effect of errors at trial deprived him of a fair trial and that reversal is required. We disagree. " 'The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of

the errors must undermine the confidence in the reliability of the verdict before a new trial is granted.' " People v Brown, 279 Mich App 116, 146; 755 NW2d 664 (2008), quoting *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). Because we have found support in the record for only two of defendant's claims of error, and because those errors were harmless, they neither separately nor cumulatively warrant a new trial.

XIV

Last, defendant argues that the trial court erred by ordering him to pay restitution for the general cost of investigating and prosecuting his criminal activity. We agree. Although defendant failed to preserve this issue, this Court may review the trial court's restitution award for plain error affecting substantial rights. *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009).

> Restitution is afforded both by statute and by the Michigan Constitution. Const 1963, art 1, § 24; *People v Grant*, 455 Mich 221, 229; 565 NW2d 389 (1997). The purpose of restitution is to "allow crime victims to recoup losses suffered as a result of criminal conduct." *Id*. at 230. The Crime Victim's Rights Act, MCL 780.751 *et seq*., determines whether a sentencing court's restitution order is appropriate. *People v Crigler*, 244 Mich App 420, 423; 625 NW2d 424 (2001). [*People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003).]

Under MCL 780.766(1), victims entitled to restitution include a "governmental entity . . . that suffers *direct* physical or financial harm as a result of a crime." (Emphasis added.)

In *Crigler*, 244 Mich App at 423, this Court determined that the loss of "buy money" paid by a narcotics enforcement team for controlled substances constituted

direct financial harm resulting from the defendant's crime. *Id*. at 426-427. This Court noted:

> The loss of buy money is qualitatively unlike the expenditure of other money related to a criminal investigation, because it results directly from the crime itself; that is, the money is lost when it is exchanged for the controlled substance. The payment of salaries and overtime pay to the investigators, the purchase of surveillance equipment, the purchase and maintenance of vehicles, and other similar expenditures are "costs of investigation" unrelated to a particular defendant's criminal transaction. These expenditures would occur whether or not a particular defendant was found to be engaged in the sale of controlled substances. [*Id*. at 427.]

In *Newton*, this Court relied on the dicta in *Crigler* that the payment of the costs of the investigation a crime, such as salaries and equipment, would occur regardless whether a particular defendant committed the crime and therefore could not be recouped through restitution. *Newton*, 257 Mich App at 69-70. Therefore, the *Newton* panel determined that the $2,500 the defendant was ordered to pay the sheriff's department as reimbursement for its cost in the investigation of the defendant was plain error affecting the defendant's substantial rights. *Id*. at 70.

Here, the trial court ordered defendant to pay restitution for officer investigation (24 hours for $864), a forensic analyst (102 hours for $3,672), and discs ($6.64). These costs are comparable to costs of the investigation in *Newton* and distinguishable from the direct cost of the buy money paid in *Crigler*.[10] There-

[10] We reject the prosecutor's argument that the trial court could have alternatively ordered the costs to be repaid under the general taxing authority of MCL 769.34(6), which provides, "As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of

fore, the trial court erred by ordering restitution and we vacate that portion of the judgment of sentence ordering $4,542.64 in restitution.

XV

We affirm defendant's convictions, vacate the order of restitution, and remand to the trial court for entry of an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

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

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restitution as provided by law." Our Michigan Supreme Court recently explained, "MCL 769.34(6) allows courts to impose only those costs or fines that the Legislature has separately authorized by statute." *People v Cunningham*, 496 Mich 145, 158 n 11; 852 NW2d 118 (2014).

PEOPLE v MINEAU

Docket No. 313178. Submitted May 13, 2014, at Marquette. Decided August 5, 2014, at 9:05 a.m.

Francis S. Mineau was convicted in 1999 of indecent exposure involving two minors and required to register as a sex offender under the Sex Offender Registration Act (SORA), MCL 28.721 *et seq*. At that time and all times relevant to this case, he lived less than 1,000 feet from an elementary school. In 2005, the Legislature amended SORA by adding provisions related to student safety zones. MCL 28.733(f) defines a student safety zone as the area 1,000 feet or less from school property, and MCL 28.735(1) prohibits registered sex offenders from residing within that zone. MCL 28.735(3)(c), however, additionally provides that the prohibition does not apply to someone who was living in the zone on January 1, 2006. Accordingly, defendant's 1999 conviction did not require him to vacate his residence when the amendments became effective. Defendant was removed from the sex offender registry in 2011, but in 2012 he exposed himself to minors who were passing his house. He was charged in the Delta Circuit Court with and pleaded guilty of aggravated indecent exposure, MCL 750.335a(2)(b) and was again required to register as a sex offender. Defendant was sentenced to probation. The prosecution argued that defendant was required by MCL 28.735(1) to vacate his residence within the student safety zone and relocate more than 1,000 feet from school property. The court, Stephen T. Davis, J., concluded that because defendant had resided within the student safety zone on January 1, 2006, the exception set forth in MCL 28.735(3)(c) applied and accordingly declined to order defendant to vacate his residence as a term of probation. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. The first sentence of MCL 28.735(3)(c) provides a general exception to the prohibition against living in a student safety zone for sex offenders who were residing within the zone on January 1, 2006. The second sentence of MCL 28.735(3)(c), however, renders that exception inapplicable to an individual who initiates or maintains contact with a minor within that student safety zone. The statute has no temporal component; it does not require that the initiation or maintenance of contact that triggers this excep-

tion to the general exception occur after the conduct giving rise to the defendant's current offense. Consequently, the exception set forth in the first sentence of MCL 28.735(3)(c) does not apply in the case of an individual who has contact with a minor in a student safety zone, and MCL 28.735(1) required defendant to vacate his residence within the student safety zone.

2. Under MCL 28.735(4), an individual who is required to move from a student safety zone pursuant to MCL 28.735(1) has a period of up to 90 days in which to do so. This provision applies to an individual such as defendant who generally meets the requirement of the MCL 28.735(3)(c) exception (that he or she had been living in the student safety zone on January 1, 2006) but to whom MCL 28.735(3)(c) does not apply by virtue of the exception to the exception set forth in the second sentence of MCL 28.735(3)(c) for individuals who initiated or maintained contact with a minor. Therefore, defendant had 90 days from the imposition of his sentence to vacate his residence within the student safety zone.

3. MCL 28.735(4) further provides that if the individual initiates or maintains contact with a minor within the student safety zone during the 90-day period, he or she is not entitled to the benefit of the 90-day allowance to effect the change of residence.

Trial court's order vacated and case remanded for resentencing with a probation term requiring defendant to leave his residence.

1. CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — STUDENT SAFETY ZONES AROUND SCHOOLS — VACATING RESIDENCE.

The Sex Offender Registration Act defines a student safety zone in MCL 28.733(f) as the area 1,000 feet or less from school property, and MCL 28.735(1) prohibits registered sex offenders from residing within that zone; MCL 28.735(3)(c) provides a general exception to that prohibition for sex offenders who were residing within the zone on January 1, 2006, but the exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone, and that individual is required to vacate his or her residence within the zone; the initiation or maintenance of contact that triggers this exception to the general exception may be the conduct that gave rise to the sex offender's current offense (MCL 28.721 *et seq.*).

2. CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — STUDENT SAFETY ZONES AROUND SCHOOLS — VACATING RESIDENCE — 90-DAY PERIOD TO VACATE.

The Sex Offender Registration Act provides in MCL 28.735(4) that a registered sex offender who is required to move from a student

safety zone pursuant to MCL 28.735(1) has a period of up to 90 days in which to do so; the provision applies to an individual who under MCL 28.735(3)(c) would otherwise not be required to move because he or she was living in the zone on January 1, 2006, except for the fact that he or she initiated or maintained contact with a minor, rendering the exception of MCL 28.735(3)(c) inapplicable; furthermore, an individual who initiates or maintains contact with a minor within the student safety zone during the 90-day period is no longer entitled to the benefit of the 90-day allowance to effect the change of residence (MCL 28.721 *et seq*.).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Steven C. Parks*, Prosecuting Attorney, and *James E. Soderberg*, Assistant Prosecuting Attorney, for the people.

Russell W. Hall for defendant.

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J. The prosecution appeals by leave granted[1] the trial court's order denying its request to order defendant, Francis Steven Mineau, to vacate his residence within the "student safety zone" as a term of probation as a registered sex offender in accordance with MCL 28.735(1), part of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. We vacate the order and remand for resentencing.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

At all relevant times, defendant's residence was located approximately 191 feet from an elementary school. Pursuant to SORA, because he lived within 1,000 feet of the school, he lived within a "student

[1] *People v Mineau*, unpublished order of the Court of Appeals, entered June 21, 2013 (Docket No. 313178).

safety zone." MCL 28.733(f). In 1999, he was apparently[2] convicted of indecent exposure involving two young girls who were walking to school. See MCL 750.335a. Consequently, he was required to register as a sex offender, but at the time, SORA did not require him to vacate his residence. In 2005, the Legislature amended SORA by adding MCL 28.735, which, *inter alia*, provides that individuals who are required to be registered under SORA "shall not reside within a student safety zone." MCL 28.735(1), as added by 2005 PA 121 (effective January 1, 2006). However, notwithstanding his 1999 conviction, defendant was not required to vacate his residence when the statute became effective because he "was residing within that student safety zone on January 1, 2006." MCL 28.735(3)(c), as amended by 2005 PA 322. In 2011, defendant was removed from the sex offender registry.

On May 15, 2012, defendant exposed himself to elementary school children who were passing his house in a school bus. Defendant was charged with, and pleaded guilty of, aggravated indecent exposure, MCL 750.335a(2)(b). As a consequence, defendant was again required to register as a sex offender. Defendant was sentenced, in relevant part, to probation subject to a number of conditions, including placing an opaque fence around his property. Relevant to the instant appeal, the prosecutor argued that under MCL 28.735(1), defendant was required to vacate his residence within the student safety zone and relocate to more than 1,000 feet from school property. The trial court concluded that because defendant had resided

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[2] The exact nature of defendant's prior conviction was not specified in the record before us, and we have not been provided with a copy of defendant's presentence investigation report. Nevertheless, defendant has not disputed the prosecution's description of the 1999 incident.

within the student safety zone on January 1, 2006, the exception set forth in MCL 28.735(3)(c) applied to him. The trial court accordingly declined to order defendant to vacate his residence as a term of probation. This appeal followed.

II. STANDARD OF REVIEW

"We review for an abuse of discretion a trial court's decision to set terms of probation." *People v Malinowski*, 301 Mich App 182, 185; 835 NW2d 468 (2013). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Id*. Additionally, an error of law might lead a trial court to abuse its discretion. *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007). We review de novo as a question of law an issue of statutory interpretation. *People v Anderson*, 298 Mich App 178, 181; 825 NW2d 678 (2012).

III. ANALYSIS

MCL 28.735(1) states that "[e]xcept as otherwise provided . . . , an individual required to be registered [under SORA] shall not reside within a student safety zone." It is not disputed that unless an exception applies, MCL 28.735(1) would require defendant, as a registered sex offender living in a student safety zone, to vacate his residence. However, the statute provides exceptions to the requirement found in MCL 28.735(1) in certain instances. In pertinent part, MCL 28.735(3) provides:

> This section does not apply to any of the following:
>
> * * *
>
> (c) An individual who was residing within that student safety zone on January 1, 2006. However, this exception

> does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

As noted, defendant was residing in his current residence on January 1, 2006. Consequently, under the *first* sentence of MCL 28.735(3)(c), defendant would not be required to vacate his residence. However, the applicability of the *second* sentence is at issue here. It is equally undisputed that "contact" need not be direct and physical. The trial court properly, if implicitly, concluded that defendant's conduct in the instant offense had constituted a kind of contact. The relevant inquiry is whether the "exception to the exception" set forth in the second sentence of MCL 28.735(3)(c) can be satisfied by the very conduct that causes an individual to have to register as a sex offender or whether it can only be satisfied by subsequent conduct. In other words, does the Legislature's use of the phrase "initiates or maintains contact" include a temporal component that cannot be satisfied by the conduct giving rise to the current offense but can only be satisfied by subsequent conduct?

We do not find such a temporal component in the language used by the Legislature in MCL 28.735(3)(c). What the Legislature was addressing was its heightened concern regarding that subset of sex offenders whose conduct is directed at minors and, in particular, minors within a student safety zone. Consequently, in recognition of the fact that the first sentence of MCL 28.735(3)(c) provides a general exception for sex offenders (of any type) who were residing within a student safety zone on January 1, 2006, the Legislature added the second sentence of MCL 28.735(3)(c) to render that exception wholly inapplicable to "an individual who initiates or maintains contact with a minor within that student safety zone."

The language used by the Legislature does not, as defendant suggests, limit the exception to the exception to conduct that occurs *after* an individual is required to register as a sex offender. To the contrary, the Legislature provided that the exception set forth in the first sentence of MCL 28.735(3)(c) simply has no application in the case of an individual who has contact with a minor in a student safety zone. The suggested temporal component would, in essence, grant defendant a "free pass," but it is one that we find the Legislature did not intend by the plain language of the statute.[3]

Accordingly, we hold that the statutory language does not limit the exception to the exception to conduct that occurs *after* an individual is required to register as a sex offender. Rather, the exception set forth in the first sentence of MCL 28.735(3)(c) simply does not apply in the case of an individual who has contact with a minor in a student safety zone.

This Court's decision in *People v Zujko*, 282 Mich App 520; 765 NW2d 897 (2009), is not to the contrary. In *Zujko*, this Court held that "MCL 28.735(1) and MCL 28.735(3)(c), taken together, mean that a registered sex offender shall not reside in a student safety zone unless the offender resided in that zone as of January 1, 2006." *Id*. at 523. In discussing the word "individual" in the context of MCL 28.735(3)(c), this Court stated that "if such an individual engages in any contact with a minor, the individual loses the benefit of the [exception] and

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[3] We similarly find no temporal component in the Legislature's use of the word "required" in MCL 28.735(1). The Legislature could have prohibited only those individuals who were required to register before committing a current offense from residing in a student safety zone. It did not do so, however. Rather, by the plain language of MCL 28.735(1), defendant is, by virtue of his current offense, "an individual required to be registered" under SORA. He is therefore prohibited under that section from residing in the student safety zone.

must move his or her residence within 90 days pursuant to [MCL 28.735(4)]." *Id*. at 524. *Zujko* thus merely held that the exception set forth in the first sentence of MCL 28.735(3)(c) applied to *any* individual who resided in the student safety zone as of January 1, 2006, thereby rejecting the prosecution's position that MCL 28.735(3)(c) also required that the individual have been a registered sex offender as of that date. The Court's holding did not require interpretation of the second sentence of MCL 28.735(3)(c) because the defendant in that case was not charged with, or required to register as a sex offender because of, any "contact with a minor within [the] student safety zone." MCL 28.735(3)(c).

Nor does the interplay between MCL 28.735(3)(c) and (4) require a different result. MCL 28.735(4) states:

> An individual who resides within a student safety zone and who is subsequently required to register under [MCL 28.723 through MCL 28.730] shall change his or her residence to a location outside the student safety zone not more than 90 days after he or she is sentenced for the conviction that gives rise to the obligation to register under [MCL 28.723 through MCL 28.730]. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone during the 90-day period described in this subsection.

While MCL 28.735(4) was not directly at issue in *Zujko*, the Court addressed its interplay with MCL 28.735(3)(c) in dicta,[4] as follows:

> Subsection 4 gives an individual who resides in a student safety zone and who becomes a registered sex offender 90 days to relocate outside the zone. A reading of MCL

[4] In arguing that an individual did not fall within the MCL 28.735(3)(c) exception unless he or she was a registered sex offender as of January 1, 2006, the prosecution contended in *Zujko* that the trial court's contrary interpretation would render MCL 28.735(4) nugatory. This Court rejected that position.

> 28.735(4) and MCL 28.735(3)(c) indicates that an individual who falls under the 3(c) exemption would not be compelled to comply with the requirement of subsection 4. However, an individual who did not meet the 3(c) requirement, i.e., he or she did not reside in a school safety zone before January 1, 2006, would be required to move his or her residence within 90 days pursuant to subsection 4. [*Zujko*, 282 Mich App at 523-524.]

MCL 28.735(4) thus generally affords an individual who is required to move from a student safety zone pursuant to MCL 28.735(1) a period of up to 90 days in which to do so. As the Court in *Zujko* noted, an individual who falls under the MCL 28.735(3)(c) exception is not required to move from the student safety zone, and therefore Subsection (4) does not apply to that individual. But "an individual who did not meet the [Subsection] 3(c) requirement, i.e., he or she did not reside in a school safety zone before January 1, 2006, would be required to move his or her residence within 90 days pursuant to subsection 4." *Id*. at 524. What the Court in *Zujko* did not address, even in dicta, was the effect, if any, of Subsection (4) when the second sentence of MCL 28.735(3)(c) applies. That, again, is because the defendant in *Zujko* had not engaged in any "contact with a minor within [the] student safety zone." MCL 28.735(3)(c).

We conclude, consistently with *Zujko*, that like an individual to whom MCL 28.735(3)(c) does not apply (because the individual did not reside within the student safety zone as of January 1, 2006), an individual who generally does meet that MCL 28.735(3)(c) requirement, but to whom MCL 28.735(3)(c) is wholly inapplicable by virtue of the exception to the exception set forth in the second sentence of MCL 28.735(3)(c), is subject to MCL 28.735(4). He or she must therefore "change his or her residence to a location outside the

student safety zone not more than 90 days after he or she is sentenced for the conviction that gives rise to the obligation to register under [MCL 28.723 through MCL 28.730].” MCL 28.735(4). However, as it did in MCL 28.735(3)(c), the Legislature has provided an exception when the individual “initiates or maintains contact with a minor within that student safety zone during the 90-day period . . . .” MCL 28.735(4). In that event, the individual is not entitled to the benefit of the 90-day allowance that Subsection (4) otherwise affords.

In other words, if, as here, the current offense required registration under SORA, see MCL 28.723(1)(a); MCL 28.722(k) and (s)(*ii*), and MCL 750.335a(2)(b), and the individual offender was not subject to an exception or, as here, the specific exception was inapplicable, the individual generally would have a 90-day period within which to change his or her residence. That is true even if, as here, the offense involved “contact with a minor within [the] student safety zone.” MCL 28.735(3)(c). However, if the individual “initiates or maintains contact with a minor within [the] student safety zone during the 90-day period,” MCL 28.735(4), he or she loses the benefit of the 90-day period otherwise allowed to effect the change of residence.

Consequently, because defendant’s current offense involved contact with a minor within the student safety zone, MCL 28.735(3)(c), the exception set forth in the first sentence of that subsection is inapplicable, and defendant must therefore vacate his residence within the student safety zone pursuant to MCL 28.735(1). Pursuant to MCL 28.735(4), he must do so within 90 days of the imposition of his sentence. If he were to initiate or maintain contact with a minor within that student safety zone during that 90-day period, he would lose the benefit of that 90-day allowance.

We therefore find that the "exception to the exception" set forth in the second sentence of MCL 28.735(3)(c) is satisfied by the conduct of the instant offense that caused defendant to have to register as a sex offender. We vacate the trial court's order denying the prosecution's request to order defendant to vacate his residence as a term of probation, and remand for resentencing with that added term of probation.

Reversed and remanded. We do not retain jurisdiction.

BECKERING, P.J., and RONAYNE KRAUSE, J., concurred with BOONSTRA, J.

NATIONAL WILDLIFE FEDERATION v DEPARTMENT OF ENVIRONMENTAL QUALITY (No 1)

Docket No. 307602. Submitted June 3, 2014, at Lansing. Decided August 12, 2014, at 9:00 a.m. Leave to appeal sought.

Kennecott Eagle Minerals Company sought to develop an underground mine to extract nickel and copper from the sulfide ores beneath the headwaters of the Salmon Trout River in the Yellow Dog Plains in Marquette County. Kennecott submitted applications to the Department of Environmental Quality (DEQ) for a nonferrous metallic mineral mining permit and a groundwater discharge permit. The DEQ consolidated the applications for public hearings and eventually issued the mining and discharge permits to Kennecott. Petitioners, the National Wildlife Federation, Yellow Dog Watershed Preserve, Inc., Keweenaw Bay Indian Community, and Huron Mountain Club, requested contested case hearings on both permits. An administrative law judge (ALJ) issued a proposal for decision, rejecting all challenges but crediting the concern of the Keweenaw Bay Indian Community that Eagle Rock, the proposed location for the mine's portal, was a place of worship and concluding that the permit application should therefore include a specific assessment in that regard. The DEQ initially remanded the matter to the ALJ for additional findings on whether Eagle Rock was a place of worship, then vacated that order and referred that issue along with the rest of the issues in the case to the DEQ's final decision-maker for a final determination and order. The final determination and order adopted the findings of fact and conclusions of law set forth in the ALJ's proposal for decision, with minor additions, except the final decision-maker concluded that a stipulation prevented petitioners from making the religious status of Eagle Rock an issue or, alternatively, that Mich Admin Code, R 425.202(2)(p), which calls for the assessment of mining impacts on "places of worship," concerned only buildings used for human occupancy, not purely outdoor locations such as Eagle Rock. Petitioners sought judicial review in the Ingham Circuit Court. The circuit court, Paula J. Manderfield, J., entered separate orders affirming the decisions of the DEQ to grant both permits. Petitioners filed separate applications for leave to appeal with regard to both permits. The Court of

Appeals granted both applications in unpublished orders. The present case, Docket No. 307602, concerns the decision to grant the mining permit. The companion case, Docket No. 308366, concerns the decision to grant the groundwater discharge permit and is reported following the present case.

The Court of Appeals *held*:

1. The DEQ and the circuit court correctly recognized the contested case proceeding below as an extension of the initial application process.

2. The DEQ did not err by allocating to appellants the burden of proof to prove their objections in the contested case proceedings. Mich Admin Code, R 324.64(1) imposes on a party filing a petition for a contested case hearing the burden of proof and of moving forward unless otherwise required by law. The provisions of MCL 324.63205(3), which establish that a person or entity seeking a mining permit under Part 632 of the Natural Resources and Environmental Protection Act, MCL 324.63201 to MCL 324.63223, bears the burden of proving that the mining project will satisfy applicable requirements, do not set forth other law governing contested case proceedings under Part 632.

3. The testimony does not support appellants' contention that the DEQ failed to hold Kennecott to its initial burden of proof concerning mitigating environmental damage or otherwise complying with applicable law.

4. The circuit court did not misapprehend or misapply the pertinent standard of review by holding that substantial evidence supported the DEQ's conclusion that the mine would be structurally sound.

5. Substantial evidence supported the conclusion that the proposed mining project imposed no significant potential for environmental impacts beyond the mining site. There was more than a scintilla of the evidence supporting the conclusion that there was no significant potential for environmental impacts beyond the immediate mining area.

6. Because Kennecott neither knew, nor should have known, of the alleged traditional cultural uses of Eagle Rock when it offered its environmental impact assessment under MCL 324.63205(2)(b), the assessment was not deficient for want of consideration of Eagle Rock.

7. The circuit court correctly recognized that the expert testimony concerning the lack of protocols for analyzing the cumulative impacts from all proposed mining activities and through all processes or mechanisms and that indicated that Kennecott had

followed best practices constituted substantial evidence to support the DEQ's determination that Kennecott had satisfied the requirement of Mich Admin Code, R 425.202(1)(b) and (2) to consider cumulative impacts.

8. The record contains more than a scintilla of the evidence indicating that the mining plans include adequate safeguards to protect surface waters from acid rock drainage.

9. Because substantial evidence supported the conclusion that the crown pillar of the mine would be stable, the DEQ and the circuit court did not err by not requiring Kennecott's contingency plans to consider an extreme-case scenario regarding failure of the crown pillar.

Affirmed.

ADMINISTRATIVE LAW — BURDEN OF PROOF — CONTESTED CASE PROCEEDINGS.

MCL 324.63205(3) establishes that a person or entity seeking a mining permit under Part 632 of the Natural Resources and Environmental Protection Act, MCL 324.63201 to MCL 324.63223, bears the burden of proving that the mining project will satisfy the requirements applicable to the project; Subsection 63205(3) does not set forth "other law" governing contested case proceedings under Part 632 for purposes of Mich Admin Code, R 324.64(1), which imposes on a party filing a petition for a contested case hearing the burden of proof and of moving forward "unless otherwise required by law."

Hooper, Hathaway, Price, Beuche & Wallace (by *Bruce T. Wallace, William J. Stapleton*, and *Angela L. Jackson*) for the National Wildlife Federation, Yellow Dog Watershed Preserve, Inc., Keweenaw Bay Indian Community, and Huron Mountain Club.

F. Michelle Halley for the National Wildlife Federation and Yellow Dog Watershed Preserve, Inc.

Honigman, Miller, Schwartz and Cohn LLP (by *Eric J. Eggan* and *H. Kirk Meadows*) and *Heather L. Chapman* for the Keweenaw Bay Indian Community.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal

Counsel, and *Robert P. Reichel* and *Andrew T. Prins*, Assistant Attorneys General, for the Department of Environmental Quality.

Warner Norcross & Judd LLP (by *Daniel P. Ettinger* and *Gaëtan Gerville-Réache*) for Kennecott Eagle Minerals Company.

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM. Appellants appeal by leave granted the circuit court's order affirming the decision of the Department of Environmental Quality (DEQ) to grant a mining permit to the Kennecott Eagle Minerals Company. We affirm.

I. FACTS

This case reflects the attempt to balance the potentially conflicting imperatives of exploiting a great economic opportunity and protecting the environment, natural resources, and public health. At issue is appellee Kennecott's proposal to develop an underground mine to extract nickel and copper from the sulfide ores beneath the headwaters of the Salmon Trout River in the Yellow Dog Plains in Marquette County.

Governing such activities is 2004 PA 449, which added Part 632, MCL 324.63201 to MCL 324.63223, to the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.* MCL 324.63205(1) states: "A person shall not engage in the mining of nonferrous metallic minerals except as authorized in a mining permit issued by the department." A "nonferrous metallic mineral" is "any ore or material to be excavated from the natural deposits on or in the earth for its metallic content, but not primarily for its iron or iron

mineral content, to be used for commercial or industrial purposes." MCL 324.63201(j). The Legislature set forth certain findings on this subject in MCL 324.63202, including the following:

> (c) Nonferrous metallic sulfide deposits are different from the iron oxide ore deposits currently being mined in Michigan in that the sulfide minerals may react, when exposed to air and water, to form acid rock drainage. If the mineral products and waste materials associated with nonferrous metallic sulfide mining operations are not properly managed and controlled, they can cause significant damage to the environment, impact human health, and degrade the quality of life of the impacted community.
>
> (d) The special concerns surrounding nonferrous metallic mineral mining warrant additional regulatory measures beyond those applied to the current iron mining operations.
>
> (e) Nonferrous metallic mineral mining may be an important contributor to Michigan's economic vitality. The economic benefits of nonferrous metallic mineral mining shall occur only under conditions that assure that the environment, natural resources, and public health and welfare are adequately protected.

In February 2006, Kennecott submitted applications to the DEQ for a nonferrous metallic mineral mining permit and a groundwater discharge permit. In January 2007, the DEQ consolidated the applications for public hearings, which were held in September 2007. In December 2007, the DEQ issued the mining and discharge permits to Kennecott.

Appellants requested contested case hearings on both permits. The DEQ's administrative law judge (ALJ) held consolidated hearings over the spring and summer of 2008. In August 2009, the ALJ issued a proposal for decision, rejecting all challenges but crediting the concern of appellant Keweenaw Bay Indian

Community that the proposed location for the mine's portal, Eagle Rock, was a place of worship, and concluding that the permit application should therefore include a specific assessment in that regard.

The DEQ initially remanded the matter to the ALJ for additional findings on whether Eagle Rock was a place of worship, then vacated that order and referred that issue along with the rest of the case to its final decision-maker for a final determination and order.

The final decision-maker concluded that a stipulation prevented appellants from making the religious status of Eagle Rock an issue, and, alternatively, that Mich Admin Code, R 425.202(2)(p), which calls for assessment of mining impacts on "places of worship," concerned only buildings used for human occupancy, not purely outdoor locations such as Eagle Rock. The final determination and order thus departed from the ALJ's recommendations in that regard, but otherwise adopted the findings of fact and conclusions of law set forth in the proposal for decision, with minor additions, and granted the mining permit.

Appellants sought judicial review in the circuit court, which, in a lengthy and detailed opinion and order, affirmed the DEQ in all regards. This Court granted leave to appeal in an unpublished order entered August 7, 2012.[1]

II. STANDARDS OF REVIEW

The circuit court's task was to review the administrative decision to determine if it was authorized by law and supported by competent, material, and substantial evi-

[1] As noted, this appeal relates only to the decision to grant the mining permit. The decision to grant the groundwater discharge permit is the subject of this case's companion, *Nat'l Wildlife Federation v Dep't of Environmental Quality (No 2)*, 306 Mich App 369; 856 NW2d 394 (2014) (Docket No. 308366).

dence on the whole record. Const 1963, art 6, § 28; MCL 24.306(1). An agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, follows from unlawful procedures resulting in material prejudice, or is arbitrary and capricious. *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998).

"[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). "This latter standard is indistinguishable from the clearly erroneous standard . . . . [A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id*. at 234-235.

A tribunal's interpretation of a statute is subject to review de novo. *In re Complaint of Rovas*, 482 Mich 90, 102; 754 NW2d 259 (2008). A tribunal's interpretation of an administrative rule is reviewed likewise. *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 270; 597 NW2d 227 (1999). A tribunal's evidentiary decisions are reviewed for an abuse of discretion. See *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Unpreserved issues, however, are reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

III. SCOPE OF CONTESTED CASE PROCEEDINGS

Appellants argue that the ALJ erred by allowing the introduction of new evidence in the contested case proceedings, or otherwise in treating the contested case

as an extension of the original process of deciding the permit application. Appellants suggest that the original application proceedings leading up to the initial decision to issue the mining permit should be deemed a completed adjudication, with the contested case proceedings that followed then serving as the first stage of appellate review, which, for that reason, should have proceeded with a conservative approach to taking new evidence. We disagree.

As noted in our opinion affirming the circuit court's rejection of this argument in connection with appellants' objections to the DEQ's decision to issue a groundwater discharge permit, *Nat'l Wildlife Federation v Dep't of Environmental Quality (No. 2)*, 306 Mich App 369; 856 NW2d 394 (2014) (Docket No. 308366), § 1701(1) of the Natural Resources and Environmental Protection Act, MCL 324.1701(1), authorizes the circuit court to grant "declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." Section 1704(2) adds that, when "administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court may direct the parties to seek relief in such proceedings." Section 1704(4) states: "If judicial review of an administrative, licensing, or other proceeding is available, . . . the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review."

MCL 324.63205(2) through MCL 324.63205(15) set forth procedures for applying for a mining permit and for an initial agency decision on the application. MCL 324.63219(1) in turn authorizes a person aggrieved by agency action or inaction relating to a mining permit to

file a petition for a contested case hearing. The statutes governing discharge permits set forth parallel provisions. See MCL 324.3103(1); MCL 324.3106; MCL 324.3112(1) and (3).

As noted in the companion case, these statutory provisions collectively set forth avenues for the DEQ to arrive at a single final decision on a permit application. We decline to repeat here the full analysis from the companion case, but reiterate that MCL 324.1704 reserves appellate review to the circuit court that deferred to an administrative agency in the first instance and that the provisions for third parties to initiate contested cases, and generous provisions for submission of new evidence, better comport with original actions than with appellate proceedings. See also MCR 7.210(A) and MCR 7.216(A)(4) (restricting additions to the original record in appeals before this Court); MCL 24.275 and Mich Admin Code, R 324.64 (liberally providing for the presentation of evidence in contested cases).

For these reasons, we conclude that the DEQ and the circuit court correctly recognized the contested case proceeding below as an extension of the initial application process for purposes of arriving at a single final agency decision on the application for a mining permit.

IV. BURDEN OF PROOF

Appellants argue that the DEQ erred by allocating the burden of proof to appellants to prove their objections in the contested case proceedings. We disagree.

MCL 324.63205(3) establishes that a person or entity seeking a mining permit under Part 632 bears the burden of proving that the mining project will satisfy applicable requirements, including that the project will proceed in ways minimizing adverse impacts on the environment:

> The applicant has the burden of establishing that the terms and conditions set forth in the permit application; mining, reclamation, and environmental protection plan; and environmental impact assessment will result in a mining operation that reasonably minimizes actual or potential adverse impacts on air, water, or other natural resources and meets the requirements of this act.

MCL 324.63219(1) authorizes a person aggrieved by agency action or inaction relating to a mining permit to file a petition for a contested case hearing, and § 63219(2) directs that such contested case hearings be held in accordance with the Administrative Procedures Act.[2] The latter authorizes administrative agencies to promulgate rules governing procedures for contested cases. MCL 24.233(3). Mich Admin Code, R 324.64(1), in turn, imposes on a party "filing an administrative complaint or petition for a contested case hearing . . . the burden of proof and of moving forward unless otherwise required by law."

Appellants insist that the burden of proof set forth in MCL 324.63205(3) properly remained with Kennecott beyond the initial application proceedings and through its answering of appellants' objections in the contested case proceedings. Appellants acknowledge Rule 324.64(1), but emphasize that it subordinates its allocation of the burden of proof where a different allocation is "required by law," and argue that such deference to "other law" should have kept MCL 324.63205(3) applicable throughout the proceedings below.

But MCL 324.63205(3) does not set forth "other law" governing contested case proceedings under Part 632, because it sets forth the burden of proof for an "applicant," meaning a party seeking a mining permit. Appellants assert that Kennecott remained an "applicant"

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[2] MCL 24.201 *et seq.*

through all the proceedings below, which is true in an important sense, given that, as discussed in Part III of this opinion, the contested case proceeding properly decided the question of Kennecott's mining permit de novo, and so Kennecott always bore the burden of offering evidence with which the DEQ could decide if the requirements for a mining permit were satisfied.[3] But if, in that sense, Kennecott retained the status of applicant throughout the proceedings, it nonetheless took on the status of responding intervenor in answering appellants' objections. MCL 324.63205(3) governs applicants, not intervenors or respondents, and so does not constitute "other law" supplanting the allocation of the burden of proof in Rule 324.64(1) to those resorting to contested cases in hopes of vindicating objections to agency action or inaction.

Appellants also suggest that the DEQ failed to apply the proper statutory evidentiary standard in reviewing Kennecott's permit application in the first instance, asserting that the DEQ official who headed the review team in this matter testified that his team did not apply MCL 324.63205 in reviewing the permit application, and that the ALJ called on appellants to submit conclusive evidence that the mining operation would, in fact, pollute, impair, or destroy natural resources.

However, checking the page of the record appellants cited to support their assertion concerning how the ALJ approached the case brought to light only one of the many instances where the ALJ held appellants to the burden of proving their objections, consistent with the substantive commands of Rule 324.64(1). The discus-

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[3] The DEQ's final determination and order reflected this understanding in pointing out that the case was ultimately decided on the basis of how the evidence preponderated generally, not simply on the basis of appellants' failure to prove their objections.

sion at the page cited related to the contested case proceeding, and thus sheds no light on what burden Kennecott was held to in initially satisfying the DEQ that it was entitled to the mining permit.

Appellants draw their argument about how the DEQ's team leader testified from the following exchange that occurred when that witness was cross-examined:

> *Q*. Subsection (11)[[4]] lays out the terms under which your department could grant a permit; right?
>
> *A*. Correct.
>
> *Q*. And could you just read that language for the record? . . . Subsection (b) would be okay, I think.
>
> *A*. Okay.
>
> "Subject to subsection (10), the department shall approve a mining permit if it determines both of the following: The permit application meets the requirements of this part. The proposed mining operation will not pollute, impair or destroy the air, water or other natural resources or the public trust in those resources in accordance with Part 17 of this act.[[5]] In making this determination, the department shall take into account the extent to which other permit determinations afford protection to natural resources. For the purposes of this subsection, excavation and removal of nonferrous metallic minerals and of associated overburden and waste rock in and of itself does not constitute pollution, impairment or destruction of those natural resources."
>
> *Q*. Now, subsection (12) indicates that, if the conditions in subsection (11), which you just read, are not met, the department shall deny the permit; right?

[4] MCL 324.63205(11).

[5] "This act" refers to the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*, Part 17 of which, MCL 324.1701 to MCL 324.1706, is the Michigan environmental protection act, commonly referred to as the MEPA.

A. That is correct.

Q. Now, given the section we just read before this about the burden of proof being on the applicant, would you agree with me that the burden of proof is on the applicant to prove that they will not pollute, impair or destroy the air, water or other natural resources of the public trust and those resources in accordance with Part 17, which is the Michigan Environmental Protection Act, for the record?

A. The applicant does have the burden under this section, yes.

Q. Okay. The burden that they will not pollute; right?

A. . . . I'm not familiar with Part 17 . . . . I'm not sure of the contents of that.

Q. Okay. But they have the burden of proving that they will not pollute natural resources; right?

A. . . . [I]t says that subsection (10)—"The department shall approve a mining permit if it determines both of the following." But you're right. They have to provide us the information that we would be able to use to make that determination.

Q. So the applicant has the burden of proving that they will not pollute air, water or other natural resources; right?

A. Well, I don't understand that. I'm not sure what your question—

Q. I'm just asking do you agree with me about that—that that's what the language here says?

A. It does not say that, because it doesn't say anything about the applicant having the burden of proof there.

Q. But we just read that.

A. We read that in the previous section.

Q. Right. But we could go back and look at it if you want to. . . . I'll just read.

"The applicant has the burden of establishing that the terms and conditions set forth in the permit application, mining, reclamation and environmental protection plan and environmental assessment will result in a mining

> operation that reasonably minimizes actual or potential adverse impacts on air, water and other natural resources and meets the requirements of this act."[6]
>
> Right?
>
> *A.* Correct.
>
> *Q.* So all of these requirements—for the whole Part 632 and its rules, the applicant has the burden; right?
>
> *A.* I'm not sure.

Counsel for Kennecott then objected that this question had been asked and answered. The ALJ opined that "he's done the best he can in answering it," but counsel for the National Wildlife Federation and the Yellow Dog Watershed Preserve, Inc., continued:

> *Q.* [W]hat standard did you apply in guiding your team's review of the application and ultimately making a recommendation that the application be approved and a permit be granted? What was the standard you used?
>
> *A.* We referred to the rule package and under the rules identified the sections that were required to be submitted by the applicant and did those indeed meet the requirements of the rules. And there's many rules that are there.
>
> *Q.* There are. Did you apply this section of the statute to your analysis?
>
> *A.* I did not, no.
>
> *Q.* Did the mining team apply this section of the statute to its analysis?
>
> *A.* I don't believe so, no.

Although counsel did finally succeed in obtaining the witness's agreement that his review team did not apply the statutory standard, presumably still referring to MCL 324.63205(3) and its placing of the burden on the applicant to show that a mining project will reasonably

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[6] This is a close paraphrase of MCL 324.63205(3).

minimize adverse impacts on natural resources and otherwise comply with environmental laws, the witness stated earlier that the applicant bore the burden of showing such compliance. That witness's inability to engage in a discourse on the environmental protection act, as incorporated by reference within Part 632, shows only that the review team considered the myriad factors involved in deciding a permit application as being guided by a "package" of "many rules" instead of by general statutory provisions. The cross-examination set forth above did not include detailing or exploring those "many rules," let alone attempting to expose them as failing to operate in furtherance of the applicable statutory imperatives.

For these reasons, we conclude that the testimony that appellants here take issue with did not imply that the DEQ failed to hold Kennecott to its initial burden of proof concerning mitigating environmental damage or otherwise complying with applicable law.

V. HYDRAULIC AND STRUCTURAL STABILITY

Appellants argue that the overwhelming weight of the evidence established that the mine is at substantial risk of hydraulic or structural failure if constructed and operated as planned. Appellants express concerns that the crown pillar—the undisturbed rock mass that is left between the active mine workings and the surface, in other words the "roof" of the mine—may collapse and that water from the overhead Salmon Trout River or wetlands could flood the mine and cause acid rock drainage on a large scale. The circuit court was satisfied that substantial evidence supported the DEQ's conclusion that the mine would be structurally sound. We agree with the circuit court.

Appellants point out that the DEQ's review team for this project resorted to outside experts to supplement its expertise in rock mechanics and geochemistry to review the plans and assert that the experts so relied on adjudged the mine application as proposing a " 'sloppy' and 'indefensible' "design. However, review of the complete opinions offered by those experts reveals that both were persuaded that the plans for the mine, as finally determined, would result in a structurally stable operation.

One of those experts, who was recognized without objection as an expert in the fields of mining engineering, geotechnical engineering, rock mechanics, and mine stability, recounted that he became involved in the instant project in 2007 and that initial concerns had included the stability of the crown pillar. But asked about a recommendation that mining operations be conducted initially to ensure a minimum thickness of $87\frac{1}{2}$ meters for the crown pillar, with careful monitoring thereafter, the expert opined that this "was a technically sound recommendation" and agreed that the mining permit should be approved. The other of those experts, whose credentials included having written a Ph.D. thesis on the analysis of crown-pillar stability, testified that the earlier envisioned crown pillar of $57\frac{1}{2}$ meters would be "marginally stable," but that one of 87 meters as eventually decided on "is definitely going to be stable."

Appellants repeatedly assert that the latter witness contradicted himself in a communication offered the same day, and they separately contest an evidentiary decision that kept that contradiction out of the record. Appellants advise that this expert communicated through an e-mail to an official with Kennecott's parent company that he retained serious concerns with even an

87½-meter crown pillar. However, the copy of this e-mail appellants wanted to enter into evidence was but one part of an offered deposition exhibit of over a thousand pages. Although the subject of that e-mail was touched upon during that expert's deposition, there was no hint that that one part of the voluminous exhibit seemed to contradict his approval of the crown pillar as ultimately proposed. Further, that witness was available for neither cross-examination nor rehabilitation when appellants attempted to contest that potential impeachment evidence. For those reasons, the ALJ limited admission of that exhibit to documents actually discussed during the deposition. The circuit court affirmed that decision. We agree that, because appellants wished to resort to that impeachment evidence only after the opportunity to cross-examine the witness regarding it had passed, the ALJ's decision to disallow it was not an abuse of discretion.

Appellants otherwise point to expert testimony that persisted in expressing concerns about the stability of the mine and argue that it should have held sway. But, again, the circuit court's task was not to reevaluate the evidence, but rather to determine if substantial evidence supported the DEQ's decisions. " 'Substantial evidence' is evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *Tomczik v State Tenure Comm*, 175 Mich App 495, 499; 438 NW2d 642 (1989). Because the circuit court recognized that the opinions of the two experts discussed above approving of the crown pillar design as finally determined provided substantial evidence in support of the DEQ's conclusion that agreed with them, we conclude that the circuit court did not misapprehend or misapply the pertinent standard of review.

VI. ENVIRONMENTAL IMPACT ASSESSMENT

MCL 324.63205(2)(b) requires that an application for a permit to engage in the mining of nonferrous metallic minerals include an environmental impact assessment (EIA) describing "the natural and humanmade features . . . in the proposed mining area and the affected area that may be impacted by the mining, and the potential impacts on those features from the proposed mining operation," and further directs that the EIA "define the affected area and . . . address feasible and prudent alternatives."

A. POTENTIALLY AFFECTED AREA

Appellants argue that Kennecott's EIA failed to consider potential impacts outside the immediate mining area. We agree with the DEQ and the circuit court that Kennecott satisfied the pertinent requirement by showing that there would be no such impacts.

"Affected area" is defined as "an area outside of the mining area where the land surface, surface water, groundwater, or air resources are determined through an environmental impact assessment to be potentially affected by mining operations within the proposed mining area." MCL 324.63201(b). In this case, Kennecott's EIA addressed environmental impacts of the mining project within the mining site only, insisting that there was no significant potential for impacts beyond the site and thus that its study needed to go no further. Appellants argue that Kennecott's EIA thus failed to satisfy the requirement to take into account the whole area that mining operations might impact, including "area outside of the mining area."

We note that the statutory command to consider impacts "outside of the mining area" where natural

resources "are determined through an environmental impact assessment to be potentially affected by mining operations" on its face imposes the duty to consider area outside the immediate mining area only to the extent that "the land surface, surface water, groundwater, or air resources" of such area are determined to be vulnerable to the impacts of mining. The question, then, is whether there was substantial evidence to support the conclusion that the proposed mining project imposed no significant potential for such environmental impacts beyond its fences.

Not in dispute is that the experts offered conflicting opinions in these regards. The ALJ resolved them in favor of Kennecott, concluding that the record showed that there would be no adverse environmental effects outside the mine's fence line from air deposition, water drawdown, habitat fragmentation, or noise, that Kennecott's air emissions would meet air quality standards both on and off site, and that emissions would be at permissible levels and have no adverse impact on the area's flora or fauna. The ALJ was thus satisfied that Kennecott fulfilled the requirements of Part 632 to address the "affected area" subject to mining impacts.

Appellants insist that the evidence militated in favor of recognizing significant environmental impacts outside the area covered by the EIA. However, again, weighing the evidence that way is not this Court's, nor was it the circuit court's, task, which was and is to review for substantial evidence.

The circuit court summarized in detail the testimony of the environmental engineer who prepared Kennecott's air permit application, who stated that he intentionally overestimated the amount of air pollutants likely to be produced, but that even under those conditions the mine's emissions would fall well within

legal limits. The court additionally noted that an air quality specialist with the DEQ testified that the amount and concentration of every air pollutant or toxin that the mine would produce would be below the permitted maximum and that, even after 10 years of accumulation, the levels would be low enough that area streams and soil would meet Michigan's drinking water and direct-contact criteria. According to this expert, although particulate deposition would occur over a wide area, it would be of no consequence because even the highest of such concentrations would be at insignificant levels. The court additionally noted that two toxicologists agreed that the maximum amount of emissions and concentrations, even as projected over the 10-year expected life of the mine, did not rise to the threshold of concentrations that would bring about adverse effects in plants, invertebrates, birds, or mammals. One of them further explained that the annual maximum deposition of the two heavy metals of greatest concern, copper and nickel, would constitute a fraction of the amount of those metals that was already found in the area's soil. The other opined that the amount of heavy metals entering the area's streams would be so small that it was unlikely that there would be any toxic plume in Lake Superior or any significant effect on the mouth of the Salmon Trout River.

The circuit court further noted that several of appellants' own witnesses admitted that serious habitat fragmentation had already occurred in the area as the result of historical and ongoing logging and other activities, that there was no evidence that wildlife used the Yellow Dog Plains as a corridor between habitats, and that other areas within the vicinity of the mine provided the same habitats as those found within the mine footprint, and so wildlife displaced by the mine could readily relocate.

The court recounted that Kennecott's expert opined that the decibel level of the blasting noise would start at something akin to that of a chainsaw at the portal but only register at the level of a spoken conversation at the property line, but that after approximately one week the noise from the blasts would register at the level of a spoken conversation at the mine portal itself and would be inaudible at the fence line. The court further noted that Kennecott would be shielding lights at the mine site, building berms around the outside of the surface facilities to dampen noise, and equipping the exhaust stacks with silencers.

The court continued that Kennecott planned to build no new roads, intended to control road dust by watering at regular intervals in accordance with the strict limits set forth in the mining permit, and planned to follow a fugitive dust plan. The court further noted that there was testimony to the effect that road use associated with the mine would not have a substantial impact on wildlife in the area because the road was already well used and regularly graded.

The court additionally summarized Kennecott's blasting expert's testimony as stating that various techniques would mitigate the vibrations of blasts in order to protect sensitive areas or structures, so that the particle velocity from blasting would be well below levels that could damage buildings. The court noted that the expert added that the blasting energy would be well below the level that would be harmful to the fish in the Salmon Trout River.

Appellants do not take issue with any of these representations concerning the evidence of record, but instead point to several examples of conflicting testimony that they insist should have held sway. But the DEQ was entitled to resolve such factual controversies

on the basis of substantial evidence, and the circuit court's summary obviously showed that there was more than a scintilla of the evidence supporting the conclusion that there was no significant potential for environmental impacts beyond the immediate mining area.

B. PLACE OF WORSHIP

Mich Admin Code, R 425.202(1)(a)(i) requires that an EIA include an "identification and description of the condition or feature as it currently exists within the mining area and the affected area." Rule 425.202(2) states that the latter requirements "apply to natural and humanmade conditions and features including, but not limited to," several listed items, among which Subrule (2)(p) specifies "[r]esidential dwellings, places of business, places of worship, schools, hospitals, government buildings, or other buildings used for human occupancy all or part of the year."

At issue is the mining project's impacts on Eagle Rock, which appellants describe in their brief on appeal as "an imposing jagged rock outcrop rising some 60 feet at its highest point, from the otherwise flat geography of the Yellow Dog Plain." The testimony below included elaborate descriptions of traditional religious and other cultural uses of that location as a special gathering place, along with ancient names for it from the pertinent Native American languages.

Kennecott's EIA considered Eagle Rock only as normal topography, its archeologist having reported nothing about that location to suggest that it was a place of any cultural significance. The Keweenaw Bay Indian Community intervened in this case over its concerns regarding the impacts of mining operations on the cultural traditions associated with Eagle Rock.

Appellees objected to further development of this issue below on the ground that appellants had stipulated to limit such advocacy to the issue of the Keweenaw Bay Indian Community's standing to intervene. The ALJ, however, reached the issue on its merits and determined that further findings were in order. The DEQ's final decision-maker, however, alternatively concluded that a stipulation kept the issue off the table and that "place of worship" for purposes of Rule 425.202(2)(p) referred to buildings for human occupancy, not purely outdoor locations. The circuit court in turn affirmed the DEQ on those alternative grounds.

We affirm on still other grounds. See *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997) (stating that this Court will not reverse when the trial court reaches the correct result even for the wrong reason). Kennecott submitted its EIA in February 2006, and public hearings on the mining application were held in September of that year. In their brief on appeal, appellants advise that Kennecott and the DEQ "were informed of the significance of Eagle Rock during the Part 632 public comment period," thus admitting that Kennecott had no knowledge of any such customs when it submitted its EIA. Appellants nowhere suggest that any investigation or inquiry on Kennecott's part in the early stages of the proceedings was deficient, nor do they cite any authority for the proposition that a mining applicant is obliged to update its EIA throughout the whole review process to take account of newly acquired information. Accordingly, assuming without deciding that no stipulation prevented litigation of this issue and also that "places of worship" for purposes of Rule 425.202(2)(p) include such outdoor locations as Eagle Rock, we nonetheless hold that Kennecott's EIA was not deficient for want of consideration of Eagle Rock as a place of worship, because it neither knew, nor should

have known, of such traditional cultural uses of that location when it offered its EIA.[7]

C. CUMULATIVE IMPACTS ANALYSIS

Mich Admin Code, R 425.202(1)(b) requires that an EIA provided with an application for a permit to mine nonferrous metallic minerals include an "analysis of the potential cumulative impacts on each of the conditions or features listed in [Rule 425.202(2)] within the mining area and the affected area from all proposed mining activities and through all processes or mechanisms," and specifies that the analysis "consider additive effects, and the assessment of significant interactions between chemical and physical properties of any discharges, with reference to the physical and chemical characteristics of the environment into which the discharge may be released." Rule 425.202(2) lists the many features and conditions to be considered. "Cumulative impact" is "the environmental impact that results from the proposed mining activities when added to other past, present, and reasonably foreseeable future activities." Mich Admin Code, R 425.102(1)(h).

That the witnesses differed on how best to analyze cumulative impacts, and thus on whether Kennecott satisfied that requirement, is not at issue. The ALJ concluded that there was no generally accepted scientific protocol for evaluating cumulative impacts of this sort, that the only evidence in the record was that the best practice was to accumulate as much data about individual stressors as is practical and use that data to

[7] The proceedings below included occasional comments about Native American treaty rights in connection with Eagle Rock, which comments were echoed at oral argument. But such discussion was properly kept at the margins in this case, because proceedings under Part 632 are not a forum for vindicating treaty rights.

reach conclusions regarding overall potential impacts, and that because Kennecott followed that best practice its EIA included a cumulative-impacts analysis that satisfied the requirements of Part 632.

The circuit court in turn acknowledged that appellants presented witnesses who disapproved of how Kennecott endeavored to address cumulative impacts, but noted that a toxicologist had testified that the components that a cumulative impact analysis should include had in fact been addressed in Kennecott's permit application and that another expert testified that the cumulative impact of multiple stressors was very difficult to measure, that there was no established protocol for evaluating the effect of multiple stressors, at least with regard to wildlife, and that Kennecott followed the standard method of assessing cumulative impacts in its EIA.

Appellants do not dispute the circuit court's summary of the evidence but for questioning the relevance of, and otherwise discounting, the toxicologist's opinion on the sufficiency of Kennecott's approach to cumulative impacts.

We conclude that the circuit court correctly recognized that the expert testimony concerning the lack of protocols for analyzing cumulative impacts and indicating that Kennecott had followed best practices, constituted substantial evidence to support the DEQ's determination that Kennecott had satisfied the requirement to consider cumulative impacts.

VII. RECLAMATION AND ENVIRONMENTAL PROTECTION PLAN

MCL 324.63205(2)(c)(*v*) requires that an application for a permit to mine nonferrous metallic minerals include a reclamation and environmental protection plan, which must in turn include "[p]rovisions for the

prevention, control, and monitoring of acid-forming waste products and other waste products from the mining process so as to prevent leaching into groundwater or runoff into surface water." Mich Admin Code, R 425.203(c)(xxi) in turn requires that such plans include information depicting or describing "[p]lans and schedules for monitoring, containment, and treatment of surface runoff that has contacted, or may contact, ore, waste rock, overburden, or tailings determined to be reactive," and that such plans "be designed to reasonably minimize actual and potential adverse impacts on groundwater and surface water by preventing leaching or runoff of acid-forming waste products and other waste products from the mining process."

MCL 324.63205(2)(c)(*i*) adds that such plans must include "[a] description of materials, methods, and techniques that will be utilized." Subsection (2)(c)(*ii*) in turn calls for "[i]nformation that demonstrates that all methods, materials, and techniques proposed . . . are capable of accomplishing their stated objectives in protecting the environment and public health," with the exception that "such information may not be required for methods, materials, and techniques that are widely used in mining or other industries and are generally accepted as effective."

A. ACID ROCK DRAINAGE

Appellants argue that Kennecott failed to adequately address the prevention, control, and monitoring of acid-forming waste products to prevent runoff into surface waters. The circuit court dismissed that concern on the ground that appellants had failed to provide evidentiary support for their position. Appellants do not argue that they did in fact provide evidentiary support for their position, but instead suggest that this issue

was self-preserving simply because, in their view, the mining application was facially deficient in addressing management of acid rock drainage and how to protect nearby watercourses from it. We disagree and conclude that the circuit court correctly recognized that appellants bore the burden of proof in the contested case proceedings (as discussed in Part IV of this opinion), and so forfeited any issue over which they failed to give expression to, and provide support for, any concerns they had.

Further, appellants argue this issue in purely substantive terms, articulating no challenge to the circuit court's decision to deem it forfeited for lack of preservation. Because appellants do not challenge the procedural basis upon which the circuit court rejected its appellate arguments regarding the adequacy of Kennecott's plans to minimize the hazards of acid rock drainage, we affirm the result below in this regard for that reason.

Alternatively, we conclude that there was substantial evidence to show that Kennecott's reclamation and environmental protection plan well enough addressed that hazard.

The evidence showed that runoff from the facility or road surfaces could contain sulfide- or sulfur-bearing rock, which could turn to sulfuric acid, and that acid rock drainage may also occur from runoff from development rock, which is the material removed from the mine to reach the ore. An environmental chemist elaborated that a project of this sort involves "a lot of rock that has not experienced oxygen or water . . . very deep in the earth," and that "as that rock is excavated . . . it is exposed to oxygen and water," triggering "reactions . . . that generate sulfuric acid." The expert added that "the sulfuric acid then dissolves a variety of

constituents," potentially resulting in "water that's . . . acidic and has a highly variable metal loading that can cause substantial impacts on receding waters."[8] The parties have consistently agreed that the hazard of acid rock drainage that this mining project poses demands careful management.

Kennecott's application reported that development rock would initially be stored in a temporary storage area, then later returned to the mine as backfill. The permit itself confirms this plan. The development rock will be sheltered and neutralized with limestone, and runoff will be routed to lined basins, whose pumps are designed to handle even severe storms, and then processed through the wastewater treatment plant. A water resources engineer testified that the life of the instant mining project was projected at seven years, but that the wastewater treatment plant was designed to accommodate extremes of rainfall that might occur over a 100-year period, and combinations of snowmelt and rainfall that might occur over a 50-year period, characterizing those models as "prudent" and resulting in a "conservative" design.

The record thus contains more than a scintilla of evidence indicating that the mining plans include adequate safeguards to protect surface waters from acid rock drainage.

B. AIR FILTER

Appellants argued below that Kennecott had failed to provide information to show that the air filter it intended to use with its smokestack to limit emissions of pollutants would be effective for that purpose, or was

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[8] This testimony confirms the Legislature's findings stated in MCL 324.63202(c), which we earlier set forth in the recitation of facts.

well enough established through uses in industry to obviate the need to do so. The circuit court agreed that Kennecott did not provide information regarding the exhaust stack, but rejected appellants' challenge on the basis of expert testimony that similar filtration systems were widely used in other industries and worked at a high efficiency rate.

We decline to address this issue in light of events transpiring since it was originally litigated. In their briefs on appeal, the parties agreed that Kennecott submitted an amended application for an air permit that eliminated the filter from the plan, and at oral argument the parties agreed that Kennecott prevailed in this regard and was vindicated in litigation not at issue in this appeal.

For these reasons, we decline to reach this issue in deference to an earlier determination, see *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010) (noting that collateral estoppel retains limited operation in cases originating in administrative agencies), or, alternatively, because subsequent events have rendered it impossible for us to grant any relief in the matter, see *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues.").

VIII. CONTINGENCY PLANS

MCL 324.63205(2)(d) requires that an application for a permit to mine nonferrous metallic minerals include a "contingency plan that includes an assessment of the risk to the environment or public health and safety associated with potential significant incidents or failures and describes the operator's notification and response plans." Mich Admin Code, R 425.205(1)(a) lists

among the potential accidents or failures that must be addressed for this purpose unplanned subsidence of the mine's structure, power disruptions, equipment failures, fires, natural disasters, and the various risks attendant to producing, processing, storing, releasing, or transporting hazardous substances. Rule 425.205(1)(b) and (c) call for descriptions of emergency procedures, including persons or entities to notify, and Subrule (1)(d) calls for a plan for testing the contingency plan.

Kennecott's contingency plan listed the 12 hazards set forth in Rule 425.205(1)(a), and addressed each in turn, along with emergency procedures and testing. Appellants protest that the plan is inadequate for failure to consider interruptions of electrical service occasioned by natural disasters and for want of plans for recapturing escaping contaminants, plugging any holes or fractures associated with subsidence, neutralizing any acidification resulting from that or other mishaps, restoring water levels drawn down by subsidence, or rescuing the fish and other wildlife potentially affected by a disaster under the Salmon Trout River. Appellants further assert that the head of the DEQ's review team for this project stated that Kennecott's application "contains no contingency plan for subsidence or crown pillar failure; for closure of the wastewater treatment plant for a substantial period of time; for significantly increased inflow to the mine; malfunction of the [mine ventilation air raise] air filtering system; or for water leaking into aquifers from the underground mine." Appellants further protest that "Kennecott's application proposes to form a plan only after the fact. If its subsidence monitoring indicates the existence of a problem, only then will it initiate an evaluation of its mining methods and only then will it attempt to devise 'response measures' to combat disaster."

In contrast, the ALJ described Kennecott's contingency plan as "thorough" and "complete," addressing "a host of contingencies," including unexpected subsidence, meaning sinking, or partial collapse, of the crown pillar.

The court noted that appellants had asserted that the head of the DEQ's review team had admitted that the contingency plan failed to consider crown pillar failure, long-term closure of the wastewater treatment plant, significantly greater mining inflow than estimated, failure of the exhaust stack, contaminated-water leakage from the reflooded mine, or other catastrophic events. The circuit court continued that appellants had in fact misrepresented that DEQ official's testimony, noting that in the testimony appellants cited the official was speaking not of the contingency plan submitted by Kennecott, but of contingency conditions included within the permit.

The circuit court further noted in detail that Kennecott's plan contained information regarding each of the contingencies identified by appellants, then added that "[g]iven the multiple different variables that may come into play should any given contingency occur, such as the scope of the problem and the cause or causes of the problem, providing a range of possible measures that will be considered and undertaken is a reasonable approach to drafting a contingency plan."

Our review of the record confirms the circuit court's observations concerning the testimony of the DEQ official to whom appellants attribute admissions concerning major deficiencies in Kennecott's contingency plan. In the testimony that appellants cite, that witness was indeed testifying that the *permit*, as issued, did not address contingency plans in the event of crown pillar failure, tornadoes, forest fires, prolonged shutdowns of

the wastewater treatment plant, inflows to the mine upwards of 500 gallons per minute, or malfunctions of the air filtering system. The witness later reiterated that the permit did not include any contingency plan for failure of the crown pillar, but stated that he would have to check the application to see what it had to say on that subject, then added, "I have not agreed" that the application lacked a contingency plan for crown pillar failure. The next day, the witness again testified about hazards for which the permit, not the application, included no contingency plans. As the circuit court ably noted, the testimony cited does not support the proposition for which appellants cited it.

We further agree with the circuit court that Kennecott properly offered a range of possible responses to several potential misadventures and did not fall short in connection with the most devastating of conceivable disasters, the wholesale collapse of the crown pillar.

Kennecott's plan first describes mining techniques calculated to "minimize the potential for surface subsidence to occur," then explains the prediction that "displacement of the crown pillar . . . will be imperceptible at the ground surface," then continues as follows:

> The contingency measures to be taken in the event unanticipated surface subsidence occurs will be initiated based on subsidence monitoring. Subsidence monitoring will be performed at two locations above the ore body, adjacent to the overlying wetland. In the event of unanticipated subsidence, the mining sequence and backfill methods . . . will be evaluated and adjusted to reduce the subsidence. Adjustments to the stope sequence, backfill methods, crown pillar thickness, and backfill mix would be [made] as needed to minimize subsidence.

Appellants do not argue that adjustments in the mining sequence and backfill methods are insufficient to cor-

rect for unexpected subsidence, but instead suggest that the plan is deficient for failing to consider a disastrous degree of subsidence occurring too quickly for those techniques to remediate. We conclude that because there was substantial evidence to support the conclusion that the crown pillar would be stable (see Part V of this opinion), the DEQ and the circuit court did not err by not insisting that the contingency plan consider such an extreme-case scenario.

IX. CONCLUSION

For the reasons stated, we affirm the decision of the circuit court affirming the DEQ's decision to grant Kennecott a Part 632 mining permit.

Affirmed. No taxable costs under MCR 7.219, a question of public policy being involved.

CAVANAGH, P.J., and OWENS and STEPHENS, JJ., concurred.

NATIONAL WILDLIFE FEDERATION v DEPARTMENT OF ENVIRONMENTAL QUALITY (No 2)

Docket No. 308366. Submitted June 3, 2014, at Lansing. Decided August 12, 2014, at 9:05 a.m. Leave to appeal sought.

Kennecott Eagle Minerals Company sought to develop an underground mine to extract nickel and copper from the sulfide ores beneath the headwaters of the Salmon Trout River in the Yellow Dog Plains in Marquette County. Kennecott submitted applications to the Department of Environmental Quality (DEQ) for a nonferrous metallic mineral mining permit and a groundwater discharge permit. The DEQ consolidated the applications for public hearings and eventually issued the mining and discharge permits to Kennecott. Petitioners, the National Wildlife Federation, Yellow Dog Watershed Preserve, Inc., Keweenaw Bay Indian Community, and Huron Mountain Club, requested contested case hearings on both permits. The contested case proceedings progressed through the proposal for decision by the administrative law judge (ALJ) to the final decision-maker's final determination and order, which adopted the proposal for decision, but for minor adjustments, and the DEQ thereafter affirmed the granting of the permits. Petitioners sought judicial review in the Ingham Circuit Court. The circuit court, Paula J. Manderfield, J., entered separate orders affirming the decisions of the DEQ to grant both permits. Petitioners filed separate applications for leave to appeal with regard to both permits. The Court of Appeals granted both applications in unpublished orders. The present case, Docket No. 308366, concerns the decision to grant the groundwater discharge permit. The companion case, Docket No. 307602, concerns the decision to grant the mining permit and is reported preceding the present case.

The Court of Appeals *held*:

1. The DEQ and the circuit court correctly recognized that the contested case proceedings were an extension of the original application process, not appellate review of the initial decision on the application to which a more limited evidentiary standard would apply.

2. The circuit court did not err by considering whether, to the extent that the discharges that the appellants opposed required permits, they did not necessarily have to come under the specific permit under review. The provisions of Mich Admin Code, R 324.74(1), which direct that review of a proposal for decision by a final decision-maker shall be restricted to the record made at the hearing and the exceptions and arguments submitted by the parties, do not prevent an appellate court from exercising any of its normal decision-making prerogatives.

3. An applicant for a permit retains that status, and the attendant burden of proof, throughout the permitting process in connection with proving entitlement to the permit, but a petitioner in a contested case hearing normally bears the burden of proving that petitioner's objections. To the extent that Kennecott relied on exemptions to permit requirements, it bore the burden of proving that they applied. To the extent that the appellants disagreed, they bore the burden of proving otherwise. There was no error in the allocations of the burdens of proof in connection with this issue.

4. The circuit court properly determined that the permit to allow discharge from the mine's wastewater treatment system under Part 31 of the Natural Resources and Environmental Protection Act, MCL 324.3101 to MCL 324.3134, was not invalidated because it failed to cover the plans for the recirculation of utility water within the mine, backfilling the excavation area, and reflooding the mine. The plans for utility water within the mine do not involve any discharges for purposes of Part 31 and Mich Admin Code, R 323.2210 provides exemptions to permit requirements applicable to the plans for backfilling and reflooding. The activities within the mine come under a Part 632 mining permit, MCL 324.63201 to MCL 324.63223, and require no separate Part 31 permit.

5. The circuit court properly affirmed the conclusions of the DEQ that the state of the design of the wastewater treatment system was sufficiently advanced so that the DEQ could evaluate it, that the estimates or assumptions used to predict the quality of influent and rate of water inflow satisfied the requirements of the applicable administrative rules, and that Kennecott used the best available information or technology for those purposes.

Affirmed.

ADMINISTRATIVE LAW — BURDEN OF PROOF — CONTESTED CASE PROCEEDINGS.

An applicant for a permit retains that status, and the attendant burden of proof, throughout the permitting process in connection

with proving entitlement to the permit; a petitioner in a contested case hearing normally bears the burden of proving that petitioner's objections.

Hooper, Hathaway, Price, Beuche & Wallace (by *Bruce T. Wallace, William J. Stapleton*, and *Angela L. Jackson*) for the National Wildlife Federation, Huron Mountain Club, and Yellow Dog Watershed Preserve, Inc.

F. Michelle Halley for the National Wildlife Federation and Yellow Dog Watershed Preserve, Inc.

Honigman, Miller, Schwartz and Cohn LLP (by *Eric J. Eggan* and *H. Kirk Meadows*) and *Heather L. Chapman* for the Keweenaw Bay Indian Community.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Robert P. Reichel* and *Andrew T. Prins*, Assistant Attorneys General, for the Department of Environmental Quality.

Warner Norcross & Judd LLP (by *Daniel P. Ettinger* and *Scott M. Watson*) for Kennecott Eagle Minerals Company.

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM. Appellants appeal by leave granted the circuit court's order affirming the decision of the Department of Environmental Quality (DEQ) to grant a groundwater discharge permit to the Kennecott Eagle Minerals Company in connection with the latter's plan to develop an underground mine to extract nickel and copper from the sulfide ores beneath the headwaters of the Salmon Trout River in the Yellow Dog Plains in Marquette County. We affirm.

I. FACTS

In February 2006, Kennecott submitted applications to the DEQ for a nonferrous metallic mineral mining permit and a groundwater discharge permit. The DEQ consolidated the applications for public hearings. In December 2007, the DEQ issued mining and discharge permits to Kennecott.

Appellants requested contested case hearings on both permits. Appellants' major concerns were that the mine might collapse and that operations would produce excessive acid rock drainage,[1] either of which would result in serious damage to the area's environment and natural resources, including the Salmon Trout River. The contested case proceedings progressed through the proposal for decision by the administrative law judge (ALJ) to the final decision-maker's January 14, 2010 final determination and order, which adopted the proposal for decision, but for minor adjustments, and the DEQ affirmed the granting of the permits.

Appellants sought judicial review in the circuit court, which, in a lengthy and detailed opinion and order, affirmed the DEQ in all regards. This Court granted leave to appeal in an unpublished order entered August 7, 2012.[2]

II. STANDARDS OF REVIEW

The circuit court's task was to review the administrative decision to determine if it was authorized by law

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[1] According to expert testimony, a project of this sort involves excavating large quantities of rock that, when exposed to oxygen and water, generate sulfuric acid. The parties agree that the hazard of acid rock drainage inherent in this project necessitates careful management.

[2] As noted, this appeal relates only to the decision to grant the groundwater discharge permit. The decision to grant the mining permit is the subject of this case's companion, *Nat'l Wildlife Federation v Dep't of Environmental Quality*, 306 Mich App 336; ___ NW2d ___ (2014) (Docket No. 307602).

and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; MCL 24.306(1). An agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, follows from unlawful procedures resulting in material prejudice, or is arbitrary and capricious. *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998).

"[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). "This latter standard is indistinguishable from the clearly erroneous standard . . . . [A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id*. at 234-235.

A tribunal's interpretation of a statute is subject to review de novo. *In re Complaint of Rovas*, 482 Mich 90, 102; 754 NW2d 259 (2008). A tribunal's interpretation of an administrative rule is reviewed likewise. *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 270; 597 NW2d 227 (1999). A tribunal's evidentiary decisions are reviewed for an abuse of discretion. See *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Unpreserved issues, however, are reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

III. SCOPE OF CONTESTED CASE PROCEEDINGS

Appellants argue that the administrative law judge erred by allowing the introduction of new evidence in

the contested case proceedings, or otherwise in treating the contested case as an extension of the original process of deciding the permit application. Appellants suggest that the original application proceedings leading up to the initial decision to issue the groundwater discharge permit should be deemed a completed adjudication, with the contested case proceedings that followed then serving as the first stage of appellate review, which for that reason should have proceeded with a conservative approach to taking new evidence. The DEQ and the circuit court rejected this argument, as do we.

Section 1701(1) of the Natural Resources and Environmental Protection Act, MCL 324.1701, authorizes the circuit court to grant "declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." Section 1704(2) adds that, where "administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court may direct the parties to seek relief in such proceedings." MCL 324.1704(2). Section 1704(4) states: "If judicial review of an administrative, licensing, or other proceeding is available, . . . the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review." MCL 324.1704(4).

Water resources protection falls under Part 31, MCL 324.3101 to MCL 324.3134, of the Natural Resources and Environmental Protection Act.[3] MCL 324.3103(1) states that "[t]he department shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the Great Lakes, which are or

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[3] MCL 324.101 *et seq.*

may be affected by waste disposal of any person." Section 3106 states that "[t]he department shall establish pollution standards for lakes, rivers, streams, and other waters of the state . . . [and] shall issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance that may affect the quality of the waters of the state." MCL 324.3106. Section 3112(1) states that "[a] person shall not discharge any waste or waste effluent into the waters of this state unless the person is in possession of a valid permit from the department." MCL 324.3112(1). Section 3113(3) authorizes "the permittee, the applicant, or any other person" to file objections and request a contested case hearing in accordance with the Administrative Procedures Act.[4] MCL 324.3113(3).

These statutory provisions collectively set forth avenues for the DEQ to arrive at a single final decision on a permit application: agency review of extensive application materials subject to broadening with a contested case hearing when an applicant or third party persuades the agency that the additional procedure is warranted.

Appellants' interpretation of those provisions as establishing an initial agency decision as a final order with the contested case hearing functioning as appellate review is a strained one. This is particularly so considering that MCL 324.1704(2) encourages judicial deference to administrative proceedings where required, and MCL 324.1704(4) then calls for the court otherwise so deferring its original jurisdiction to "maintain jurisdiction for purposes of judicial review." These provisions call for administrative proceedings to arrive at a final decision first subject to appeal in the circuit court.

[4] MCL 24.201 *et seq.*

Other authorities bearing on contested cases and appeals support our conclusion.

Appeals involve the parties in the original litigation, or subsets of them, and come about when initiated by one or more parties, with strangers to the case eligible to participate only as amici curiae constrained to addressing issues raised by the parties. See MCR 7.212(H). But Part 31 authorizes even strangers to the original permit proceedings to petition for a contested case hearing. MCL 324.3113(3).

Further, the rules governing appellate practice establish that appeals in this Court "are heard on the original record," MCR 7.210(A), except that this Court, "in its discretion, and on the terms it deems just," may "permit amendments, corrections, or additions to the transcript or record," MCR 7.216(A)(4). In contrast, MCL 24.275 sets forth several general rules for the admission of evidence in contested case proceedings in the administrative setting, including incorporation by reference of "the rules of evidence as applied in a nonjury civil case in circuit court," and the statement that "an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." This statute is inclusive in nature, inviting further evidentiary development. As are the administrative rules governing evidence in contested case proceedings. Mich Admin Code, R 324.64(5) states that "[p]arties are entitled to offer evidence as to the facts at issue," Subrule (2) states that "parties shall present the evidence in an order determined by the administrative law judge," and Subrule (4) authorizes parties to cross-examine witnesses. The conservative provisions for enlarging the record for purposes of appeals in this Court thus stand in stark

contrast to the liberal provisions for presenting new evidence in administrative contested case proceedings.

At oral argument, appellants attempted to draw support for their position from the administrative rules promulgated to implement Part 31. In particular, Mich Admin Code, R 323.2133, Subrule (1), which authorizes "the department" to issue a final decision on a permit application after review of pertinent determinations, recommendations, and comments, and Subrule (2), which states that "[a]n *appeal* to a final determination of the department made pursuant to subrule (1) . . . , or to a condition of a permit issued, or the denial of a permit pursuant to part 31 of the act and the rules shall be in accordance with and subject to section 3113 of part 31 of the act." (Emphasis added.)

Appellants argue that use of the word "appeal" indicates the understanding that a contested case proceeding following an initial agency decision is in the nature of an appellate proceeding. We disagree. The word "appeal" appears in tandem with a reference to MCL 324.3113, and thus the latter's Subsection (3) that, again, directs that a contested case hearing proceed in accordance with the Administrative Procedures Act. That incorporation by reference thus brings to bear the generous provisions of MCL 24.275 for submission of new evidence, which, as noted, are more consistent with original actions than appellate ones. Further, "[i]t is fundamental administrative law that administrative agencies are the creatures of statute." *Castro v Goemaere*, 53 Mich App 78, 80; 218 NW2d 395 (1974). Accordingly, an agency cannot, by word choice or otherwise, transform statutory provisions reserving appellate review to the judiciary into a scheme whereby the agency itself sits as its own first appellate tribunal.

Appellants rely on *In re 1987-88 Med Doctor Provider Class Plan*, 203 Mich App 707; 514 NW2d 471 (1994), where this Court held that a contested case proceeding conducted in accordance with the Administrative Procedures Act, which thus may involve introduction of new evidence, does not necessarily transform the contested case proceeding into "a 'square one' determination 'de novo' " of the issue at hand. *Id*. at 728. But, as the circuit court in this case noted, that case involved "an unusual appellate process." *Id*. at 724. At issue was a statutory scheme according to which a determination of the Insurance Commissioner is subject to appellate review by an independent hearing officer. See *id*. at 710. This Court noted that, although the appeal was to take the form of a contested case proceeding under the Administrative Procedures Act, the pertinent provisions of the Nonprofit Health Care Corporation Reform Act, MCL 550.1101 *et seq.*, consistently specified that the independent hearing officer's review was in the nature of an appeal. *In re Med Doctor*, 203 Mich App at 725-726. Accordingly, despite being directed to conduct a contested case hearing pursuant to the Administrative Procedures Act, the independent hearing officer owed considerable deference to the Insurance Commissioner. *Id*. at 727-728. *In re Med Doctor* is distinguishable from the instant case in that Part 31 nowhere describes as an appeal a contested case proceeding to decide whether to grant a groundwater discharge permit.

Appellants also rely on *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531; 747 NW2d 321 (2008), in which this Court disapproved of the DEQ's practice of issuing general permits to allow concentrated animal feeding operations to develop their own comprehensive nutrient management plans that substantially bypassed the public participa-

tion required for the permitting process by the federal Clean Water Act.[5] *Id*. at 554-555. *Sierra Club* is distinguishable from the instant case because the application process here at issue included extensive public notice and comment, of which appellants took full advantage.

Appellants complain that the additional evidence received through contested case proceedings was not subject to such public scrutiny, but cite no authority that stands for the proposition that, when the evidentiary record is supplemented for contested case proceedings in accordance with MCL 324.3113(3), MCL 24.275, and Rule 324.64, any such new evidence must be limited to matters subjected to public notice and comment in accordance with the initial review process. We do not deem the Legislature's apparent satisfaction that public notice and comment apply to only the initial permitting process as suggesting that the Legislature envisioned proceeding to a contested case hearing as starting the appeal process instead of as continuing the original decisional mechanisms.

For these reasons, the DEQ and the circuit court correctly recognized the contested case proceeding below as an extension of the initial application process for the purpose of arriving at a single final agency decision on the application for a groundwater discharge permit.

IV. SCOPE OF THE PART 31 PERMIT

Kennecott applied for a permit to discharge storm water coming into contact with potentially polluting materials at the surface of the mine site, drainage water collected from the development rock storage area, and water pumped out of the mine to enable mining operations. The DEQ granted a permit authorizing a maxi-

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[5] 33 USC 1251 *et seq.*

mum daily discharge originating from the aforementioned sources of 504,000 gallons per day, or 350 gallons per minute, through the treated-water infiltration system. Appellants argue that the Part 31 permitting process should have also covered Kennecott's plans to recirculate utility water[6] within the mine, to backfill the mine cavity in time by returning development rock to it, and to reflood the mine upon the completion of operations. At issue are whether the circuit court erred by treating this issue as properly preserved, whether it correctly allocated the burden of proof, and whether it correctly identified the pertinent substantive requirements of Part 31.

A. ISSUE PRESERVATION

An issue is preserved for appellate review if it was raised in, and decided by, the trial court. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In this case, there was considerable advocacy and decision-making concerning this issue in the proceedings below.

In answering appellants' exceptions to the proposal for decision, Kennecott argued that the instant proceeding was limited to a determination of the adequacy of the permits at hand and that appellants' "claim that Kennecott needs additional permits to engage in mining activity is not a basis for overturning the Permits at issue in this proceeding." Kennecott appended to that brief a copy of its closing arguments and proposed findings of fact and conclusions of law, which included the assertions that the alleged discharges that appellants oppose "do not involve 'discharges' at all within

[6] One of appellants' witnesses described "utility water" as inflowing water that, "before it goes into the wastewater treatment plant . . . is peeled off . . . for different uses at the mine facility."

the meaning of the Part 22 groundwater permit rules, or they are the subject of specific exemptions from the permitting requirements of the Part 22 rules."

An employee of the DEQ's Water Bureau testified that the agency's position was that the discharges that appellants oppose came under exemptions to permit requirements as specified in Mich Admin Code, R 323.2210(a) to (x), or, alternatively, that because the discharges in question all involved in-mine operations, they were subject to regulation under the provisions of Part 632 governing mining permits, not the provisions of Part 31 governing groundwater discharge permits.

For these reasons, the circuit court did not err by considering whether, to the extent that the discharges that appellants opposed required permits, they did not necessarily have to come under the specific permit under review.

Appellants point out that Mich Admin Code, R 324.74(1) directs that review of a proposal for decision by a final decision-maker "shall be restricted to the record made at the hearing and the exceptions and arguments submitted by the parties" and suggest that subsequent review should be likewise so limited. We disagree. As discussed in Part III of this opinion, contested case proceedings of this sort are an extension of the original application proceedings, not appellate review of the initial decision on the application. Rule 324.74(1) thus sets forth limitations on the final decision-maker after a potentially lengthy and expansive decision-making process presided over by the ALJ. It does not admonish against exercise by an appellate court, including the circuit court when sitting in that capacity, of any of an appellate court's normal decision-making prerogatives.

B. BURDEN OF PROOF

The circuit court, citing *Brown v Beckwith Evans Co*, 192 Mich App 158, 168-169; 480 NW2d 311 (1991), recited the general rule according to which a party claiming the benefit of a statutory exception bears the burden of proving the applicability of that exception and then concluded that the ALJ and the final decision-maker below erred by putting the burden on appellants to prove that exemptions to permit requirements did not apply. We conclude that the circuit court was led slightly astray on this issue.

In discussing the Part 31 permit, the ALJ never suggested that Kennecott bore no responsibility for showing that exemptions applied while holding appellants responsible for proving that they did not. Appellants concede that the DEQ's final determination and order similarly does not state that appellants were obliged to prove that the exemptions did not apply, but note that the order does state in general terms that the petitioners in a contested case hearing bear the burden of proving the objections they raise.

As we discussed in the companion case,[7] an applicant for a permit retains that status, and the attendant burden of proof, throughout the permitting process in connection with proving entitlement to the permit, but a petitioner in a contested case hearing normally bears the burden of proving that petitioner's objections. See Mich Admin Code, R 323.2206(1) ("It is the responsibility of the applicant to provide the information described in these rules as required or necessary for the department to make a decision."); Mich Admin Code, R 324.64(1) (imposing on a party "filing an administrative complaint or petition for a contested case hearing . . .

[7] *Nat'l Wildlife Federation*, 306 Mich App at 345.

the burden of proof and of moving forward unless otherwise required by law").

Accordingly, to the extent that Kennecott relied on exemptions to permit requirements, it bore the burden of proving that they applied, and to the extent that appellants disagreed, they bore the burden of proving otherwise. There was no error in allocations of burdens of proof in connection with this issue.

Further, this issue concerns a question of law, not evaluation of evidence. Accordingly, as the circuit court held, any error in the allocation of burdens of proof was harmless.

C. PART 31 PERMIT

Kennecott's application for a Part 31 permit covered discharges of storm water coming into contact with potentially polluting materials at the surface of the mine site, drainage water collected from the development rock[8] storage area, and water pumped out of the mine to enable mining operations, and the resulting permit authorizes a maximum daily discharge originating from the aforementioned sources of 504,000 gallons per day, or 350 gallons per minute through the treated-water infiltration system. Appellants insist that Kennecott's plans to recirculate utility water within the mine, to backfill excavated areas in time by returning development rock to the mine cavity, and to reflood the mine upon the completion of operations likewise require a Part 31 permit.

The ALJ, in the proposal for decision, held that those activities "either do not involve 'discharges' within the meaning of the Part 22 administrative rules, or are

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[8] "Development rock" is the rock that must be excavated to provide access to the desired ores.

subject to specific exemptions from the permitting requirements as set forth in those rules."

Concerning utility water, Mich Admin Code, R 323.2201(i) defines "discharge" as "any direct or indirect discharge . . . into the groundwater or on the ground" of waste, waste effluent, wastewater, pollutant, cooling water, or a combination of those things. The ALJ noted this definition and added that according to *Webster's Ninth New Collegiate Dictionary* (1983) "discharge" means " 'a flowing or issuing out.' " The ALJ reasoned that the "utility water is cycled through the mining operation in closed-loop fashion," and since "[t]here is no 'discharge' of utility water," there is no need for a discharge permit.

The ALJ continued that the process of "backfilling and rapidly reflooding the mine" came under the following three exemptions set forth in Rule 323.2210:

> (w) A discharge that has been specifically authorized by the department under a permit if the permit was not issued under this part.
>
> (x) A discharge that occurs as the result of placing waste materials on the ground in compliance with a designation of inertness issued under part 115 . . . .
>
> (y) A discharge that has been determined by the department to have an insignificant potential to be injurious based on volume and constituents. In making the determination, the department shall follow the public notice and comment procedures of R 323.2117 to R 323.2119. The department may establish criteria, limitations, or conditions applicable to the discharge to ensure that it meets the terms of this subdivision.

The ALJ elaborated as follows:

> Because Kennecott's backfilling and reflooding operations: (1) are authorized under the Part 632 permit; (2) consist of backfill materials that automatically qualify as

> "inert" under Part 115[9]; and (3) will occur in an unusable aquifer, and because the Part 632 permit imposes requirements to protect the upper glacial aquifer to minimize the risks of any impacts from the backfill and reflooding, the DEQ implicitly concluded that the backfill and reflooding would not be "injurious", . . . they are exempt "discharges" under the Part 22 rules and, therefore, Kennecott is not required to obtain an additional Part 31 permit for those activities.

Appellants expressly eschew offering argument with the ALJ's reasoning, characterizing such advocacy as beyond the scope of this appeal.

The circuit court in turn held as follows:

> [T]he permit being challenged here is a permit to discharge from the mine's wastewater treatment system. The necessity for Kennecott to seek additional Part 31 discharge permits for other discharges, specifically for the discharge into the mine of utility water, backfill, and water to re-flood the mine, accordingly, is irrelevant. . . .
>
> . . . Petitioners assert that they are not arguing that additional Part 31 permits are required, but rather that the discharges into the mine of utility water, backfill, and water to re-flood the mine are required to be considered and included in the Part 31 permit at issue here. Clearly discharges into the mine, which never become discharges from the wastewater treatment system, are entirely different [from] discharges from the wastewater treatment system into the groundwater and, accordingly, to the extent

[9] Part 115 of the Natural Resources and Environmental Protection Act comprises MCL 324.11501 to MCL 324.11550 and concerns solid waste management. Within those provisions, MCL 324.11504(2) defines "inert material" as "a substance that will not decompose, dissolve, or in any other way form a contaminated leachate upon contact with water, or other liquids determined by the department as likely to be found at the disposal area, percolating through the substance." MCL 324.11507(3), in turn, states: "The department may exempt from regulation under this part solid waste that is determined by the department to be inert material for uses and in a manner approved by the department."

that such discharges might require a Part 31 permit, that permit (or permits) would be separate from the Part 31 permit currently being challenged.

We think that the ALJ's treatment of this issue was more satisfactory than that of the circuit court. It is apparent that appellants' concern was that there was no Part 31 permit for utility water within the mine, or for backfilling and reflooding, not necessarily that the permit under consideration did not happen to include those things. Because the objection was that those activities were subject to regulation through a Part 31 permit, but that none was requested, let alone issued, the circuit court was hasty in disposing of those objections simply on the grounds that additional Part 31 permitting might come about.

The ALJ, however, ably identified bases for recognizing that Kennecott's plans for utility water within the mine do not involve any discharges for purposes of Part 31, along with exemptions to permit requirements applicable to the plans for backfilling and reflooding, which harmonize nicely with appellees' position that activities within the mine came under the Part 632 permit and thus required no separate Part 31 permit.

For these reasons, we adopt the ALJ's reasoning as our own in affirming the circuit court's determination that the discharge permit at issue was not invalidated for failing to cover the additional activities of which appellants here make issue.

V. WASTEWATER TREATMENT SYSTEM

Appellants argue that the DEQ and the circuit court erred by approving plans for the wastewater treatment system on the basis of the grounds that the design was not yet complete and that Kennecott did not satisfy the

requirement to predict wastewater influent[10] concentrations with some accuracy. The circuit court affirmed the DEQ's conclusions that the state of the design of the wastewater treatment system was sufficiently advanced so that the DEQ could evaluate it, that the estimates or assumptions used to predict the quality of influent and rate of water inflow satisfied the requirements of the applicable administrative rules, and that Kennecott used the best available information or technology for those purposes. We agree with the circuit court.

Again, MCL 324.3106 states that "[t]he department . . . shall issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance that may affect the quality of the waters of the state," and MCL 324.3112(1) states that "[a] person shall not discharge any waste or waste effluent into the waters of this state unless the person is in possession of a valid permit from the department."

The applicable administrative rules require an applicant for a Part 31 discharge permit to show that the proposed wastewater treatment system has sufficient capacity to treat the anticipated influent and to describe the anticipated influent, characterize the discharge using the best available information, and evaluate and implement the best technology in processing and treatment that would eliminate or reduce the new or increased loading of certain listed substances. "It is the responsibility of the applicant to provide the information described in these rules as required or necessary for the department to make a decision." Mich Admin Code, R 323.2206(1).

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[10] "Influent" refers to the wastewater coming into the system for treatment, and "effluent" refers the treated water to be discharged into the environment.

A. DESIGN OF WASTEWATER TREATMENT SYSTEM

Mich Admin Code, R 323.2218(2) conditions discharge permits on a showing that "the proposed system for treating the wastewater to be discharged shall have sufficient hydraulic capacity and detention time to adequately treat the anticipated organic and inorganic pollutant loading." It states that, for this purpose, "at the time of application a permit applicant shall submit a basis of design for the treatment system," and it lists many factors to be covered. Subrule (2)(c) calls for "[a] description of the existing or proposed treatment, or both," then sets forth many details that must be addressed.

Appellants do not assert that Kennecott's application failed to address any of these requirements, but argue instead that testimony concerning the possibility of design modifications or other changes in operations as needs arise showed that there really was no complete plan in place for the DEQ to evaluate.

An environmental chemist described the proposed wastewater treatment system as "expensive," "complicated," and "unprecedented," and elaborated that "it would be highly unusual to have all these components put together and work the first time out." The expert continued, "I suspect that certainly before designing the system . . . there would need to be quite a bit more work before you can assume a system like this will work." The witness opined that the proposal was "not unreasonable," but nonetheless "may not work." The expert noted that alternative approaches were under consideration for a major aspect of the system's design and expressed the concern that "certainly this water treatment system has not been tested, and they're not completely sure how they're going to configure it yet either." The witness added, "I would suggest that it needs certainly a much more extensive set of tests to

determine in fact that these individual components could . . . come together to treat water quality that's both . . . predicted and then plus some uncertainty in that water quality."

The lead process engineer for the mining project, who served as its certifying engineer for the groundwater discharge application, similarly testified that Kennecott was evaluating some alternative approaches for some aspects of the wastewater treatment process and that early in the review process it would be unusual to offer more detailed specifications for the system. This expert agreed that the particular combination of components envisioned for the instant system was a new one, but added that the individual components were not new and were well tested. The process engineer continued that the system was conservatively designed so that it would be able to treat much higher concentrations of contaminants than predicted levels and still stay within the permitted discharge limits.

The official from the DEQ's Water Bureau who reviewed the basis for the design of the wastewater treatment system stated that the individual unit processes proposed or included in the basis of design for the system in question were demonstrated technologies used in other industrial settings and opined that there was no reason to believe that they would not work well. This witness opined that Kennecott's application and supplemental information adequately described the basis for the proposed system and its expected performance. She additionally opined that Kennecott had shown that the proposed treatment system made use of the most advanced, adequately demonstrated, and reasonably available treatment techniques.

The circuit court noted that Rule 323.2218(2) does not require any set level of specificity in making the

required showing, but, instead, requires a description of the existing or proposed treatment along with, to the extent applicable, engineering plans depicting such things as a schematic flow diagram, information on unit processes, flow rates, and design hydraulic capacity. The court further noted that the only requirement of finality with regard to the wastewater treatment system pertained to the Part 632 mining permit, not the Part 31 discharge permit.

We agree that the call for the submission of a "basis of design" in Rule 323.2218(2) is not a demand for an exhaustive plan complete in every detail. The rule thus reflects the understanding that undertakings of this sort remain projects in progress well into actual operation. That certain details of operation were not yet firmly in place, or that alternatives were under consideration for some aspects of the design, underscore Kennecott's preparedness to address a broad range of potential realities as they come into play in order for Kennecott to operate within permit limits. Because there was substantial evidence that the design of the proposed wastewater treatment system, including where alternatives were yet in contemplation, was sufficiently complete and detailed to allow the DEQ to evaluate it for purposes of the Part 31 permit, the circuit court properly rejected appellants' argument to the contrary.

B. ANTICIPATED INFLUENT CONCENTRATIONS

Mich Admin Code, R 323.2218(2)(b) requires that a discharge permit applicant's description of the basis for design of the treatment system include "a description of the anticipated influent, including the substances to be treated . . . and the concentrations of the substances." Appellants argue that Kennecott failed to satisfy this

requirement because its witnesses provided insufficiently precise or firm estimates in these regards.

Appellants challenge of the testimony of the geochemist whose company performed the geochemical testing in connection with the instant mining project. That witness testified that "there are sufficient sulfide minerals present in the development rock and the concentrations of trace metals are sufficiently high that active management of all rock units in the mine . . . will be required in order to have a modern environmental program for a mine." He explained that he did not endeavor to predict precisely the number of various constituents that would be in the water in the mine, or water collected from the development rock storage area, because he did not believe that such predictions were scientifically possible. The expert elaborated that he had engaged in "an exploratory type of modeling for the purposes of answering simple questions about the directions that materials are going to go in a system, not making firm predictions of specific details that would exist sometime in the future before we've ever gone underground."

The geochemist continued that his reporting had relied on estimates of concentrations of pollutants that were generally lower than those of appellants' experts because "we had data only up to about week 50" and the others were using a "time period in here around 50 to 70 weeks," and he added that "there are increasing concentrations in some but not all of the samples." But the witness stated that, even if crediting the higher figures, his conclusion remained that the situation called for active management of all rock types.

The geochemist additionally acknowledged that he used an estimate for the rate of groundwater inflow into the mine based on information from Kennecott's

hydrogeologist and that, had he used the estimate suggested in a later report, the result would have been an increase in the calculated concentration by a factor of approximately 2.4. The witness characterized those figures as illustrating the uncertainty inherent in calculations of that sort and reiterated that his advice to Kennecott, using either an estimate or a calculation, would have been that the situation called for active management.

Appellants suggest that this expert chose his figures arbitrarily, making no effort to arrive at accurate conclusions, and thus that his work fell short of satisfying the requirement of Rule 323.2218(2)(b) for "a description of the anticipated influent, including the substances to be treated . . . and the concentrations of the substances." The circuit court rebuffed those contentions, crediting the recommendation for "active management" as covering well the possibility that the hazard for acid rock drainage would be greater than estimated, and similarly noting that the various estimates Kennecott's experts used in modeling the operations were conservatively chosen in order to steer operations toward a system that could process even the largest reasonably apprehended quantities of wastewater and pollutants. The court further noted that Rule 323.2218(2)(b) does not call for accurate predictions of precise concentrations of pollutants, but instead reflects the understanding that "where an operation has not yet been undertaken it is scientifically impossible to provide an exact or accurate accounting of the concentrations of the substances that will be found in the operation's influent wastewater."

The circuit court concluded that, for these reasons, "there is evidence that a reasoning mind would accept as sufficient to support the . . . finding that Kennecott's

influent wastewater quality prediction met the requirements of Part 31 and the administrative rules promulgated to implement Part 31."

We conclude that the circuit court correctly reasoned that, despite appellants' characterizations, the geochemist at issue was as concerned about the accuracy, or lack thereof, of some of the figures he was working with as the situation demanded. The court recognized that what was important, in light of the regulatory purpose behind Rule 323.2218(2)(b), was that the expert advised active management, meaning close monitoring and quick adjustments, in connection with all rock types removed from the mine and that there was substantial evidence that the wastewater treatment system had sufficient capacity to handle the whole range of concentrations of contaminants, and the water flow rates, that the various witnesses put forward as reasonably likely to occur.

Appellants further assert that the geochemist's prediction of mine drainage quality omitted the presence of backfill, where the backfilling actually planned would cause additional leaching and thus higher concentrations of pollutants, and that this expert admitted that the prediction was not accurate and was not intended to be. However, this characterization does not accurately reflect the record. In fact, the geochemist explained that he eschewed taking backfill into account for that particular calculation because he "was looking at what the impacts of the mine walls would be on water quality" and was thus "simplifying the system for the purposes of understanding a partial behavior and providing information that would be useful to my client." The expert then continued that in forecasting a final scenario for the water quality in the mine after the completion of

operations, he had "assumed 379,000 tons of backfill without limestone amendment."[11]

C. CHARACTERIZATION OF DISCHARGE, PREDICTED EFFLUENT, BEST TECHNOLOGY AVAILABLE

Mich Admin Code, R 323.2220(1) obligates an applicant for a discharge permit to "properly characterize the waste or wastewater to be discharged" by determining "the pollutants that may be present in the waste or wastewater in light of the process by which it is generated." Subrule (6) states that, "[f]or a facility not yet operating, the discharger shall characterize the anticipated discharge using the best available information" and "identify the source of the information in the application." Similarly, Mich Admin Code, R 323.1098(4)(b)(iii) requires a "discharger" in certain situations, including this one,[12] to "evaluate and implement the best technology in process and treatment (BTPT) that would eliminate or reduce the new or increased loading of the LSB-BSIC,"[13] and it defines "best technology in process and treatment" as "the most advanced treatment techniques which have been adequately demonstrated and which are reasonably available to the discharger."

Appellants argue that their objections concerning the state of design completion, and the accuracy of various predictions and estimates, also apply in con-

[11] The witness here referred to Kennecott's plan to neutralize stored development rock with limestone to reduce its potential to leak sulfuric acid.

[12] The DEQ determined that this "antidegradation" rule would apply to the discharges here at issue, and Kennecott has not argued otherwise.

[13] This initialism stands for "Lake Superior basin-bioaccumulative substances of immediate concern," which are "substances identified in the September 1991 binational program to restore and protect the Lake Superior basin . . . ." Mich Admin Code, R 323.1043(qq).

nection with the rules governing discharges on the ground that, before deciding to issue a permit on the basis of an applicant's predictions of the concentrations of contaminants that will be in its discharge, the DEQ must confirm that the applicant's predictions are correct and that the proposed treatment system is in fact capable of meeting those predictions. For the same reasons that we concluded that the circuit court correctly rejected those objections in connection with Rule 323.2218(2)(b) (anticipating influent quality) and (c) (system design), we conclude that the circuit court correctly rejected them in connection with the rule governing effluent.[14] Further, the circuit court specifically cited expert testimony that the proposed treatment system made use of the most advanced, adequately demonstrated, and reasonably available treatment techniques as substantial evidence that that requirement of Rule 323.1098(4)(b)(iii) had been met.

For these reasons, we reject appellant's claims of error concerning system design, estimates or assumptions concerning concentrations of contaminants, or use of the best available information or technology.

VI. CONCLUSION

For the reasons stated, we affirm the decision of the circuit court affirming the DEQ's decision to grant Kennecott a Part 31 groundwater discharge permit.

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[14] The circuit court held that because Rule 323.2220(1) and (6) concerned discharges, there was no need to consider those subrules while deciding whether the requirements of Rule 323.2218(2)(b) regarding anticipated influent were satisfied. Appellants characterize this holding as a declaration that "inaccurate prediction of wastewater influent concentrations is not relevant to these rules." In fact, the circuit court simply considered those objections under a different rubric.

Affirmed. No taxable costs under MCR 7.219, a question of public policy being involved.

CAVANAGH, P.J., and OWENS and STEPHENS, JJ., concurred.

PEABODY v DIMEGLIO

Docket No. 315319. Submitted June 4, 2014, at Lansing. Decided August 12, 2014, at 9:10 a.m.

Dany Jo Peabody filed a complaint in the Eaton County Probate Court against Marta DiMeglio, individually and as the personal representative of the estate of Paul J. DiMeglio, after Marta denied Peabody's claims against the estate. Peabody and Paul had been married in 1989 and divorced in 1995. They entered into a property settlement agreement, which was incorporated, but not merged, into a Virginia divorce judgment by express language. The relevant portion of the agreement concerned a parcel of property located in Colorado. It provided (1) that the property would continue to be investment property, (2) that it would remain in Peabody's name, (3) that Paul would indemnify Peabody from any liability arising out of the property, (4) that he would make the mortgage payments, (5) that Peabody could not sell the property, (6) that Peabody had a right of first refusal if Paul did, and (7) that the proceeds would be split equally between the parties upon sale. After Paul missed several mortgage payments in 1997, Peabody executed a quitclaim deed conveying her entire interest in the property to Paul in order to avoid financial responsibility for the property and allow him to refinance. Paul further encumbered the property with mortgage debt in 2000 and eventually conveyed his entire interest in the property to Marta, who was his new wife, by means of two quitclaim deeds executed in 2003 and 2004. Marta conveyed the property to a third-party buyer the same day and used the proceeds from the sale for a like-kind exchange under 26 USC 1031 of the Internal Revenue Code in which she purchased property in Michigan. Peabody's complaint in the probate court action alleged breach of contract, breach of a covenant of good faith and fair dealing, conversion, statutory conversion, concert of action, fraud, and unjust enrichment and sought enforcement of the Virginia divorce judgment. Marta moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The court, Thomas K. Byerley, J., granted summary disposition under MCR 2.116(C)(8) and (10) to Marta in her individual capacity because she was not a party to the property settlement agreement and had no personal liability for any of the claims. The court further granted summary

disposition under MCR 2.116(C)(7) to Marta in both capacities, concluding that the six-year statutory period of limitations for contract claims had run. Peabody appealed, specifically contesting the court's finding that the statute of limitations for contract claims barred her claims for enforcement of the divorce judgment and unjust enrichment, and Marta cross-appealed the denial of her motion for attorney fees.

The Court of Appeals *held*:

1. Peabody argued that Virginia substantive law regarding the incorporation of property settlements should apply because the judgment was a Virginia divorce judgment that provided for incorporation by reference. MCL 691.1173 (part of the Uniform Enforcement of Foreign Judgments Act), however, authorizes the filing of a copy of an authenticated foreign judgment in certain courts of this state and further provides that a judgment filed in that manner has the same effect and is subject to the same procedures, defenses, and proceedings as a judgment of a Michigan court and may be enforced or satisfied in the same manner. Because the divorce judgment was filed in accordance with the act, it was treated as a Michigan judgment and Michigan law applied to its enforcement.

2. The probate court erred by applying the 6-year period of limitations of MCL 600. 5807(8) for breach-of-contract claims to Peabody's action to enforce the divorce judgment rather than the 10-year period of limitations of MCL 600.5809(3) for noncontractual money obligations founded on a judgment. "Incorporation by reference" refers to making a secondary document a part of the primary document by stating in the primary document that the secondary document should be treated the same as if it were contained in the primary one. Merger, in the context of this case, is the absorption of a contract into a court order so that the agreement loses any separate identity as an enforceable contract. When the parties to a divorce agree to incorporate the terms of a property settlement agreement by reference and specifically agree not to merge the agreement into a judgment, their clear intent is to make the agreement enforceable both as a court order and as an ordinary contract. Given that the property settlement agreement was incorporated, rather than merged, into the divorce judgment, it was enforceable as a judgment to which the 10-year limitations period applied. Because Peabody sought enforcement of the provision requiring Paul to pay her half of the property sale proceeds, her cause of action for that claim accrued in 2004 when Paul sold the property and did not pay Peabody half of the proceeds. Therefore, Peabody timely filed her complaint in 2012.

3. The probate court also erred by granting summary disposition to Marta on Peabody's claim of unjust enrichment. The law implies a contract in order to prevent unjust enrichment, but not if there is already an express contract on the same subject matter. Peabody, however, alleged more than a breach of contract in her unjust-enrichment claim, asserting not only that the estate owed her for Paul's breach, but that Marta was unjustly enriched when she retained the funds from the sale of the property. That was a purely equitable claim not covered by any express contract of the parties. Because the claim was not based on an analogous legal claim, the statute of limitations for breach of contract did not apply, and the claim for unjust enrichment would instead be time-barred, if at all, under the equitable doctrine of laches. On remand, the probate court was directed to determine whether laches barred Peabody's claim for unjust enrichment.

4. The probate court's interpretation of the language in the property settlement agreement that provided for attorney fees was overly narrow. A contract provision providing for attorney fees is a valid exception to the American rule regarding attorney fees, and a commonsense reading of the relevant provisions of the property settlement agreement was that the reasonable costs incurred by a party in the successful defense to any action for enforcement of any of the agreements between the parties would include attorney fees regardless of which party prevailed. Given the disposition of Peabody's appeal, however, Marta no longer had a successful defense within the meaning of the contractual language unless the probate court were to find in her favor on the merits on remand.

Reversed and remanded.

DIVORCE — JUDGMENTS — PROPERTY SETTLEMENTS — INCORPORATION BY REFERENCE — ENFORCEMENT — STATUTES OF LIMITATIONS.

Incorporation by reference refers to making a secondary document a part of the primary document by stating in the primary document that the secondary document should be treated the same as if it were contained in the primary one; merger of documents is the absorption of a contract into a court order so that the agreement loses any separate identity as an enforceable contract; parties to a divorce who agree to incorporate the terms of a property settlement agreement by reference and specifically agree not to merge the agreement into a divorce judgment make that agreement enforceable both as a court order and as an ordinary contract, and it is accordingly enforceable as a judgment with a 10-year limitations period under MCL 600.5809(3) for noncontractual money obligations founded on a judgment.

Ligon Law Office (by *M. Jean Ligon* and *Paul S. Vaidya*) for Dany Jo Peabody.

The Gallagher Law Firm, PLC (by *Craig S. Girard* and *Jennifer M. Tichelaar*), for Marta DiMeglio.

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM. Plaintiff, Dany Jo Peabody, appeals as of right the probate court's order granting summary disposition for defendant, Marta DiMeglio, in her individual and representative capacities, pursuant to MCR 2.116(C)(7), based on the expiration of the six-year statutory period of limitations for breach-of-contract claims. Defendant cross-appeals the probate court's order denying her motion for attorney fees. We reverse the probate court's grant of summary disposition and remand for further proceedings.

Plaintiff and Paul DiMeglio (the decedent) were married in 1989 and divorced in 1995. As part of the divorce, plaintiff and the decedent entered into a property settlement agreement, which was incorporated, but not merged, into a Virginia divorce judgment by express language to that effect on December 15, 1995. The portion of the agreement relevant to this appeal deals with a piece of real property located in Colorado (the Colorado property). Paragraph 16(B)(2) of the agreement states, "The Husband specifically agrees that he shall be responsible for and shall indemnify the Wife from any liability whatsoever arising out of the . . . Colorado Mortgage . . . ." Paragraph 19(B) of the agreement states:

> The parties agree that Wife is the sole owner of a property located at 1222 Colorado Boulevard, Idaho Springs, Colorado, in which the Husband has an investment interest. The parties further agree that:

> (1) Said Colorado residence shall remain as an investment property.
>
> (2) Wife shall not sell, deed over or otherwise dispose of said property in any manner.
>
> (3) Neither party shall encumber said property by subsequent mortgages, equity loans or any other means without the written agreement of the other.
>
> (4) Husband shall be responsible for all mortgage payments on said property even though the mortgage loan on said property is in the name of the Wife.
>
> * * *
>
> (7) Husband has the sole and separate right and option to sell said property at any time of his choosing. Wife shall have the right of first refusal to purchase said property incident to any such sale.
>
> (8) If said property is sold, all net proceeds of sale after customary costs of sale, such as the real estate commission, closing costs, mortgage pay-off and capital gains tax responsibilities, etc., shall be divided equally between the parties. The settlement attorney or other person conducting the settlement shall receive a copy of this Agreement as his or her instructions.

Sometime before 1997, the decedent missed several mortgage payments on the Colorado property. On November 27, 1997, plaintiff executed a quitclaim deed in favor of the decedent conveying her entire interest in the Colorado property. This was done to remove her from the mortgage to avoid financial responsibility for the property and to allow the decedent to refinance. Sometime around 2000, the decedent further encumbered the property with mortgage debt.

On November 12, 2003, the decedent conveyed his entire interest in the Colorado property to his new wife, defendant Marta DiMeglio, by quitclaim deed. He executed a second quitclaim deed in favor of Marta on

August 30, 2004. On that same day, Marta conveyed the property to a third-party buyer by general warranty deed for consideration of $215,000. The proceeds from the sale were used in a § 1031 "like-kind" exchange[1] in which Marta purchased real property in Eaton Rapids, Michigan.

The decedent died on November 12, 2011. Plaintiff filed a claim against his estate that Marta, as personal representative, denied. Plaintiff then filed her eight-count complaint in the probate court against the decedent's estate and Marta as personal representative of the estate and individually. The complaint alleged breach of contract, breach of a covenant of good faith and fair dealing, conversion, statutory conversion, concert of action, fraud, enforcement of the divorce judgment, and unjust enrichment.

Marta moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The probate court granted summary disposition under MCR 2.116(C)(8) and (10) to Marta in her individual capacity because she was not a party to the property settlement agreement and had no personal liability for any of the claims. The probate court further granted summary disposition under MCR 2.116(C)(7) to Marta in both capacities, finding that the six-year statutory period of limitations for contract claims had run. On appeal, plaintiff only contests the probate court's finding that the statute of limitations for contract claims barred all of plaintiff's claims,

[1] Like-kind exchanges are provided for in § 1031 of the Internal Revenue Code:

> No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment. [26 USC 1031(a)(1).]

including, in particular, the claims for enforcement of the divorce judgment and unjust enrichment provided for in Counts VII and VIII of her complaint, respectively.

We review de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a defendant is entitled to governmental immunity is a question of law, which we also review de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). "A motion under MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005) (quotation marks and citations omitted). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, 461 Mich at 119.

At the outset, with regard to plaintiff's claim for enforcement of the divorce judgment in Count VII of her complaint, plaintiff argues that Virginia substantive law regarding incorporation of property settlements should apply because the judgment is a Virginia divorce decree that provided for incorporation. Michigan has adopted the Uniform Enforcement of Foreign Judgments Act, MCL 691.1171 *et seq.*, which provides in pertinent part,

> A copy of a foreign judgment authenticated in accordance with an act of congress or the laws of this state may be filed in the office of the clerk of the circuit court, the district court, or a municipal court of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court, the district court, or a municipal court of this state. A judgment filed under this act has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating,

> or staying as a judgment of the circuit court, the district court, or a municipal court of this state and may be enforced or satisfied in like manner. [MCL 691.1173.]

Because the divorce judgment was filed in accordance with this act, the judgment is treated as a Michigan judgment and Michigan law applies to its enforcement.

Statutes of limitations are found at Chapter 58 of the Revised Judicature Act (RJA), MCL 600.5801 *et seq*. MCL 600.5807(8) provides a six-year statutory period of limitations for ordinary breach-of-contract claims. Plaintiff, however, argues that claims to enforce a judgment are classified as "noncontractual money obligations" that carry a 10-year statutory period of limitations pursuant to MCL 600.5809, which provides in pertinent part,

> (1) A person shall not bring or maintain an action to enforce a noncontractual money obligation unless, after the claim first accrued to the person or to someone through whom he or she claims, the person commences the action within the applicable period of time prescribed by this section.
>
> * * *
>
> (3) Except as provided in subsection (4),[2] the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record of this state, or in a court of record of the United States or of another state of the United States, from the time of the rendition of the judgment or decree.

In *Gabler v Woditsch*, 143 Mich App 709; 372 NW2d 647 (1985), we directly addressed the issue of which statute of limitations applies in this context. The Court stated:

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[2] MCL 600.5809(4) addresses actions to enforce support order that are enforceable under the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*.

> The present action is an action to enforce the provisions of the 1968 divorce judgment and is therefore an action founded upon a judgment within RJA § 5809(3). Plaintiff's claim is not converted into a breach of contract action merely because the specific payment provision which he seeks to enforce was contained in a property settlement agreement. *That agreement was expressly incorporated by reference into the divorce judgment.* The trial court correctly applied the ten-year period in RJA § 5809(3). [*Id*. at 711 (emphasis added).]

Thus, according to *Gabler*, because plaintiff and the decedent's property settlement, which plaintiff seeks to enforce, was expressly incorporated by reference into the divorce judgment, the action is "founded upon a judgment within" MCL 600.5809(3) and the 10-year period of limitations would apply.

Defendant, however, persists in arguing that the provisions of the property settlement can only be enforced in an action for breach of contract and not in an action to enforce a judgment. In support of this argument, defendant relies on the following language in *Marshall v Marshall*, 135 Mich App 702, 712-713; 355 NW2d 661 (1984):

> In the within case, the divorce judgment incorporated the parties' property settlement agreement by reference, but specifically provided that the property settlement agreement was not merged in the divorce judgment. When a property settlement agreement is incorporated and merged in a divorce judgment, it becomes a disposition by the court of the property. *But, when not merged in the divorce judgment, the property settlement agreement may only be enforced by resort to the usual contract remedies and not as part of the divorce judgment*.
>
> Thus, in the within case, by providing that the property settlement agreement was not merged in the divorce judgment, the parties lifted enforcement out from under GCR 1963, 528.3 [the former court rule governing relief from

> judgment]. This analysis does not, however, aid plaintiff because, for the reasons indicated, we have already declined to find ambiguity, and thus find that the trial court lacked inherent power to interpret and clarify the terms of the property settlement agreement. [Emphasis added.]

The italicized language, however, is ambiguous. The language appears to provide one outcome when an agreement is incorporated *and* merged, and the opposite outcome when the agreement is not merged. *Marshall* does not specifically address the third possible situation, in which the agreement is incorporated but not merged. It is unclear whether the Court confused the terms "merged" and "incorporated" or whether it wished to create a rule that nonmerger precludes enforcement of the agreement as a judgment. Further, this language appeared in the opinion after the Court stated its holding. The Court made it clear that this analysis did not aid the plaintiff because it had already determined that the trial court could not interpret the property settlement agreement. Therefore, it is clear that this language was not "germane to the controversy in the case" and was therefore dictum that is not binding on this Court. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007).

We find defendant's argument unpersuasive, and we reaffirm the principle of law in *Gabler* that incorporation by reference into a divorce judgment makes a property settlement agreement enforceable as a judgment to which the 10-year statutory period of limitations, MCL 600.5809(3), applies. In doing so, we note that our holding is consistent with the meaning of the terms "incorporation by reference" and "merger" and respects the intent of parties. "Incorporation by reference" means "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary

document should be treated as if it were contained in the primary one." *Black's Law Dictionary* (9th ed), p 834. "Merger," as used in this context, is defined as "[t]he absorption of a contract into a court order, so that an agreement between the parties (often a marital agreement incident to a divorce or separation) loses its separate identity as an enforceable contract when it is incorporated into a court order." *Id*. at 1079. When the parties to a divorce agree, through their attorneys, to incorporate the terms of a property settlement agreement by reference and specifically agree not to merge the agreement into a judgment, it could be assumed that the attorneys and the court that enters the judgment understand the definitions of "merger" and "incorporation by reference." The clear intent of parties entering into such an agreement would be to make the agreement enforceable both as a court order and as an ordinary contract.

Applying *Gabler* to this case, we conclude that the property settlement agreement is enforceable as a judgment because it was incorporated, rather than merged, into the divorce judgment. Therefore, the probate court erred by applying the 6-year statutory period of limitations for breach-of-contract claims to plaintiff's claim to enforce the divorce judgment and should have applied the 10-year statutory period of limitations for noncontractual money obligations pursuant to MCL 600.5809(3). Because plaintiff sought enforcement of the provision requiring the decedent to pay plaintiff half of the proceeds from the 2004 sale of the Colorado property, her cause of action for that claim accrued in 2004 when the property was sold and the decedent failed to pay plaintiff half of the proceeds. Therefore, plaintiff timely filed her complaint in 2012 pursuant to MCL 600.5809(3).

Plaintiff also argues that her claim for unjust enrichment in Count VIII of her complaint should not have been barred by the six-year statutory period of limitations for breach-of-contract claims. Defendant argues that a claim for unjust enrichment cannot be sustained when an express contract on the same subject matter exists. Defendant is correct that "the law operates to imply a contract in order to prevent unjust enrichment" and that this will not occur if there is already an express contract on the same subject matter. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Count VIII of the complaint, however, goes beyond a claim for breach of contract. Plaintiff alleges not only that the estate owes her for the decedent's breach, but that Marta was unjustly enriched when she retained the funds from the sale of the Colorado property. This is a purely equitable claim that is not covered by any express contract of the parties. Because the claim is not based on an analogous legal claim, the breach-of-contract statute of limitations does not apply. *Lothian v Detroit*, 414 Mich 160, 170; 324 NW2d 9 (1982). If the claim for unjust enrichment were time-barred, it would be under the equitable doctrine of laches. *Id*. "As a general rule, '[w]here the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot * * * be recognized.' " *Id*. at 168, quoting *Walker v Schultz*, 175 Mich 280, 293; 141 NW 543 (1913). On remand, the probate court should determine whether laches bars the claim for unjust enrichment.

Accordingly, we hold that the probate court erred by granting summary disposition to defendant as to plaintiff's Count VII (enforcement of the divorce judgment) and Count VIII (unjust enrichment).

With regard to defendant's cross-appeal challenging the probate court's denial of her motion for attorney fees, we conclude that the probate court's interpretation of the contractual language in the property settlement agreement providing for attorney fees is overly narrow. Contrary to the probate court's determination, a contract provision providing for attorney fees is a valid exception to the American rule regarding attorney fees. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002). A commonsense reading of ¶ 31, the relevant provision of the property settlement agreement, is that "reasonable costs incurred by a party in the successful defense to any action for enforcement of any of the agreements, covenants, or provisions of [the property settlement agreement]" would include attorney fees regardless of which party prevails. We decline to reverse the probate court's order, however, because given our disposition of plaintiff's appeal, defendant no longer has a "successful defense" under the contractual language, unless and until the probate court holds in defendant's favor on the merits. *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").

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

CAVANAGH, P.J., and OWENS and STEPHENS, JJ., concurred.

GALIEN TOWNSHIP SCHOOL DISTRICT v
DEPARTMENT OF EDUCATION

Docket Nos. 317734 and 317739. Submitted August 5, 2014, at Lansing. Decided August 14, 2014, at 9:00 a.m. Vacated in part and remanded (as to Galien Twp School Dist) at 497 Mich ___. Leave to appeal denied (as to Delton-Kellogg Schools) at 497 Mich ___.

Galien Township School District filed a claim of appeal in the Ingham Circuit Court related to a final decision by the Department of Education and the Superintendent of Public Instruction. In the same document, Galien and Delton-Kellogg Schools brought an action for declaratory relief against the department and the superintendent in connection with the same administrative proceedings. Defendants had audited both school districts' pupil-attendance records and, unable to verify the enrollment of numerous students, reduced state school aid for both districts, following which they sought administrative review. Galien exhausted its administrative remedies. In Galien's first-level review, the department reinstated full-time equivalents (FTEs) related to some of the students for purposes of calculating school aid. Galien then sought further administrative review, requesting the reinstatement of additional FTEs. The superintendent conducted the final review, which resulted in the reinstatement of approximately two additional FTEs. Delton-Kellogg did not exhaust its administrative remedies. In its first-level review, the department reinstated numerous FTEs. Delton-Kellogg appealed to the superintendent, but that appeal remained pending when the instant action was filed. The court, Rosemarie E. Aquilina, J., granted the school districts a declaratory judgment, determining that defendants did not have the authority to retroactively audit them. The court also overruled the superintendent's final decision that reduced Galien's state aid because of the findings of the retroactive audits and ordered defendants to reinstate all wrongfully deducted FTEs and return state aid. Defendants appealed in Docket No. 317734 with respect to Delton-Kellogg, and appealed by leave granted in Docket No. 317739 with respect to both districts. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Because Delton-Kellogg failed to exhaust its administrative remedies, the circuit court lacked jurisdiction over all of Delton-

Kellogg's claims. MCL 24.301 provides for judicial review, but requires the party seeking review to first exhaust all administrative remedies available within the agency unless review of the agency's final decision or order would not provide an adequate remedy, that is, if it would run counter to the policies that underlie the doctrine. The policies requiring the exhaustion of administrative remedies include the following: (1) an untimely resort to the courts might result in delay and disruption of an otherwise cohesive administrative scheme, (2) judicial review is best made with a full factual record developed before the agency, (3) resolution of the issues might require the technical competence of the agency or might have been entrusted by the Legislature to the agency's discretion, and (4) a successful agency settlement of the dispute might render a judicial resolution unnecessary. Delton-Kellogg submitted to the administrative procedure, but disrupted the progression of the otherwise cohesive process by seeking relief in the circuit court. Further, it was partially successful at the first level of review. Full review through the administrative process might result in the reinstatement of all contested FTEs, which would provide the relief requested, rendering judicial review unnecessary. The interests of judicial economy were not served by interrupting the administrative process.

2. Galien's act of combining its claim of appeal and claim for declaratory relief in a single pleading did not divest the circuit court of subject-matter jurisdiction. Under MCL 600.631 and MCR 7.103(A), a circuit court has subject-matter jurisdiction over a claim of appeal from a final administrative order or decision. A circuit court has jurisdiction over a claim for declaratory relief under MCR 2.605(A)(1) and (2) if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than declaratory judgment, regardless of whether other relief is or could be sought or granted. Given that the circuit court has jurisdiction to hear appeals regarding final orders or decisions of the department, it also had jurisdiction over Galien's claim for declaratory relief and the existence of an appeal did not void that jurisdiction.

3. The circuit court, however, did not have jurisdiction to grant declaratory relief in this case because substantively the claim failed to address a future harm as required by MCR 2.605, which requires a case of actual controversy as a condition precedent to invocation of declaratory relief. Generally, an actual controversy exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights. While Galien styled the relief requested as declaratory

relief, asserting that future retroactive audits might compel it to refund additional state-aid monies, the audits had already been completed, they were decided against Galien, and the department reduced current and future school aid over a number of years to make up the deficiency revealed by the audits. These facts established instead a current conflict between Galien and the department that was based on a past controversy.

4. The circuit court erred by concluding that the department did not have the authority to retroactively audit the districts and adjust their state school aid. The State School Aid Act, MCL 388.1601 *et seq*., governs the allocation of school aid among school districts. MCL 388.1615, MCL 388.1618, and MCL 388.1768 empower the department to audit districts and to do so retroactively to gather updated data for prior fiscal years. The department may use this updated data to make deductions from a district's school aid allocation for incorrect allocations related to a prior fiscal year.

Order vacated in its entirety in Docket No. 317734, and Delton-Kellogg directed to exhaust its administrative remedies.

Order vacated in its entirety in Docket No. 317739, and case remanded for reinstatement of the superintendent's March 14, 2013 final decision.

1. COURTS — CIRCUIT COURTS — SUBJECT-MATTER JURISDICTION — ADMINISTRATIVE APPEALS — DECLARATORY RELIEF — PLEADINGS.

Under MCL 600.631 and MCR 7.103(A), a circuit court has subject-matter jurisdiction over a claim of appeal from a final administrative order or decision; under MCR 2.605(A)(1) and (2), a circuit court has jurisdiction over a claim for declaratory relief if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than declaratory judgment, regardless of whether other relief is or could be sought or granted; the jurisdiction to hear appeals regarding final orders or decisions of an agency may coexist with the court's jurisdiction over a claim for declaratory relief, and the combining of a claim of appeal and a claim for declaratory relief in a single pleading does not divest the circuit court of subject-matter jurisdiction.

2. SCHOOLS — STATE SCHOOL AID — AUDITS — RETROACTIVE AUDITING — DEPARTMENT OF EDUCATION.

The State School Aid Act, MCL 388.1601 *et seq*., governs the allocation of school aid among school districts; MCL 388.1615, MCL 388.1618, and MCL 388.1768 empower the Department of Education to audit school districts, including doing so retroactively to gather updated data for prior fiscal years; the department may

use this updated data to make deductions from a district's school aid allocation for incorrect allocations related to a prior fiscal year.

Thrun Law Firm, PC (by *Margaret M. Hackett* and *Jennifer K. Johnston*), for Galien Township School District.

Thrun Law Firm, PC (by *Robert A. Dietzel* and *Jennifer K. Johnston*), for Delton-Kellogg Schools.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Travis Comstock*, Assistant Attorney General, for the Department of Education and the Superintendent of Public Instruction.

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

PER CURIAM. In these consolidated appeals, defendants—the Michigan Department of Education (MDE) and the Superintendent of Public Instruction—appeal as of right, in Docket No. 317734, a circuit court order that granted plaintiff Delton-Kellogg Schools a declaratory judgment, determining that defendants did not have the authority to retroactively audit plaintiff. In Docket No. 317739, the same defendants appeal by leave granted[1] the same circuit court order, which also granted plaintiff Galien Township School District declaratory judgment for the same reasons. The circuit court order also overruled the superintendent's final decision that reduced Galien's state aid because of the findings of the retroactive audits and ordered that defendants reinstate all wrongfully deducted full-time equivalent students (FTEs) and return state aid. In Docket No. 317734, we conclude that the circuit court

[1] *Galien Twp Sch Dist v Superintendent of Pub Instruction*, unpublished order of the Court of Appeals, entered December 18, 2013 (Docket No 317739).

did not have subject-matter jurisdiction over Delton-Kellogg's claims and vacate the circuit court's order in its entirety. In Docket No. 317739, we vacate the circuit court's order in its entirety and remand for reinstatement of the superintendent's final decision.

I. BACKGROUND

After plaintiffs admitted teacher misconduct in reporting student attendance, defendants claimed authority under the State School Aid Act (SSAA), MCL 388.1601 *et seq.*, and audited prior years' attendance records. The audit could not verify 225.75 FTEs enrolled in Galien Township School District and 408.75 FTEs enrolled in Delton-Kellogg Schools. On the basis of these retroactive audits, defendants reduced approximately $750,000 from state aid for Galien and approximately $1.5 million for Delton-Kellogg. Both school districts sought administrative review. Galien exhausted its administrative remedies, and in a first-level review, the MDE reinstated 35.27 FTEs. Galien sought further administrative review, requesting that 190.38 additional FTEs be reinstated. Superintendent of Public Instruction Michael Flanagan conducted the final review and issued his report on March 14, 2013. The final administrative review resulted in 1.84 additional reinstated FTEs. Galien then filed the instant action, including a claim of appeal, in the circuit court.

Delton-Kellogg, on the other hand, did not exhaust its administrative remedies. In a first-level review, the MDE reinstated 162.4 FTEs. Delton-Kellogg appealed to the superintendent, and that appeal remains pending. In the meantime, Delton-Kellogg brought the instant action in the circuit court.

II. SUBJECT-MATTER JURISDICTION

A. DOCKET NO. 317734

Defendants argue that the circuit court erred by holding that it had subject-matter jurisdiction over all of Delton-Kellogg's claims because Delton-Kellogg failed to exhaust all the administrative remedies available. We agree. "Whether a court has subject matter jurisdiction is a question of law that we review de novo." *Bruley Trust v Birmingham*, 259 Mich App 619, 623; 675 NW2d 910 (2003) (citation omitted).

MCL 24.301 addresses judicial review in the context of administrative exhaustion:

> When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

Delton-Kellogg does not dispute that it has not exhausted all administrative remedies, but it argues that exhaustion was not required here. As stated, exhaustion is not required "if review of the agency's final decision or order would not provide an adequate remedy," MCL 24.301, i.e., "if it would run counter to the policies which underlie the doctrine," *Int'l Business Machines Corp v Dep't of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977) (*IBM*). See also *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 53;

620 NW2d 546 (2000), quoting *IBM*, 75 Mich App at 610. These policies include the following:

> (1) an untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agency; (3) resolution of the issues may require the accumulated technical competence of the agency or may have been entrusted by the Legislature to the agency's discretion; and (4) a successful agency settlement of the dispute may render a judicial resolution unnecessary. [*IBM*, 75 Mich App at 610; see also *Citizens for Common Sense*, 243 Mich App at 53.]

Relying on *IBM*, Delton-Kellogg asserts that exhaustion was not required here because the question raised only challenged the MDE's legal authority to take the complained-of action, it was clearly framed for review, fact-finding was unnecessary, application of the MDE's expertise was not required, review by the circuit court promoted judicial economy, and the MDE did not have exclusive jurisdiction over questions of statutory authority. We disagree. The record shows that Delton-Kellogg submitted to the administrative procedure, but disrupted the progression of the otherwise cohesive process by seeking relief in the circuit court. Further, Delton-Kellogg was successful in the first level of review, regaining 162.4 FTEs. Not only will this Court not presume that administrative review is futile when the outcome has aided the party seeking review, see *Papas v Gaming Control Bd*, 257 Mich App 647, 664-665; 669 NW2d 326 (2003), but also full review through the administrative process could very well result in the reinstatement of all contested FTEs, which would provide the relief requested, rendering judicial review unnecessary. Accordingly, the interests of judicial economy are not served here by interrupting the administrative process. Given the pending appeal before the

superintendent, the disruptive potential of pursuing judicial review is a circumstance to be avoided. See *Citizens for Common Sense*, 243 Mich App at 52 ("Our Supreme Court has stated that 'administrative law dictates that courts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency.' "), quoting *74th Judicial Dist Judges v Bay Co*, 385 Mich 710, 727; 190 NW2d 219 (1971). Cf. *Detroit Auto Inter-Ins Exch v Ins Comm'r*, 125 Mich App 702, 708-709; 336 NW2d 860 (1983). Therefore, we conclude that because Delton-Kellogg failed to exhaust its administrative remedies, the circuit court lacked jurisdiction over all of Delton-Kellogg's claims.

B. DOCKET NO. 317739

Defendants next attack the circuit court's subject-matter jurisdiction to hear Galien's claims because its claim of appeal and claim for declaratory relief were combined in a single pleading. Defendants also assert that the circuit court did not have jurisdiction over Galien's claim for declaratory relief because there was no claim or controversy. Again, we review this issue de novo. *Bruley Trust*, 259 Mich App at 623.

We reject defendants' argument that the circuit court lacked jurisdiction because Galien combined the claims. A circuit court has subject-matter jurisdiction over a claim of appeal from a final administrative order or decision. MCL 600.631; MCR 7.103(A)(3) and (4). For the circuit court to be vested with jurisdiction in an appeal of right, MCR 7.104(B), provides that

> an appellant must file with the clerk of the circuit court within the time for taking an appeal:
>
> (1) the claim of appeal, and
>
> (2) the circuit court's appeal fee, unless the appellant is indigent.

Likewise, a circuit court has jurisdiction over a claim for declaratory relief "if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment," MCR 2.605(A)(2), and this jurisdiction is invoked by filing a complaint with the court, MCR 2.101. Thus, given that the circuit court has jurisdiction to hear appeals regarding final orders or decisions of the MDE, MCR 7.103(A)(3) and (4), it follows that it would have jurisdiction over Galien's claim for declaratory relief. By the plain language of the court rule, the existence of an appeal does not void jurisdiction over the declaratory judgment, as that jurisdiction applies "whether or not other relief is or could be sought or granted." MCR 2.605(A)(1).

Further, Galien's act of combining the claims into one document did not divest the circuit court of jurisdiction according to the plain language of the court rules. The record indicates, and defendants have not argued to the contrary, that Galien invoked the court's jurisdiction by filing its claim of appeal and complaint for declaratory relief and paying the fees. This was sufficient to invoke the court's jurisdiction over both claims. While it would perhaps have been advisable to bring the appeal and declaratory relief actions under separate circuit court dockets and move for consolidation, the presentation of the claims together was insufficient to divest the court of subject-matter jurisdiction. This is particularly evident given that the record indicates that the circuit court addressed the two claims separately, as reflected in its opinion and order. See *Chen v Wayne State Univ*, 284 Mich App 172, 199; 771 NW2d 820 (2009) (noting that cases consolidated for administrative convenience or judicial economy retain their separate identities).

Nevertheless, we do conclude that the circuit court did not have jurisdiction to grant declaratory relief because substantively the claim failed to address a future harm. MCR 2.605 governs declaratory judgments, reading in relevant part as follows:

> (A) Power To Enter Declaratory Judgment.
>
> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.
>
> * * *
>
> (C) Other Adequate Remedy. The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case.
>
> * * *
>
> (F) Other Relief. Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment.

A case of actual controversy is a "condition precedent to invocation of declaratory relief." *Citizens for Common Sense*, 243 Mich App at 54-55 (quotation marks and citation omitted). "Generally, an actual controversy exists where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Id*. It is essential that a plaintiff "pleads facts entitling him to the judgment he

seeks and proves each fact alleged" and those facts "indicate an adverse interest necessitating the sharpening of the issues raised." *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978).

Galien styled the relief requested in circuit court as declaratory relief, asserting that future retroactive audits might compel the district to refund additional state-aid monies. It is undisputed that the audits were completed by the MDE, that were they decided against Galien, and that the MDE reduced current and future school aid over a number of years to make up the deficiency revealed by the audits. These facts establish a controversy between Galien and the MDE, but a *current* conflict based on a past controversy. That the MDE allowed the funding deficits to be repaid over several years is not dispositive because the determination of the legal rights of the parties was already settled. See *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 516; 810 NW2d 95 (2011) (holding that an actual controversy was lacking because the plaintiffs had not alleged imminent injury given that the alleged physical injuries had already occurred). Accordingly, the circuit court did not have jurisdiction over Galien's claim for declaratory relief.[2]

III. RETROACTIVE AUDITS

Defendants also argue that the circuit court improperly granted plaintiffs appellate relief on the basis of the erroneous conclusion that the MDE lacked authority to

[2] We note that although we conclude that the circuit court did not have jurisdiction over Delton-Kellogg's claims because of its failure to exhaust its administrative remedies, we would conclude for the reasons given here that the circuit court would not have had jurisdiction to grant declaratory relief to Delton-Kellogg even if it had exhausted its administrative remedies.

retroactively audit and adjust state school aid.[3] This issue requires us to interpret and apply various sections of the SSAA. Interpretation and application of a statute is a question of law we review de novo. *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). The foremost rule of statutory construction "is to discern and give effect to the intent of the Legislature." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). Interpretation strives to give effect to "every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory." *Id*. at 311-312. Each word or phrase of a statute is given its commonly accepted meaning unless otherwise expressly defined. *McAuley*, 457 Mich at 518. "Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest." *Id*.

During the course of proceedings below, § 15 of the SSAA provided, in pertinent part:

> (1) . . . Subject to subsections (2) and (3), if a district or intermediate district has received more than its proper apportionment, the department, upon satisfactory proof, shall deduct the excess in the next apportionment. Notwithstanding any other provision in this article, state aid overpayments to a district, other than overpayments in payments for special education or special education transportation, may be recovered from any payment made under this article . . . .
>
> (2) If the result of an audit conducted by or for the department affects the current fiscal year membership, affected payments shall be adjusted in the current fiscal

[3] In light of our conclusion that the circuit court did not have jurisdiction over any of Delton-Kellogg's claims, we need not consider this issue as it relates to Delton-Kellogg. However, because our analysis of this issue is the same for both plaintiffs, we will address the issue as it relates to both plaintiffs.

> year. A deduction due to an adjustment made as a result of an audit conducted by or for the department, or as a result of information obtained by the department from the district, an intermediate district, the department of treasury, or the office of auditor general, shall be deducted from the district's apportionments when the adjustment is finalized. . . . [T]he department may grant up to an additional 4 years for the adjustment . . . .
>
> (3) If, because of the receipt of new or updated data, the department determines during a fiscal year that the amount paid to a district or intermediate district under this article for a prior fiscal year was incorrect under the law in effect for that year, the department may make the appropriate deduction or payment in the district's or intermediate district's allocation for the fiscal year in which the determination is made. [MCL 388.1615, as amended by 2012 PA 286.][4]

Further, § 18 provided, in pertinent part:

> (4) For the purpose of determining the reasonableness of expenditures and whether a violation of this article has occurred, all of the following apply:
>
> (a) The department shall require that each district and intermediate district have an audit of the district's or intermediate district's financial and pupil accounting records conducted at least annually at the expense of the district or intermediate district, as applicable, by a certified public accountant or by the intermediate district superintendent, as may be required by the department, or in the case of a district of the first class by a certified public accountant, the intermediate superintendent, or the auditor general of the city.
>
> * * *

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[4] 2014 PA 196 amended § 15, effective October 1, 2014, by amending the language of Subsection (3) and adding a new Subsection (4) that provided: "The department may conduct audits, or may direct audits by designee of the department, for the current fiscal year and the immediately preceding 3 fiscal years of all records related to a program for which a district or intermediate district has received funds under this article."

> (d) The pupil and financial accounting records and reports, audits, and management letters are subject to requirements established in the auditing and accounting manuals approved and published by the department.
>
> * * *
>
> (8) The department shall review its pupil accounting and pupil auditing manuals at least annually and shall periodically update those manuals to reflect changes in this article. [MCL 388.1618, as amended by 2012 PA 201.][5]

And § 168 provided:

> In order to receive funds under this act, a district . . . or other entity that directly or indirectly receives funds under this act shall allow access for the department or the department's designee to audit all records related to a program for which it receives such funds. The district . . . or other entity shall reimburse the state for all disallowances found in the audit. [MCL 388.1768, as amended by 1993 PA 175.][6]

Section 168, which empowers the MDE "to audit all records related to a program," notes that it is applicable to "funds under this act," indicating that the powers and definitions in § 168 applied to the entire SSAA.[7] Thus, the ability to access the records to conduct an audit applied to the other sections under consideration here, including §§ 15 and 18. Although the MDE is

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[5] 2014 PA 196 also amended § 18(4)(a) to indicate that audits could be conducted "at such other times as determined by the department" and that districts "shall retain these records for the current fiscal year and from at least the 3 immediately preceding fiscal years."

[6] 2014 PA 196 amended § 168 to change references from "this act" to "this article" and require access related to programs for which funds have been received "for any of the 3 immediately preceding fiscal years."

[7] 2014 PA 196 did not change this. While it refers to "this article" rather than "this act," the reference is to the article of the SSAA that governs public schools.

clearly empowered to audit, the question is whether it may retroactively audit.

We conclude that when they are read together in their entirety, the interplay of §§ 15 and 168 authorizes the MDE to conduct retroactive audits. MCL 388.1615(3) provides:

> If, because of the receipt of new or updated data, the department determines during a fiscal year that the amount paid to a district or intermediate district under this article for a prior fiscal year was incorrect under the law in effect for that year, the department may make the appropriate deduction . . . in the district's or intermediate district's allocation for the fiscal year in which the determination is made.

Section 15(3) clearly empowers the MDE to make deductions from a district's allocation for incorrect allocations related to a prior fiscal year. Any deduction is driven by the "receipt of new or updated data." Further, § 168 required districts to "allow access for the department or the department's designee to audit all records related to a program for which it receives such funds." MCL 388.1768. "All records" necessarily includes past and present records and the right of access to complete an audit is given to the MDE. MCL 388.1615(3), unlike MCL 388.1615(2), does not use the term "audit," but that is the most likely avenue for the MDE to receive new or updated data, especially given the reference to audits in MCL 388.1615(2). The MDE clearly has audit power and there is no indication in § 15(3) that this power cannot be used to gather "new or updated data." Therefore, the audit power can act retroactively to gather updated data on a prior fiscal year.[8] Accordingly, we hold that the circuit

[8] We reject Galien's argument that the amendments made by 2014 PA 196 indicate that the MDE previously lacked the authority to conduct retroactive audits. As we have concluded, before the amendments, the

court erred by concluding that the MDE did not have the authority to retroactively audit.

IV. CONCLUSION

In Docket No. 317734, we vacate the circuit court's order in its entirety and direct Delton-Kellogg to exhaust its administrative remedies before seeking judicial review.

In Docket No. 317739, we vacate the circuit court's order in its entirety and remand for reinstatement of the superintendent's March 14, 2013 final decision.

SAAD, P.J., and OWENS and K. F. KELLY, JJ., concurred.

SSAA clearly granted the MDE the authority to conduct retroactive audits. The recently passed amendments simply clarify this authority by specifically limiting the scope of audits and recordkeeping requirements to three years, rather than an undefined period.

IME v DBS

Docket No. 316274. Submitted August 5, 2014, at Grand Rapids. Decided August 14, 2014, at 9:05 a.m.

IME, through her next friend, GE, filed a petition in the Allegan Circuit Court seeking an ex parte personal protection order (PPO) against DBS. DBS, a juvenile, in a previous delinquency proceeding was found to have committed first- and second-degree criminal sexual conduct against petitioner. The court, Margaret Z. Bakker, J., granted the petition. Respondent moved to modify or terminate the PPO, asserting that the statute under which the PPO was granted, MCL 600.2950a(2)(a), was unconstitutional. Following a hearing, the court amended the order to allow respondent to possess a firearm while hunting with family members. The court took the issue of the constitutionality of the statute under advisement. The court subsequently determined that respondent had failed to demonstrate that the statute was unconstitutional and denied respondent's motion to terminate the order. Respondent appealed.

The Court of Appeals *held*:

1. Under MCL 600.2950a(2)(a), a person may petition a court to enter a PPO to restrain or enjoin an individual from engaging in certain acts if that individual has been convicted of a sexual assault of the petitioner. Consistent with the minimum requirements of the Due Process Clause, the respondent to a petition for a PPO under MCL 600.2950a(2)(a) has the ability to contest the petition by presenting evidence that he or she has not in fact been convicted of sexually assaulting the petitioner. The fact that the respondent's status satisfies the requirement for issuing a PPO under the statute does not result in a violation of procedural due process because the respondent received all the process to which he or she was due at the criminal proceeding that led to conviction. The Legislature also enacted additional procedural safeguards to ensure that the orders are properly issued and subject to review. The statute requires a demonstration of exigent circumstances before an ex parte PPO may be issued, provides for rescission of a PPO on motion by the respondent, and allows a respondent who has not received notice of the PPO to avoid arrest for an unwitting

violation of the PPO. These safeguards are sufficient to protect a respondent's right to procedural due process, and, on the facts of this case, respondent was given a meaningful opportunity to be heard and to seek appropriate modifications of the PPO.

2. To determine whether a statute is unconstitutional, courts must examine whether the statute interferes with a fundamental right. If the right asserted is not fundamental, the government's interference with that right need only be reasonably related to a legitimate government interest. When issuing a PPO under MCL 600.2950a(2)(a), a court may restrain or enjoin a number of different acts, which are identified in MCL 600.2950a(3), but the court is not required to restrain or enjoin the respondent from engaging in any of those acts, and most of those acts do not implicate fundamental rights. To the extent that the court has the power to restrain or enjoin the purchase or possession of firearms, the restriction is a reasonable exercise of the state's police power because it allows the court to make a judgment regarding whether and to what extent the PPO should restrict the right to bear arms. Therefore, the statute does not on its face impair a fundamental right. With the enactment of MCL 600.2950a(2)(a), the Legislature intended to protect the victims of sexual assault from further victimization by the perpetrator of the sexual assault. The Legislature could have reasonably concluded that the victims of sexual assault are particularly susceptible to further victimization by the perpetrator of the assault, and that they require additional measures to protect them from their previous attackers beyond those provided under MCL 600.2950 and MCL 600.2950a(1). Therefore, the Legislature's decision to allow victims of sexual assault to seek personal protections orders against the persons convicted of assaulting them is reasonably related to the legitimate government purpose of protecting victims of sexual assault from further victimization. The flexibility given to the court when fashioning the PPO also ensures that the liberty interests of respondents are not arbitrarily or unreasonably restrained. The trial court correctly ruled that MCL 600.2950a(2)(a) passes constitutional scrutiny.

Affirmed.

1. STATUTES — PERSONAL PROTECTION ORDERS AGAINST PERPETRATORS OF SEXUAL ASSAULTS — CONSTITUTIONAL LAW — PROCEDURAL DUE PROCESS.

Under MCL 600.2950a(2)(a), a person may petition a court to enter a personal protection order to restrain or enjoin an individual from engaging in certain acts if that individual has been convicted of a

sexual assault of the petitioner; the statute contains sufficient procedural safeguards to protect a respondent's right to procedural due process.

2. STATUTES — PERSONAL PROTECTION ORDERS AGAINST PERPETRATORS OF SEXUAL ASSAULTS — CONSTITUTIONAL LAW — SUBSTANTIVE DUE PROCESS.

When issuing a personal protection order under MCL 600.2950a(2)(a), a court may restrain or enjoin a number of different acts, but the statute does not on its face impair a fundamental right; the Legislature's decision to allow victims of sexual assault to seek personal protections orders against the persons convicted of assaulting them is reasonably related to the legitimate government purpose of protecting victims of sexual assault from further victimization; the flexibility given to the court when fashioning the personal protection order ensures that the liberty interests of respondents are not arbitrarily or unreasonably restrained; MCL 600.2950a(2)(a) passes constitutional scrutiny.

Law Office of Leo Hendges, PLLC (by *Leo T. Hendges*), for respondent.

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

PER CURIAM. Respondent, DBS, appeals by right the trial court's decision to grant the request for a personal protection order (PPO) by petitioner, IME, through her next friend, GE, who is her father. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

These events have their origin in a prior incident that occurred when respondent was just 12 years of age. He was visiting the home of petitioner's family at the time. GE walked into a room and discovered respondent with petitioner, who was just 6 years of age. Petitioner was in a state of undress.

The county prosecutor initiated a delinquency proceeding against respondent in September 2010. At the proceeding, the jury heard evidence that respondent touched petitioner's vagina and performed cunnilingus on her. The jury found him guilty of one count each of criminal sexual conduct in the first degree and criminal sexual conduct in the second degree.

In October 2012, petitioner's father petitioned for a PPO against respondent on his daughter's behalf. In a statement attached in support of the petition, petitioner's mother noted that petitioner was a victim of sexual assault and described the incident at a high school football game that she attended with her daughter (age 9 as of the petition), which precipitated the need for a PPO. She stated that her daughter became "scared and panicked" and began to cry after she saw respondent at the game. She was alarmed because respondent was "walking around and staring at her." Petitioner's mother argued that, "[a]s a victim[,] she [petitioner] shouldn't have to leave school functions and activities because he [respondent] is there." "Furthermore," she stated, "he shouldn't be allowed at school [functions] or around other young children." Petitioner's father asked the court to issue an ex parte order prohibiting respondent from "following" or "approaching or confronting" petitioner "in a public place or on private property."

The trial court granted the petition on the ground that respondent had committed a sexual assault against petitioner. However, it expanded the scope of the order to include limitations beyond those requested in the petition. The court barred respondent from following petitioner, appearing at her workplace or residence, approaching or confronting her in a public place or on

private property, entering onto or remaining on property owned, leased, or occupied by her, sending mail or other communications to her, contacting her by telephone, placing an object on or delivering an object to property owned, leased, or occupied by her, or threatening to kill or physically injure her. In addition, the court prohibited him from purchasing or possessing a firearm. Respondent received service of the order in November 2012. The order stated that it would remain in effect until October 2013.

In December 2012, respondent moved to modify or terminate the PPO. He maintained that the statute allowing courts to issue a PPO on the basis of a single prior sexual assault is unconstitutional. He argued that it is overbroad because it restricts "more conduct than is necessary to accomplish the goal of protecting victims of convicted sex offenders." Respondent also asserted that the statute is impermissibly overbroad because there are "no time limitations built into this law"; the petitioner could obtain a PPO every year for the rest of her life. Respondent further argued that the statute is unconstitutional because it allows a court to restrain the respondent's personal liberties even after he or she has served his or her sentence. In his brief in support of his motion, respondent also claimed that the PPO violated his right to equal protection of the laws, his right to exercise his religion, his right to freely associate, his right to bear arms, his right against unreasonable searches and seizures, and his right not to be subjected to double jeopardy.

The trial court held a hearing on the motion in February 2013. At the hearing, the trial court noted that respondent had not challenged the underlying facts, but was challenging the constitutionality of the statute alone. Respondent's lawyer agreed that that was the case.

At the hearing, respondent's lawyer explained how the PPO stripped respondent of his ability to lead a normal life on the basis of a single underlying conviction for a sex crime. Now respondent cannot do the things that he likes to do:

> In this case, go to a football game where [respondent] is back in school . . . . He actually was on the team for a period. I am not sure if he still is now. But he likes going to football games. And he--he's a fifteen year old kid now. He scans the stands to see if his friends are there. And in this case, apparently [petitioner's family] felt that he was staring at them. And they feel that that made [petitioner] nervous, so they filed for a personal protection order.

Respondent's lawyer also explained that respondent cannot go hunting with his family and, if petitioner's family suddenly chose to attend his church, he would be precluded from practicing his religion. And these limitations, he emphasized, can be renewed in perpetuity under the statute. It is this breadth, he maintained, that makes the statute unconstitutional:

> In this case, the parties live in similar towns. They go to the grocery store. They run into each other. That's going to happen. There is no showing that [respondent or his family] have in any way tried to approach them, tried to come to their house, tried to mail things. But they are still--[respondent] is subject to a personal protection order. . . .
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> * * *
>
> He is back in the public schools. He is trying to get on with his life. Fortunately he doesn't have to register on the sex offender registry, because that was amended. But now he is subject to personal protection orders and if he wants to buy a gun to go hunting this next year with his father in Cadillac, at his uncle's property, he can't do that because he can't own a gun. If that is the way that the order is entered.

Petitioner's father spoke on his daughter's behalf and argued that the statute was proper. He related that he too had previously made a bad decision and had to live with the consequences: "And we all--you know, ten years ago, I decided to do something and commit two felonies. And because of that decision, I have to live with not being able to have a gun, not being able to do certain things because of my criminal record." But, he stated, it was his job to protect his daughter and "now she feels that she is unsafe." Petitioner's father reiterated that he was not trying to make respondent miserable: "we went two years without having any issues until that day." But after the incident he wanted to "make sure that she is protected." The trial court asked petitioner's father if it would be all right to amend the order to allow respondent to hunt, and he agreed: "You know what, I don't care if he can possess--I don't want to ruin his--everything about his life. . . . [T]hat's not my point here."

The trial court took the motion under advisement, but left the existing order in place pending its decision. It, however, amended the order to allow respondent to possess a firearm while hunting with family members.

In April 2013, the trial court issued its opinion and order on the motion to modify or terminate the PPO. The trial court determined that respondent had not met his burden to demonstrate that the statute was unconstitutional. The court explained that respondent had to show that the statute's overbreadth was "real and substantial" when judged in relation to its legitimate sweep. Although respondent identified possible situations in which the PPO authorized under the statute might interfere with his exercise of certain rights, those possibilities were merely theoretical rather than realistic dangers arising from the statute itself. The trial

court also rejected respondent's contention that the statute violated the prohibition against multiple punishments because any punishment would be for the violation of the PPO and not for committing the original sexual assault. Finally, it concluded that the statute met the minimum requirements for due process. For these reasons, the trial court denied respondent's motion to the extent that it asked the trial court to find the statute unconstitutional or to construe it in a way to impose additional requirements.

This appeal followed.

II. CONSTITUTIONALITY

A. STANDARDS OF REVIEW

On appeal, respondent argues that MCL 600.2950a(2)(a) is unconstitutional because it allows a petitioner to obtain a PPO against a respondent solely on the basis that the respondent sexually assaulted the petitioner or provided the petitioner with obscene material. Respondent asserts that by creating this automatic right to a PPO, the Legislature eliminated the need for the petitioner to demonstrate that he or she needs a PPO in order to ensure his or her safety, which violates the respondent's right to procedural due process.[1] Respondent also claims that the statute is unconstitutional because it does not satisfy the rational-basis test.

This Court reviews de novo a challenge to the constitutionality of a statute. *Bonner v Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014). This Court also reviews de novo whether the trial court properly selected, interpreted, and applied a statute. *Kincaid v Cardwell*,

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[1] We note that respondent has not challenged whether MCL 600.2950a(2)(a) applies to juvenile adjudications.

300 Mich App 513, 522; 834 NW2d 122 (2013). This Court must presume that MCL 600.2950a(2)(a) is constitutional unless its " 'invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution . . . .' " *Bonner*, 495 Mich at 221, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

B. PROCEDURAL DUE PROCESS

Although respondent argues that MCL 600.2950a(2)(a) is unconstitutional because it denies respondents a meaningful opportunity to be heard, he does not actually address the procedural safeguards that the Legislature put into place to protect persons who are respondents in a proceeding under the statute. Indeed, he appears to concede that he received notice and had an opportunity to contest the PPO; he simply does not like the fact that the statute provides the victims of sexual assault with an automatic right to obtain a PPO against the persons convicted of attacking them. Nevertheless, we shall examine the safeguards of the statutory scheme.

Before the state may deprive persons of liberty or property, due process requires that the person be given notice of the proceedings and an opportunity to be heard in a meaningful time and manner. *Dow v Michigan*, 396 Mich 192, 206-207; 240 NW2d 450 (1976). Any additional procedural protections required by due process are flexible and depend on the particular situation. *In re Brock*, 442 Mich 101, 110-111; 499 NW2d 752 (1993). Generally, three factors will be considered when determining what is required by due process: (1) the private interest affected by the official action, (2) the risk of erroneous deprivation of the interest through

the procedures used, and (3) the probable value, if any, of additional or substitute procedural safeguards. *Id*. at 111.

The Legislature has provided courts with the authority to restrain or enjoin persons from engaging in certain conduct. The statutory provisions governing such orders are found under MCL 600.2950 and MCL 600.2950a. Under MCL 600.2950a, which is at issue here, the Legislature provided for personal protection orders against persons other than those with whom the petitioner has a domestic relationship. Originally, this statute only permitted a petitioner to obtain a PPO to restrain or enjoin the respondent from engaging in the conduct criminalized under MCL 750.411h or MCL 750.411i, which statutes prohibit what is commonly referred to as stalking. See 1992 PA 262. However, the Legislature determined that certain other potentially vulnerable persons should have the power to petition for personal protection orders to restrain persons who pose a danger to them.

The current statute allows a petitioner to obtain a PPO under three circumstances. A petitioner may obtain a PPO enjoining the respondent from engaging in the conduct prohibited under MCL 750.411h, MCL 750.411i, or MCL 750.411s, when the petitioner alleges that the respondent engaged in acts that would constitute a violation of one of those statutes without regard to whether the respondent has actually been charged or convicted of such a violation. MCL 600.2950a(1). A petitioner may also seek a PPO to enjoin or restrain a respondent from engaging in certain conduct—listed under MCL 600.2950a(3)—when the petitioner has "been subjected to, threatened with, or placed in reasonable apprehension of sexual assault by the individual to be enjoined." MCL 600.2950a(2)(b). Finally, a

petitioner may seek a PPO to restrain or enjoin the respondent from engaging in the conduct listed under MCL 600.2950a(3) when the "respondent has been convicted of a sexual assault of the petitioner" or has been "convicted of furnishing obscene material to the petitioner . . . ." MCL 600.2950a(2)(a).

Consistent with minimum due process, the respondent to a petition for an order under MCL 600.2950a(2)(a) has the ability to contest the petition by presenting evidence that he or she has not in fact been convicted of sexually assaulting the petitioner or furnishing obscene material to the petitioner. And, with regard to those respondents who have been convicted of sexually assaulting the petitioner, the fact that his or her status satisfies the minimum requirements for issuing a PPO does not—by itself—result in a violation of procedural due process; the respondent received "all the process to which he [or she] was due" at the criminal proceeding resulting in his or her conviction. *People v Minch*, 493 Mich 87, 94; 825 NW2d 560 (2012).

The Legislature also enacted procedural safeguards to ensure that the orders are properly issued and subject to review. The petitioner has the burden to establish grounds for the issuance of a PPO. See MCL 600.2950a(1) and MCL 600.2950a(2). The order must be served on the respondent and, in the case of minors, on the respondent's parent, guardian, or custodian. MCL 600.2950a(18). When seeking an ex parte order, the petitioner must establish "that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice . . . ." MCL 600.2950a(12). A respondent to a petition under MCL 600.2950a(2)(a) also has the right to file and have a hearing on his or her motion to rescind or modify the PPO. MCL 600.2950a(13) and MCL 600.2950a(14). Similarly, a respondent named in a PPO

issued under MCL 600.2950a who has not received notice of the PPO cannot be arrested unless given actual notice and the opportunity to comply with the order. MCL 600.2950a(22). Finally, even after the expiration of the period within which to request a hearing, the respondent may request a hearing to rescind or modify the PPO on the basis of a showing of good cause. See MCL 600.2950a(13).

These procedural safeguards are substantially similar to the safeguards provided under MCL 600.2950 for the issuance of a PPO involving domestic relations. And this Court has already determined that those safeguards were sufficient to protect a respondent's right to procedural due process. See *Kampf v Kampf*, 237 Mich App 377, 383-386; 603 NW2d 295 (1999). Accordingly, for the reasons stated in *Kampf*, we conclude that MCL 600.2950a provides sufficient procedural safeguards to satisfy due process.

Even considering the facts of this case, it is evident that these procedural safeguards afforded respondent a meaningful opportunity to be heard and ensured that his liberty was not improperly limited. Respondent received notice of the PPO and had the opportunity to file a motion to rescind or modify the order. Notably, although the statute requires the trial court to issue a PPO on a petitioner's request when the petitioner establishes that the person to be enjoined has been convicted of sexually assaulting the petitioner, the statutory scheme leaves it to the trial court to tailor the order to the specific circumstances—that is, it does not require the trial court to enjoin any specific conduct. See MCL 600.2950a(3). Moreover, the trial court had the discretion to modify or rescind the order on the basis of a proper motion. See MCL 600.2950a(13) and (14). And the trial court actually modified the order at

issue after respondent's lawyer noted that the order would preclude respondent from hunting with his family. Had the trial court felt it appropriate, it could have removed the firearms restrictions altogether. Finally, although petitioner can renew her request for a PPO in perpetuity, the trial court still has the discretion to take into consideration the specific facts applicable when fashioning a new or renewed PPO. Even when considered on the facts specific to this case, the statutory scheme provided respondent with a meaningful opportunity to be heard and the opportunity to seek appropriate modifications to the order.

C. SUBSTANTIVE CHALLENGE

Although framed as a procedural challenge, respondent's claim on appeal bears the hallmarks of a substantive challenge; specifically, he appears to argue that MCL 600.2950a(2)(a) is unconstitutional because it impermissibly allows the petitioner to obtain an order to restrain or enjoin the respondent without a sufficiently high burden of proof, which, he maintains, is irrational. Stated another way, he challenges whether the Legislature has the authority to enact a statute that allows a person to petition the trial court for a PPO to restrain or enjoin another person on the sole basis that the individual to be restrained has been convicted of sexually assaulting the petitioner. In respondent's view, the Legislature cannot enact such a statute because the mere fact that a person has sexually assaulted another person in the past is not sufficiently indicative of whether the perpetrator poses a future danger to his or her victim. He also indicates that it is fundamentally unfair that the statute does not have a "sunset provision."

In order to properly determine whether a statute is unconstitutional, courts must first examine whether

the statute interferes with a fundamental right; if the right asserted is not fundamental, "the government's interference with that right need only be reasonably related to a legitimate government interest." *Bonner*, 495 Mich at 227. Before the trial court, respondent's lawyer argued that the statute impermissibly allows a court to issue a PPO that—in theory—could interfere with a variety of fundamental rights, especially if the petitioner is vindictive.[2] He stated that the PPO could interfere with respondent's right to equal protection of the laws, his right to exercise his religion, his right to freely associate, his right to bear arms, his right against unreasonable searches and seizures, and his right not to be subjected to double jeopardy. Respondent's lawyer has not repeated these arguments on appeal with the exception of a brief mention of the fact that the order limits respondent's right to purchase and possess firearms.

In any event, because he has challenged the facial validity of the statute, the specific facts surrounding respondent's claim are inapposite; the fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to invalidate it. *Bonner*, 495 Mich at 223. Instead, respondent must show that no set of circumstances exists under which the statute could be said to be valid. *Id*. A "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances

[2] This Court has already considered the possibility that a party may inappropriately use the procedures for obtaining a PPO and determined that the trial courts are in the best position to recognize and address that possibility through the exercise of their discretion to grant, rescind, or modify the PPO. *Pickering v Pickering*, 253 Mich App 694, 702 n 3; 659 NW2d 649 (2002).

exists under which the Act would be valid." *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

When issuing a PPO under MCL 600.2950a(2)(a), a trial court may restrain or enjoin a variety of conduct. It may restrain or enjoin the individual against whom the PPO is sought from "[e]ntering onto premises," "[t]hreatening to sexually assault, kill, or physically injure [the] petitioner or a named individual," "[p]urchasing or possessing a firearm," "[i]nterfering with the petitioner's efforts to remove the petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined," "[i]nterfering with the petitioner at the petitioner's place of employment or education or engaging in conduct that impairs the petitioner's employment or educational relationship or environment," "[f]ollowing or appearing within the sight of the petitioner," "[a]pproaching or confronting the petitioner in a public place or on private property," "[a]ppearing at the petitioner's workplace or residence," "[e]ntering onto or remaining on property owned, leased, or occupied by the petitioner," "[c]ontacting the petitioner by telephone," "[s]ending mail or electronic communications to the petitioner," "[p]lacing an object on, or delivering an object to, property owned, leased, or occupied by the petitioner," "[e]ngaging in conduct that is prohibited under" MCL 750.411s, or "[a]ny other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence or sexual assault." MCL 600.2950a(3)(a) to (n). The trial court is, however, not required to restrain or enjoin the respondent from engaging in any one or more of these types of conduct and most of the conduct listed does not on its face implicate a fundamental right. Even with regard to a

person's right to bear arms, this Court has held that the analogous statutory scheme found under MCL 600.2950 is a reasonable exercise of the state's police power because it allows the trial court to "make a judgment" regarding whether and to what extent the PPO should include a restriction on the right to bear arms. See *Kampf*, 237 Mich App at 383 n 3. Because the statute does not on its face impair a fundamental right, this Court must uphold the statute if there is a "reasonable relationship between the governmental purpose and the means chosen to advance that purpose." *Bonner*, 494 Mich at 230.

Respondent argues that MCL 600.2950a(2)(a) is irrational because it imposes no burden on the petitioner; rather, it allows a trial court to issue a PPO without any showing that the PPO is reasonably necessary for the petitioner's protection. Respondent, however, fails to see that a single incident of sexual assault is indicative of the danger that the perpetrator poses to the victim—perhaps more so than the other conduct for which a petitioner may obtain a PPO. In addition, he improperly equates the ease with which a petitioner can marshal his or her proofs with the nature of the burden to be demonstrated in order to justify the issuance of a PPO.

Under MCL 600.2950a(2)(a), the Legislature placed the burden on the petitioner (in relevant part) to demonstrate that the person to be restrained has been convicted of sexually assaulting the petitioner. Admittedly, once a person has been convicted of sexually assaulting another person, presenting proof of that fact will not be burdensome. But that does not mean that the burden is meaningless or even less onerous than the burden of proof applicable to the other statutes governing the issuance of a PPO. In the domestic relations context, a petitioner can establish the right to a PPO by

alleging facts that would permit the trial court to find that there is reasonable cause to believe that the person to be restrained might commit an act that could be enjoined. MCL 600.2950(4). That is, the petitioner can obtain a PPO against the person to be enjoined without having to prove that the person has actually done anything illegal. Similarly, a petitioner can obtain a restraining order under MCL 600.2950a(1) by alleging that the person to be restrained engaged in acts that constitute stalking without the need to show that the person to be restrained has actually been charged or convicted of violating the applicable statutes. By contrast, to establish the right to a PPO under MCL 600.2950a(2)(a), in relevant part, the petitioner must establish that a jury has already found beyond a reasonable doubt that the person to be restrained sexually assaulted the petitioner. That is, the petitioner must have endured a sexual assault, must have gone through the difficult experience of a criminal prosecution, which likely included testifying against the person to be enjoined, and must have convinced a jury to unanimously find beyond a reasonable doubt that the person to be enjoined actually committed the sexual assault. When considered in full context, meeting the qualifications for a PPO under MCL 600.2950a(2)(a) is more onerous than meeting the qualifications for one under MCL 600.2950(4) and MCL 600.2950a(1).

With the enactment of MCL 600.2950a(2)(a), the Legislature intended to protect the victims of sexual assault from further humiliation and victimization at the hands of the person who perpetrated the sexual assault. Sexual assault is a particularly heinous crime that—as courts have recognized—commonly results in psychological injury. See, e.g., *People v Smith*, 482 Mich 292, 311; 754 NW2d 284 (2008) (recognizing that sexual assault is "most certainly heinous"); *People v Beckley*,

434 Mich 691, 721; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.) (characterizing sexual assault as one of society's most heinous offenses); *Jenkins v McCoy*, unpublished opinion per curiam of the United States Court of Appeals for the Fourth Circuit, issued September 14, 1994 (Case No. 93-6919), p 3 (stating that any layman knows about the psychological injury associated with rape). On that basis, the Legislature could reasonably conclude that the victims of sexual assault—more so than the victims of other crimes—are particularly susceptible to further victimization by the perpetrators of the assault, whether inadvertently or through deliberate acts directed to that purpose. Moreover, the perpetrators of sexual assault may be intimately acquainted with their victims and may return to their communities after serving their sentences. From that, the Legislature could reasonably infer that the person who sexually assaulted the victim continues to be a danger to his or her victim. Given the nature and extent of the harm caused by sexual assaults and the heightened possibility that the perpetrators might again directly or indirectly harm their victims, the Legislature could reasonably conclude that the victims of sexual assault require additional measures to protect them from their attackers beyond those provided under MCL 600.2950 and MCL 600.2950a(1).

The Legislature's decision to allow the victims of sexual assault to seek personal protection orders against the persons convicted of assaulting them is reasonably related to the legitimate government purpose of protecting the victims of sexual assault from further victimization. See *Bonner*, 495 Mich at 227. Moreover, trial courts have substantial discretion to fashion a PPO that balances the petitioner's need for appropriate protection and the respondent's liberty interests. The respondent has the opportunity to file a

motion to rescind or modify the order and is entitled to a hearing on that motion. At the hearing, the respondent can argue and present evidence that the order should be limited or even rescinded under the facts peculiar to the case. The trial court also has the discretion to set the term of the PPO. See MCL 600.2950a(13); MCL 600.2950a(11)(d). By setting an appropriate term, the trial court can ensure that the order will be subject to periodic review. This flexibility advances the Legislature's interest in protecting the victims of sexual assault while ensuring that the perpetrators' liberty interests are not arbitrarily or unreasonably restrained.

For all these reasons, MCL 600.2950a(2)(a) passes constitutional scrutiny.

III. CONCLUSION

Respondent failed to demonstrate that MCL 600.2950a(2)(a) is unconstitutional. Because respondent has not otherwise challenged the trial court's exercise of discretion in fashioning and imposing the PPO, we affirm.

Affirmed.

M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ., concurred.

OKRIE v STATE OF MICHIGAN

Docket No. 319550. Submitted July 8, 2014, at Detroit. Decided August 19, 2014, at 9:00 a.m. Leave to appeal denied 497 Mich 955.

Thomas R. Okrie brought an action in the Court of Appeals under MCL 600.308(4) to challenge the constitutionality of 2013 PA 164, which relocated the Court of Claims from the Ingham Circuit Court to the Court of Appeals. Before 2013 PA 164 took effect, plaintiff had filed an action against the state of Michigan, Governor Rick Snyder, and others in the Court of Claims, alleging that the taxation of his pension pursuant to 2011 PA 38 constituted a breach of contract. The underlying case was temporarily stayed, and the Court of Appeals ordered that plaintiff's petition proceed to a full hearing.

The Court of Appeals *held*:

1. The transfer of the Court of Claims from the Ingham Circuit Court to the Court of Appeals did not conflict with the separation of powers set forth in Const 1963, art 3, § 2. The Court of Claims was not a division of the circuit court; rather, it was created by and derives its powers from the Legislature, which had the authority to transfer its functions to the Court of Appeals. Plaintiff did not demonstrate that the separation-of-powers doctrine precluded 2013 PA 164 from any valid application.

2. The Court of Appeals judges appointed to serve as Court of Claims judges were not holding incompatible offices in violation of MCL 15.182. Contrary to plaintiff's argument, Const 1963, art 6, § 8 does not prohibit a Court of Appeals judge from sitting as a judge on a lower tribunal while holding elective office, and nothing in the record supported a finding that the Court of Claims judges would review their own judgments. Quo warranto was not merited.

3. 2013 PA 164 did not violate Const 1963, art 6, § 13 by reassigning the functions of the Court of Claims to the Court of Appeals. The Legislature did not exercise general control over the Ingham Circuit Court but over the Court of Claims, which was not a division of the circuit court but a legislatively created function of it.

4. Plaintiff did not show that his due-process right to an impartial decision-maker was violated when the underlying case

was moved from the circuit court to the Court of Appeals. Plaintiff did not establish that the four Court of Claims judges are biased, that the judge overseeing his case was not neutral, or that the appellate review procedure established in 2013 PA 164 gave rise to the probability of bias or appearance of impropriety.

5. Plaintiff's argument that the immediate effect given to 2013 PA 164 violated Const 1963, art 4, § 27 was without merit because it was based on the roll call vote in the House of Representatives for the bill itself rather than the vote for immediate effect, which the House Journal recorded as having garnered the requisite two-thirds majority.

Relief sought in the petition was denied.

Law Office of Gary P. Supanich (by *Gary P. Supanich*) for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Patrick M. Fitzgerald*, *Joshua Booth*, and *Margaret Nelson*, Assistant Attorneys General, for defendants.

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

PER CURIAM. Plaintiff, Thomas R. Okrie, commenced this original action to challenge the constitutionality of Public Act 164 of 2013 (PA 164).[1] Plaintiff objects to the transfer of the Court of Claims from the Ingham Circuit Court (the circuit court for the 30th judicial circuit), where it has been housed since 1978, to this Court, in which appeals from the Court of Claims are also heard. Plaintiff challenges the legislation on various constitu-

[1] This Court is authorized to hear certain original actions. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). Jurisdiction for this particular action is provided for in PA 164 itself: "The court of appeals has exclusive original jurisdiction over any action challenging the validity of [MCL 600.6404, 600.6410, 600.6413, or 600.6419]." MCL 600.308(4).

tional grounds. Defendants contend that PA 164 is constitutional and that the transfer was within the Legislature's authority. Although Michigan is not alone in creating a separate court or tribunal to hear claims made against the government, the Legislature's decision to house the trial court for claims against the state in the appellate court is very unusual and quite possibly unprecedented.[2] Nevertheless, plaintiff has not established that PA 164 is unconstitutional on its face.

I. FACTUAL BACKGROUND

A. HISTORY OF THE COURT OF CLAIMS

In the mid-1800s, long before the creation of the Court of Claims, the Board of State Auditors, which was a specially initiated administrative board, decided claims brought against the state:

> Before the Court of Claims was created, persons with claims for damages against the state initially sought relief before the Board of State Auditors. This board, originally created by 1842 PA 12, heard claims against the state until the early Twenties, at which time the State Administrative

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[2] A number of jurisdictions have created a separate court or tribunal to hear claims against the state. See, e.g., 28 USC 1491; Ohio Rev Code Ann 2743.03(3)(B); NY Court of Claims Act, §§ 8 and 9 (McKinney 1963); 705 Ill Comp Stat 505/1; W Va Code 14-2-4; Tenn Code Ann 9-8-307; 42 Pa Con Stat 761. However, we note that these jurisdictions create a court or tribunal that is separate from the court that will eventually hear an appeal as of right from the original decision. In particular, we note that in Pennsylvania, although the Commonwealth Court (which functions as an intermediate appellate court) hears actions against the state as original actions, it does not hear appeals from its own decisions; instead, those appeals are heard in the Pennsylvania Supreme Court. See 42 Pa Con Stat 723(a); *Commonwealth of Pennsylvania, Dep't of Environmental Protection v Cromwell Twp, Huntingdon Co*, 613 PA 1, 14; 32 A3d 629 (2011). We have found no other court structure in the country similar to that set forth in PA 164.

> Board was created to hear such claims.[3] 1921 PA 3, 1925 PA 374, 1927 PA 133, and 1929 PA 259. See, Cooperrider, *Governmental Tort Liability*, 72 Mich L Rev 187, 250-256 (1973). 1939 PA 135, the original Court of Claims Act, gave the state Court of Claims exclusive jurisdiction over claims and demands against the state or any of its departments or agencies. [*Freissler v State Hwy Comm*, 53 Mich App 530, 537; 220 NW2d 141 (1974).]

In 1939, the Legislature enacted the Court of Claims Act, 1939 PA 135,[4] and therein adopted a comprehensive scheme authorizing lawsuits against the state and its agencies. See *Greenfield Const Co Inc v Dep't of State Hwys*, 402 Mich 172, 195; 261 NW2d 718 (1978) (opinion by RYAN, J.). In 1961, the Legislature amended 1939 PA 135 and reenacted it as Chapter 64 of 1961 PA 236. The Court of Claims Act reflects the state's waiver of sovereign immunity from suit and submission to a court's jurisdiction. *Greenfield Constr Co*, 402 Mich at 195. The Court of Claims thus was legislatively created. It has limited powers, *Feliciano v Dep't of Natural Resources*, 97 Mich App 101, 109; 293 NW2d 732 (1980), with explicit limits on the scope of its subject-matter jurisdiction, *Dunbar v Dep't of Mental Health*, 197 Mich App 1, 5; 495 NW2d 152 (1992). The jurisdiction of the Court of Claims is subject to Michigan statutory law. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767; 664 NW2d 185 (2003). The Court of Claims therefore does not have extensive and inherent powers akin to those of a constitutional court of general jurisdiction. *Taylor v Auditor General*, 360 Mich 146, 150; 103 NW2d 769 (1960), disapproved on other grounds in *Parkwood*, 468 Mich 763.

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[3] The current State Administrative Board has the discretionary authority, upon the advice of the Attorney General, to allow any claim against the state for an amount less than $1,000. MCL 600.6419(1).

[4] The current Court of Claims Act is MCL 600.6401 *et seq.*

In 1978, the Legislature exercised its statutory control over the Court of Claims, declaring in the former version of MCL 600.6404(1) that "[t]he court of claims is created as a function of the circuit court for the thirtieth judicial circuit." 1978 PA 164. Also, the 1978 Court of Claims legislation reflected that Ingham Circuit Court judges, and any judge assigned to that circuit court, could exercise Court of Claims jurisdiction. Thus, the Court of Claims had resided in the Ingham Circuit Court for 35 years before PA 164 was enacted.

In late 2013, PA 164 was introduced to enlarge the jurisdiction of the Court of Claims and transfer it to this Court. To the concern of many in the legal community, the bill was ushered through the Legislature with extraordinary speed and little allowance for discussion as to the wisdom of the proposed dramatic changes to the Court of Claims system.[5] The Senate passed and gave immediate effect to PA 164 on October 30, 2013;[6] the House of Representatives did likewise on November 6, 2013.[7] Governor Rick Snyder approved the legislation, and PA 164 became effective on November 12, 2013.[8]

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[5] The scant testimony on PA 164 that was received by the Committee on Government Operations was largely in opposition and repeatedly expressed concerns with the speed of the enactment of the legislation, with several individuals and entities calling upon the Legislature to take time to allow more responses to the legislation. See House Committee on Government Operations, Testimony From 1/2013, available at <http://house.mi.gov/mhrpublic/CommitteeInfo.aspx?comkey=229> (accessed July 17, 2014) [perma.cc/8239-7UD2]. One commentator remarked that the swift manner in which the legislation was passed "is an embarrassment to the democratic ideal and should not be repeated." Hastings, *Down the Rabbit Hole with the Court of Claims*, 93 Mich B J 14, 16 (July 2014).

[6] Senate Journal 89 reflects 26 yeas to 11 nays for passage (10/30/13 Journal, p 1689).

[7] House Journal 96 reflects 57 yeas to 52 nays for passage (16/13 Journal, p 1757).

[8] The Legislature subsequently amended the Court of Claims Act to clarify that matters in the Court of Claims may be joined for trial with

PA 164 provides that the jurisdiction in the Court of Claims is exclusive and that all Court of Claims actions "shall be filed" in the Court of Appeals. MCL 600.6419(1). Under PA 164, the Court of Claims consists of four Court of Appeals judges from at least two districts.[9] The Michigan Supreme Court assigns the four judges, who may exercise the jurisdiction of the Court of Claims. MCL 600.6404(1). The judges serve two-year terms, but may be reassigned. MCL 600.6404(6). As a result of PA 164, pending Court of Claims matters were transferred for assignment among the four Court of Appeals judges sitting as Court of Claims judges. MCL 600.6404(2). The clerk of the Court of Claims[10] assigned the cases by blind draw. MCL 600.6410(3).

B. PROCEDURAL HISTORY

In July 2013, plaintiff filed a verified class action[11] against the state of Michigan in the Court of Claims alleging breach of contract due to taxation of his pension under 2011 PA 38. The case, *Okrie v Michigan* (Docket No. 13-93-MK), was assigned to Ingham Circuit Judge Rosemarie Aquilina. In August 2013, defendants moved for summary disposition of the breach-of-

cases arising out of the same transaction pending in a trial court of the state. 2013 PA 205. Plaintiff does not challenge that amendment and it is not at issue in this case.

[9] The current Court of Claims Judges are Chief Judge MICHAEL J. TALBOT and Judges PAT M. DONOFRIO, AMY RONAYNE KRAUSE, and DEBORAH A. SERVITTO.

[10] The clerk of this Court also serves as the clerk of the Court of Claims. MCL 600.6410(1).

[11] The proposed class consists of similarly situated state and public school employees whose pensions will be subject to taxation under 2011 PA 38. For ease of reference, and because the Court of Claims denied plaintiff's motion for class certification, plaintiff is referred to in the singular.

contract claim. Plaintiff thereafter filed an amended complaint alleging unjust enrichment, breach of employment contract, and violations of the contract and takings clauses of the federal and state constitutions. Plaintiff also alleged substantive and procedural due process violations.

On November 5, 2013, the Court of Claims granted summary disposition to defendants on plaintiff's breach-of-contract claim. Defendants then moved for summary disposition of the remainder of plaintiff's claims. PA 164 took effect on November 12, 2013, and on the following day, Judge MICHAEL J. TALBOT, Chief Judge of the Court of Claims, issued an order temporarily staying all Court of Claims cases. On December 13, 2013, plaintiff filed the instant petition, the first such petition under MCL 600.308(4), to challenge PA 164.[12]

This Court ordered that plaintiff's petition proceed to a full hearing.[13] In its order, the Court invited briefs amicus curiae; however, despite the public outcry from the legal community during the Legislature's enactment proceedings, no such briefs were filed. Therefore, this Court restricts its analysis to the issues raised by plaintiff.

After this Court issued the order directing a hearing on plaintiff's petition, Judge SERVITTO granted defen-

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[12] Once the temporary stay was lifted in the Court of Claims, plaintiff filed a second amended complaint, adding counts for breach of an investment contract purchasing service credit and breach of the Michigan Investment Plan contract. Plaintiff moved in the Court of Claims for a stay of the underlying case in light of the instant constitutional challenge to the transfer pending in this Court, but Judge DEBORAH SERVITTO, acting as a judge on the Court of Claims, denied plaintiff's motion for stay.

[13] See *Okrie v Michigan*, unpublished order of the Court of Appeals, entered April 17, 2014 (Docket No. 319550).

dants' motion for summary disposition. When this opinion was drafted, reconsideration remained pending.[14]

II. DISCUSSION

A. LEGAL STANDARDS

In this petition, plaintiff challenges the constitutionality of PA 164. An examination of the constitutionality of a statute presents a question of law. *GMAC LLC v Treasury Dep't*, 286 Mich App 365, 372; 781 NW2d 310 (2009). Plaintiff's issues involve interpretation of the Michigan Constitution, a process that requires the application of three rules. The first is the rule of "common understanding," which means that courts should give the Constitution the interpretation that the majority of the people would give it. See *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 67; 748 NW2d 524 (2008). Consequently, when interpreting the Constitution, this Court examines what the text meant to the ratifiers, the people, when they ratified the Constitution. *Mich Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). The second rule provides that, to clarify the meaning of constitutional provision, courts should consider the circumstances surrounding its adoption and the purpose sought to be accomplished. *Kearney v Bd of State Auditors*, 189 Mich 666, 673; 155 NW 510 (1915). Third, courts generally are to presume that a statute is constitutional. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 90; 803 NW2d 674 (2011).

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[14] Despite that order, this challenge to the constitutionality of PA 164 is not moot. In light of the constitutional challenges raised, the grant of summary disposition is not the type of subsequent event for which this Court may not fashion a remedy. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003).

Plaintiff raises a facial challenge to the constitutionality of PA 164. A facial challenge is a claim that the law is "invalid *in toto*—and therefore incapable of any valid application . . . ." *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974). A litigant raising a facial challenge faces an arduous task. *Detroit Mayor v Arms Technology, Inc*, 258 Mich App 48, 59; 669 NW2d 845 (2003). The litigant must establish that no circumstances exist under which the statute would be valid. *In re Request for Advisory Opinion re Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007). " 'The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . .' " *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Accordingly, we must determine whether PA 164 is capable of any construction that would make it constitutional. See *Keenan v Dawson*, 275 Mich App 671, 680; 739 NW2d 681 (2007).

B. SEPARATION OF POWERS

Plaintiff maintains that PA 164 unconstitutionally interferes with this Court's jurisdiction and blurs the line dividing the powers of government. Whether the separation-of-powers doctrine has been violated is a question of law. *Fieger v Cox*, 274 Mich App 449, 463-464; 734 NW2d 602 (2007).

The separation-of-powers clause in the Michigan Constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

Separating the three branches of government preserves the independence of each branch. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 585; 640 NW2d 321 (2001). Simply put, the legislative branch makes the laws, the executive branch executes them, and the judicial branch interprets and applies them in cases properly before the courts. *Kyser v Kasson Twp*, 486 Mich 514, 535; 786 NW2d 543 (2010). More recently, our Supreme Court further explained that "[t]he true meaning [of the doctrine] is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." *Makowski v Governor*, 495 Mich 465, 482; 852 NW2d 61 (2014) (citation and quotation marks omitted).

In order to determine whether PA 164 violates the separation-of-powers clause, we examine the constitutional authority granted to the Legislature with regard to the courts.

Given that the Legislature's task is to enact laws in accordance with the authority that has been granted to it, it follows that the Legislature does not have authority to alter the jurisdiction of a court in a manner that is inconsistent with our Constitution. See *Chicago & WMR Co v Nester*, 63 Mich 657, 660; 30 NW 315 (1886) (stating that the Legislature may not disturb or destroy the jurisdiction of a constitutional court, i.e., one on which the state constitution confers authority). We therefore examine the creation of the Court of Claims and the mechanism by which it is empowered in order to determine whether the Legislature had the authority to enact PA 164.

The Constitution of 1835 established the Supreme Court as the lone constitutional court in Michigan, but

also indicated that the Legislature could establish other courts. Const 1835, art 6, § 1 ("The judicial power shall be vested in one supreme court, and in such other courts as the legislature may, from time to time, establish."). It is notable that this state's first constitution established that the Legislature had the authority to establish courts. Successive constitutions narrowed and further defined that authority, but did not abolish it.

For example, the Constitution of 1850 provided for the creation of circuit courts, probate courts, and justices of the peace along with the Supreme Court.[15] Const 1850, art 6, § 1. That section also authorized the Legislature to establish municipal courts. *Id*. ("The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the Legislature in cities."). The Constitution of 1908 likewise permitted the Legislature to establish certain courts inferior to our Supreme Court. See Const 1908, art 7, § 1 ("The judicial power shall be vested in one supreme court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law . . . .").

The system of providing for certain constitutionally created courts, along with providing the Legislature with authority to create other courts, continues in our current Constitution. Notably, Const 1963, art 6, § 1 provides:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme

[15] Apparently, the Legislature's establishment and dissolution of courts had been considered with disfavor. See *Streeter v Paton*, 7 Mich 341, 349 (1859) (observing that the Legislature's "frequent changes in the judicial tribunals of the state were looked upon as an evil").

> court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Consequently, selected courts, such as municipal courts and the Court of Claims, are not constitutionally created, but instead are only constitutionally permitted, and derive all their powers from the Legislature. *People ex rel Wexford Co Prosecuting Attorney v Kearney*, 345 Mich 680, 687; 77 NW2d 115 (1956).

Plaintiff admits that, like the municipal courts, the Court of Claims is not a constitutional court. Our Court clearly has stated that the Court of Claims is a court of legislative creation:

> The Court of Claims is a "legislative court" and not a "constitutional court" and derives its powers only from the act of the Legislature and is subject to the limitations therein imposed. *Manion v State Highway Comm'r*, 303 Mich 1; 5 NW2d 527 (1942), cert den 317 US 677; 63 S Ct 159; 87 L Ed 543 (1942). The Legislature created a Court of Claims as a substitute "for the 'board of State auditors' and the 'State administrative board' for the purpose of hearing and determining 'all claims and demands, liquidated and unliquidated, *ex contractu* and *ex delicto* against the State' * * *". *Id.*, 20. *Taylor v Auditor General*, 360 Mich 146, 150; 103 NW2d 769 (1960). Thus, the jurisdiction granted to the Court of Claims is "narrow and limited, substituting, merely, a 'court' of claims for the superseded claims jurisdiction of the earlier boards". *Id*. [*Littsey v Bd of Governors of Wayne State Univ*, 108 Mich App 406, 412; 310 NW2d 399 (1981).]

Given that the Court of Claims was created by legislation, the amendment of that legislation does not run afoul of the constitutional separation-of-powers doctrine. As *Littsey* noted, the Court of Claims derives its powers from the Legislature, which retains its author-

ity over that court. Accordingly, because the Legislature has authority over the Court of Claims, it could transfer the functions of that court from the circuit court to this Court.

Plaintiff asserts, however, that PA 164 violates the fundamental jurisdictional character of this Court by transferring additional duties to this Court. In contrast to the Court of Claims, the roots of this Court are grounded in our Constitution:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house. [Const 1963, art 6, § 1.]

The 1963 Constitution also set forth parameters for the Legislature to establish this Court's jurisdiction: "The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." Const 1963, art 6, § 10.

The parties agree, and we concur, that the principal function of this Court is to act as an intermediate appellate court and to hear appeals of right from circuit courts. In addition, this Court's jurisdiction encompasses appeals by leave as well as certain original actions and any other appeal or action established by law. See Const 1963, art 9, § 32; MCL 259.110(4); 600.308(1) and (2); MCR 7.203(A) through (D); MCR 7.206(E). Notably, those jurisdictional provisions are expressed via statute, as well as court rule. While it is true that appellate jurisdiction is understood to "only lie from one court to another," *In re Mfr's Freight Forwarding Co*, 294 Mich 57, 69; 292 NW 678 (1940)

(citation and quotation marks omitted), as noted, this Court's jurisdiction is not exclusively limited to appellate matters. Further, Const 1963, art 6, § 10 expressly states that this Court's jurisdiction shall be "provided by law," and therefore, the provisions of PA 164 are consistent with the Constitution.

Although plaintiff argues that the Legislature interfered with the essential constitutionally created jurisdiction of this Court, plaintiff has not cited any law expressly forbidding the transfer. More significantly, plaintiff's argument fails to account for the fact that our Constitution expressly provides that "[t]he jurisdiction of the court of appeals *shall be provided by law* and the practice and procedure therein shall be prescribed by rules of the supreme court." Const 1963, art 6, § 10 (emphasis added). And plaintiff has not demonstrated how PA 164 fundamentally altered this Court's jurisdiction.[16] Thus, plaintiff has not demonstrated that the Legislature's decision to transfer the Court of Claims to this Court violated the separation-of-powers doctrine.

To the extent that plaintiff argues that this Court is not equipped to be a trial court, that argument fails, as only the Court of Claims, not this Court, must function as a trial court under PA 164. Admittedly, before becoming Chief Justice, Justice YOUNG commented that this Court is "poorly suited and equipped for factual development of new claims," see MCR 2.112, Comments of Justices to 2007 Amendment, providing some merit to plaintiff's argument that this Court ordinarily is not prepared to be a trial court. The issue here, however, is

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[16] PA 164 did alter this Court's jurisdiction in one respect, by giving this Court exclusive original jurisdiction over any action challenging the validity of the amended statutes. MCL 600.308(4). However, this alteration was consistent with the constitutional mandate that this Court's jurisdiction "shall be provided by law . . . ." Const 1963, art 6, § 10.

whether the Court of Claims is outfitted to perform as a trial court. The Court of Claims has sufficiently rebutted plaintiff's argument by ably functioning as a trial court over the months preceding this decision by accepting new cases, holding hearings both in person and over the telephone, conducting settlement conferences and status conferences, and disposing of cases.

Even if plaintiff's argument had merit, we may not consider the wisdom of statutes properly enacted by the Legislature. *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). The courts should not exchange their judgment for that of the Legislature, which has responsibility over the legislatively created Court of Claims. See generally *Kyser*, 486 Mich at 535 (observing that the Court should not substitute its judgment for that of the Legislature in matters over which the Legislature is responsible).

Next, plaintiff argues that PA 164 erodes the constitutional division of judicial power between a superior appellate court and a trial court whose orders are subject to appellate review. The effect of PA 164 is that the Court of Appeals is required to simultaneously house an appellate court and a trial court of limited jurisdiction. Courts have long been critical of "horizontal" or "lateral" appeals. See, e.g., *In re Mfr's Freight Forwarding Co*, 294 Mich at 69 ("We cannot lose sight of the fact that appeals only lie from one court to another—not from an executive officer to a court. There must be a competent judicial tribunal to pass upon a case before an appeal can be taken to a higher court.") (citation and quotation marks omitted); *A Miner Contracting, Inc v Toho-Tolani Co Improvement Dist*, 233 Ariz 249, 254 n 7; 311 P3d 1062 (2013); *Economou v Economou*, 133 Vt 418, 422; 340 A2d 86 (1975), overruled on other grounds by *Morrisseau v Fayette*, 164 Vt

358 (1995) ("The appellate process must proceed vertically, not sideways."). PA 164 requires judges from this Court to first hear Court of Claims cases at the trial court level, and provides for direct review of those decisions, as of right, by the colleagues of the judges who first heard the matter. At first glance, such a procedure could be viewed as giving the appearance that there is no meaningful appellate review, and that the same court is merely rendering an appellate opinion on a matter that it already decided. However, nothing in PA 164 requires a Court of Claims judge to review his or her decisions in appeals filed in this Court. And the four Court of Claims judges will not sit in review of Court of Claims decisions. This Court routinely screens cases to identify potential conflicts and flags them for the judge in question to decide whether recusal is necessary. See Internal Operating Procedure (IOP) 7.213(D)-(3) (providing, in pertinent part, that "[t]he Court screens cases to identify potential conflicts based on even minimal involvement of a current Court of Appeals judge at the trial court level. . . . If, upon assignment of a case, a judge on the panel discovers a prior connection to the case, the judge will decide whether recusal is necessary."). Further, in the unlikely event that a Court of Claims judge does not recuse himself or herself when assigned a Court of Claims matter on appeal, parties are free to move for disqualification. See IOP 7.213(D)-(3) (providing that "[a] party seeking to disqualify a judge of the Court may file a motion to disqualify."). Thus, we do not conclude that this amounts to a violation of the separation-of-powers doctrine.[17]

Next, plaintiff argues that PA 164 violates the separation-of-powers doctrine because, he maintains,

[17] Plaintiff raises a similar argument in asserting a due process violation. We will discuss that claim later in this opinion.

the Legislature may not combine the office of a Court of Appeals judge with that of a Court of Claims judge. Plaintiff relies on Const 1963, art 6, § 15, which involves probate courts, and provides:

> In each county organized for judicial purposes there shall be a probate court. The legislature may create or alter probate court districts of more than one county if approved in each affected county by a majority of the electors voting on the question. *The legislature may provide for the combination of the office of probate judge with any judicial office of limited jurisdiction within a county with supplemental salary as provided by law*. . . . [*Id*. (emphasis added).]

Plaintiff points out that the Constitution does not include a provision for combining the office of a Court of Appeals judge with another judicial office, such as judge of the Court of Claims. Although the Constitution expressly provides for the combination of a probate judge with another judicial office, the inclusion of § 15 was an attempt to better administrate courts in the state's small counties,[18] a consideration not relevant to the Court of Claims. We conclude that the existence of this constitutional provision does not preclude the combination of the positions of a Court of Appeals judge with a Court of Claims judge, and we decline plaintiff's invitation to engage in constitutional interpretation by negative implication. See *Lowe v Estate Motors Ltd*, 428 Mich 439, 465; 410 NW2d 706 (1987).

In addition, we reject plaintiff's contention that the Court of Claims is considered a "division" of the circuit court, thereby precluding the Legislature from interfer-

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[18] "These permissive provisions are included to make possible better administration of these courts in the smaller counties of the state." 2 Official Record, Constitutional Convention 1961, p 3387. See also *Green v Court Administrator*, 44 Mich App 259, 261; 205 NW2d 306 (1972).

ing with the circuit court's jurisdiction. Plaintiff conspicuously neglects to provide legal authority for that assertion. See *Dunn v Bennett*, 303 Mich App 767, 775; 846 NW2d 75 (2013) (stating that when the appellant failed to include legal authority, the appellant abandoned the argument). Further, the Court of Claims Act does not support plaintiff's theory, given that the prior version of MCL 600.6404(1) indicated that the Court of Claims was "created as a *function* of the circuit court [in Ingham County]." (Emphasis added.) "Function" is defined in part as "the kind of action or activity proper to a person, thing, or institution; the purpose for which something is designed or exists; role." *Random House Webster's College Dictionary* (1997).[19] Under the former version of the statute, the circuit court was authorized merely to perform the actions or activities of the Court of Claims; the plain statutory language does not support plaintiff's contention that the Court of Claims was ever a part or division of the circuit court.

Plaintiff adds that PA 164 interferes with the judicial independence of this Court to perform its constitutionally mandated duties as an intermediate appellate court that is separate from the trial court whose actions are being reviewed. Initially, we observe that the addition of the independent Court of Claims has not impeded this Court from operating as the intermediate appellate court. Further, the combining of courts is not unprecedented. In 1998, this Court affirmed a trial court's ruling that the statute transferring judges from the Recorder's Court in Detroit, a limited jurisdiction court, to the Third Circuit Court, a general jurisdiction court, did not violate constitutional provisions regarding or-

[19] Because the statute does not define the term "function," it is proper to consult a dictionary for its common meaning. *Klooster v City of Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011).

ganization and jurisdiction of constitutionally and legislatively created courts. *Kuhn v Secretary of State*, 228 Mich App 319, 325-326; 579 NW2d 101 (1998). Moreover, we disagree that PA 164 alters the jurisdictional character of the Court of Appeals as an intermediate appellate court. Because PA 164 did not disturb this Court's jurisdiction over matters that are appealable by right and by application,[20] this Court has retained its essential character as an intermediate appellate court. Although PA 164 also expanded this Court's jurisdiction to include exclusive original jurisdiction over any action challenging the validity of statutes that pertain to the Court of Claims,[21] that lone addition did not fundamentally change this Court's jurisdiction.

PA 164 does not violate the separation-of-powers doctrine because it governs the Court of Claims, a legislatively created court deriving its powers from the Legislature. The Court of Claims was not a division of the circuit court, but was merely a function performed by the circuit court. Plaintiff has not demonstrated that the separation-of-powers doctrine precludes PA 164 from any valid application.

C. INCOMPATIBLE OFFICES—CONST 1963, ART 6, § 8

Plaintiff argues that PA 164 results in the four Court of Claims judges holding incompatible offices. In making this argument, plaintiff cites, in cursory fashion, Const 1963, art 6, § 8, which provides:

> The court of appeals shall consist initially of nine judges who shall be nominated and elected at non-partisan elec-

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[20] MCL 600.308(1) details matters that are appealable as a matter of right. Section 308(2) describes matters that may be appealed by leave.

[21] MCL 600.308(4) provides: "The court of appeals has exclusive original jurisdiction over any action challenging the validity of [MCL 600.6404, 600.6410, 600.6413, or 600.6419]."

> tions from districts drawn on county lines and as nearly as possible of equal population, as provided by law. The supreme court may prescribe by rule that the court of appeals sit in divisions and for the terms of court and the times and places thereof. Each such division shall consist of not fewer than three judges. The number of judges comprising the court of appeals may be increased, and the districts from which they are elected may be changed by law.

Plaintiff maintains that a violation of this provision occurs when a Court of Appeals judge is assigned to fill his or her judicial office in a different manner, i.e., by assuming the duties of a Court of Claims judge. The plain language above, however, does not prohibit a judge of this Court from sitting as a judge on a lower tribunal while holding elective office.

In further support, plaintiff cites *In re Districting for Court of Appeals*, 372 Mich 227; 125 NW2d 719 (1964), in which our Supreme Court opined that this Court's districts could not be split, but instead must be drawn on county lines pursuant to Const 1963, art 6, § 8. *In re Districting* is distinguishable because our Constitution expressly provides that judges shall be elected from "districts drawn on county lines." Const 1963, art 6, § 8 does not expressly delineate the duties of a Court of Appeals judge; hence, it may be concluded that Const 1963, art 6, § 8 does not preclude this Court's judges from acting as judges for the Court of Claims.

Consider also that our Supreme Court has the constitutional authority to assign duties to judges: "The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." Const 1963, art 6, § 23. Additionally, Const 1963, art 6, § 4 bestows the power of superintending control over all courts on the Supreme Court. See also MCL 600.225(1)

(providing that the Supreme Court generally may assign an elected judge to serve in any other court in Michigan). The assignment of judges onto the Court of Claims as set forth in PA 164 thus is consistent with the authority granted to the Supreme Court.

Plaintiff also cites MCL 15.182, the statute providing that a public officer or employee "shall not hold 2 or more incompatible offices at the same time." We are not convinced that the statute applies to this circumstance. The Attorney General or a local prosecutor must bring an action to enforce the statute; no private cause of action exists. See MCL 15.184 (explaining that the statute governing incompatible offices "shall not create a private cause of action" and that the "attorney general or a prosecuting attorney may apply" for "injunctive or other appropriate judicial relief or remedy."). Moreover, the four Court of Claims judges continue to perform the responsibilities that they were elected to fulfill as Court of Appeals judges. In addition, they also perform work duties related to the Court of Claims. Although the offices may be considered "incompatible" if the judges reviewed their own Court of Claims decisions, nothing in the record supports a finding that the Court of Claims judges will review their own judgments once the cases they have decided are before this Court.

Likewise, plaintiff's argument that he is entitled to the exceptional remedy of quo warranto fails.[22] Quo warranto "is the proper and exclusive remedy to try title to office finally and conclusively." *Layle v Adjutant General of Mich*, 384 Mich 638, 641; 186 NW2d 559 (1971). "Where one has been found to be holding office contrary to law, courts must order their removal from

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[22] Quo warranto is an extraordinary remedy provided for by law. *Sobocinski v Quinn*, 330 Mich 386, 389; 47 NW2d 655 (1951).

office." *Wayne Co Republican Comm v Wayne Co Bd of Comm'rs*, 70 Mich App 620, 627; 247 NW2d 571 (1976). Quo warranto relief is not merited here because we have decided that the four Court of Claims judges are not holding incompatible offices.

D. TRANSFER OF FUNCTIONS—CONST 1963, ART 6, § 13

Plaintiff also maintains that the transfer of the Court of Claims from the Ingham Circuit Court to the Court of Appeals improperly impedes the circuit court's jurisdiction. The scope of a trial court's powers is a question of law. *Hill v City of Warren*, 276 Mich App 299, 305; 740 NW2d 706 (2007).

Generally, the jurisdiction of circuit courts, which are constitutional courts,[23] cannot be diminished by legislative enactment. *Irishman's Lot, Inc v Secretary of State*, 338 Mich 662, 665; 62 NW2d 668 (1954). See also *People ex rel Allen v Kent Co Circuit Judge*, 37 Mich 473, 475 (1877) (ruling in part that circuit courts "are constitutional courts, and so far as any jurisdiction is conferred upon [them] by the Constitution, it is beyond the reach of the legislative power").

Const 1963, art 6, § 13, which sets forth the jurisdiction of circuit courts, provides:

> The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

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[23] See Const 1963, art 6, § 11. See also Const 1963, art 6, § 1 (stating that Michigan's "one court of justice" includes "one trial court of general jurisdiction known as the circuit court").

Plaintiff cites *Mooney v Unemployment Compensation Comm*, 336 Mich 344, 353; 58 NW2d 94 (1953), for the proposition that the Legislature may not exercise general control over circuit courts. The Legislature, however, has not asserted general control over the Ingham Circuit Court in PA 164; rather, it has asserted control over the Court of Claims. As we stated previously, the Court of Claims is not a constitutional court, but was established by the Legislature pursuant to the Court of Claims Act and therefore derives all of its powers from the Legislature. It is not a court of general jurisdiction. See *Dunham v Tilma*, 191 Mich 688, 692; 158 NW 216 (1916) (recognizing the Legislature's role in determining the extent of the authority to be given to municipal courts, which received their powers from legislation, not the Constitution). If a court is a creation of the Legislature, the legislation establishing that court guides the determination of the court's authority. See *Nichols v Grand Rapids Superior Court Judge*, 130 Mich 187, 191; 89 NW 691 (1902). And, as discussed earlier, we note that the prior version of MCL 600.6404 described the Court of Claims as a "function" of the circuit court, MCL 600.6404(1). Accordingly, we cannot accept plaintiff's argument that the Court of Claims is a "division" of the circuit court.

Plaintiff adds that PA 164 changed the jurisdictional makeup of the circuit court as a court of general jurisdiction in which orders are subject to appellate review in a constitutionally tiered judicial system. The circuit court's jurisdiction derives from the general jurisdiction imparted to circuit courts by the Michigan Constitution. See Const 1963, art 6, § 13; *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 51; 832 NW2d 728 (2013). Michigan's circuit courts are courts of general jurisdiction. See MCL 600.605 (providing, in part, that "[c]ircuit courts have original jurisdiction to

hear and determine all civil claims and remedies . . . ."); *Ammex, Inc v Dep't of Treasury*, 272 Mich App 486, 494; 726 NW2d 755 (2006). Nevertheless, the circuit courts' jurisdiction is not without limits. *In re Harper*, 302 Mich App 349, 353; 839 NW2d 44 (2013). Exceptions to the general rule occur when the constitution or a statute gives exclusive jurisdiction to another court or denies jurisdiction. See MCL 600.605 (providing that circuit courts generally have original jurisdiction except "where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state"). See also MCL 600.151 (indicating that circuit court is a trial court of "general jurisdiction") and MCL 600.601 (setting forth the jurisdiction and powers of the circuit court).

Plaintiff neglects to explain how the transfer of Court of Claims' functions to this Court alters the general jurisdictional makeup of the circuit court. Admittedly, by granting exclusive jurisdiction over Court of Claims matters to the four Court of Claims judges in this Court, the Legislature divested the Ingham Circuit Court of the authority to adjudicate those disputes. But that divestiture is not prohibited under statute. See, e.g., MCL 600.605, regarding the circuit court's general jurisdiction. It simply does not follow that that transfer of authority interfered with the circuit court's general jurisdiction. The transfer of the Court of Claims therefore does not, as plaintiff contends, "diminish" the jurisdiction of the circuit court. Given that our Constitution does not otherwise expressly confer jurisdiction on the circuit courts over cases against the state, PA 164's transfer of the Court of Claims to this Court does not deprive the Ingham Circuit Court of constitutionally based jurisdiction.

Finally, that transfer does not, as plaintiff argues, create a new trial court requiring a constitutional amendment. The Court of Claims was first created by statute in 1939 and was further formed by the amended Court of Claims Act in 1961. The transfer of Court of Claims functions from one existing constitutional court to another existing constitutional court did not create an entirely new court.

E. DUE PROCESS RIGHT TO AN IMPARTIAL DECISION-MAKER

Plaintiff contends that his right to an objective, deliberative, and reasoned adjudication before a neutral decision-maker has been thwarted. Whether a party has been afforded due process of law is a question of law. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). In plaintiff's view, the fact that PA 164 authorizes our Supreme Court to choose the four judges to serve on the Court of Claims, see MCL 600.6404(1), in contrast to the random draw plaintiff received at the Ingham Circuit Court, calls into question whether he will receive a neutral decision-maker.

"Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004) (citation and quotation marks omitted). Due process, a flexible concept, essentially requires fundamental fairness. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 514; 844 NW2d 470 (2014). "It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 876; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (citation and quotation marks

omitted). "[T]he Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case." *Id*. (citation and quotation marks omitted). "This rule reflects the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.' " *Id*., quoting The Federalist No. 10 (James Madison) (J. Cooke ed. 1961), p 59.

Although plaintiff argues that PA 164 violates his right to a neutral decision-maker, plaintiff makes no specific suggestion that the four Court of Claims judges are biased, nor does he contend that the particular judge who has been assigned to this case is not a neutral judge. That the Michigan Supreme Court chooses the four judges to serve on the Court of Claims does not amount to a showing of bias. Thus, we find no due process violation based on bias that would amount to a successful facial challenge of PA 164.

In addition, we find no direct bias in the appellate review procedure established by PA 164. The statute essentially requires Court of Appeals judges to review the work of their colleagues; significantly, however, we find unfounded any concerns that the statute would require or permit Court of Claims judges to sit in review of their own decisions on appeal of those decisions. The Legislature could have alleviated concerns that this Court would review itself by including in PA 164 a specific prohibition whereby Court of Claims judges could not conduct appellate review of cases originating from the Court of Claims; however, although past practice may have allowed a judge to review his or her own decisions, that practice has not been accepted for more than a century. See, e.g.,

Rexford v Brunswick-Balke-Collender Co, 228 US 339, 343-344; 33 S Ct 515; 57 L Ed 864 (1913) (ruling that the appellate court should have judges who did not previously rule on the case). In addition, this Court's internal operating procedures will prevent a Court of Claims judge from sitting in appellate review of his or her Court of Claims decisions. Similarly, this Court keeps a docketing system that is separate from that of the Court of Claims; no overlap in recordkeeping exists.

Although plaintiff is unable to show actual bias, that does not end our inquiry under the due process clause. Plaintiff need not show actual bias "[i]f the situation is one in which 'experience teaches that the probability of actual bias on the part of a decisionmaker is too high to be constitutionally tolerable.' " *Hughes v Almena Twp*, 284 Mich App 50, 70; 771 NW2d 453 (2009) (citation and quotation marks omitted). For example, that risk may be present when the decision-maker:

> (1) has a pecuniary interest in the outcome; (2) has been the target of personal abuse or criticism from the party before him; (3) is enmeshed in [other] matters involving the petitioner . . . ; or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [*Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975) (citations and quotation marks omitted; formatting altered).]

In evaluating this issue, we consider "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.' " *Caperton*, 556 US at 883-884, quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975).

In addition, the appearance of impropriety, under Canon 2 of the Michigan Code of Judicial Conduct, may provide grounds for disqualification of a judge. Canon 2 provides that judges "must avoid all impropriety and appearance of impropriety." Under this objective standard, whether an appearance of impropriety exists requires consideration of " 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.' " *Caperton*, 556 US at 888, quoting ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004).

Although plaintiff fairly contends that the nature of appellate review set forth in PA 164 lends itself to criticism,[24] we do not find an appearance of impropriety,

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[24] We would be remiss not to acknowledge the fact that PA 164's unusual court structure is fairly subject to criticism, albeit not rising to the level of constitutional infirmity. Most notably, the statute creates a Court of Claims where one Court of Appeals judge hears cases at the trial court level, and then a panel of that judge's colleagues on the Court of Appeals reviews the decision on direct review. Surely, we do not doubt that Court of Appeals judges can be fair when reviewing their colleagues' rulings in Court of Claims cases. See, generally, *People v Aceval*, 486 Mich 887, 889 (2010) (statement of HATHAWAY, J.) (noting that Court of Appeals judges and Michigan Supreme Court justices routinely review the decisions of their former colleagues). As members of three-person panels, we are regularly tasked with the obligation of dissenting when we disagree with the legal reasoning or conclusions of our colleagues. However, a fair concern exists with the *appearance* of how this direct appellate review will function. Although legally incorrect, the statute lends itself to lay criticism that an appeal as of right for Court of Claims cases is nothing more than a horizontal or lateral appeal. A peaceful governance based on principles such as the rule of law depends on the public's trust that the judicial system is fairly and impartially deciding cases. PA 164, with its apparently unprecedented system of housing the trial court for state claims in the only appellate court of right, could contribute to distrust in the appellate process when it concerns Court of Claims matters. See Hunt, *Legal Ethics—Attorney Conflicts of Interest—The Effect of Screening Procedures and the Appearance of Impropriety Standard on the Vicarious Disqualification of a Law Firm*, 70 Tenn L Rev 251, 278 (2002),

nor do we find that this case is the type of "extreme" situation that would amount to a due process violation. See *Caperton*, 556 US at 887. The "appearance of impropriety" inquiry is an objective one, asking " 'whether the conduct would create in *reasonable minds* a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.' " *Id*. at 888, quoting Model Code of Judicial Conduct, Canon 2 (emphasis added). See also MCR 2.003(C)(1)(b) (providing for the disqualification of a judge "based on objective and reasonable perceptions"); *Cain v Dep't of Corrections*, 451 Mich 470, 512 n 48; 548 NW2d 210 (1996) (citation and quotation marks omitted; emphasis added) (describing the federal standard that "recusal is appropriate where a *reasonable person with knowledge of all the facts* would conclude that the judge's impartiality might reasonably be questioned"). Objectively, although housing appellate review of Court of Claims cases in the very same court where the cases are heard at the trial court level appears, at first glance, strange, we are satisfied that it does not amount to such an extreme case as to require recusal of all Court of Appeals judges under the Due Process Clause. See *Caperton*, 556 US at 887. Indeed, PA 164 does not create a situation in which any Court of Appeals judges who will be reviewing the work of their colleagues as Court of Claims judges have any sort of financial interest or interest because of participation in an earlier proceeding. See *id*. at 877, 880 (explaining that such interests can create a due process violation). Initially, as noted, this Court's internal operating procedures will screen judges who earlier participated in a

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quoting Llewellyn, *The Bramble Bush*, (New York: Oceana Publications, Inc, 1960), p 171 (explaining that among the reasons for distrust and distaste of the legal profession is that "[t]he more 'delicate and strange [the lawyer's] work . . . the less we love him' ").

case; thus, although there is a subjective concern of a lack of meaningful appellate review, the objective facts suggest otherwise. Further, we are confident that members of this Court will maintain the highest ethical standards when reviewing Court of Claims cases that were initially decided by their colleagues. In other words, we are confident that appeals of Court of Claims cases will be given the independent, impartial review to which they are entitled, regardless of who initially decided the cases. We decline to accept plaintiff's contention that the judges of this Court are unable to impartially review the decisions of the Court of Claims judges who are their colleagues. Thus, although PA 164 creates a situation whereby Court of Appeals judges are required, on a regular basis, to review the work of their colleagues,[25] we conclude that plaintiff has not shown a clear affiliation between the decision-maker (one of the four Court of Claims judges) and the reviewing court

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[25] Reviewing the work of a colleague is not unheard of in the judiciary; indeed, conflict panels on this Court and *en banc* proceedings in the federal circuit courts require some review of a colleague's decisions, albeit on a less frequent basis, and in a situation that is not entirely comparable to the direct review, as of right, of decisions under PA 164. In addition, circuit court judges, in years past, sat on this Court by designation, thereby requiring those judges to review the work of their colleagues. Still, the nature of reviewing the work of a colleague, even in an *en banc* manner, is not without its critics. See, e.g., Haire, Lindquist, and Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 Law & Society Rev 143, 151, 160-161 (2003) (explaining that studies of the federal judiciary have found that district judges who sit on appellate panels, and therefore review their colleagues' work, are less likely to vote for reversal); Brudney and Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 Law & Society Rev 565, 575 (2001); Abramowicz, *En Banc Revisited*, 100 Colum L Rev 1600, 1617-1619 (October 2000) (questioning the decisions of judges in review of their colleagues, given the inevitable connections between colleagues); Rooklidge & Weil, *En Banc Review, Horror Pleni, and the Resolution of Patent Law Conflicts*, 40 Santa Clara L Rev 787, 795 (2000).

(the remaining judges in the Court of Appeals), aside from the fact that the judges sit on the same court. In the absence of the probability of bias, no due process violation has occurred. See *Monroe v State Employees' Retirement Sys*, 293 Mich App 594, 603; 809 NW2d 453 (2011) (ruling that no alignment had been shown between the decision-making board, one of whose members was an Assistant Attorney General, and the advocate, an Assistant Attorney General who represented the employees' retirement system, particularly in light of the board's statutory duty to manage the system for retirees' benefit). And, for many of the same reasons, we conclude that, objectively, there is no appearance of impropriety that would require *all* Court of Appeals judges to recuse themselves from hearing Court of Claims cases. Indeed, this Court can, and will, implement requisite screening procedures where necessary, and appellants in Court of Claims cases will receive an independent, impartial review. Thus, plaintiff's facial challenge fails. Accordingly, although we express no opinion on the wisdom of the direct review process provided for by PA 164, we do not conclude that the statute creates a due process violation or that it creates an appearance of impropriety that prevents all Court of Appeals judges from hearing Court of Claims appeals.

F. IMMEDIATE EFFECT—CONST 1963, ART 4, § 27

Plaintiff finally argues that the immediate effect given to PA 164 violates Const 1963, art 4, § 27 because the bill did not obtain two-thirds of the votes of the members of the House of Representatives. We disagree.

A statute becomes operational on its effective date. *In re Request for Advisory Opinion re Constitutionality of 2005 PA 71*, 479 Mich at 12. Generally, the effective date of a statute is 90 days after the end of the session at

which it was passed. See *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 333, 340; 414 NW2d 873 (1987). However, Const 1963, art 4, § 27 provides that the Legislature may vote to give an act immediate effect:

> No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.

Unless two-thirds of the members of each house vote for immediate effect, that act will not become effective until 90 days after the end of the pertinent session. *Genesee Merchants Bank & Trust Co v St Paul Fire & Marine Ins Co*, 47 Mich App 401, 405; 209 NW2d 605 (1973).[26] Accordingly, if each house obtains a two-thirds vote in favor, an act may take immediate effect.

Plaintiff states that the roll call vote in the House of Representatives (57 in favor, 52 opposed) demonstrates that the two-thirds necessary for immediate effect was not reached. Plaintiff, however, has cited only the record roll call vote of the yeas and nays on the bill itself. The "record roll call vote" required to pass an act, cited by plaintiff, is separate from the "rising or voice vote" taken regarding whether to give an act immediate effect. Const 1963, art 4, § 27 does not require the taking of a record roll call vote on the issue of immediate effectiveness. *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 649; 825 NW2d 616 (2012). The journal entry is dispositive

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[26] For examples of acts that were not ordered to take immediate effect because the vote for immediate effect either failed or was not taken, see *Lansing v State Bd of Tax Admin*, 295 Mich 674, 680; 295 NW 358 (1940), and *In re Contempt of Henry*, 282 Mich App 656, 682; 765 NW2d 44 (2009).

of the vote on immediate effect. *Mich Taxpayers United, Inc v Governor*, 236 Mich App 372, 379; 600 NW2d 401 (1999).

Plaintiff has failed to cite House Journal 96 of the session on November 6, 2013, which reflects that the requisite two-thirds of the representatives voted for immediate effect:

> Rep. Stamas moved that the bill be given immediate effect.
>
> The motion prevailed, 2/3 of the members serving voting therefor. [2013 House Journal 1758.]

The House Journal reflects that the two-thirds total was reached.[27] Plaintiff's argument is meritless.[28]

Plaintiff thereafter relies on *City of Pontiac Retired Employees Ass'n v Schimmel*, 726 F3d 767 (CA 6, 2013), in which a panel of the Sixth Circuit addressed the immediate effect of a bill regarding emergency managers and remanded to the district court for it to examine whether, contrary to the holding in *Hammel*, our Constitution restricts the Legislature's ability to give bills immediate effect absent a "real" two-thirds vote from the elected members. However, upon rehearing en banc, that opinion in *City of Pontiac Retired Employees Ass'n v Schimmel* was vacated, 751 F3d 427 (CA 6, 2014).

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[27] We note that although an official dissent was registered in which more than a third of House members disputed whether this vote was in fact taken, see 2013 House Journal 1766, our Supreme Court has recognized that such a dissent "is a personal privilege merely. It has no force as legislative action, and cannot be resorted to to nullify a legislative act. It has no force as a statement of fact contradicting the journal." *Auditor General v Menominee Co Bd of Supervisors*, 89 Mich 552, 577; 51 NW 483 (1891).

[28] In making this argument, plaintiff does not contend that the bill failed to garner enough votes for immediate approval from the Michigan Senate. Such a claim would be meritless, however, given that the Senate Journal reveals that at least 2/3 of the members of the Senate voted to give PA 164 immediate effect. 2013 Senate Journal 1689.

Consequently, this Court is bound by *Hammel*. As indicated, *Hammel* supports that the two-thirds vote recorded in the Journal is a sufficient basis for this Court to rule that PA 164 properly was given immediate effect and does not violate Const 1963, art 4, § 27.

III. CONCLUSION

We hold that plaintiff has failed to establish a constitutional infirmity in PA 164. The transfer of the Court of Claims to this Court does not conflict with the separation-of-powers doctrine because the Court of Claims is a legislatively created court. The Court of Claims judges on this Court are not holding incompatible offices. PA 164 does not violate the Michigan Constitution by reassigning to this Court the functions of the Court of Claims. Plaintiff has not shown that his due-process right to an impartial decision-maker was violated when the underlying case was moved from the circuit court to this Court. And the immediate effect given to PA 164 did not violate Const 1963, art 4, § 27 because the House Journal reflects that the motion obtained the requisite votes. In sum, plaintiff has not met his heavy burden to show that PA 164 is unconstitutional, and we must deny the relief sought in his petition.

BECKERING, P.J., and HOEKSTRA and FORT HOOD, JJ., concurred.

P J HOSPITALITY, INC v DEPARTMENT OF TREASURY

Docket No. 314302. Submitted June 11, 2014, at Detroit. Decided June 26, 2014. Approved for publication August 21, 2014, at 9:00 a.m.

The Department of Treasury assessed P. J. Hospitality, Inc., for the Michigan tax liability of Soulful Concepts, Inc., on the basis that P. J. Hospitality was a successor of Soulful Concepts under MCL 205.27a(1). A hearing referee upheld the assessment. The Tax Tribunal adopted the findings of fact and conclusions of law of the referee and entered an opinion and judgment in favor of the Department of Treasury. P. J. Hospitality appealed.

The Court of Appeals *held*:

1. According to the plain language of MCL 205.27a(1), P. J. Hospitality is personally liable for the payment of the taxes, interest, and penalties accrued and unpaid by Soulful Concepts because P. J. Hospitality failed to comply with the escrow requirements of § 27a(1) when it purchased Soulful Concepts' business, including all of its assets.

2. Because P. J. Hospitality failed to provide any evidence of what the market value of the business assets of Soulful Concepts was, it cannot claim the benefits of the provision in §27a(1) to the effect that the purchaser's personal liability is limited to the fair market value of the business less the amount of any proceeds that are applied to balances due on secured interests that are superior to the lien provided for in MCL 205.29(1).

3. MCL 205.27a(1) only allows for an offset for "any proceeds that are applied to balances due on secured interests that are superior to the lien provided for in section 29(1)." In order for such an offset to occur, proceeds from the sale must be applied to balances due. The mere existence of any balances is insufficient for an offset. There is no evidence that any part of the proceeds of the sale of Soulful Concepts was applied to balances due on secured interests that are superior to the lien provided for in § 29(1).

Affirmed.

Abraham & Rose, PLC (by *Jerry R. Abraham*), for P. J. Hospitality, Inc.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for the Department of Treasury.

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

PER CURIAM. Petitioner appeals as of right the Tax Tribunal's opinion and judgment, which adopted the findings of fact and conclusions of law of a hearing referee, who had upheld respondent's assessment of successor liability to petitioner. Because the tribunal did not commit an error of law or adopt a wrong legal principle and its factual findings were supported by competent, material, and substantial evidence, we affirm.

I. BASIC FACTS

Before 2007, the entity Soulful Concepts, Inc., owned the restaurant in Southfield, Michigan, called Beans & Cornbread. Patrick Coleman, in turn owned Soulful Concepts. In 2007, petitioner, also owned by Coleman, purchased all of Soulful Concepts' business, including all of its assets, for $50,000[1] and continued to operate the Beans & Cornbread restaurant. Coleman testified that he thought the value of all the assets was between $30,000 and $40,000. Coleman stated that this transaction was done because Soulful Concepts had "some debt issues" and "needed to get a fresh start." Part of those debt issues involved large tax liabilities owed to both the federal government and the state of Michigan.

[1] No actual money exchanged hands though. Instead, petitioner gave Soulful Concepts a promissory note for the $50,000, and Coleman signed the purchase agreement on behalf of both parties.

Specifically, at the time of the referee's hearing, the amount owed to the federal government was approximately $150,000, and the amount owed to the state of Michigan, not including some interest, was approximately $57,000.

Respondent assessed petitioner with Soulful Concepts' Michigan tax liability on the basis that it was a successor entity under MCL 205.27a(1). Petitioner objected to the assessment and filed a petition for a hearing. Petitioner argued at the hearing that under the statute, its liability was limited by the fair market value of the assets acquired minus any senior, outstanding liabilities, such as the amount owed to the federal government. As a result, petitioner claimed that, with the value of the assets not exceeding $40,000, the outstanding $150,000 owed to the federal government "eviscerate[d] any sort of liability" to respondent.

After holding a hearing, the referee disagreed and concluded that respondent's assessment was proper. First, the referee did not accept Coleman's lay opinion on the evaluation of the assets, stating that it "cannot be accepted as credible or accurate." The referee explained:

> [Coleman] did not make any effort to describe the property with the specificity that would be needed to determine its fair market value. There is no evidence regarding the value of the liquor license or goodwill. [Coleman] executed the documents of sale on behalf of both the seller and the purchaser, which indicates that this was not an arm's-length transaction and the stated purchase price cannot be accepted as fair market value. There is no market evidence whatsoever to support an appraisal of the value of the assets or the business.

The referee also concluded that if any federal tax liens existed, there was no evidence that they were ever

perfected by being recorded in the Oakland County Register of Deeds. Furthermore, the referee concluded that the statute only allows for liability to be limited by the fair market value of the business acquired minus any proceeds of the sale that were used to satisfy a senior, secured interest. But the referee also found that none of the proceeds were used for such a purpose; thus, petitioner was not entitled to any reduction in liability.

The Tax Tribunal affirmed the referee's decision and adopted his proposed opinion, including the findings of fact and conclusions of law.

II. ANALYSIS

Review of decisions by the Tax Tribunal is limited. "Unless fraud is alleged, an appellate court reviews the decision for a misapplication of the law or adoption of a wrong principle." *Podmajersky v Dep't of Treasury*, 302 Mich App 153, 162; 838 NW2d 195 (2013), quoting *Liberty Hill Housing Corp v Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008) (quotation marks omitted). "The tribunal's factual findings are deemed conclusive provided they are supported by competent, material, and substantial evidence on the whole record." *Podmajersky*, 302 Mich App at 162.

But to the extent that our review involves issues of statutory interpretation, that aspect of our review is de novo. *Id*. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). To ascertain the Legislature's intent, we look to the language in the statute and give the words their plain and ordinary meanings. *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246; 801 NW2d 629 (2010). If the statute's language is not ambiguous, this

Court will enforce the statute as written. *Ford Motor*, 475 Mich at 438-439.

MCL 205.27a(1), which governs successor liability, provided the following at all relevant times:[2]

> If a person liable for a tax administered under this act sells out his or her business or its stock of goods or quits the business, the person shall make a final return within 15 days after the date of selling or quitting the business. The purchaser or succeeding purchasers, if any, who purchase a going or closed business or its stock of goods shall escrow sufficient money to cover the amount of taxes, interest, and penalties as may be due and unpaid until the former owner produces a receipt from the state treasurer or the state treasurer's designated representative showing that the taxes due are paid, or a certificate stating that taxes are not due. Upon the owner's written waiver of confidentiality, the department may release to a purchaser a business's known tax liability for the purposes of establishing an escrow account for the payment of taxes. If the purchaser or succeeding purchasers of a business or its stock of goods fail to comply with the escrow requirements of this subsection, the purchaser is personally liable for the payment of the taxes, interest, and penalties accrued and unpaid by the business of the former owner. The purchaser's or succeeding purchaser's personal liability is limited to the fair market value of the business less the amount of any proceeds that are applied to balances due on secured interests that are superior to the lien provided for in [MCL 205.29(1)].

Petitioner first argues that the tribunal erred by relying on the fact that there was no evidence that any of the federal tax liens were ever recorded. However, this issue is not relevant because, as will be discussed later, the existence of any senior security interests only comes into play *when proceeds from the sale of the*

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[2] MCL 205.27a(1) was modified by 2014 PA 3, effective February 6, 2014.

business are used to satisfy part of that debt, and there was no evidence that any proceeds were applied in this manner. Thus, we offer no opinion on whether the federal tax liens in this case qualify as "secured interests that are superior to the [state's tax] lien."

Here, Coleman admitted that he never escrowed any funds on behalf of petitioner. Thus, according to the plain language of the statute, it is clear that petitioner "is personally liable for the payment of the taxes, interest, and penalties accrued and unpaid by" Soulful Concepts. MCL 205.27a(1); see also *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 537; 669 NW2d 594 (2003).

The next inquiry is to determine to what extent petitioner is liable. Petitioner claims that the indebtedness owed to the federal government needs to be taken into account for determining the amount it owes the state as a successor entity. The statute provides that the "purchaser's personal liability is limited to the fair market value of the business less the amount of any proceeds that are applied to balances due on secured interests that are superior to the lien provided for in [MCL 205.29(1)]." The tribunal determined that petitioner could not invoke the benefits of this section because it failed to establish the fair market value of the business. The finding that petitioner failed to establish the fair market value was supported by competent, material, and substantial evidence. Coleman agreed at the hearing that the sale of the business was not an arm's-length transaction. Accordingly, the $50,000 sale price had no bearing on any market value determination. See *Mackey v Dep't of Human Servs*, 289 Mich App 688, 704; 808 NW2d 484 (2010). Further, petitioner offered nothing to establish what the fair market value may be except for Coleman's unsupported lay opinion

regarding the value. The referee and the tribunal decided that Coleman's opinion on the value of the assets was not credible, and such credibility determinations will not be disturbed by this Court. *Detroit Lions, Inc v Dearborn*, 302 Mich App 676, 703; 840 NW2d 168 (2013). Further, Coleman admitted that he never got an appraisal of the assets and did not provide a list of the specific assets to respondent. Accordingly, because petitioner utterly failed to provide any evidence of what the market value of the business assets was it cannot claim this limitation. Cf. *Podmajersky*, 302 Mich App at 164-165 (stating that the burden of proving an exemption to a tax is on the party claiming the exemption).

The tribunal further found that there was no evidence that any proceeds from the sale were applied to balances due on any superior secured interests. Petitioner does not dispute this finding. Rather, petitioner argues that the presence of a superior secured interest, without any proceeds having been applied to the balance of the secured interest, is enough for it to offset its successor liability. However, the statute only allows for an offset for "any proceeds *that are applied* to balances due on secured interests that are superior to the lien provided for in section 29(1)." MCL 205.27a(1) (emphasis added). Thus, it is clear that in order for any such offset to occur, proceeds from the sale must be "applied" to balances due—the mere existence of any balances is insufficient. Accordingly, the tribunal did not misapply the law or adopt an incorrect legal principle when it came to the same conclusion.

In conclusion, we affirm the Tax Tribunal's opinion and judgment affirming the imposition of petitioner's successor liability pursuant to MCL 205.27a(1). The tribunal did not misapply the law or adopt an incorrect legal principle. It is undisputed that petitioner was

liable for Soulful Concepts' liability because it did not escrow any funds in conjunction with the business purchase. While normally, petitioner's liability would have been limited to the fair market value of the business acquired, petitioner offered no evidence of the fair market value. Finally, the existence of any superior federal tax liens is of no consequence because the statute only allows for any offset of successor liability when proceeds from the sale are applied to such superior liens, and there is no evidence that any part of the proceeds were applied in this manner.

Affirmed.

DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ., concurred.

FEDERAL HOME LOAN MORTGAGE ASSOCIATION v KELLEY
(ON RECONSIDERATION)

Docket No. 315082. Submitted June 11, 2014, at Lansing. Decided August 26, 2014, at 9:00 a.m.

The Federal Home Loan Mortgage Association (Freddie Mac) brought an action in the 55th district court to evict defendants Michael R. Kelley and Kathryn Kelley from a home that Freddie Mac bought at a sheriff's sale after defendants defaulted on their mortgage. Defendants' mortgage was obtained from First National Bank of America, which assigned it to ABN-AMRO Mortgage Group, Inc. Before defendants defaulted, ABN-AMRO merged with CitiMortgage, Inc. CitiMortgage (CMI) foreclosed on defendants' property by advertisement under MCL 600.3201 *et seq*., and after defendants failed to redeem the property within the six-month statutory redemption period, the property vested in Freddie Mac. Defendants challenged the foreclosure, arguing that foreclosing on the property by advertisement violated their Fifth Amendment due process rights and that CMI's foreclosure was statutorily invalid under the recording act because there was no chain of title evidencing the transfer of the mortgage from ABN-AMRO to CMI. Therefore, according to defendants, CMI did not own the debt and the foreclosure notice failed to properly identify the foreclosing entity. The district court, Thomas P. Boyd, J., granted Freddie Mac's motion for summary disposition, ruling that Freddie Mac was not a governmental actor subject to Fifth Amendment claims and that the chain of title was proper under MCL 600.3204(3) because the merger between ABN-AMRO and CMI did not constitute an assignment of the mortgage that necessitated a recording. Defendants appealed. The circuit court, Rosemarie E. Aquilina, J., reversed the district court on both grounds and dismissed the complaint. Freddie Mac applied for leave to appeal, and the Federal Housing Finance Agency (FHFA), which had placed Freddie Mac into conservatorship, moved to intervene. The Court of Appeals granted both applications and initially affirmed in part, reversed in part, and remanded for reinstatement of the district court's order. Plaintiff filed a motion for reconsideration. The Court of Appeals granted reconsideration, vacating its earlier opinion.

On reconsideration, the Court of Appeals *held*:

1. The circuit court erred by concluding that Freddie Mac was a governmental entity subject to Fifth Amendment claims. The fact that Freddie Mac filed tax exemptions as the United States under MCL 207.526(h)(i) and 505(h)(i) was not determinative given that, under 12 USC 1452(e), Freddie Mac would have been exempt from taxation regardless of whether it sought an exemption as the United States, and, in any event, no authority supported the position that seeking a tax exemption as the United States subjected federally created corporations to constitutional claims under the Fifth Amendment. Under *Lebron v Nat'l Railroad Passenger Corp*, 513 US 374 (1995), a corporation is part of the federal government for constitutional purposes if the Government created it by special law for the furtherance of governmental objectives and retained permanent authority to appoint a majority of the directors of that corporation. In this case, there was no dispute that the government created Freddie Mac by special statute for the purpose of furthering governmental objectives, but the FHFA's 2008 conservatorship did not transform Freddie Mac into a governmental entity because the conservatorship was temporary rather than permanent.

2. It was unnecessary to determine whether the circuit court erred by concluding that CMI was required to record the transfer of defendants' mortgage under MCL 600.3204(3) because defendants did not allege that they were prejudiced by CMI's failure to do so.

Reversed and remanded for further proceedings.

1. MORTGAGES — CONSTITUTIONAL LAW — FEDERAL HOME LOAN MORTGAGE ASSOCIATION — DUE PROCESS CLAIMS.

The Federal Home Loan Mortgage Association, commonly known as "Freddie Mac," is not a governmental entity subject to Fifth Amendment claims.

2. MORTGAGES — FORECLOSURES BY ADVERTISEMENT — STATUTORY RECORDING REQUIREMENTS — FAILURE TO COMPLY — RELIEF — PREJUDICE.

To obtain relief on the ground that a mortgagee failed to comply with the statutory recording requirement in MCL 600.3204(3), a mortgagor must establish that the failure to comply was prejudicial.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Christyn M. Scott*) for plaintiff.

Legal Services of South Central Michigan (by *Nicole Shannon*, *Kellie Maki*, and *Perry Thompson*) for defendants.

Amicus Curiae:

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache* and *Rodney D. Martin*) for the Michigan Bankers Association.

ON RECONSIDERATION

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

PER CURIAM. In this foreclosure-related litigation, plaintiff, Federal Home Loan Mortgage Association[1] (Freddie Mac), appeals by leave granted an Ingham Circuit Court opinion and order reversing the 55th District Court's July 31, 2012 order terminating the possession by defendants Michael R. and Kathryn M. Kelley[2] of residential property located in East Lansing. For the reasons set forth in this opinion, we reverse and remand for reinstatement of the district court's order.

I. BACKGROUND

A. UNDERLYING MORTGAGE TRANSACTION

This dispute involves real property located at 2458 Barnsbury Road, in East Lansing, Michigan. On

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[1] In the lower court, plaintiff referred to itself as the Federal Home Loan Mortgage Corporation; however, on appeal, it refers to itself as the Federal Home Loan Mortgage Association. For purposes of this opinion, we will refer to plaintiff as "Freddie Mac."

[2] Although it appears from the mortgage and other documents that defendants' surname is "Kelly," this opinion retains the spelling from the caption of the order being appealed.

March 21, 2003, First National Bank of America loaned defendants $240,000 for the purchase of the property. Defendants executed a mortgage encumbering the property to First National. The mortgage was recorded on April 24, 2003. On March 26, 2003, First National assigned the mortgage to ABN-AMRO Mortgage Group, Inc. The assignment was recorded on November 25, 2003. On September 1, 2007, CitiMortgage, Inc. and ABN-AMRO merged and maintained the name CitiMortgage (hereinafter CMI).

B. FREDDIE MAC AND THE FEDERAL HOUSING FINANCE AGENCY CONSERVATORSHIP

Freddie Mac is a federally chartered corporation that was created as part of the Emergency Home Finance Act of 1970.[3] See 12 USC 1451 *et seq*.; *American Bankers Mtg Corp v Fed Home Loan Mtg Corp*, 75 F3d 1401, 1404 (CA 9, 1996). Freddie Mac operates in the secondary mortgage market, purchasing and securitizing residential mortgages. *Sonoma Co v Fed Housing Fin Agency*, 710 F3d 987, 989 (CA 9, 2013). Freddie Mac is governed by the Federal Housing Enterprises Financial Safety and Soundness Act, 12 USC 4501 *et seq*. *Sonoma Co*, 710 F3d at 989.

In 2008, Congress amended the Financial Safety and Soundness Act by enacting the Housing and Economic Recovery Act (HERA), 12 USC 4511 *et seq*. "HERA established the Federal Housing Finance Agency [FHFA], an independent agency charged with supervising [Fannie Mae and Freddie Mac] and the Federal Home Loan Banks." *Sonoma Co*, 710 F3d at 989. HERA empowered the FHFA to act, under certain circumstances, as a conservator or receiver of Freddie Mac or

[3] "Freddie Mac" was officially titled the "Federal Home Loan Mortgage Corporation." See 12 USC 1451, 1452.

the Federal National Mortgage Association (Fannie Mae) for purposes of "reorganizing, rehabilitating, or winding up the affairs" of either entity. 12 USC 4617(a)(2). It is undisputed that the FHFA placed Freddie Mac into conservatorship in September 2008.[4]

C. FORECLOSURE OF THE PROPERTY

In June 2011, defendants defaulted on the mortgage and CMI foreclosed on the property under Michigan's foreclosure by advertisement statute, MCL 600.3201 *et seq*. Freddie Mac purchased the property at an October 20, 2011 sheriff's sale. Defendants failed to redeem the property within the six-month statutory redemption period, and the property vested in Freddie Mac on April 20, 2012. See MCL 600.3236.

On May 1, 2012, after expiration of the statutory redemption period, Freddie Mac initiated eviction proceedings in district court pursuant to MCL 600.5704. Defendants challenged the foreclosure, arguing in part that the foreclosure violated their Fifth Amendment due process rights. Defendants maintained that Freddie Mac was a federal actor by virtue of FHFA's conservatorship and was subject to the due process requirements of the Fifth Amendment, and therefore could not foreclose by advertisement.[5] Defendants also argued that CMI's foreclosure was invalid under MCL 600.3204(3) because there was no chain of title evidencing the transfer of the mortgage from ABN-AMRO to CMI. Therefore, according to defendants, CMI did not own

[4] The FHFA also simultaneously placed Fannie Mae into conservatorship. See *Herron v Fannie Mae*, 857 F Supp 2d 87 (D DC, 2012).

[5] Defendants' brief on appeal explains that at the time of the foreclosure, Freddie Mac was the investor of defendants' mortgage, and CMI was selected by Freddie Mac to service the mortgage.

the debt and the foreclosure notice failed to properly identify the foreclosing entity.

The district court granted Freddie Mac's motion for summary disposition under MCR 2.116(C)(9) (failure to state valid defense) and MCR 2.116(C)(10) (no genuine issue of material fact). The district court held in relevant part that Freddie Mac was not a governmental actor subject to Fifth Amendment claims and that the chain of title was proper under MCL 600.3204(3) because the merger between ABN-AMRO and CMI did not constitute an "assignment" of the mortgage that necessitated a recording.

Defendants appealed, and the circuit court reversed. The circuit court held that Freddie Mac was a governmental entity subject to the Fifth Amendment's notice and hearing requirements. The circuit court reasoned that Freddie Mac filed tax exemptions as the United States under MCL 207.526(h)(*i*) and 505(h)(*i*) and that the federal government retained permanent control over all aspects of Freddie Mac. Noting that "FHFA controls every aspect of [Freddie Mac's] business and its Board of Directors is appointed by and answers to the Director of the FHFA," the court concluded that "the procedures and provisions in place in this case make the conservatorship, in all practicality, permanent." Regarding the chain of title, the circuit court held that the foreclosure was invalid because MCL 600.3204(3) requires assignments to be made whenever the foreclosing party is not the original mortgagee, so that assignments must be recorded when a mortgagee merges into another company. The court stated, "ABN AMRO ceased to exist when it merged with [CMI]. Because of this, [CMI] is not synonymous with ABN AMRO, but is an entirely different entity that is required to be assigned the mortgage under MCL 600.3204(3)."

The circuit court reversed the district court's order awarding possession to Freddie Mac and dismissed the complaint. Freddie Mac applied for leave to appeal and the FHFA moved to intervene. This Court granted both applications.[6] On appeal, Freddie Mac argues that the circuit court erred by holding that it was a governmental entity for constitutional purposes, erred by concluding that the foreclosure failed to comply with MCL 600.3204(3), and, to the extent there was a defect in the chain of title, erred by concluding that the foreclosure was void *ab initio* as opposed to merely voidable.

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition to determine whether the moving party is entitled to judgment as a matter of law." *Cuddington v United Health Servs*, *Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). We review constitutional issues and issues of statutory construction under the same standard. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 425; 761 NW2d 371 (2008); *Cuddington*, 298 Mich App at 271.

III. ANALYSIS

A. DUE PROCESS

The Fifth Amendment "appl[ies] to and restrict[s] only the Federal Government and not private persons." *Pub Utilities Comm of DC v Pollak*, 343 US 451, 461; 72 S Ct 813; 96 L Ed 1068 (1952). Therefore, the threshold question in this case is whether Freddie Mac is a governmental entity subject to a Fifth Amendment claim.

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[6] *Fed Home Loan Mtg Ass'n v Kelley*, unpublished order of the Court of Appeals, entered October 11, 2013 (Docket No. 315082).

The circuit court concluded that Freddie Mac is a governmental entity subject to Fifth Amendment claims for two reasons: (1) Freddie Mac "filed tax exemptions as the United States under MCL 207.526(h)(*i*) and 505(h)(*i*)"; and (2) Freddie Mac is a governmental entity under *Lebron v Nat'l R Passenger Corp*, 513 US 374, 377; 115 S Ct 961; 130 L Ed 2d 902 (1995). Both of these conclusions are erroneous.

With respect to Freddie Mac's tax status, while MCL 207.505(h)(*i*) and MCL 207.526(h)(*i*) provide tax exemptions for certain instruments and transactions involving the United States, Freddie Mac is specifically authorized by federal statute to be exempt from "all taxation now or hereafter imposed by any . . . State," except for real property taxes. 12 USC 1452(e). Thus, Freddie Mac would have been exempt regardless of whether it sought an exemption "as the United States." Moreover, the circuit court did not cite, and defendants do not provide, any authority supporting the position that seeking a tax exemption "as the United States" subjects federally created corporations to constitutional claims under the Fifth Amendment. As the United States Court of Appeals for the Ninth Circuit stated in *Hall v American Nat'l Red Cross*, 86 F3d 919, 922 (CA 9, 1996), "Government-created corporations are often held to be tax-immune government instrumentalities, but courts have also frequently found them not to be subject to constitutional treatment as government actors."[7] Thus, the mere fact that Freddie Mac filed for tax exemptions as "the United States" was not dispositive of whether Freddie Mac is a governmental entity

[7] "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999).

for constitutional purposes. Instead, *Lebron*, 513 US 374, is controlling on this issue, and under the *Lebron* framework, we conclude that Freddie Mac is not a governmental entity.

In *Lebron*, the United States Supreme Court addressed whether the National Railroad Passenger Corporation (commonly known as Amtrak) was a governmental entity for constitutional purposes. In that case, Amtrak refused to display the plaintiff's political advertisement on a large billboard at Penn Station commonly known as "the Spectacular." The plaintiff sued, alleging violations of his First and Fifth Amendment rights. *Id*. at 377-378. At issue was whether Amtrak was a governmental entity subject to the plaintiff's constitutional claims. *Id*. at 378-379.

In resolving this issue, the Supreme Court held that, "where . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government" for constitutional purposes. *Id*. at 400. Although Amtrak's authorizing statute expressly stated that Amtrak was not a federal entity, the *Lebron* Court concluded otherwise. The Court reasoned that Amtrak was created by special statute explicitly for the furtherance of a governmental goal—specifically, the preservation of passenger trains in the United States. *Id*. at 383, 397-398. Furthermore, six of the eight Amtrak board members were directly appointed by the President of the United States. *Id*. at 397. Moreover, the Court reasoned, the government's control of Amtrak was permanent in nature, explaining:

> Amtrak is not merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be); it is established and

> organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission, which are run by Presidential appointees with fixed terms. [*Id.*]

In concluding that Amtrak was a federal entity, the *Lebron* Court distinguished *Regional Rail Reorganization Act Cases*, 419 US 102; 95 S Ct 335; 42 L Ed 2d 320 (1974), wherein the Supreme Court held that Conrail was not a federal instrumentality "despite the President's power to appoint . . . 8 of [Conrail's] 15 directors." *Lebron*, 513 US at 399. The *Lebron* Court noted that, in *Regional Rail*, the federal appointees were appointed to the Conrail board to protect federally backed debt obligations. *Id*. Furthermore, the appointees were required to operate Conrail "at a profit for the benefit of its shareholders," and full control of the board would shift back to the shareholders once federally backed debt obligations fell below 50 percent of total indebtedness. *Id*. (quotation marks and citations omitted). In contrast, "[t]he Government exerts its control [over Amtrak] not as a creditor but as a policymaker, and no provision exists that will automatically terminate control upon termination of a temporary financial interest." *Id*.

In this case, there is no dispute that the government created Freddie Mac by special statute for the purpose of furthering governmental objectives.[8] Defendants do

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[8] See, e.g., 12 USC 4501; *American Bankers Mtg Corp v Fed Home Loan Mtg Corp*, 75 F3d 1401, 1406-1407 (CA 9, 1996) ("The congressional purposes for Freddie Mac are clearly designed to serve the public interest by increasing the availability of mortgages on housing for low- and moderate-income families and by promoting nationwide access to mortgages.").

not argue, nor can they prove that, preconservatorship, Freddie Mac was a governmental entity. See *American Bankers Mtg Corp v Fed Home Loan Mtg Corp*, 75 F3d 1401, 1406-1409 (CA 9, 1996) (holding that preconservatorship Freddie Mac lacked sufficient government control under *Lebron* because 13 of its 18 directors were elected annually by common shareholders and its 60 million shares of common stock were publicly traded on the New York Stock Exchange).

Instead, defendants argue that the FHFA's 2008 conservatorship served to transform Freddie Mac into a governmental entity. This argument is not novel and has been repeatedly rejected by federal courts including the United States Court of Appeals for the Sixth Circuit, which recently held that "[u]nder the *Lebron* framework, Freddie Mac is not a government actor who can be held liable for violations of the Fifth Amendment's Due Process Clause." *Mik v Fed Home Loan Mtg Corp*, 743 F3d 149, 168 (CA 6, 2014). This holding aligned with numerous decisions by federal courts across the country, which have soundly rejected the same argument.[9] For the following reasons, we now

[9] See, e.g., *Narra v Fannie Mae*, opinion of the United States District Court for the Eastern District of Michigan, issued February 7, 2014 (Docket No. 2:13-cv-12282); *Fed Home Loan Mtg Corp v Shamoon*, 922 F Supp 2d 641 (ED Mich, 2013); *Lopez v Bank of America, N.A.*, 920 F Supp 2d 798 (WD Mich, 2013); *Dias v Fed Nat'l Mtg Ass'n*, 990 F Supp 2d 1042 (D Hawaii, 2013); *Matveychuk v One West Bank*, opinion of the United States District Court for the Northern District of Georgia, issued December 19, 2013 (Docket No. 1:13-CV-3464-AT); *May v Wells Fargo Bank*, opinion of the United States District Court for the Southern District of Texas, issued August 29, 2013 (Docket No. 4:11-3516); *Bernard v Fed Nat'l Mtg Ass'n*, opinion of the United States District Court for the Eastern District of Michigan, issued March 27, 2013 (Docket No. 12-14680); *In re Kapla*, 485 BR 136 (Bankr ED Mich, 2012); *Syriani v Freddie Mac Multiclass Certificates*, opinion of the United States District Court for the Central District of California, issued July 10, 2012 (Docket No. CV 12-3035-JFW); *Herron v Fannie Mae*, 857 F Supp 2d 87, 95-96 (D DC, 2012).

similarly hold that Freddie Mac, under the conservatorship of the FHFA, is not a governmental entity for constitutional purposes.

As conservator, the FHFA succeeded to "all" of Freddie Mac's "rights, titles, powers, and privileges," with authority to operate all of its business "with all the powers of the shareholders, the directors, and the officers . . . ." 12 USC 4617(b)(2)(A), (B)(i). Although these powers are sweeping, importantly, Congress did not appoint FHFA as *permanent* conservator over Freddie Mac. Instead, the purpose of the conservatorship is to reorganize, rehabilitate, or wind up Freddie Mac's affairs. 12 USC 4617(a)(2). These terms connote a temporary period of control, and defendants identify no statutory language showing that the government intended to effectuate a permanent takeover of Freddie Mac.

The circuit court concluded that although "conservatorship is described as a temporary status of a company, the procedures in place in this case make the conservatorship, in all practicality, permanent," noting that "there is no determined end date in which [Freddie Mac] will become a private entity, nor is there an automatic provision that will revert [Freddie Mac] to a private entity." Similarly, defendants point out that in *Regional Rail*, 419 US at 102, the Court held that Conrail was not a federal instrumentality in part because the government's full voting control would *automatically* shift back to Conrail's shareholders once the corporation's federal debt obligations fell below 50 percent of its indebtedness. *Lebron*, 513 US at 399, citing *Regional Rail*, 419 US at 152. Defendants argue that, unlike Conrail, in this case there is no triggering mechanism that terminates the conservatorship. These arguments are unpersuasive.

The *Lebron* Court noted that with respect to Conrail the government was merely acting as its creditor and exerted control over Conrail for the purpose of ensuring a profit for Conrail's shareholders. *Lebron*, 513 US at 399. Notably, the *Lebron* Court did not state that government control would be deemed permanent unless the government's involvement was scheduled to terminate on a specified date or upon the satisfaction of a specified condition. To the contrary, the *Lebron* Court recognized that the indefinite government control over Conrail, pending the satisfaction of certain conditions, did not equate to permanent government control. *Id.* With respect to permanence, the conservatorship of Freddie Mac is analogous to the government's control of Conrail, as it is similarly of indefinite duration pending the satisfaction of certain conditions. See 12 USC 4617(a)(2). Thus, Congress's failure to specify a termination date does not render the FHFA's control permanent under the *Lebron* framework. This is especially true considering that the government's control of Freddie Mac was imposed for the inherently temporary purpose of "reorganizing, rehabilitating, or winding up" its affairs. 12 USC 4617(a)(2).

In sum, Freddie Mac was created by special law for governmental purposes; however, although the federal government, through the FHFA, exercises control over Freddie Mac, that control is not permanent in nature. Accordingly, under the *Lebron* framework, Freddie Mac is not a federal entity for constitutional purposes, and defendants' due process claim fails as a matter of law.[10] See *Nat'l Airport Corp v Wayne Bank*, 73 Mich App 572,

[10] Because we conclude that Freddie Mac is not a governmental entity for constitutional purposes, we need not address Freddie Mac's argument that Michigan's foreclosure by advertisement does not violate the Due Process Clause.

574; 252 NW2d 519 (1977) ("It is unquestioned that state action is required in order to assert a denial of due process under both the Michigan and United States Constitutions.").

B. VALIDITY OF FORECLOSURE UNDER MCL 600.3204(3)

Freddie Mac argues that the circuit court erred in holding that the foreclosure was void *ab initio* because the foreclosure did not comply with MCL 600.3204(3).

MCL 600.3204(3) provides as follows:

> *If the party foreclosing a mortgage* by advertisement *is not the original mortgagee*, *a record chain of title shall exist* prior to the date of sale under [MCL 600.3216] *evidencing the assignment of the mortgage* to the party foreclosing the mortgage. [Emphasis added.][11]

In this case, it is undisputed that the foreclosing party was not the original mortgagee. First National assigned the mortgage to ABN-AMRO, and that assignment was duly recorded. Subsequently, ABN-AMRO merged with CMI, the foreclosing entity. Freddie Mac argues that CMI was not required to record its interest in defendants' mortgage under MCL 600.3204(3) because it acquired that interest pursuant to a merger. Defendants argue that the circuit court correctly concluded that CMI failed to comply with MCL 600.3204(3). We need not address the substance of this issue, however, because our Supreme Court in *Kim v JPMorgan Chase Bank*, *NA*, 493 Mich 98, 115-116; 825 NW2d 329 (2012), held that parties seeking to set aside a foreclosure sale on this basis must show that they were prejudiced by the mortgagee's failure to comply

[11] This language reflects the version of MCL 600.3204(3) in effect when this action was filed. The minor amendment of this provision that became effective on June 19, 2014, does not affect our analysis. See 2014 PA 125.

with MCL 600.3204 by demonstrating that "they would have been in a better position to preserve their interest in the property absent [the mortgagee's] noncompliance with the statute." In this case, the only prejudice defendants allege is that plaintiff violated their due process rights. In light of our holding that defendants' due process rights were not violated, defendants have failed to allege the prejudice necessary for this Court to reach the merits of this issue.

IV. CONCLUSION

In summary, we conclude that Freddie Mac is not a governmental entity for constitutional purposes and defendants' due process claim therefore failed as a matter of law. Further, whether CMI properly complied with MCL 600.3204(3) is not before us given defendants' failure to allege prejudice. Therefore, defendants were not entitled to any relief, and the district court properly entered an order terminating defendants' possession of the property. Accordingly, we reverse the circuit court's order and remand for reinstatement of the district court's order terminating defendants' possession of the property.

Reversed and remanded for proceedings consistent with this opinion. No costs are awarded in this matter. MCR 7.219 (A). We do not retain jurisdiction.

BORRELLO, P.J., and SERVITTO and BECKERING, JJ., concurred.

ATTALA v ORCUTT

Docket No. 315630. Submitted June 3, 2014, at Grand Rapids. Decided August 26, 2014, at 9:05 a.m.

Tammi Attala brought a premises liability action against Larry and Carolyn Orcutt in the Kent Circuit Court. Plaintiff was injured when she slipped and fell on the icy surface of the parking lot outside her apartment, which she rented from defendants. She was on her way to school to turn in a report that was due that day. Plaintiff slipped as she was entering her car. The parties stipulated the facts and agreed that the sole issue was whether special aspects existed such that defendants owed a duty to plaintiff despite the open and obvious nature of the hazardous ice. The court, Dennis B. Leiber, J., ruled that the hazard was effectively unavoidable and, therefore, the open and obvious danger doctrine did not vitiate defendants' duty. The court entered judgment in favor of plaintiff. Defendants appealed.

The Court of Appeals *held*:

A premises owner retains a duty with regard to those open and obvious hazards that have either of two special aspects: those that are either (1) effectively unavoidable, or (2) pose a substantial risk of death or serious injury. If the hazard in question has either of these special aspects, it presents an unreasonable risk of harm despite being open and obvious. In this case, the trial court properly rejected defendants' sole argument—that to fall outside the open and obvious danger doctrine, the conditions of the premises must be both effectively unavoidable and pose a substantial risk of death or serious injury.

Affirmed.

RIORDAN, J., dissenting, concluded that plaintiff had failed to establish the existence of special aspects sufficient to overcome the open and obvious danger doctrine and would have reversed. Plaintiff chose to walk on the parking lot in conditions that were known, open, and obvious to her. The stipulated facts did not lead to the conclusion that plaintiff was required or compelled to confront the hazard. Accordingly, the hazard was not effectively unavoidable.

NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGERS — SPECIAL ASPECTS.

A premises owner retains a duty with regard to those open and obvious hazards that have either of two special aspects: those that are either (1) effectively unavoidable, or (2) pose a substantial risk of death or serious injury; if the hazard in question has either of these special aspects, it presents an unreasonable risk of harm despite being open and obvious.

Dale Sprik & Associates, PC (by *Scott B. Hansberry*), for plaintiff.

James M. Searer, PC (by *James M. Searer*), for defendants.

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

SHAPIRO, J. Defendants appeal from the trial court judgment for plaintiff in this premises liability and personal injury action. Because the trial court did not err in its application of the exceptions to the open and obvious danger doctrine, we affirm.

On January 20, 2010, plaintiff was injured when she slipped and fell on the icy surface of the parking lot outside her apartment, which she rented from defendants, while trying to get into her car in order to attend her college class as scheduled. The parties reached an agreement that the case turned solely on whether or not defendants owed plaintiff a duty given that (a) the ice was an open and obvious hazard and (b) the entire parking lot was covered in ice and the plaintiff had to encounter the ice in order to get to her car. They agreed that if defendants owed a duty under these conditions, judgment should enter for plaintiff, but that if defendants did not owe a duty under these conditions, judgment should enter for defendants. Accordingly, the parties jointly submitted this purely legal issue to the trial court for determination on the following stipulated facts:

1. On January 20, 2010, Plaintiff, Tammi Attala, slipped and fell on ice in the parking lot of the apartment she rented at 1307 Northfield Ave., Grand Rapids, Michigan.

2. That at all times pertinent, the Defendants, Larry Orcutt and Carolyn Orcutt, were the Plaintiff's landlords and owners of the premises where the injury occurred.

3. Tammi Attala had the status of an invitee on the premises at the time of the accident.

4. The apartment rented by Plaintiff was one of four apartments in the Defendants' apartment building.

5. That the Defendants, as owners and landlords of the Plaintiff, provided the parking lot for use of their tenants.

6. That the Defendants owned, managed and maintained the premises, including the parking lot.

7. *That Defendants provided the parking for their tenants and the tenants could reasonably expect to be able to get to and from their vehicles as part of using this parking lot.*

8. *That on January 20, 2010, and for a period of time prior thereto, the entire parking lot was covered with thick ice. There was no snow covering the ice.*

9. *The lot had been plowed at some time prior to January 20, 2010 but not salted.*

10. That on January 20, 2010, Plaintiff was a student taking classes to become a medical assistant. On the date of her injury, she was going to school to attend classes and turn in a report that was due that day.

11. *To get to her car from her apartment, Ms. Attala had to encounter the ice on the surface of the parking lot.*

12. Plaintiff was injured when she slipped and fell on the ice as she was entering into her car.

13. The thick ice covering the parking lot was known to Ms. Attala and open and obvious.

14. The amount of Ms. Attala' damages after all applicable setoffs is $12,500.

> 15. *The sole issue for determination by the Court is whether special aspects existed such that Defendants owed a duty to the Plaintiff despite the* [sic] *open and obvious nature of the hazard.* [Emphasis added.]

The trial court ruled that, because it was undisputed that to reach her car, plaintiff had to encounter the icy conditions and that the entire parking lot was covered with thick ice, the hazard was effectively unavoidable and, therefore, the open and obvious danger doctrine did not vitiate defendants' duty. The court reviewed the decisions in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), and *Hoffner v Lanctoe*, 492 Mich 450, 463-465; 821 NW2d 88 (2012), correctly noting their holdings that a premises owner retains a duty as to those open and obvious hazards that have either of two "special aspects": those that are either (1) effectively unavoidable or (2) pose a substantial risk of death or serious injury. *Lugo*, 464 Mich at 517-519; *Hoffner*, 492 Mich at 463. As explained in *Lugo*, these two types of special aspects address the two different ways in which a risk may remain unreasonable even when open and obvious. An effectively unavoidable hazard "give[s] rise to a uniquely high *likelihood* of harm" while one which poses a substantial risk of death or serious injury "give[s] rise to a uniquely high . . . *severity* of harm . . . ." *Lugo*, 464 Mich at 519 (emphasis added). If the hazard in question has either of these special aspects, then it continues to present an "unreasonable risk of harm" despite being open and obvious. *Id*. at 517-519.

Given these principles, the trial court properly rejected defendants' sole argument—that to fall outside the open and obvious danger doctrine, the conditions of the premises must be *both* effectively unavoidable *and* pose a substantial risk of death or serious injury. The trial court accurately stated the law in its opinion:

> [C]ontrary to Defendants' position, the *Lugo* Court clearly saw unavoidable situations as distinct from avoidable but substantial risks. This distinction is applied in *Hoffner*, where the Court first found that the plaintiff freely admitted that the danger was avoidable. *Hoffner supra* at 473. The *Hoffner* Court then proceeded to analyze whether the danger was substantial. *Id*. Therefore, the *Hoffner* Court did not see substantiality and unavoidability as two necessary elements because the substantiality analysis would have been unnecessary once the plaintiff admitted that the condition was avoidable. *See id*.

The trial court was correct in describing *Hoffner*'s two-part analysis and in describing effective unavoidability as one of the exceptions to the open and obvious danger doctrine. However, the trial court erred by referring to the second exception as being applicable when "the danger was substantial." This understates the degree of potential injury that must be present for the second exception to apply. The Supreme Court has made clear that if the danger is not effectively unavoidable, the premises owner does not have a duty unless the hazard poses " 'an extremely high risk of *severe* harm . . . .' " *Hoffner*, 492 Mich at 462, quoting *Lugo*, 464 Mich at 519 n 2 (emphasis added). As an example, *Lugo* offered a 30-foot deep unguarded pit in a parking lot, noting that while the pit would be avoidable, a person who failed to avoid it would suffer "a substantial risk of death or severe injury . . . ." *Lugo*, 464 Mich at 518. Therefore, contrary to the characterization used by the trial court, if the hazard is not effectively unavoidable, the premises owner's duty under the common law is limited to situations in which the hazard poses a substantial risk of death or severe injury.

The parties agreed that judgment should enter for plaintiff if defendants owed a duty and for defendants if defendants did not owe such a duty. Defendants did not

argue below or on appeal that the hazard was not effectively unavoidable. The parties submitted a question of law to the trial court on stipulated facts and the trial court correctly stated and applied the relevant law.[1]

Affirmed.

MURPHY, C.J., concurred with SHAPIRO, J.

RIORDAN, J. (*dissenting*). Because plaintiff fails to establish the existence of special aspects sufficient to overcome the open and obvious danger doctrine, I respectfully dissent.

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[1] Our dissenting colleague concludes that plaintiff's case should have been dismissed because she failed to show that "alternative" modes of transportation were not available to her. We reject this view for several reasons. First, defendant never made any such argument in either the trial court or in its brief to this Court. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009) (stating that in a motion brought under MCR 2.116(C)(10), the moving party must " 'specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact' "), quoting MCR 2.116(G)(4). Second, defendants *stipulated*, "[plaintiff] had to encounter the ice on the surface of the parking lot" to get to her car, so any claim that she did not need to do so is waived. Third, the dissent never states what reasonable alternative modes of transportation it theorizes might have allowed plaintiff to avoid the icy conditions that covered the entire premises and cites no evidence to support that theory. This is a telling omission, as it is difficult to imagine what could have transported plaintiff off the property without having to encounter the universally present ice. The dissent seems to take the view that that, even if a defendant does not argue that safe and reasonable alternatives existed, a plaintiff must nevertheless demonstrate a lack of safe and reasonable alternatives. A plaintiff is required to rebut the reasonableness of any alternatives proffered by the defense, but is not required to do so where the defense, as here, fails to offer evidence (or even a claim) of any such alternatives. The dissent's approach suggests that the party with the burden of proof must rebut theories that are never presented. This is akin to an appellate court reversing a defendant's conviction because the prosecution failed to *disprove* self-defense or alibi when the defendant never asserted that he acted in self-defense or that he had an alibi for the time in question.

In its opinion and order, the trial court misstated the stipulation between the parties. It wrote, in the first paragraph of its opinion, that the parties agreed that the ice in the parking lot "was not avoidable in order for Plaintiff to enter or exit her apartment." In fact, the parties stipulated, "[t]o get to her car from her apartment, Ms. Attala had to encounter the ice on the surface of the parking lot." Defendants did not concede that the ice was unavoidable under all circumstances and, in particular, that the ice "was not avoidable in order for Plaintiff to enter or exit her apartment." In fact, the ice was "unavoidable" only if plaintiff chose to walk on the parking lot in conditions that were known, open, and obvious to her. In essence, the trial court reached its decision in favor of plaintiff on the basis of a faulty premise.

Seemingly recognizing this faulty premise, the majority's opinion focuses on the fact that plaintiff "had to encounter the ice to get to her car." It also describes the ice as being "universally present," to strengthen the conclusion that the plaintiff was compelled or required to traverse the ice in the parking lot. The majority twists the issue, and the stipulated facts, to transform this case by inserting on its own accord, like the trial court, a new, unstipulated fact, that plaintiff was compelled to encounter the admittedly open and obvious condition on the parking lot, when, in actuality, the facts indicate that she simply chose to do so.

A landowner generally owes no duty to protect or warn an invitee of dangers that are open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But the Michigan Supreme Court "has discussed two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Hoffner v Lanctoe*, 492 Mich

450, 463; 821 NW2d 88 (2012). As the Court cautioned, "*In either circumstance*, such dangers are those that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided and thus must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards." *Id*. at 463 (quotation marks and citation omitted). Accordingly, the special aspects exception is exceedingly narrow because "neither a common condition nor an avoidable condition is uniquely dangerous." *Id*.

In the instant case, the parties stipulated that the parking lot was covered with thick ice at the time of plaintiff's fall and that no snow was covering it. Both parties agreed that the ice covering the parking lot was known to plaintiff, and open and obvious. The parties also agreed that in order to reach her car, plaintiff had to encounter the ice. From these facts, the majority concludes that there was a hazard, though not necessarily an unreasonable one, that was effectively unavoidable and, as a result, defendants are liable.

The majority's conclusion requires a logical leap that is not supported by the limited stipulated facts before this Court. While the parties stipulated that plaintiff was going to class to turn in a report, there is no evidence establishing that her only option to do so was to encounter ice in the parking lot, a condition the majority now has taken to describe as, "universally present." Further, contrary to plaintiff's suggestion, there was no evidence that she was "trapped" in her apartment. Even if walking across the parking lot at the instant she desired was the only way to reach her car, she voluntarily chose to do so.

In her appellate brief, plaintiff frames the issue before the Court as being:

> Whether the Circuit Court Erred in Determining that Special Circumstances Existed Where the Parking Lot of Tammi Attala's Apartment Building Was Completely Covered With Thick Ice That She Was Required to Cross to Leave Her Apartment.[1]

Plaintiff argues on appeal, without there being any factual basis in the record to support her, that she "had" to get to her car, she was "unable to protect herself," she "had no option," she "had no choice" and that she was otherwise "trapped" in the apartment building. In reality, the parties did not stipulate those facts, nor were they ever established in the trial court.

As the Michigan Supreme Court has held, a hazard is effectively unavoidable if a person "for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Hoffner*, 492 Mich at 468-469.

The example the Court provided in *Lugo* further demonstrates this point. The Court provided the following example of an effectively unavoidable condition: "[A] commercial building with only one exit for the general public where the floor is covered with standing water." *Lugo*, 464 Mich at 518. In such a scenario, a person would be effectively trapped in the building, as he or she could not exit safely. Yet, in this case, there is no evidence that plaintiff was unable to exit her apartment safely, that she had no alternative way of attending her class or submitting her report other than by walking through the parking lot to her car. The facts provided through the parties' stipulation merely indicate that plaintiff voluntarily chose to walk on the open and obvious ice. The parties do not stipulate that

[1] Capitalization altered.

plaintiff was required or compelled to do so. As such, from the limited facts before this Court, it cannot be said that the hazard was effectively unavoidable or that plaintiff was required or compelled to confront it.

Moreover, as the Court in *Hoffner* emphasized, the exception for effectively unavoidable hazards "is a limited exception designed to avoid application of the open and obvious doctrine only when a person is subjected to an unreasonable risk of harm." *Hoffner*, 492 Mich at 468. In other words, the "touchstone of the 'special aspects' analysis is that the condition must be characterized by its *unreasonable risk of harm*. Thus, an 'unreasonably dangerous' hazard must be just that—not just a dangerous hazard, but one that is unreasonably so." *Id*. at 455-456.

While the parking lot may have had ice, the parties did not stipulate that it created such a risk that its mere presence made it unreasonably hazardous, that it was universally present, or that it created an unreasonable risk of harm. As our Supreme Court has observed, "Michigan, being above the 42nd parallel of north latitude, is prone to winter. And with winter comes snow and ice accumulations on sidewalks, parking lots, roads, and other outdoor surfaces." *Id*. at 454. Nothing in the stipulated facts indicates that the accumulation of ice in the parking lot was anything other than typical. As such, the ice was nothing more than an "ordinary condition[]," which did not present any special aspects that could give rise to liability. See *id*. at 463

Because plaintiff failed to meet her burden of proof on the stipulated facts,[2] I dissent from the majority opinion. I would reverse.

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[2] Plaintiff bore the burden to prove that defendants owed her a duty in this negligence action. See *Flones v Dalman*, 199 Mich App 396, 402-403; 502 NW2d 725 (1993).

MAYOR OF CADILLAC v BLACKBURN

Docket No. 312803. Submitted October 3, 2013, at Petoskey. Decided August 26, 2014, at 9:10 a.m.

Petitioner, the mayor of the city of Cadillac, sent respondent, Jim Blackburn, an appointed commissioner of the city's Act 78 fire and police department civil service commission, written notice of his removal from the commission pursuant to MCL 38.504. Respondent promptly answered the notice. Petitioner then filed a petition in the Wexford Circuit Court, setting forth the reason for said removal and seeking confirmation by the court of the mayor's action. The court, William M. Fagerman, J., ruled that it would decide the matter by determining whether the mayor proved the allegations in the petition by a preponderance of the evidence and entered an order to that effect. The Court of Appeals granted petitioner's application for leave to appeal that alleged that the circuit court employed an incorrect standard of review and violated the constitutional doctrine of the separation of powers.

The Court of Appeals *held*:

1. The circuit court correctly determined that the plain language of MCL 38.504 places the burden of proof on petitioner to establish good cause for removal by the preponderance of the evidence at a hearing de novo.

2. MCL 38.504 does not provide for circuit court review of a final administrative decision. It provides a procedure for an original action by a mayor for the removal of a commissioner. The circuit court correctly held that it possessed original jurisdiction over the dispute under MCL 38.504.

3. Because the notice of removal, and more particularly the petition for confirmation of removal, is not a final administrative decision, the provisions of Const 1963, art 6, § 28 regarding the review of final decisions, findings, rulings, and orders of administrative officers, do not control the circuit court proceedings under MCL 38.504.

4. Permitting review de novo in the circuit court of petitioner's decision to seek removal of respondent does not violate the

constitutional doctrine of the separation of powers. MCL 38.504 does not impinge on a mayor's decision to seek the removal of a civil service commissioner or pose an impediment to the mayor's decision in the first instance of what constitutes other good cause for removal under the statute. There can be no encroachment by the circuit court on an executive or administrative function of a mayor contrary to Const 1963, art 3, § 2 because that constitutional provision applies only to state government, not local government.

Affirmed and remanded for further proceedings.

MUNICIPAL CORPORATIONS — BOARDS AND COMMISSIONS — REMOVAL OF COMMISSIONERS — ACTIONS.

MCL 38.504 provides a procedure for an original action in the circuit court by a mayor or other principal executive officer of a city, village, or municipality that has established a fire and police department civil service commission under 1935 PA 78 for the removal of a commissioner for incompetence, malfeasance, or other good cause; the burden of proof is placed on the mayor in the circuit court action to establish good cause for removal by a preponderance of the evidence; the provisions of Const 1963, art 6, § 28 regarding the review of administrative action do not apply to the original circuit court action under MCL 38.504.

Foster, Swift, Collins & Smith, PC (by *Michael D. Homier* and *Laura J. Genovich*), for petitioner.

McCurdy, Wotila & Porteous, PC (by *Roger Wotila* and *Cynthia Wotila*), for respondent.

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

PER CURIAM. Petitioner, the mayor of the city of Cadillac, appeals by leave granted the trial court's ruling that it would hear and decide the mayor's petition for removal of respondent as a civil service commissioner under 1935 PA 78, MCL 38.501 *et seq.*, by determining whether the mayor proved the allegations in his removal petition by the preponderance of the

evidence.[1] The mayor argues that the trial court's ruling provides for review de novo of the mayor's administrative decision, contrary to the review provided for in Const 1963, art 6, § 28, and would also violate the doctrine of the separation of powers, Const 1963, art 3, § 2. We affirm and remand for further proceedings.

During the city's 2011 election cycle, the mayor was informed that respondent served on a political committee or was active in the management of the campaign of the mayor's political opponent. Respondent had served for several years as an unpaid, appointed commissioner of the city's Act 78 fire and police department civil service commission. The commission consists of three members, one appointed by the "principal elected officer of the city," one selected by the paid members of the police and fire department, and one selected by the other two commissioners. MCL 38.502. The act prohibits any civil service commissioner from serving on "any political committee or [taking] any active part in the management of any political campaign." MCL 38.503. Section 4 of the act provides that the mayor or principal executive officer of the pertinent city, village, or municipality "shall at any time remove any commissioner for incompetency, dereliction of duty, malfeasance in office

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[1] This Court originally dismissed petitioner's interlocutory application for leave to appeal for lack of jurisdiction. See *Mayor of Cadillac v Blackburn*, unpublished order of the Court of Appeals, entered October 29, 2012 (Docket No. 312803). Our Supreme Court decided otherwise in *Mayor of the City of Cadillac v Blackburn*, 493 Mich 889 (2012), holding that this Court "has jurisdiction over the petitioner's application for leave to appeal pursuant to Const 1963, art 6, § 10, MCL 600.308(2)(e), and MCR 7.203(B)(1)." The Supreme Court also granted a stay of the proceedings in the circuit court pending this appeal. *Blackburn*, 493 Mich 889. This Court subsequently granted leave to appeal. *Mayor of Cadillac v Blackburn*, unpublished order of the Court of Appeals, entered December 17, 2012 (Docket No. 312803).

or any other good cause . . . .” MCL 38.504. The mayor or principal executive officer must initiate removal in a writing filed with the commission and served on the commissioner. But when the executive initiates removal, § 4 provides that “such removal shall be temporary only and shall be in effect for a period of 10 days.” *Id*. The commissioner is “deemed removed” if he or she does not respond within the 10 days. If, however, the commissioner answers the removal notice within 10 days, the statute provides:

> [T]he mayor shall file in the office of the clerk of the circuit court of said county a petition setting forth in full the reason for said removal and praying for the confirmation by said circuit court of the action of the mayor in so removing the said commissioner. A copy of said petition, in writing, shall be served upon the commissioner so removed simultaneously with its filing in the office of the clerk of the circuit court and shall have precedence on the docket of the said court and shall be heard by said court as soon as the removed commissioner shall demand. [MCL 38.504.]

Petitioner complied with the initial removal requirements of MCL 38.504 by sending respondent written notice of his removal and by then petitioning the circuit court for confirmation of his removal decision after respondent promptly answered the notice. The circuit court held that it had original jurisdiction over the dispute under MCL 38.504 so that petitioner had to prove, by a preponderance of the evidence, the good cause for removing respondent from office that petitioner alleged in its removal petition. On appeal, petitioner argues that the court erroneously interpreted MCL 38.504 in a manner inconsistent with the judicial review of administrative decisions provided for in Const 1963, art 6, § 28. Petitioner also asserts that a circuit court’s review de novo of a mayor’s removal decision would violate the

separation of powers doctrine, Const 1963, art 3, § 2. We hold that the circuit court correctly applied the plain terms of the statute and that this reading of the statute is not contrary to Michigan's Constitution.

I. STANDARD OF REVIEW

This case presents questions of law regarding statutory interpretation and also the application of our state Constitution, which we review de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Id*. When interpreting a statute, our primary goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628; 765 NW2d 31 (2009). If the language of a statute is unambiguous, we presume the Legislature "intended the meaning expressed in the statute." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). A statutory provision is ambiguous only if it conflicts irreconcilably with another provision or it is equally susceptible to more than one meaning. *Fluor Enterprises, Inc v Dep't of Treas*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007). A statute is not ambiguous merely because a term it contains is undefined or has multiple definitions in a dictionary, especially when the term is read in context. *Cairns v East Lansing*, 275 Mich App 102, 107; 738 NW2d 246 (2007). When construing a statute, we must assign every word or phrase its plain and ordinary meaning unless the Legislature has provided specific definitions or has used technical terms that have acquired a peculiar and appropriate meaning in the law. *Superior Hotels*, 282 Mich App at 629.

The primary goal of the judiciary when construing Michigan's Constitution is to ascertain the purpose and intent of the provision at issue. *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010). To do so, courts must apply the original meaning attributed to the words of a constitutional provision by its ratifiers, i.e., the most obvious commonly understood meaning the people would have assigned the words employed at the time of ratification. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). This is known as the rule of "common understanding." *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). Under the rule of common understanding, we must apply the meaning that, at the time of ratification, was the most obvious to the common understanding, the one that reasonable minds and the great mass of the people themselves, would give it. *In re Burnett Estate*, 300 Mich App 489, 497; 834 NW2d 93 (2013). Thus, words should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms may be appropriate. *Id*. at 497-498. While historical records such as those concerning the debate that occurred at the constitutional convention are relevant, they are not controlling. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Furthermore, all provisions must be read in light of the whole document and no provision should be read to nullify another. *Id*.

II. ANALYSIS

We hold the circuit court correctly read the plain terms of MCL 38.504 as placing the burden of proof on petitioner to establish good cause for removal by the preponderance of evidence at a hearing de novo. We also find that this reading of MCL 38.504 violates neither

the provision for judicial review of final administrative decisions established in Const 1963, art 6, § 28, nor the constitutional doctrine of the separation of powers, Const 1963, art 3, § 2.

First, we examine the plain terms of the statute. Contrary to petitioner's contention, the mayor's administrative (or executive) decision to seek removal of respondent is, on the facts of this case, not final. Rather, the statute plainly provides that where, as here, respondent answers the mayor's notice of removal within 10 days, the notice results in only a suspension of the commissioner during the removal proceedings. When the commissioner subject to removal timely answers the notice, the statute places the burden of going forward on the mayor, who must file "a petition setting forth in full the reason for said removal and praying for the confirmation by said circuit court of the action of the mayor in so removing the said commissioner." MCL 38.504. If the mayor fails to file a petition for confirmation of the removal decision within 10 days after the commissioner's answer, the "commissioner shall immediately resume his position as a member of the civil service commission." *Id*. On the timely filing of the petition, "the commissioner so suspended shall remain suspended until a hearing is had upon the petition of the mayor." *Id*.

Under the foregoing, MCL 38.504 clearly does not provide for circuit court review of a final administrative decision; rather, it provides a procedure for an original action by the mayor or other principal executive officer of a city, village, or municipality that has established an Act 78 fire and police department civil service commission for the removal of a commissioner that the executive believes to be incompetent or has committed malfeasance, or for which other good cause exists for

removal. The statute in no way impinges on the administrative or executive determination in the first instance that good cause to remove a commissioner exists. Indeed, the mayor's interpretation of the statute is entitled to respectful consideration, consonant with the principle of the separation of powers. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 93, 103; 754 NW2d 259 (2008). But interpreting the law is a defining aspect of judicial power. *Id*. at 98. While an administrative agency in a contested case may engage in the "quasi-judicial" function of fact finding, *id*. at 99, deciding an existing case or controversy pending before the court is a quintessentially judicial function. See *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 738; 629 NW2d 900 (2001), quoting *Daniels v People*, 6 Mich 381, 388 (1859) (" 'By the judicial power of courts is generally understood the power to hear and determine controversies between adverse parties, and questions in litigation.' ") (emphasis omitted), and *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884) (" 'The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.' ") (emphasis omitted); see also *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 360 n 6; 792 NW2d 686 (2010).

In this case, the clear and unambiguous terms of the statute must be enforced as written. *Fluor Enterprises*, 477 Mich at 174; *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). As discussed, under MCL 38.504, the mayor's decision to initiate removal of a commissioner from office only works a temporary suspension; removal becomes final only after either (1) the commissioner fails to respond to the notice of removal after 10 days, or (2) the circuit court confirms the mayor's removal decision. The statute further provides that after the mayor files a petition in the circuit

court that states in "full the reason for . . . removal," the court "shall hear and decide upon said petition." *Id*. Indeed, the hearing is to be accorded precedence on the court's docket and "and shall be heard by said court as soon as the removed commissioner shall demand." The statute contemplates an evidentiary hearing at which the "contestant . . . shall have the right of appearing in person and by counsel and presenting his defense . . . ." *Id*. With respect to the circuit court's decision on the removal petition, the statute provides the right "to petition the supreme court for a review . . . as in chancery cases." *Id*.

Thus, we conclude that the circuit court correctly held that it possessed original jurisdiction over the present dispute under MCL 38.504. While the exact nature of the hearing afforded by the statute is delineated, it is clear that petitioner could not, over respondent's timely objection, unilaterally remove respondent from office. Because the mayor's decision to seek removal of respondent as a civil service commissioner was not final until confirmed, after a circuit court hearing, the trial court correctly concluded that the removal proceeding is not controlled by Const 1963, art 6, § 28. That provision guarantees and provides a minimum standard for judicial review of "final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses . . . ." See *Rental Prop Owners Ass'n v Grand Rapids*, 455 Mich 246, 269; 566 NW2d 514 (1997). We agree with petitioner that where applicable, Const 1963, art 6, § 28 does not provide for or permit review de novo of final administrative decisions. See *Viculin v Dep't of Civil Serv*, 386 Mich 375, 392; 192 NW2d 449 (1971) ("Art 6, § 28, neither guarantees nor permits *de novo* review of final decisions of the State Civil Service

Commission. The scope of review is that stated by the constitution, 'whether the same are supported by competent, material and substantial evidence on the whole record.' "). But the mayor's notice of removal, and more particularly the petition for confirmation of removal, is not a final administrative decision; it is an original action. Consequently, Const 1963, art 6, § 28 does not control the circuit court proceedings under MCL 38.504.

Because the circuit court had original jurisdiction over this dispute, the court correctly determined that petitioner, who is the proponent of facts justifying removal, bore the burden of establishing the allegations supporting removal by a preponderance of the evidence, which is the default burden of proof in civil disputes. See *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976) ("The party alleging a fact to be true should suffer the consequences of a failure to prove the truth of that allegation."); *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993) (where the statute did not specify the standard of proof, the usual civil " 'preponderance of the evidence' " quantum of proof applied). After respondent answered petitioner's removal notice, MCL 38.504 placed the burden on the mayor to petition the circuit court for confirmation of the mayor's removal decision. The mayor must set forth his reasons "in full" for removal. The statute also permits respondent to appear in person and with counsel to present his defense to the mayor's allegations. Further, the statute provides for a hearing in the circuit court by stating that the court "shall hear and decide upon said petition." Thus, as the proponent of the allegations supporting removal, the burden of proof rested with the mayor. *Kar*, 399 Mich at 539; see also *Baker v Costello*, 300 Mich 686, 689; 2 NW2d 881 (1942), and *Bunce v Secretary of State*, 239 Mich App 204, 216;

607 NW2d 372 (1999). Further, because the statute does not state the quantum of proof necessary to obtain confirmation of removal, the default standard in civil cases, the preponderance of the evidence, applies. See *Residential Ratepayer Consortium*, 198 Mich App at 149; see also *In re Moss*, 301 Mich App 76, 84; 836 NW2d 182 (2013) ("in civil cases, the Legislature's failure to spell out a standard of proof would usually require application of the preponderance of the evidence standard").

Petitioner lastly argues that permitting review de novo of his decision to seek removal of respondent as a civil service commissioner violates the constitutional doctrine of the separation of powers. Const 1963, art 3, § 2. Petitioner contends that as the highest executive official of the city, he has sole discretion on how to operate the city, including whether to remove a civil service commissioner from office. The circuit court conducting a hearing on the executive's removal decision, petitioner argues, intrudes on the domain of the executive contrary to the constitutionally mandated separation of powers. We disagree.

Our state Constitution expressly delineates three branches of government as follows:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

This state's courts have long held that each branch of government must carefully balance their exercise of power so as not to intrude on the exclusive domain of the other branches.

> Our government is one whose powers have been carefully apportioned between three distinct departments, which

> emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. [*Sutherland v Governor*, 29 Mich 320, 324-325 (1874).]

But the separation of powers doctrine does not require so strict a separation that no overlap of responsibilities and powers of the various branches of government is permitted. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 585; 640 NW2d 321 (2001). " 'If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible.' " *Id.* (citation omitted).

In this case, as we have discussed already, the statute as correctly interpreted by the circuit court in no way impinges on the city executive's decision to seek removal of a civil service commissioner. Further, the statute, as interpreted, poses no impediment to the mayor's deciding in the first instance what constitutes "other good cause" for removal under the statute. Moreover, the statute merely requires that the circuit court perform a quintessentially judicial function of deciding an existing case or controversy pending before it. *Lee*, 464 Mich at 738. But, more fundamentally, there can be no encroachment by the circuit court on an executive or administrative function of a mayor contrary to Const 1963, art 3, § 2 because that constitutional provision applies only to state government and not local government. See *Rental Prop Owners Ass'n*,

455 Mich at 266-268; see also *Hackel v Macomb Co Comm*, 298 Mich App 311, 327; 826 NW2d 753 (2012).

We affirm and remand for further proceedings. We do not retain jurisdiction. Respondent appellee, as prevailing party, may tax costs pursuant to MCR 7.219.

RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

KUBICKI v SHARPE

Docket No. 317614. Submitted August 5, 2014, at Detroit. Decided August 28, 2014, at 9:00 a.m.

DLS was born in 2002 to Holly Westmoreland (now Holly Kubicki) and Dale Sharpe, Jr. The parties never married and only lived together briefly. In 2005, the parties consented to a judgment in the Wayne Circuit Court, Family Division, that awarded Holly sole legal and physical custody of DLS and granted Dale reasonable parenting time. In 2006, Dale moved for a change of custody. The court entered an order that Holly and Dale share joint legal custody and that Holly had primary physical custody. In November 2012, Dale again moved to modify the custody order on the basis that Holly planned to join the United States military. Dale sought primary physical custody while Holly was training or deployed outside southeastern Michigan. A hearing referee determined that Dale had failed to establish grounds warranting a custody review. Dale objected to the recommendation of the referee and the circuit court scheduled a hearing. Before the hearing was held, Holly filed a motion for a change of domicile. The court entered an order expanding Dale's parenting time on January 11, 2013. The court scheduled a single hearing concerning the custody and domicile motions and did not address Dale's objections to the referee's recommendation. Dale filed a motion seeking to modify the January 11, 2003 order, alleging that he had only recently learned that Holly's husband, Daniel Kubicki, had been arrested and charged with domestic violence two years earlier and had pleaded guilty to a charge of killing an animal and been sentenced to probation. On May 3, 2013, the court entered an order awarding Dale temporary custody and Holly weekend parenting time. The order stated that it would remain in force and effect until there was a decision on Holly's motion for a change of domicile. An evidentiary hearing was conducted in June 2013. In July 2013, the court, Lynne A. Pierce, J., entered an opinion and order modifying parenting time. The court prefaced its legal conclusions with the statement that because of Holly's active military duty, the court could not consider a motion to change custody and would treat Dale's motion as a motion for a change of parenting time. The court determined that Daniel Kubicki's proposed status as DLS's primary caregiver, his

mental health diagnosis, his failure to complete treatment, and his conviction for killing an animal were a change of circumstances sufficient to reevaluate custody. The court noted that to consider a change of parenting time amounted to considering a request to change the child's placement to Dale's home. The court quoted the language of MCL 722.27(1)(c) that provides that when a parent is in active military duty the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child. The court stated that it had to determine if a temporary change of placement was in the child's best interest and that Dale must show this by clear and convincing evidence. The court, noting that Holly had asked for a change of domicile to Kansas, found that it was appropriate to apply the best interest factors provided in MCL 722.23, because a change of placement to Dale's home amounted to a change of the child's established custodial environment. The court proceeded to consider the best interest factors and determined that Factors (a), (b), (c), (e), (h), and (j) favored the parties equally, Factor (d) slightly favored Dale, Factors (f), (g), (k), and (*l*) favored Dale, and Factor (i) would not be considered because the parties did not want the court to interview the child. Following consideration of the factors applicable to a change of domicile provided in MCL 722.31(4), the court held that Holly had failed to show by a preponderance of the evidence that a change of domicile was warranted and that Dale had presented clear and convincing evidence that a temporary change of placement was in the child's best interest. The court entered an order that the parties continue to share joint custody, with Dale having temporary physical placement of the child until further order of the court. Holly appealed.

The Court of Appeals *held*:

1. The limitation on custodial changes stated in MCL 722.27(1)(c) applies only if a motion for a change of custody is filed during the time a parent is in active military duty. The statute did not foreclose a custodial change in this case because Dale sought to change the child's custody before Holly enlisted. The circuit court incorrectly concluded that Holly's intervening deployment deprived it of authority to change custody of the child.

2. The circuit court employed the analysis required for a custodial change despite inaccurately styling its order as merely concerning parenting time.

3. The trial court implicitly found that the child's established custodial environment lay either with Holly or with both parents.

4. Except with regard to Factors (f) and (i), the trial court's factual findings regarding the best-interest factors set forth in

MCL 722.23 are well supported by the evidence. The best-interest analysis called for in motions to change domicile is identical to that required for motions to change custody. The touchstone for both is the child's best interest.

5. The great weight of the evidence supports the trial court's decision to score Factor (e) as favoring the parties equally. Factor (f) concerns the moral fitness of the parties and focuses on moral fitness as a parent. On remand, the trial court must confine its evaluation under Factor (f) to the moral fitness of Holly and Dale as parents. Kubicki's conduct and mental health should not be considered under this factor.

6. The trial court erred by failing to consider under Factor (i) the 10-year-old child's preference. The order of the trial court is vacated and the matter is remanded for a new custody hearing.

Vacated and remanded.

1. CHILD CUSTODY — MOTIONS TO CHANGE CUSTODY — PARENT'S ACTIVE MILITARY DUTY.

The limitation on custodial changes stated in MCL 722.27(1)(c) applies only if a motion for a change of custody is filed during the time a parent is in active military duty.

2. CHILD CUSTODY — BEST INTERESTS OF THE CHILD.

Factor (f) of the factors to be considered in determining the best interests of the child under MCL 722.23 concerns the moral fitness of the "parties" and focuses on moral fitness as a parent.

3. CHILD CUSTODY — BEST INTERESTS OF THE CHILD — REASONABLE PREFERENCE OF THE CHILD.

When a court deems a child to be of sufficient age to express a preference, a factor that a trial court must consider in determining the best interests of the child involved in a custody dispute is the reasonable preference of the child (MCL 722.23(i)).

Robert A. Switzer for plaintiff.

Law Offices of Suzanna Kostovski (by *Suzanna Kostovski*) for defendant.

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

PER CURIAM. This child custody dispute requires us to construe a provision of the Child Custody Act intended to safeguard the custodial rights of a parent called to active military duty. Holly Kubicki, an active-duty member of the United States Army, contends that by placing her son in the temporary custody of his father, the circuit court deprived her of the statute's protection. Because the father filed a change of custody motion before the mother was called to active duty, we find the relevant statutory language inapplicable. Nevertheless, we must vacate the custody order and remand for a new evidentiary hearing, as the court failed to consider the child's wishes.

I. UNDERLYING FACTS AND PROCEEDINGS

DLS was born in 2002 to plaintiff, Holly Westmoreland (now Kubicki), and defendant, Dale Sharpe, Jr. The parties never married. Holly and Dale briefly lived together with the child.[1] In 2005, they consented to a judgment awarding Holly sole legal and physical custody and granting Dale "reasonable parenting time[.]"

In 2006, Dale moved for a change of custody. He asserted that Holly had established a coguardianship of the minor child with her sister and brother-in-law and that due to Holly's living arrangement, the child "does not have his own bedroom or bed." Holly retorted that she obtained the guardianship so that the child would have health insurance, maintaining that Dale, whose child support payments were substantially in arrears, had consented to it. She denied that her son lacked an appropriate place to sleep. The circuit court terminated

[1] For the sake of clarity and ease of reference, we refer to the parties by their first names.

the guardianship and ordered that Holly and Dale share joint legal custody, with Holly having primary physical custody.

Dale again moved to modify DLS's custody in November 2012.[2] He averred that Holly planned to join the United States military, which "will either require physical displacement of the minor son and complete disruption of the established custodial environments with both parents, or he will be left in the custody of his step-father."[3] According to the motion, DLS expressed a preference to live with his father "if his mother is absent." Dale requested an order stating that when Holly "is in training or deployed outside southeastern Michigan in the U.S. military, [Dale] will have primary physical custody." A referee ascertained that Holly had enlisted in the Army and would start basic training in January 2013. Holly intended to leave the child with her husband, Daniel Kubicki, during basic training. If subsequently stationed more than 100 miles from her home, Holly planned to file a motion for a change of domicile and to allow Dale expanded parenting time. The referee determined that Dale failed to establish grounds warranting a custody review.

Dale objected to the referee's recommendation and the circuit court scheduled a hearing for January 11, 2013. Before the hearing was held, Holly filed a motion for a change of domicile. She asserted that after completing 12 weeks of basic training she would be deployed more than 100 miles away and that "it would be in the best interests of the child to remain primarily in her

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[2] Dale had also sought modification of the custody order in 2010, after DLS ran away from Holly's home in the middle of the night. That request was denied.

[3] Dale's motion raised other custodial issues that are not pertinent to our resolution of this case.

family's care and custody during active duty deployment." Holly explained that her "Army-retired husband and their two children" would live in on-base housing and that Kubicki would "assume most housekeeping and child care responsibilities."[4]

It is unclear whether the circuit court conducted the hearing scheduled for January 2013.[5] In an order dated January 11, 2013, the circuit court expanded Dale's parenting time and called for "the step-parent" to "have parenting time during the balance of the month." The court did not address Dale's objections to the referee's recommendation, and instead scheduled a single hearing concerning the custody and domicile motions. In April 2013, Dale filed a motion seeking modification of the January 11, 2013 order. He alleged that he had only recently learned that approximately two years earlier, Kubicki was arrested and charged with domestic violence after shooting Holly's dog. According to Dale's motion, Kubicki ultimately pleaded guilty to a charge of "killing an animal" and was sentenced to two years' probation. The motion further averred that, while in Kubicki's care, the child had been tardy from school on nine occasions and "wears dirty clothes," and that Kubicki did not help the child with his homework.

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[4] Daniel Kubicki has custody of a child born from an earlier relationship. He and Holly also have a child together.

[5] This Court has struggled to obtain the entire circuit court record in this case. The record initially produced was woefully incomplete. This Court's subsequent record requests have yielded only portions of the missing record items. The circuit court's disorganized and inefficient approach to its basic recordkeeping obligation has unnecessarily delayed and complicated our review. We remind the circuit court that the court rules require production of a complete record, "except for those things omitted by written stipulation of the parties." MCR 7.210(G). No such stipulation was filed. In the future, the circuit court is advised to produce the entire record when requested to do so by this Court.

On May 3, 2013, the circuit court entered an order awarding Dale "temporary custody," with Holly granted weekend parenting time upon her return from basic training. The order concluded: "This order shall remain in force and effect until there is a decision on [Holly's] motion for change of domicile."

At the outset of the June evidentiary hearing, the circuit court characterized the issue presented as involving Holly's change of domicile. The court acknowledged awareness of the pertinent language of MCL 722.27(1)(c) concerning the active military duty of a parent. Regarding Dale's motion to change custody, the circuit court stated:

> One of the other things that we talked about is whether this is a motion for change of custody and whether the Court has to look at all the best interests factors in making a determination on this matter. We will be moving forward with mother's Motion for Change of Domicile, and the Court will be looking at the factors that are involved with that, and then based on the facts the Court will have to make the determination of whether I have to apply the best interests factors to that.

Holly testified that she enlisted in the Army on January 2, 2013, completed basic training, and deployed to Fort Riley, Kansas, in May 2013. She described her job as a cook required her to work from 4:00 a.m. until 1:30 p.m. Holly secured a four-bedroom house on the base located in a community designated for families. She contemplated that Kubicki would care for the children during the morning, pack their lunches, and walk them to school. She would assume parenting responsibilities in the afternoon.

The focus of the hearing then turned to Kubicki's 2011 arrest. Holly recounted that on the day of his arrest, she and Kubicki had a "big fight" about her

12-pound miniature Doberman pinscher. The dog had bitten Kubicki and the children on many occasions, and Kubicki insisted that she get rid of it. The argument escalated. Kubicki took Holly's identification papers and a cable modem. Holly responded by telling Kubicki that she had hidden something of his. The two then fought over a phone charger, which broke. Kubicki threw Holly's dog across the kitchen, and the two moved their dispute outside. While Kubicki choked the dog, Holly bit Kubicki's wrist. Although Holly claimed in a written statement that Kubicki had pulled her hair, she recanted at the hearing, asserting that he merely "pulled" his fingers through it. When she stopped biting Kubicki, she kicked Kubicki's dog. He retrieved a pistol from the home, held her miniature pinscher in the air by the collar, and shot it in the head at point-blank range.

Holly told the police that she tried to leave the home with the children, but Kubicki forbade her from leaving with his son that was born from an earlier relationship. After she called 911, she and the children fled the scene. The police arrested Kubicki and seized two pistols and eight rifles from the home.

The prosecutor charged Kubicki with killing an animal, a four-year felony under MCL 750.50b, and use of a firearm in the commission of a felony in violation of MCL 750.227b. Kubicki pleaded guilty to the charge of killing an animal in exchange for dismissal of the felony-firearm charge. The court sentenced him to a two-year term of probation during which he was ordered to complete an anger-management program and a residential treatment program for posttraumatic stress disorder (PTSD) offered by the Veterans Administration (VA). Holly admitted that Kubicki had never entered the residential treatment program, insisting that he did not suffer from PTSD.

Kubicki explained that he had served for 6½ years in the Army and was medically discharged after a roadside bomb explosion fractured several bones in his cervical spine. The Army considers him 30% disabled and able to work. Kubicki admitted killing the dog, but expressed his belief that he had acted "in self defense from a dog that bit me[.]" Contrary to his wife's testimony, Kubicki conceded that he suffered from PTSD and that he had been treated for this disorder on approximately five occasions before the dog incident. Kubicki acknowledged that his plea agreement required him to obtain residential treatment for PTSD, but claimed that he had not been permitted to enroll because the VA program had no room for him. He claimed that he successfully completed the anger-management class. Despite having been diagnosed with "major depressive disorder" by the VA, Kubicki denied suffering from this condition and admitted that he did not take his prescribed antidepressant medication.

The circuit court engaged in the following dialogue with Kubicki:

> *The Court*: . . . [D]o you have something from [the] VA Hospital or can you provide the Court with anything showing that you have completed your treatment for [PTSD] and you're no longer considered to have that condition?
>
> *Kubicki*: I'm sure I can get with Dr. Smith or something on that, your Honor.
>
> *The Court*: You do understand that that's the essence of this case, right?
>
> *Kubicki*: Yes, your Honor.
>
> *The Court*: You do understand that, right?
>
> *Kubicki*: I do now, your Honor.
>
> *The Court*: You understand that the reason we're here is that [Dale] is worried about the safety of his son in your care and custody because of your [PTSD], you do understand that, right?

Kubicki: Yes, your Honor.

Dale testified that he works full-time as a diesel technician, is married, and has no other children. He shared his concern that Kubicki would act impulsively due to the PTSD and expressed dismay at the prospect of not being able to see his son regularly.

At the close of the evidentiary hearing, the circuit court first stated:

> [T]here is a statute that says the Court cannot change custody when one parent is in the active military. What the Court can do is order a temporary placement of the child with the other parent if I feel it's appropriate based on clear and convincing evidence which is a fairly high standard of proof. So the Court has to be convinced based on that standard that it would be better that it's in [DLS's] best interests that he stay with his father if I were to make that ruling.

The court then observed that its most recent custody order had only temporarily changed custody, continuing:

> And I want to state for the record that that order really should have said temporary -- that there is a temporary placement with father, that the parenting time -- that he's the primary placement of the child for parenting time purposes, it's not actually a change of custody.
>
> I don't know if I said that as clearly as I could have, but even though the order says temporary custody of the minor child is transferred to [Dale], it's really that the parenting time was changed to allow the child to be at dad's primarily while mom was at her basic training, because this Court doesn't have the authority to enter a custody change under these circumstances.

The court opined that, "from the Court's point of view, this case hinges on whether Mr. Kubicki has received sufficient treatment for the Court to be com-

fortable that [DLS] should continue to be living with his mother." The court explained that it lacked sufficient evidence regarding Kubicki's recovery from his PTSD and directed him to provide documentation regarding the current status of his PTSD within two weeks.

In a subsequent order the court reiterated:

> Daniel Kubicki shall procure and provide to the parties and the court, through [Holly's] counsel, a report by a medical professional or any other information on his diagnosis, treatment plan, and/or medical discharge regarding [PTSD] and Major Depressive Disorder. This must be done by 28 June 2013 or the Court will decide without this information.

In July 2013, the circuit court issued a written "Opinion and Order Modifying Parenting Time[.]" After summarizing the evidence produced during the hearing, the circuit court found that Kubicki had not "sought or obtained any additional treatment for his [PTSD]" since completing the required anger-management therapy. The court continued: "He did not provide the Court with a psychological evaluation nor did he ever attend an in-patient program for [h]is [PTSD]."

The circuit court prefaced its legal conclusions with the statement that: "Due to [Holly's] active military duty this Court cannot consider a change of custody. . . . Therefore, [the] Court will treat [Dale's] motion as a motion for Change of Parenting Time." The court found that Kubicki's proposed status as DLS's primary caregiver, his "mental health diagnosis, his failure to complete treatment, and his conviction for willfully killing the family dog" yielded a change of circumstances sufficient to reevaluate custody. The court continued:

To consider a change of parenting time i[n] this instance amounts to a request to change the child's placement to [Dale's] home. MCL [722.27(1)(c)] states:

. . . [when] a parent is in active military duty . . . the Court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child.

The Court must determine if a temporary change of placement is in the child's best interest. [Dale] must show this by clear and convincing evidence.

Since [Holly] has asked for a change in domicile to the state of Kansas, this Court finds that it is appropriate to apply the 12 best interest factors, since a change of placement to [Dale's] home amounts to a change of the child's established custody environment.

The court proceeded to the statutory best interests factors,[6] finding that Factors (a),(b), (c), (e), (h), and (j)

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[6] MCL 722.23 provides the statutory best interest factors "to be considered, evaluated, and determined by the court." These factors are:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

favored the parties equally. Factor (d), the court determined, "slightly" favored Dale, while Factors (f), (g), (k), and (*l*) favored Dale. In regard to Factor (i), the preference of the child, the court stated, "The parties did not want the Court to interview the child. Therefore, his preference has not been considered by the Court."

The court then turned to the *D'Onofrio*[7] factors, observing that Holly was required to show by a preponderance of the evidence that a change of domicile would serve the child's best interest. Although the court found that the move to on-base housing "has the capacity to improve the quality of life for [Holly's] family" and that Holly would likely comply with Dale's increased parenting time, the court apparently determined that Holly had not demonstrated by an evidentiary preponderance that a change of domicile was warranted. The court found that Dale "has met his burden of proof by clear and convincing evidence that a temporary change of placement is in the child's best interest." The court ordered that the parties continue to share joint custody,

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(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

[7] *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976), aff'd 144 NJ Super 352 (1976). The *D'Onofrio* factors have been codified in MCL 722.31(4). *Rittershaus v Rittershaus*, 273 Mich App 462, 469-470; 730 NW2d 262 (2007).

with Dale having "temporary physical placement of the child until further order of the Court." Holly now appeals.

II. ANALYSIS

A

Three different standards govern our review of a circuit court's decision in a child-custody dispute. We review findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A clear legal error occurs when the circuit court "incorrectly chooses, interprets, or applies the law . . . ." *Id*. at 881. De novo review applies to underlying issues of statutory interpretation. *People v Smith-Anthony*, 296 Mich App 413, 416; 821 NW2d 172 (2012).

B

Holly first challenges the circuit court's interpretation of the "active military duty" provision of the Child Custody Act, MCL 722.27(1)(c). We agree with Holly that the circuit court misconstrued the statute. The circuit court's flawed legal analysis does not yield a victory for Holly, however, as under the circumstances presented, the statute plainly permitted a custodial change.

We begin by examining the pertinent language of MCL 722.27(1)(c):

> If a motion for change of custody is filed during the time a parent is in active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's

> placement that existed on the date the parent was called to active military duty, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child.

When interpreting a statute, we must discern and give effect to the Legislature's intent. We accomplish this task by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written. *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585, 591; 766 NW2d 675 (2009).

The circuit court declared that "[d]ue to [Holly's] active military duty this Court cannot consider a change of custody." Contrary to this conclusion, the limitation on custodial changes stated in MCL 722.27(1)(c) applies only "[i]f a motion for change of custody is *filed* during the time a parent is in active military duty . . . ." (Emphasis added.) Dale brought his change of custody motion in November 2012, approximately two months before Holly enlisted in the Army. Because Dale sought to change the child's custody prior to Holly's enlistment, the statute did not foreclose a custodial change. Thus, the circuit court incorrectly concluded that Holly's intervening deployment deprived it of authority to change DLS's custody. Consequently, the circuit court need not have disguised its order by characterizing it as "modifying parenting time," when in reality the order changed the child's custody. Given the timing of Dale's motion, the text of MCL 722.27(1)(c) erected no barrier to this result.

Despite inaccurately styling its order as merely affecting parenting time, the circuit court employed the analysis required for a custodial change. As prescribed in *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003), the court first considered

whether Dale had established a change of circumstances or proper cause for a custodial change under MCL 722.27(1)(c). The court determined that Kubicki's enhanced role in the child's life fulfilled this standard, and Holly has not challenged this finding. The circuit court's consideration of the *Vodvarka* threshold signaled its awareness that custody rather than parenting time was at stake.[8]

The next step in a court's custody analysis requires a determination of the appropriate burden of proof. The child's established custodial environment governs this decision. A court may not modify or amend a previous judgment or issue a new custody order that changes a child's established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). A custodial environment "is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." *Id*. Whether an established custodial environment exists is a question of fact to which the great weight of the evidence standard applies. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). In evaluating this issue, the focus is on the care of the child during the period preceding the custody trial. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995).

The circuit court failed to articulate any findings specifically identifying DLS's established custodial en-

[8] The statutory requirement for a threshold finding of proper cause or a change of circumstances does not necessarily control a case involving modification of parenting time "absent a conclusion that a change in parenting time will result in a change in an established custodial environment." *Shade v Wright*, 291 Mich App 17, 25-27; 805 NW2d 1 (2010). Here, the court failed to clearly elucidate a finding regarding the child's established custodial environment.

vironment. Nevertheless, the court required Dale to prove the child's best interests "by clear and convincing evidence." Thus, the court implicitly found that the child's established custodial environment lay either with Holly or with both parents. Because the court held Dale to the highest standard of proof applicable to custody proceedings, the omission qualifies as harmless error. On remand, we instruct the court to explicitly state its established custodial environment finding and to support it with reference to pertinent facts.[9]

After finding grounds for a custodial evaluation, the circuit court made findings and rendered conclusions regarding the 12 best-interest factors set forth in MCL 722.23. By proceeding in this fashion, the court analyzed the evidence in the manner applicable to custody challenges. We discuss the court's best-interest analysis later in this opinion. For now, it suffices that we discern no *statutory* basis arising from Holly's deployment to disturb the court's finding that a temporary change in custody would serve DLS's best interests.

C

Holly next contends that several of the circuit court's best-interest findings contravened the great weight of the evidence. Except with regard to Factors (f) and (i), we find the court's factual findings well supported by the evidence.

We begin by reviewing the context of the court's best-interest analysis. After deciding that MCL 722.27(1)(c) precluded it from entertaining Dale's mo-

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[9] The circuit court's "temporary" custodial order may have precipitated a change in the child's established custodial environment. The determination remains intrinsically factual. The existence of the order, standing alone, does not establish a custodial environment. See *Baker v Baker*, 411 Mich 567; 309 NW2d 532 (1981).

tion to change DLS's custody, the circuit court considered Holly's request for a change of domicile. The court's formulation of the relevant domicile inquiry for the most part comported with the procedure set forth in *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013):

> A motion for a change of domicile essentially requires a four-step approach. First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4) . . . support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence.

The best-interest analysis called for in motions to change domicile is identical to that required for motions to change a child's custody. In both circumstances, the touchstone is the child's best interest. In reviewing Holly's best-interest arguments, we remain mindful that "a trial court's findings on each factor should be affirmed unless the evidence ' "clearly preponderates in the opposite direction." ' " *Fletcher*, 447 Mich at 879, quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959), quoting *Finch v W R Roach, Co*, 299 Mich 703, 713; 1 NW2d 46 (1941).

Holly first insists that the circuit court erred by finding that Factor (d), concerning "[t]he length of time the child has lived in a stable, satisfactory environment,

and the desirability of maintaining continuity," slightly favored Dale. The circuit court premised its decision on the facts that "[t]he child has lived his entire life in this area, has attended the same school, has extended family in the area and has thrived here." Holly argues that the court would have found differently had it acknowledged that the child's current stable living environment included her two other children. The circuit court's measurement of this factor as weighing only slightly in Dale's favor suggests a close call and that DLS's relationship with his stepbrother and his half brother played a part in the court's evaluation. The court's findings of fact specifically mention the other two children. "[T]he trial court's failure to address the myriad facts pertaining to a factor does not suggest that the relevant among them were overlooked." *Fletcher*, 447 Mich at 883-884. Accordingly, we find no reason to disturb the circuit court's conclusion.

Holly next contends that the circuit court's findings concerning Factor (e), which addresses "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." Factor (e) requires a court to "weigh all the facts" bearing on which parent likely can "best provide" the child "the benefits of a custodial home that is marked by permanence, as a family unit." *Ireland v Smith*, 451 Mich 457, 466; 547 NW2d 686 (1996). The circuit court found that this factor favored both parties equally, stating that DLS "has lived most of his life with [Holly] and firs[t,] her extended family, and then with her husband and their [two] children. [Dale]'s family has also been a stable family unit." Holly asserts that the court should have given greater weight to the fact that in Dale's custody, DLS would no longer live with the other two children. We find no error. The stability of DLS's living arrangement is at the core of Factors (d) and (e). While DLS would be separated from

his brothers if Dale was granted custody, moving to Kansas would result in a similar environmental disruption. The great weight of the evidence supports the neutrality of Factor (e).

Holly also criticizes the circuit court's finding that Factor (f), which addresses the moral fitness of the parties, favored Dale. The court's brief explanation for this finding provided: "The main concern to the Court in this factor is [Kubicki's] mental health issues and his felony conviction arising out of a dispute with [Holly]." Holly correctly points out that this factor concerns the *parties'* "moral fitness." Further, it focuses on moral "fitness *as a parent*." *Fletcher*, 447 Mich at 887. In *Fletcher*, the Supreme Court instructed that when evaluating this factor,

> courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. [*Id*.]

Kubicki's conduct and mental health may be considered under other best interest factors. On remand, the court must confine itself to an evaluation of the moral fitness of Holly and Dale as parents.

We discern a second error that mandates remand for a new best-interest hearing. The circuit court legally and harmfully erred by failing to consider the child's wishes when it made its best-interest determination. In regard to Factor (i), the court stated, "The parties did not want the Court to interview the child. Therefore, his preference has not been considered by the Court." Regardless whether the parties wished for an interview, the court was affirmatively required to consider the

child's preference. "One of the . . . factors a trial judge must consider in a custody dispute is the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference." *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991) (quotation marks and citation omitted). "Children of six, and definitely of nine, years of age are old enough to have their preferences given some weight in a custody dispute, especially where there was a prior custody arrangement." *Id*. at 55-56. At the time of the evidentiary hearing, the child was 10 years old, and as such, was "definitely . . . old enough to have [his] preference[] given some weight . . . ." *Id*. "The trial court's failure to interview the child[] was error requiring reversal." *Id*. at 56. Because the circuit court did not consider DLS's preference, we must vacate the circuit court's order and remand for a new custody hearing. On remand, the court may continue the child's placement with his father if the court again concludes that clear and convincing evidence of the child's best interest supports that placement. In making this determination, the court must reevaluate the child's established custodial environment and must also reanalyze the best-interest factors. In resolving both issues, the court should consider all up-to-date information brought to its attention.

We vacate the circuit court's opinion and order and remand for a new custody hearing. We do not retain jurisdiction.

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

GARDNER v DEPARTMENT OF TREASURY

NGO v DEPARTMENT OF TREASURY

MASELLI v DEPARTMENT OF TREASURY

Docket Nos. 315531, 315684, and 317171. Submitted June 4, 2014, at Lansing. Decided September 9, 2014, at 9:00 a.m. Leave to appeal sought.

After selling their homes, James and Susan Gardner, Liem and Alecia Ngo, and John and Jennifer Maselli sought refunds from the Department of Treasury of the transfer tax they had paid on the sales. The department denied the refund requests. Petitioners appealed in the Tax Tribunal, which reversed the department's decision in all three cases, holding that petitioners were entitled to refunds. The department appealed, and the appeals were consolidated by the Court of Appeals.

The Court of Appeals *held*:

Under MCL 207.523(1), the State Real Estate Transfer Tax Act (SRETTA) generally imposes a tax on written instruments when the instrument is recorded. However, a written instrument is exempt from the tax, under MCL 207.526(u), when (1) a principal residence exemption was claimed regarding the property under MCL 211.7cc, and (2) at the time the property was conveyed, the state equalized value (SEV) was less than or equal to the SEV on the date the property was acquired. But MCL 207.526(u) also contains a penalty clause, which states that after an exemption is claimed under Subsection (u), if the sale or transfer of property is found by the Treasurer to have been at a value other than true cash value, then a penalty equal to 20% of the tax shall be assessed in addition to the tax due under the act to the seller or transferor. The penalty clause requires a comparison of "value" to "true cash value." SRETTA, in MCL 207.522(g), defines the word "value" as the current or fair market worth in terms of legal monetary exchange at the time of transfer. Accordingly, when considering whether petitioners were entitled to a refund of the transfer taxes they paid, the Treasurer was required to consider how much petitioners were paid for their properties. The statute then required the Treasurer to compare that value to the true cash value

of each property. Although SRETTA does not define the term "true cash value," the General Property Tax Act (GPTA), in MCL 211.27(1), defines it as the usual selling price at the place where the property is at the time of assessment, being the price that could be obtained for the property at a private sale. SRETTA and the GPTA must be read *in pari materia* because they relate to the same subject and share a common purpose—taxation. Under the GPTA, the SEV represents 50% of the true cash value of a property for taxation purposes. MCL 207.526(u) plainly states that if the property was conveyed for a value different than its true cash value, the conveyance was not exempt from the transfer tax and the penalty clause applies. The Gardners sold their property for $875,000, although its true cash value was $749,600 (the SEV of $374,800 multiplied by two). The Ngos sold their property for $464,000, although its true cash value was $439,720 (the SEV of $219,860 multiplied by two). The Masellis sold their property for $470,000, although its true cash value was $397,060 (the SEV of $198,530 multiplied by two). Because none of the petitioners sold their property for its true cash value, the petitioners were not entitled to the exemption, and the Tax Tribunal erred when it ordered that the transfer taxes paid by petitioners be refunded.

Reversed.

OWENS, J., dissenting, would have affirmed the judgment of the Tax Tribunal. The purpose of the exemption is to provide relief for a homeowner in a declining market when the property's SEV has decreased from the time of purchase to the time of sale. The majority's interpretation of the penalty clause renders the statute effectively nugatory because a property will almost never sell for exactly twice the SEV. The term "true cash value" is synonymous with fair market value and refers to the probable price that a willing buyer and a willing seller would arrive at through arm's-length negotiation. In this case, petitioners were entitled to the exemption because the properties were the principal residences of the sellers, the properties had SEVs at the time of conveyance that were less than or equal to the SEVs those properties had at the time they were acquired, and the properties were sold at prices resulting from arm's-length negotiations.

TAXATION — PROPERTY — TRANSFER TAXES — EXEMPTION — TRUE CASH VALUE.

Under MCL 207.526(u), a written instrument is exempt from the transfer tax imposed under the State Real Estate Transfer Tax Act when (1) a principal residence exemption was claimed regarding the property under MCL 211.7cc, (2) at the time the property was conveyed, the state equalized value (SEV) was less than or equal to

the SEV on the date the property was acquired, and (3) the property was conveyed for its true cash value; the SEV represents 50% of the true cash value of a property for taxation purposes; if the sale or transfer of property is found by the Treasurer to have been at a value other than true cash value, then a penalty equal to 20% of the tax shall be assessed in addition to the tax due under the act to the seller or transferor.

1-800-LAW-FIRM, PLLC (by *Joshua T. Shillair*), for James and Susan Gardner, Liem and Alecia Ngo, and John and Jennifer Maselli.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *B. Eric Restuccia*, Deputy Solicitor General, and *Matthew B. Hodges*, Assistant Attorney General, for the Department of Treasury.

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

CAVANAGH, P.J. In these consolidated appeals, the Department of Treasury (respondent) appeals as of right judgments of the Michigan Tax Tribunal (Tax Tribunal) awarding refunds of the transfer tax that each petitioner paid pursuant to the State Real Estate Transfer Tax Act (SRETTA) when they sold their homes, on the ground that the conveyances were exempt under MCL 207.526(u). We reverse.

The facts are not disputed. All of the petitioners were entitled to the principal residence exemption under MCL 211.7cc. And at the time each petitioner sold their home, the state equalized value (SEV) was less than the SEV at the time of their purchase. In particular, petitioners James and Susan Gardner purchased their home in 2008 when the SEV was $464,300, but sold it for $875,000 when the SEV was $374,800. Petitioners Liem and Alecia Ngo purchased their home in 2007 when the SEV was $321,180, but sold it for $464,000

when the SEV was $219,860. Petitioners John and Jennifer Maselli purchased their home in 2004 when the SEV was $303,370, but sold it for $470,000 when the SEV was $198,530.

Upon the sale of their homes, each petitioner paid the transfer tax under SRETTA, MCL 207.523, and then requested a refund from respondent under MCL 207.526(u), which provides that certain written instruments and transfers of property are exempt from the transfer tax, including:

> A written instrument conveying an interest in property for which an exemption is claimed under section 7cc of the general property tax act, 1893 PA 206, MCL 211.7cc, if the state equalized valuation of that property is equal to or lesser than the state equalized valuation on the date of purchase or on the date of acquisition by the seller or transferor for that same interest in property. If after an exemption is claimed under this subsection, the sale or transfer of property is found by the treasurer to be at a value other than the true cash value, then a penalty equal to 20% of the tax shall be assessed in addition to the tax due under this act to the seller or transferor. [MCL 207.526(u).]

Respondent denied each petitioner's request for a refund of the transfer tax, concluding that they were not entitled to the exemption because each property sold for more than its "true cash value." Respondent interpreted the penalty clause phrase "true cash value" as meaning two times the SEV, consistent with the annual property tax assessment process. Thereafter, each petitioner appealed in the Tax Tribunal.

In each appeal, the Tax Tribunal held that the first sentence of MCL 207.526(u) is unambiguous and sets forth two elements that must be met to qualify for the transfer tax exemption: (1) a principal residence exemption was claimed regarding the subject property under MCL 211.7cc, and (2) at the time the subject property

was conveyed, the SEV was less than or equal to the SEV on the date the property was acquired. However, the Tax Tribunal opined, when the first sentence of the statute is read in conjunction with the second sentence—the penalty clause—the statute becomes ambiguous because the penalty clause would only allow an exemption when the value or sale price of the property is the same as its true cash value, which constituted an absurdity that was unintended by the Legislature. In reaching this conclusion, the Tax Tribunal rejected respondent's argument that true cash value means two times the SEV, noting that MCL 211.27(1) defines "true cash value" as "the usual selling price" and "the price that could be obtained for the property at private sale . . . ." Further, the Tax Tribunal held that respondent failed to carry its burden of proving that the penalty provision applied and, therefore, each petitioner was entitled to a refund of the transfer tax. Respondent appealed in each case, and the appeals were consolidated. *Gardner v Dep't of Treasury*, unpublished order of the Court of Appeals, entered December 10, 2013 (Docket Nos. 315531, 315684, and 317171).

Respondent argues that the Tax Tribunal erred when it determined that each conveyance was exempt from transfer tax because, according to respondent, petitioners sold their properties for more than the true cash value of each property. We agree.

When the facts are not in dispute and there is no claim of fraud, decisions of the Tax Tribunal are reviewed to determine whether the tribunal made an error of law or adopted a wrong legal principle. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). We review de novo issues of statutory interpretation. *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

Generally, SRETTA imposes a tax upon written instruments when the instrument is recorded. MCL 207.523(1). However, MCL 207.526 sets forth several exemptions and provides, in relevant part:

> The following written instruments and transfers of property are exempt from the tax imposed by this act:
>
> * * *
>
> (u) A written instrument conveying an interest in property for which an exemption is claimed under section 7cc of the general property tax act, 1893 PA 206, MCL 211.7cc, if the state equalized valuation of that property is equal to or lesser than the state equalized valuation on the date of purchase or on the date of acquisition by the seller or transferor for that same interest in property. If after an exemption is claimed under this subsection, the sale or transfer of property is found by the treasurer to be at a value other than the true cash value, then a penalty equal to 20% of the tax shall be assessed in addition to the tax due under this act to the seller or transferor.

The foremost rule of statutory interpretation "is to discern and give effect to the intent of the Legislature." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). Each word or phrase of a statute is given its commonly accepted meaning, unless a word or phrase is expressly defined, and then courts must apply it in accordance with that definition. *McAuley*, 457 Mich at 518. Unambiguous language is given the intent clearly expressed and the statute is enforced as written. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Judicial construction of unambiguous language is not permitted. *Id*. Interpretation strives to give effect to every phrase, clause, and word in a statute. *Id*. at 237. "To discern the true intent of the Legislature, the statutes must be read together, and no

one section should be taken in isolation." *Apsey v Mem Hosp*, 477 Mich 120, 132 n 8; 730 NW2d 695 (2007).

The parties agree with the Tax Tribunal that the first sentence of MCL 207.526(u) imposes two requirements for the exemption to apply: (1) a principal residence exemption was claimed regarding the subject property under MCL 211.7cc, and (2) at the time the subject property was conveyed, the SEV was less than or equal to the SEV on the date the property was acquired. The dispute regards the statute's second sentence, the penalty clause.

Respondent argues that the Tax Tribunal failed to accord the proper and distinct meanings to the word "value" and the phrase "true cash value" used in the penalty clause. The word "value" is defined in SRETTA as "the current or fair market worth in terms of legal monetary exchange at the time of the transfer." MCL 207.522(g). However, respondent argues, "[T]rue cash value as used in MCL 207.526(u) means the true cash value assigned by the assessor in that year. And, because property is assessed at 50% of the true cash value, subject to county equalization, true cash value will always be two times the state equalized value." Respondent further argues that the statute's use of the phrase "other than" means "greater than" with respect to the true cash value because that construction allows for a transfer tax exemption in a declining market.

To the contrary, petitioners argue, the General Property Tax Act (GPTA) defines "true cash value" as the usual selling price or price that could be expected at a private sale of the property. MCL 211.27(1). And "true cash value," according to petitioners, is synonymous with "fair market value." See *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974). Further, SRETTA and the GPTA must be read

in pari materia because they both relate to the same subject, taxation, and SRETTA specifically refers to the GPTA and its terms. Accordingly, petitioners argue, to establish that the penalty clause was applicable here, respondent was required to prove that petitioners' properties were sold for a value other than fair market value, i.e., the price that a willing buyer and a willing seller would arrive at through arm's-length negotiation. Because respondent failed to provide any such evidence, the Tax Tribunal properly found that the penalty clause did not apply and petitioners were entitled to a refund of the transfer tax they paid.

There is some merit to both parties' arguments on appeal. We agree with respondent that the Tax Tribunal erred as a matter of law by concluding that MCL 207.526(u) is ambiguous when its two sentences are considered together. Although the Tax Tribunal's interpretation of a state statute is entitled to respectful consideration, the tribunal's interpretation is not controlling and cannot overcome a statute's plain meaning. See *In re Rovas Complaint*, 482 Mich 90, 117-118; 754 NW2d 259 (2008). The statute at issue here is not ambiguous; the word "value" and the phrase "true cash value" have clear meanings.

SRETTA defines the word "value"; thus, that definition controls. See *McAuley*, 457 Mich at 518. Specifically, MCL 207.522(g) defines "value" as "the current or fair market worth in terms of legal monetary exchange at the time of the transfer. The tax shall be based on the value of the real property transferred . . . ." See also MCL 207.525. A well-established rule of statutory construction is that statutory language must be read within its particular context. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). The statutory provision at issue here requires a

comparison of "value" to "true cash value" for purposes of property taxation. Thus, "value" refers to the worth, in monetary terms, of what was exchanged for the real property in which the exemption was claimed. This definition is consistent with the definition provided by *Black's Law Dictionary* (7th ed), which defines "value" as "[t]he monetary worth or price of something; the amount of goods, services, or money that something will command in an exchange." And, similarly, as this Court noted in *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 326; 725 NW2d 80 (2006), the definition of "value" in *Random House Webster's College Dictionary* (1997) is: " 'monetary or material worth, as in commerce," and "the worth of something in terms of some medium of exchange . . . .' " Accordingly, in these cases, when considering whether petitioners were entitled to a refund of the transfer taxes they paid, the Treasurer was required to consider how much petitioners were paid for their properties.

The statute then requires the Treasurer to compare that "value" to the "true cash value" of the subject property. Although SRETTA does not define "true cash value," the GPTA specifically defines "true cash value" for purposes of taxation as "the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale . . . or at forced sale." MCL 211.27(1). In accordance with well-established principles of statutory construction, statutory provisions of SRETTA and the GPTA are *in pari materia* because they relate to the same subject and share a common purpose—taxation. See *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998), quoting *Detroit v Mich Bell Tel Co*, 374 Mich 543, 558; 132 NW2d 660 (1965), overruled on other grounds by *City of Taylor v*

Detroit Edison Co, 475 Mich 109, 119 (2006). Thus, we consider the definition of "true cash value" set forth in GPTA applicable for purposes of SRETTA.

Essentially, then, MCL 207.526(u) requires consideration of how much claimants of the transfer tax exemption were paid for their properties compared to how much their properties were worth for taxation purposes. In Michigan, the true cash value, or worth, of a property is used to assess property taxes. That is, property must be assessed at 50% of its "true cash value." MCL 211.27a(1), citing Const 1963, art 9, § 3. The manner in which the assessment occurs is prescribed by law. See, for example, MCL 211.27. Generally, after the local tax assessor assesses each property at 50% of its true cash value, the assessment rolls are then subjected to an equalization process at both the county level, MCL 211.34(2), and state level, MCL 209.4(1), to ensure that taxing units "have equally and uniformly assessed property at fifty percent of its true cash value." *Fairplains Twp v Montcalm Co Bd of Comm'rs*, 214 Mich App 365, 369; 542 NW2d 897 (1995), citing *Emmet Co v State Tax Comm*, 397 Mich 550, 560; 244 NW2d 909 (1976) (WILLIAMS, J., dissenting). See also *WPW Acquisition Co v City of Troy*, 250 Mich App 287, 300-301; 646 NW2d 487 (2002). Thus, as respondent argued, the SEV represents 50% of the true cash value of a property for taxation purposes.[1]

And, pursuant to MCL 211.31, upon completion and endorsement of the assessment roll, "the same shall be conclusively presumed by all courts and tribunals to be valid, and shall not be set aside except for causes

[1] MCL 205.737(2) also directs the Tax Tribunal that, when determining SEV in an assessment dispute: "The property's state equalized valuation shall not exceed 50% of the true cash value of the property on the assessment date."

hereinafter mentioned." See also MCL 205.735(2) ("For an assessment dispute as to the valuation of property or if an exemption is claimed, the assessment must be protested before the board of review before the tribunal acquires jurisdiction of the dispute . . . ."). In this case, none of the petitioners protested their assessments or filed an assessment appeal; therefore, petitioners' assessments are conclusively presumed to be valid with regard to their properties. See *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767-768; 314 NW2d 479 (1981) ("[T]he conclusive presumption of validity as to an individual assessment arises only after an appeal is decided or the time for appeal has expired with respect to such parcel."). Accordingly, to determine whether each petitioner was entitled to the transfer tax exemption, the Treasurer had to compare how much was paid for each property to the value of the SEV multiplied by two, the property's undisputed true cash value.

However, when considering whether a claim for exemption has merit, the Treasurer must also determine whether the sale or transfer of property was "at a value *other than* the true cash value . . . ." MCL 207.526(u) (emphasis added). Respondent argues that the phrase "other than" should be construed to mean "greater than," consistent with an opinion by the Attorney General, which concluded that an exemption may be claimed provided that the property is sold for "not more than" its true cash value. OAG, 2007-2008, No. 7214, p 125 (April 3, 2008). That is, according to the Attorney General, this penalty clause applies only if the sale price was in excess of the true cash value of the property. *Id*. at p 128. However, opinions of the Attorney General are not binding on Michigan courts. *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 338; 414 NW2d 873 (1987). And we disagree with the constructions of the phrase "other than" offered by respondent and the Attorney General.

Simply stated, "other than" does not mean "greater than"; rather, it plainly means "different." See MCL 8.3a. Thus, if the property was conveyed for a value different than its true cash value, the conveyance is not exempt from the transfer tax and the penalty clause applies. Tax exemption statutes "are to be strictly construed in favor of the taxing unit." *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 753; 298 NW2d 422 (1980) (citation and quotation marks omitted). Accordingly, if the subject property was conveyed for a value less than or greater than its true cash value, the conveyance is not exempt from the transfer tax and the penalty clause applies if a claim for exemption or a claim for a refund of the transfer tax is made. By way of explanation, we offer the following examples: (A) if the true cash value of the subject property is $100,000 and it was sold for $50,000, the conveyance is not exempt from the transfer tax; (B) if the true cash value of the subject property is $100,000 and it was sold for $150,000, the conveyance is not exempt from the transfer tax. In the first hypothetical, the seller sold the property for less than its fair market value; a reasonably prudent seller would not typically sell below fair market value[2] and may have structured the sale to avoid paying the transfer tax or may not have consummated the sale through an arm's-length transaction. In any case, the conveyance is not exempt from the transfer tax. The second hypothetical is clear; the seller sold the property for more than its true cash value and the conveyance is not exempt from the transfer tax.

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[2] The concepts of "true cash value" and "fair market value" are synonymous for purposes of ad valorem taxation of property. *CAF Investment Co*, 392 Mich at 450. Further, as this Court noted in *Mackey v Dep't* of *Human Servs*, 289 Mich App 688, 699; 808 NW2d 484 (2010), *Black's Law Dictionary* (7th ed) defines "fair market value" as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction . . . ."

This strict construction in favor of the taxing unit may seem harsh but, as noted by our Supreme Court, tax exemptions represent the "antithesis of tax equality" because they result in "the unequal removal of the burden generally placed on all landowners to share in the support of local government." *Mich Baptist Homes & Dev Co v Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976). This interpretation is also consistent with the principles set forth by our Supreme Court in *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), regarding the construction of tax exemptions:

> "[I]t is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. . . . Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant." [Quoting 2 Cooley, Taxation (4th ed), § 672, p 1403.]

In this case, if petitioners sold their properties for more than or less than the true cash value of their properties, i.e., the value of the SEV doubled, the transfer tax was properly paid and they were not entitled to a refund. Again, the burden of proving entitlement to an exemption is on the party claiming the right to the exemption, *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 150; 549 NW2d 837

(1996), and that party must prove entitlement by a preponderance of the evidence, *ProMed Healthcare v Kalamazoo*, 249 Mich App 490, 494-495; 644 NW2d 47 (2002). Petitioners Gardner sold their property for $875,000, although its true cash value was $749,600 (the SEV of $374,800 multiplied by two). Therefore, petitioners Gardner were not entitled to a refund of the transfer tax they paid and the Tax Tribunal's decision is reversed. Petitioners Ngo sold their property for $464,000, although its true cash value was $439,720 (the SEV of $219,860 multiplied by two). Therefore, petitioners Ngo were not entitled to a refund of the transfer tax they paid and the Tax Tribunal's decision is reversed. Petitioners Maselli sold their property for $470,000, although its true cash value was $397,060 (the SEV of $198,530 multiplied by two). Therefore, petitioners Maselli were not entitled to a refund of the transfer tax they paid and the Tax Tribunal's decision is reversed. Accordingly, we reverse the decisions of the Tax Tribunal in each case. Petitioners were not entitled to a refund of the transfer tax paid with regard to each conveyance.

Reversed.

STEPHENS, J., concurred with CAVANAGH, P.J.

OWENS, J. (*dissenting*). I respectfully dissent from the majority opinion and, for the reasons set forth in this opinion, would affirm the judgments of the Tax Tribunal.

MCL 207.526(u) provides a seller or transferor an exemption from the state real estate transfer tax if (1) the seller or transferor claimed a principal residence exemption for the subject property under MCL 211.7cc, and (2) the state equalized value (SEV) at the time the

property was conveyed was equal to or lesser than the SEV on the date the property was acquired. The purpose of this exemption is to provide relief for homeowners in a declining market when the property's SEV decreased from the time of purchase to the time of sale.

The second sentence of subsection (u), which is in dispute, states:

> If after an exemption is claimed under this subsection, the sale or transfer of property is found by the treasurer to be at a value other than the true cash value, then a penalty equal to 20% of the tax shall be assessed in addition to the tax due under this act to the seller or transferor.

The majority's interpretation of this clause, known as the "penalty clause," renders the statute effectively nugatory. From the plain language of the statute, it is clear that the Legislature intended for a penalty to be assessed when a seller or transferor claimed the exemption and the sale was "at a value other than the true cash value . . . ." In other words, the Legislature did not intend for the exemption to apply to situations in which a seller or transferor sold their house at a value other than the true cash value.

The majority defines "true cash value" to mean the SEV of the property multiplied by two. According to the majority, the exemption would only apply if a property sold for exactly twice the SEV. The problem with employing this definition is that the exemption would become virtually nonexistent because a property will almost never sell for exactly twice its SEV. Although an assessor does his or her best, twice the SEV can only ever be an estimate of the true cash value, and that is why, unless the assessor is particularly lucky, sales are almost never exactly twice the SEV. This cannot be what the Legislature intended when it enacted an

exemption designed to protect homeowners in a declining market.

Rather, it is an arm's-length sale that, by definition, gives us the true cash value. "True cash value is synonymous with fair market value, and refers to the probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation." *Detroit Lions, Inc v Dearborn*, 302 Mich App 676, 696; 840 NW2d 168 (2013) (citations and quotation marks omitted). By this definition, then, the exemption would not apply only when a seller or transferor sold the property at a value other than the price that a willing buyer and a willing seller would arrive at through arm's-length negotiation. *Id*. Therefore, to claim the transfer-tax exemption, the property must be the principal residence of the seller or transferor, must have an SEV at the time of conveyance that is lesser than or equal to the SEV at the time it was acquired, and must be sold or transferred at a price resulting from an arm's-length sale. Employing this definition best effectuates the legislative intent, which is the foremost rule of statutory construction. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

Applying this construction to the present cases, I would affirm the judgments of the Tax Tribunal. Petitioners were selling their principal residences, the SEV of each property at the time of conveyance was lesser than the SEV at the time it was acquired, and the sales were conducted through arm's-length negotiations. Because the requirements of MCL 207.526(u) were met in all three cases, petitioners were entitled to the exemption, and therefore, the Tax Tribunal did not err by awarding refunds of the transfer tax that they each paid.

PEOPLE v DUNBAR

Docket No. 314877. Submitted April 1, 2014, at Grand Rapids. Decided September 9, 2014, at 9:05 a.m. Leave to appeal sought.

Charles Almando-Maurice Dunbar was charged in the Muskegon Circuit Court with various controlled substance and weapons crimes in connection with items seized from his pickup during a traffic stop. Defendant had a trailer towing ball attached to the rear bumper, and the police officers were unable to read one of the seven characters on the pickup's license plate. They stopped defendant after concluding that he was violating MCL 257.225(2), which provides that a vehicle's license plate must be maintained free of foreign materials that obscure or partially obscure the registration information and in a clearly legible condition. Defendant moved to suppress the evidence of the contraband discovered on the grounds that the traffic stop violated his rights under the Fourth Amendment and Const 1963, art 1, § 11. The court, Timothy G. Hicks, J., denied the motion, and defendant appealed by leave granted.

In separate opinions, the Court of Appeals *held*:

Defendant did not violate MCL 257.225(2), and the trial court erred by denying his motion to suppress the contraband.

SHAPIRO, J., stated in the lead opinion that when the officers initiated the traffic stop, they had no basis to believe that defendant was engaged in any criminal conduct. They testified that defendant was driving safely, that they did not see him violate any traffic laws governing vehicle operation, and that he did not engage in any suspicious behavior. The sole basis for the stop was their conclusion that defendant was violating MCL 257.225(2), but the circumstances observed by the officers did not constitute a violation of that statute. The mere presence of a towing ball was not a violation of MCL 257.225(2), which requires that the license plate be maintained free from foreign materials and kept in a legible condition. The statute does not refer to trailer hitches, towing balls, or other commonly used towing equipment that might partially obscure the view of an otherwise legible plate. There was no evidence that the plate on defendant's truck was not maintained free of foreign materials.

There was no evidence that defendant's plate was dirty, rusted, defaced, scratched, snow-covered, or otherwise not maintained in legible condition, and the officers agreed that it was legible. Because the officers did not have grounds to believe that defendant was violating MCL 257.225(2), the search was conducted in violation of the Fourth Amendment.

O'CONNELL, J., concurred with the lead opinion's result but stated that MCL 257.225(2) is ambiguous, and to avoid a construction that would render the statute unconstitutionally void for vagueness, it must be interpreted as requiring only that the license plate itself be maintained free from materials that obscure the registration information and that the plate itself be in a clearly legible condition. The subject matter of MCL 257.225 is the physical location and condition of license plates, and it does not address trailer hitches or other types of car equipment. Given the limited subject matter of the statute, it was necessary to interpret MCL 257.225(2) as prohibiting physical obstructions affixed to license plates. Because there was no evidence of any obstruction affixed to defendant's license plate, there was no evidence that he was in violation of MCL 257.225(2).

Reversed.

METER, P.J., dissented and stated that the trial court did not clearly err by concluding that a trailer hitch obstructed defendant's license plate. The deputies could not see the entire license plate number because it was obstructed, and the trial court correctly determined that the obstruction of the number provided a lawful basis for the traffic stop. Therefore, it was not necessary to suppress the drugs and handgun seized during the traffic stop. The lead and concurring opinions incorrectly concluded that MCL 257.225(2) concerns only items that touch the plate itself. The statute, however, refers to keeping the plate free from obstructing materials. A license plate that is in otherwise perfect condition but cannot be read because of obstructing materials is not being kept in a clearly legible condition. Judge METER would have affirmed.

MOTOR VEHICLES — LICENSE PLATES — TRAILER HITCHES — OBSCURED PLATE.

The mere presence of a towing ball that partially obscures the license plate on a vehicle by itself is not a violation of MCL 257.225(2), which provides that a vehicle's license plate must be maintained free of foreign materials that obscure or partially obscure the registration information and in a clearly legible condition.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Michael L. Oakes for defendant.

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

SHAPIRO, J. This case arises out of an October 12, 2012 traffic stop during which police officers discovered contraband in defendant's pickup truck. Defendant moved to suppress the evidence of the discovered contraband on the grounds that the traffic stop violated his rights under the Fourth Amendment of the United States Constitution and Article 1, § 11 of the Michigan Constitution. The trial court denied the motion, and we granted defendant's application for leave to appeal. Because no traffic violation had occurred or was occurring, we reverse.[1]

The Fourth Amendment guarantees "[t]he right of the people . . . against unreasonable searches and seizures . . . ." US Const, Am IV. "An automobile stop is . . . subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. . . . [T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996); see also *People v Kazmierczak*, 461 Mich 411, 420 n 8; 605 NW2d 667 (2000); *People v Davis*, 250 Mich App 357, 363-364; 649 NW2d 94 (2002).

The prosecution concedes that when the officers initiated the traffic stop they had no basis to believe

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[1] We review de novo a trial court's ruling on a motion to suppress. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

that defendant was engaged in any criminal conduct. In addition, the officers testified that defendant was driving safely, they did not see him violate any traffic laws governing vehicle operation, and he did not engage in any suspicious behavior. They testified that the sole basis for the stop was their conclusion that defendant was violating a traffic law, MCL 257.225(2), which provides in pertinent part that "[a vehicle's license] plate shall be maintained free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition."[2] We conclude that the circumstances observed by the officers did not constitute a violation of this statute.

As noted, the officers testified that defendant was driving safely and lawfully when they stopped him. They explained that when they have no other matters to attend to on patrol, as a matter of course they randomly enter the license plate numbers of cars they are following, a practice that sometimes reveals that the driver is subject to an outstanding warrant. According to the officers' testimony, they had difficulty reading one of the seven characters on the pickup's license plate due to the presence of a trailer towing ball attached to the rear bumper. One of the officers testified that he was able to determine, while driving behind defendant, that the license plate number was either CHS *6*818 or CHS *5*818. It was, in fact, CHS 6818.

Common experience reveals that thousands of vehicles in Michigan are equipped with trailer hitches and towing balls. The prosecution argues, however, that the presence of that equipment behind a license plate is a violation of MCL 257.225(2) and, therefore, the officers

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[2] As amended by 2014 PA 26. MCL 257.225(a) as amended by 1995 PA 129 was the version in effect at the time of the traffic stop, but it had only slight grammatical differences that do not affect the analysis.

had proper grounds to conclude that a traffic law was being violated. However, the mere presence of a towing ball is not a violation of MCL 257.225(2). The statute provides that "[*t*]*he plate* shall be maintained free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition." (Emphasis added.) The statute makes no reference to trailer hitches, towing balls, or other commonly used towing equipment that might partially obscure the view of an otherwise legible plate. There is no evidence that *the plate* on defendant's truck was not maintained free of foreign materials. There is similarly no evidence that defendant's plate was dirty, rusted, defaced, scratched, snow-covered, or otherwise not "maintained" in legible condition. The plate was well lit and in essentially pristine condition. Moreover, the officers agreed that the plate was legible, a fact confirmed by the photos taken at the scene.

In this case, the officers did not have grounds to believe that defendant was in violation of MCL 257.225(2) and they, as well as the prosecution, agree there was no other basis for the stop. Accordingly, we reverse the trial court's denial of defendant's motion to suppress the contraband seized during an automobile search conducted in violation of the Fourth Amendment. *Whren*, 517 US at 809-810.

Reversed. We do not retain jurisdiction.

O'CONNELL, J. (*concurring*). I concur with the result reached by the lead opinion. I write separately to state that MCL 257.225(2) is ambiguous. In fact, the statute casts a net so wide that it could be construed to make ordinary car equipment illegal, including equipment like bicycle carriers, trailers, and trailer hitches. This broad construction would render the statute unconsti-

tutionally vague for failure to provide fair notice of the conduct the statute purports to proscribe. See *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007). However, this Court must construe statutes as constitutional if possible and must examine statutes in light of the particular facts at issue. *People v Harris*, 495 Mich 120, 134; 845 NW2d 477 (2014). Accordingly, I would interpret MCL 257.225(2) to require only that the *license plate itself* be maintained free from materials that obscure the registration information and that the *plate itself* be in a clearly legible condition.

This interpretation is consistent with the fair and natural import of the provisions in MCL 257.225(2) in view of the statute's subject matter. See *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009) (stating that provisions should be construed by considering the subject matter of the statute). The subject matter of MCL 257.225 is the physical location and condition of license plates: Subsection (1) addresses the license plate's location on a vehicle, Subsection (3) addresses the colors used on license plates and expiration tabs, and Subsections (4) and (5) address name plates, insignias, and advertising devices that could obscure the registration information on license plates. MCL 257.225(1), (3), (4), and (5).[1] The statute does not address trailer hitches or other types of car equipment. Given the limited subject matter of the statute, this Court should interpret Subsection (2) of the statute to prohibit physical obstructions affixed to license plates.

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[1] After defendant's arrest in this case, the Legislature amended MCL 257.225 to add a subsection addressing license plates on historic military vehicles. MCL 257.225(6), as amended by 2014 PA 26. The amendment also made minor punctuation and grammatical changes in Subsection (2). MCL 257.225(2), as amended by 2014 PA 26.The changes are not relevant to the analysis in this case.

See *People v Gaytan*, 2013 Ill App 120217, ¶¶ 38-40; 372 Ill Dec 478; 992 NE2d 17 (2013), lv granted 996 NE2d 18 (Ill, 2013).

In this case, there is no evidence of any obstruction affixed to defendant's license plate. Consequently, there is no evidence that defendant was in violation of MCL 257.225(2), and the circuit court decision must be reversed.

METER, P.J. (*dissenting*). For the reasons set forth below, I respectfully dissent. I would affirm the denial of defendant's motion to suppress the evidence.

This case arises out of a traffic stop of defendant's vehicle. On October 12, 2012, at approximately 1:00 a.m., deputies of the Muskegon County Sherriff's Department stopped defendant's truck on the basis of an obstructed license plate. After stopping defendant's vehicle, deputies found cocaine, marijuana, and a handgun.

Defendant argues that the deputies did not have a lawful basis for stopping his truck and that his motion to suppress should have been granted. "A trial court's ruling on a motion to suppress evidence is reviewed for clear error, but its conclusions of law are reviewed de novo." *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Malone*, 287 Mich App 648, 663; 792 NW2d 7 (2010) (citation and quotation marks omitted). If the trial court was in a superior position to assess the evidence, we will give deference to the trial court's resolution of factual issues, especially when it involved the credibility of witnesses. MCR 2.613(C); *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

The lawfulness of a search or seizure depends upon its reasonableness. See *Virginia v Moore*, 553 US 164, 171; 128 S Ct 1598; 170 L Ed 2d 559 (2008). "In order to effectuate a valid traffic stop, a police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009) (citation and quotation marks omitted). MCL 257.225(2) provides that a license plate "shall be maintained free from foreign materials that obscure or partially obscure the registration information and in a clearly legible condition."[1] A violation of MCL 257.225(2) constitutes a civil infraction. MCL 257.225(7). "A police officer who witnesses a civil infraction may stop and temporarily detain the offender . . . ." *People v Chapo*, 283 Mich App 360, 366; 770 NW2d 68 (2009).

The record shows that the trial court did not clearly err by concluding that defendant's license plate was obstructed by a trailer hitch. At the hearing, the deputies testified that they could not see the entire license plate number because it was obstructed by a trailer hitch. The trial court determined that the deputies were credible, which is a determination that we will not disturb. See MCR 2.613(C) and *Farrow*, 461 Mich at 209. Additionally, the trial court's finding is supported by pictures taken at the scene, which show that defendant's license plate was obstructed.

Further, because police officers may stop and detain an individual who commits a civil infraction, *Chapo*, 283 Mich App 366, the trial court correctly determined that the obstruction of defendant's license plate num-

[1] MCL 257.225 was amended by 2014 PA 26 after the incident in this case, but the changes to the pertinent subsections are immaterial for purposes of this appeal.

ber provided a lawful basis for the traffic stop pursuant to MCL 257.225(2) and that suppression of the drugs and handgun seized during the traffic stop was not required.

It is simply unreasonable to expect police officers to essentially "weave" within a lane in order to view the entire license plate of a vehicle.[2] Moreover, the lead and concurring opinions appear to indicate that the pertinent phrase from MCL 257.225(2)—"[t]he plate shall be maintained free from foreign materials . . . and in a clearly legible condition"—concerns only items that touch the plate itself. This is not a reasonable reading of the statute. What if, for example, a person attached a sort of shield that entirely covered his or her license plate but did not touch the plate itself? Clearly the statute refers to keeping the plate free from obstructing materials. *Random House Webster's College Dictionary* (1997) defines "maintain," in part, as "to keep in a specified state, position, etc." A license plate that is in otherwise perfect condition but cannot be read because of obstructing materials is not being "kept" in "a clearly legible condition."[3]

I would affirm.

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[2] Nor should officers be required to enter multiple possible numbers into their computers to try to ascertain the correct license plate number for a vehicle.

[3] Because it is not in issue here, I do not reach the question regarding whether a properly licensed, attached trailer that obscures a vehicle's license plate would be grounds for a traffic stop. As noted in the concurring opinion, this Court must find a statute constitutional unless its unconstitutionality is clearly apparent and, as long as First Amendment concerns are not present in conjunction with a vagueness issue, this Court must examine a statute in light of the particular facts at issue. *People v Harris*, 495 Mich 120, 134; 845 NW2d 477 (2014); *People v Williams*, 142 Mich App 611, 613; 370 NW2d 7 (1985). I conclude that MCL 257.225(2) is constitutional as applied to the present facts and also conclude that it provided a valid basis for the traffic stop.

In re CONTEMPT OF DORSEY

Docket No. 309269. Submitted February 8, 2013, at Lansing. Decided September 9, 2014, at 9:10 a.m. Leave to appeal sought.

A delinquency petition was filed in the Livingston Circuit Court, Family Division, charging Tyler Dorsey, a minor, with carrying a dangerous weapon with unlawful intent, receiving and concealing stolen property, possession of a controlled substance, and possession of alcohol by a minor. The weapon and alcohol charges were dismissed and Tyler pleaded guilty to the remaining charges. Tyler was placed on probation and ordered to complete a number of terms and conditions, including submitting to random drug screens. Tyler thereafter tested positive for a controlled substance. In addition, petitions were filed against Tyler charging him with domestic violence, first-degree home invasion, and possession of alcohol by a minor. Tyler was placed in a residential facility. During a placement review hearing, Tyler's probation officer informed the court that an abuse and neglect petition had been filed by Tyler's guardian ad litem, naming Kelly M. Dorsey, Tyler's mother, and another as respondents. The probation officer recommended continuation of Tyler's placement in the facility and that the court order Kelly and her daughter, Destiny Dorsey, to submit to random drug tests. The court, David J. Reader, J., entered an order dated January 14, 2011, requiring Kelly and Destiny to submit to random drug tests. The court also ordered that Kelly's home remain drug and alcohol free and subject to random searches. Tyler pleaded guilty to a misdemeanor charge of larceny in a vacant building and the charges of home invasion and possession of alcohol by a minor were dismissed. Tyler was released from the residential facility and into Kelly's custody following another placement review hearing. Tyler thereafter tested positive for K2, a synthetic form of cannabis. His probation officer sought to have the court hold him in criminal contempt and requested that Kelly begin biweekly drug screenings. After Kelly failed to take drug screenings requested by the probation officer, the probation officer filed motions for show-cause hearings and the court granted the motions and ordered Kelly to appear and show cause why she should not be found in criminal contempt for failing to submit to the requested drug tests. Kelly appeared and stated that, although she had been aware of an order in the abuse and neglect case that required her to submit to random

drug tests, she was not aware that the court had entered an order in the delinquency proceedings requiring her to submit to such tests. The court, David J. Reader, J., found Kelly in contempt of court for failing to comply with the court's order to submit to blood testing and entered a written order of contempt. A second order of contempt was entered four days later. The court thereafter denied Kelly's motion for a judgment of acquittal or a new trial as well as her motion to correct the sentence. Kelly appealed.

The Court of Appeals *held*:

1. The family court in the delinquency proceeding was entitled, under MCL 712A.6, to render orders affecting adults that were necessary for the physical, mental, or moral well-being of Tyler. Kelly's contention that the court lacked subject-matter jurisdiction is without merit.

2. An order entered by a court must be obeyed until it is judicially vacated. Generally, all persons who interfere with the proper exercise of a court's judicial function are punishable for contempt. Kelly could be punished for contempt because the court concluded that she interfered with the court's function.

3. The court's order in the delinquency proceeding requiring Kelly to submit to random drug testing was unconstitutional under US Const, Am IV and Const 1963, art 1, § 11. However, the unconstitutionality of the order was not a defense to the criminal contempt allegations. The order was entered by a court with proper jurisdiction and Kelly was required to follow it.

4. Kelly waived any objection to the order in the delinquency proceeding that required her to submit to random drug testing.

5. The court properly made its findings of contempt under the "beyond a reasonable doubt" standard not the "preponderance of the evidence" standard.

6. There is no merit to Kelly's argument that there was insufficient evidence that she willfully disregarded or disobeyed the court's order to submit to drug testing because she was confused about the order and intended to consult an attorney before submitting to testing. There was competent evidence to support the finding that the elements of criminal contempt were proven beyond a reasonable doubt.

Affirmed.

1. CIRCUIT COURTS — FAMILY DIVISION — JURISDICTION — ORDERS AFFECTING ADULTS.

The family division of the circuit court has jurisdiction to make orders affecting adults when, in the opinion of the court, such

orders are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction; such orders are incidental to the jurisdiction of the court over the juvenile or juveniles (MCL 712A.6).

2. MOTION AND ORDERS — APPEAL.

An order entered by a court with proper jurisdiction must be obeyed, even if the order is clearly incorrect, until it is judicially vacated.

3. CONTEMPT — PARTIES — NONPARTIES.

Generally, all persons who interfere with the proper exercise of a court's judicial function, whether parties or strangers, are punishable for contempt.

William J. Vailliencourt, Jr., Prosecuting Attorney, and *William M. Worden*, Assistant Prosecuting Attorney, for the Livingston County Prosecuting Attorney.

The Law Office of Kurt T. Koehler (by *Kurt T. Koehler*) for Kelly M. Dorsey.

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

PER CURIAM. Appellant, Kelly Michelle Dorsey, appeals by right the contempt order entered by the Livingston Circuit Court, Family Division (the family court). As part of her son's juvenile adjudication, the family court entered an order requiring appellant to submit to random drug screens at the request of the probation department. The court found appellant in criminal contempt after she refused to comply with the order, and she was sentenced to 93 days in jail and ordered to pay $200 in costs, $120 in attorney's fees, and $500 in fines. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The criminal contempt proceeding against appellant originated from juvenile delinquency proceedings con-

cerning appellant's son, Tyler Dorsey. Tyler first came to the attention of the family court in April 2008, when he was charged with three counts of breaking and entering a vehicle, MCL 750.356a(2)(a). Tyler was placed on the consent calendar/informal docket, which he successfully completed on July 3, 2009.

A second delinquency petition was filed in December 2009, when Tyler was charged with carrying a dangerous weapon with unlawful intent, MCL 750.226, receiving and concealing stolen property, MCL 750.535, possession of a controlled substance (hydrocodone), MCL 333.7403(2)(b)(*ii*), and possession of alcohol by a minor, MCL 436.1703(1)(a). The weapon and alcohol charges were dismissed, and Tyler pleaded guilty to the remaining charges. A dispositional hearing/sentencing was scheduled for March 25, 2010, but, it was adjourned after Tyler's father died.

After the father's death, Kimberly Ognian, the father's longtime girlfriend, was named Tyler's guardian. A dispositional hearing was scheduled for April 16, 2010. Before the hearing, Tyler's probation officer, Susan Grohman, submitted a report and recommendation to the family court. Grohman reported that Ognian was Tyler's primary caregiver and that appellant had not been involved in Tyler's life for the past year. Grohman further reported that appellant had "alcohol/drug problems and a criminal record." Tyler was referred for a biopsychosocial assessment. In his assessment, Tyler reported "little contact with his mother [appellant] recently and that he feels that this might be due to his mother's substance abuse."

On April 16, 2010, Tyler was placed on probation and ordered to complete a number of terms and conditions, including random drug screens. On August 2, 2010, Tyler tested positive for benzodiazepines. Shortly

thereafter, a petition charging Tyler with domestic violence was filed, MCL 750.81(2). The victim was Meagan Ognian, Kimberly Ognian's daughter, with whom Tyler was living and in a relationship. Tyler was removed from Kimberly Ognian's care and went to live with appellant.

On August 20, 2010, another petition was filed, charging Tyler with first-degree home invasion, MCL 750.110a(2), and possession of alcohol by a minor, MCL 436.1703(1)(a). Grohman reported that Tyler's biggest problem was a lack of supervision. Tyler was allowed to come and go as he pleased and was seen walking around downtown Howell at all hours of the night. Because of his chronic delinquency and the inability of appellant and his guardian to control him, Tyler was placed in a residential facility.

Appellant and her daughter, Destiny Dorsey, visited Tyler at the facility and participated in family counseling sessions. According to the counselor's report, appellant and Destiny both denied that they used drugs and further reported that they did not keep alcohol in the house. Appellant did report, however, that "she had a serious drug problem several years ago when she got divorced . . . . [Appellant] acknowledged that the only way she knew how to cope with her feelings was to escape by smoking crack cocaine." Appellant represented to the family counselor that she had changed and could be a positive parent for Tyler.

Tyler's behavior began to improve at the facility, and a placement review hearing was conducted on January 13, 2011. Grohman reported that Tyler was doing well and had been granted a day pass for Christmas to see his grandparents. Grohman further stated:

> Transportation became an issue due to the fact that the grandparents had to cook and entertain. Tyler's sister and

> [appellant] became the next logical choice for a transport. A drug test was requested prior to allowing Tyler to be released to the care and custody of [appellant]. Due to the fact that his sister would be driving, she agreed to submit to a test as well. From the date the test [was] requested [to] the date [appellant] and Destiny appeared for a test, three days had lapsed. The test would not return prior to Christmas so a decision was made to allow the visit to take place in an effort not to punish Tyler. Unfortunately, both tests returned diluted. A retest was requested. To date, Destiny has failed to appear and [appellant] did report (again not on the day requested). [Appellant's] test returned negative for all substances.
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> * * *
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> In the meantime Tyler's [guardian ad litem] filed an abuse and neglect petition naming both [appellant] and Kim Ognian as respondents. Since the time of this hearing, Kim's guardianship has been terminated.

Grohman recommended that Tyler's facility placement continue and that the family court order appellant and Destiny to submit to random drug tests. Following the hearing, the family court issued an order dated January 14, 2011, requiring appellant and Destiny to "submit to random drug testing as requested by Maurice Spear Campus or the probation department." The family court further ordered that appellant's home remain drug and alcohol free and subject to random searches.

On August 26, 2011, the family court conducted another placement review hearing.[1] Grohman reported that Tyler and appellant responded extremely well to services at the residential facility. Further, Grohman stated that the Department of Human Services (DHS)

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[1] Tyler previously pleaded guilty to a misdemeanor charge of larceny in a vacant building, MCL 750.359, and the prosecutor dismissed the home invasion and minor in possession of alcohol charges.

reported full compliance by appellant in her abuse and neglect case. Following the hearing, the family court entered an order releasing Tyler into appellant's custody.

On December 19 and December 27, 2011, Tyler tested positive for K2, a synthetic form of cannabis.[2] On January 9, 2012, Grohman filed a motion requesting that the family court issue an order directing Tyler to appear and show cause why he should not be found in criminal contempt. Also on January 9, 2012, Grohman requested that appellant begin biweekly drug screenings at Second Chance.

Appellant reported to Second Chance on January 9 and 10, 2012, but she refused to test both days. After appellant's second refusal, Grohman filed two show-cause motions. Both motions referred to the January 14, 2011 order requiring appellant to submit to random drug tests. The family court granted both motions and ordered appellant to appear and show cause why she should not be found in criminal contempt.

Counsel was appointed for appellant, and a show-cause hearing was conducted on February 2, 2012. During the hearing, Grohman referred to the juvenile proceedings and the abuse and neglect proceeding, noting that appellant's abuse and neglect case had been closed by the DHS. Grohman stated that appellant was required to drug test in the abuse and neglect case and was compliant with testing in that case.[3] Grohman stated that she asked appellant to test in the delin-

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[2] Tyler had not been tested for K2 before.

[3] Grohman's report shows the DHS began testing appellant in the abuse and neglect case on March 7, 2011. Two testing dates are listed for appellant's abuse and neglect case, March 7, 2011, and September 29, 2011. Appellant tested positive for alcohol on March 7, 2011, and negative for all substances on September 29, 2011.

quency case on January 9, 10, 11, 12, 13, and 17, 2012, and appellant had refused each time. Grohman did not show appellant the January 14, 2011 order requiring appellant to submit to random drug testing, but Grohman spoke with appellant, and appellant was aware of the order. Megan Alcala, a Community Reintegration Program facilitator, corroborated Grohman's testimony. Alcala stated that she was present when Grohman spoke with appellant and requested appellant to take a drug test. Alcala stated that Grohman explained to appellant that there was a court order and that appellant appeared to understand.

Appellant testified that she was confused between the delinquency case and the abuse and neglect case. Appellant stated that she was aware of an order requiring her to test in the abuse and neglect case, but she was unaware that there was a similar order in the delinquency case. Appellant stated that the abuse and neglect case was closed in November 2011. Therefore, appellant was confused when Grohman asked her to test on January 9, 2012. Appellant stated that Grohman did not explain that there was an order requiring her to test in the delinquency case. Appellant acknowledged, however, that Grohman had told appellant that "she wanted [appellant] to test for the [delinquency] case." Appellant further stated that she received a piece of paper that stated "it is requested by Sue Grohman, juvenile probation, and Second Chance that you drug test though Second Chance twice a week until April 16th for drugs, alcohol, and K2." Appellant stated: "I didn't refuse right then but I refused later on that day until I could talk to my attorney." Appellant further stated: "I didn't know if it was legal . . . because my [abuse and neglect] case was closed and I hadn't—there wasn't—in my opinion there was no reason why I would have to do a drug test."

At the conclusion of the hearing, the family court found appellant in contempt of court for failing to comply with the court's order. On February 6, 2012, the family court entered a written order of contempt. The order appears to be a standard court document and includes boxes labeled "preponderance of the evidence" and "beyond a reasonable doubt." The "preponderance of the evidence" box was checked on the order. The order did not indicate whether appellant was found guilty of civil or criminal contempt.

The family court adjourned sentencing to allow appellant to report to Second Chance for a drug test. On February 9, 2012, the family court sentenced appellant to 93 days in jail. The court further ordered appellant to pay costs in the amount of $200, attorney's fees in the amount of $120, and "a total of $500 to the court within 30 days of her release from jail." The family court indicated that appellant did take a drug test on February 2, 2012, but the court did not disclose the results. A second order of contempt was entered February 10, 2012. The "preponderance of the evidence" box was checked and the order did not indicate whether appellant was found guilty of criminal or civil contempt.

Following sentencing, appellant filed three motions: a motion for a judgment of acquittal or a new trial, a motion to correct the sentence, and a motion to stay execution of the sentence. In the motions, appellant argued that the family court's order requiring appellant to submit to drug testing was beyond its jurisdiction and authority. Additionally, appellant argued that the order violated her right to be free from unreasonable searches and seizures. Finally, appellant argued that there was insufficient evidence to convict her of criminal contempt. Specifically, appellant noted that the family court checked the "preponderance of evidence"

box on the order of contempt. Appellant argued that a preponderance of evidence was insufficient to sustain her conviction for criminal contempt.

A hearing on all three motions was conducted. After hearing arguments, the family court denied appellant's motion for a judgment of acquittal or a new trial, as well as her motion to correct the sentence. The family court clarified that appellant was found guilty of criminal contempt and that its findings were beyond a reasonable doubt. The court indicated that there was a clerical error on the contempt order. Additionally, the court rejected appellant's argument that its order requiring appellant to drug test was beyond its jurisdiction or authority, stating that "the jurisdiction of the parent is in essence obtained, in the opinion of the Court, by way of jurisdiction over the juvenile." The court granted appellant's motion to stay the sentence pending appeal to this Court.

II. JURISDICTION

As an initial matter we note that appellant contends that the family court did not have subject-matter jurisdiction. We disagree.

The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. *Id*. This Court's review of jurisdictional issues is de novo. *Pontiac Food Ctr v Dep't of Community Health*, 282 Mich App 331, 335; 766 NW2d 42 (2009). Issues involving the interpretation of court rules are also reviewed de novo as questions of law. *Id*. "The term jurisdiction refers to the power of a court to act and the authority a court has to hear and

determine a case." *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 269; 583 NW2d 512 (1998). "The 'power to review' thus granted is the power to hear and determine. It is language of jurisdiction." *Peplinski v Employment Security Comm*, 359 Mich 665, 668; 103 NW2d 454 (1960). Questions surrounding subject-matter jurisdiction present questions of law and are reviewed de novo. *In re Lager Estate*, 286 Mich App 158, 162; 779 NW2d 310 (2009). Generally, subject-matter jurisdiction is defined as a court's power to hear and determine a cause or matter. *Id*. More specifically, subject-matter jurisdiction is the deciding body's authority to try a case of the kind or character pending before it, regardless of the particular facts of the case. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001). Subject-matter jurisdiction cannot be waived and can be raised at any time by any party or the court. *MJC/Lotus Group v Brownstown Twp*, 293 Mich App 1, 7-8; 809 NW2d 605 (2011), rev'd in part on other grounds *Mich Props, LLC v Meridian Twp*, 491 Mich 518 (2012). The plaintiff bears the burden of demonstrating subject-matter jurisdiction. *Phinney v Perlmutter*, 222 Mich App 513, 521; 564 NW2d 532 (1997). A trial court must dismiss an action when there is a lack of subject-matter jurisdiction, and a party cannot be estopped from raising the issue. *In re Acquisition of Land for the Central Indus Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989).

"Before a court may obligate a party to comply with its orders, the court must have in personam jurisdiction over the party." *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427; 633 NW2d 408 (2001). General personal jurisdiction over individuals may be established by domicile in this state or consent, MCL 600.701, and limited personal jurisdiction may be established by maintaining domicile in this state while sub-

ject to a family relationship that is the basis of a claim for divorce, alimony, separate maintenance, property settlement, child support, or child custody, MCL 600.705(7). The defense of lack of personal jurisdiction may be waived. *Dundee v Puerto Rico Marine Mgt, Inc*, 147 Mich App 254, 257; 383 NW2d 176 (1985).

"Const 1963, art 6, § 15 grants probate courts 'original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law.' " *In re AMB*, 248 Mich App 144, 167; 640 NW2d 262 (2001). The family division of the circuit court (family court) now exercises this jurisdiction. *People v Thenghkam*, 240 Mich App 29, 36; 610 NW2d 571 (2000), reasoning and analysis repudiated in part on other grounds in *People v Petty*, 469 Mich 108 (2003).[4] "In construing jurisdictional statutes, retention of jurisdiction is presumed, and any intent to divest a court of jurisdiction must be clearly and unambiguously stated." *In re Waite*, 188 Mich App 189, 202; 468 NW2d 912 (1991).

Under MCL 712A.2, the family division of the circuit court obtained authority over juveniles. The family court also acquires jurisdiction over adults pursuant to MCL 712A.6, which provides as follows:

> The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082, and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles.

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[4] See also MCL 600.1009, which provides: "A reference to the former juvenile division of probate court in any statute of this state shall be construed to be a reference to the family division of circuit court."

Appellant's contention that the family court lacked subject-matter jurisdiction is without merit. The subject matter of the proceeding involved the appellant's son's juvenile proceeding. Accordingly, the family court was entitled to render orders affecting adults that were necessary for the physical, mental, or moral well-being of appellant's son. We reject appellant's challenge to the subject-matter jurisdiction of the court.

Furthermore, individuals who violate court orders are subject to contempt proceedings. See *ARA Chuckwagon of Detroit, Inc v Lobert*, 69 Mich App 151, 159; 244 NW2d 393 (1976). An order entered by a court must be obeyed until it is judicially vacated. *Id*. at 161. The validity of an order is determined by the courts, not the parties. *Id*. "Generally, all persons who interfere with the proper exercise of a court's judicial function, whether parties or strangers, are punishable for contempt." 8 Michigan Law & Practice (2d ed), Contempt, § 2, p 3. Because the family court concluded that appellant interfered with the court's function, appellant could be punished for contempt. *Id*.

III. SEARCH AND SEIZURE AND RANDOM DRUG SCREENS

Appellant next contends that the family court order for random drug screens constituted an illegal search and seizure. The family court's order requiring appellant to submit to random drug testing was unconstitutional under the Fourth Amendment and Const 1963, art 1, § 11. However, the unconstitutionality of the order is not a defense to criminal contempt allegations. The order was entered by a court with proper jurisdiction. Therefore, appellant was required to follow it.

The application of constitutional standards to uncontested facts is a question of law subject to review de novo. *People v Stevens* (*After Remand*), 460 Mich 626,

631; 597 NW2d 53 (1999). "This Court review[s] de novo whether the Fourth Amendment was violated . . . ." *People v Mungo* (*On Second Remand*), 295 Mich App 537, 545; 813 NW2d 796 (2012) (quotation marks and citation omitted).

"It is well settled that both the United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009) (quotation marks and citations omitted); see also US Const, Am IV; Const 1963, art 1, § 11. The Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment of the United States Constitution. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011). The touchstone of the Fourth Amendment is reasonableness. *Brigham City, Utah v Stuart*, 547 US 398, 403; 126 S Ct 1943; 164 L Ed 2d 650 (2006). Whether a particular search and seizure is reasonable "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 619; 109 S Ct 1402; 103 L Ed 2d 639 (1989) (quotation marks and citation omitted). In most criminal cases, this balance is struck "in favor of the procedures described by the Warrant Clause of the Fourth Amendment. Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Id*. (citation omitted); see also *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999).

An order requiring a student to submit to drug testing is an intrusion on bodily privacy and is, there-

fore, a search under the Fourth Amendment. *Vernonia Sch Dist 47J v Acton*, 515 US 646, 652; 115 S Ct 2386; 132 L Ed 2d 564 (1995) ("[S]tate-compelled collection and testing of urine . . . constitutes a 'search' subject to the demands of the Fourth Amendment."). See also *Skinner*, 489 US at 617. Such a search, however, "will survive constitutional scrutiny, in the absence of a warrant or individualized suspicion, if the 'important governmental interest furthered by the intrusion' outweighs the 'privacy interests implicated by the search . . . .' " *Middlebrooks v Wayne Co*, 446 Mich 151, 159; 521 NW2d 774 (1994), quoting *Skinner*, 489 US at 624. Although the state has an important governmental interest in protecting and rehabilitating juvenile offenders, such interest does not outweigh appellant's right to privacy in this case.

Michigan has not previously addressed the specific issue presented in this case. Other jurisdictions, however, have. In *State v Doe*, 149 Idaho 353; 233 P3d 1275 (2010), the Does' minor daughter was placed on formal probation under Idaho's Juvenile Corrections Act (JCA). *Id*. at 355. A social investigation revealed that the Does had a history of drug abuse. Accordingly, the magistrate judge ordered the Does "to undergo random drug urinalyses as a term of their daughter's probation." *Id*. The Supreme Court of Idaho concluded that the probation order violated the Fourth Amendment. *Id*. at 357-360. The court began its analysis concluding that the Does retained an undiminished expectation to privacy: "Although the Does' daughter is on probation, it does not necessarily follow that they themselves are subject to a diminished expectation of privacy in their bodily fluids." *Id*. at 358. The court acknowledged the state's legitimate interest in protecting and rehabilitating children but held that "even where a substan-

tial State interest exists, this Court will not uphold a search 'whose primary purpose is ultimately indistinguishable from the general interest in crime control.' " *Id*. at 359 quoting *City of Indianapolis v Edmond*, 531 US 32, 44; 121 S Ct 447; 148 L Ed 2d 333 (2000).

The *Doe* court took guidance from *Ferguson v City of Charleston*, 532 US 67; 121 S Ct 1281; 149 L Ed 2d 205 (2001). In *Ferguson*, the Supreme Court analyzed the constitutionality of a state hospital's policy of performing nonconsensual drug testing on pregnant women suspected of cocaine abuse. *Id*. at 69-70. The policy provided for a referral to substance-abuse treatment for women who tested positive and added the threat of law enforcement intervention. *Id*. at 72. The Supreme Court found the policy violative of the Fourth Amendment because "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id*. at 80. The Supreme Court observed that the "ultimate goal" of the program, i.e., substance-abuse treatment, may have been salutary, but "the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal." *Id*. at 82-83. Although the hospital intended that the threat of prosecution would curtail drug use, the "direct and primary purpose" of the scheme was to assist the police. *Id*. at 84. The Supreme Court found the distinction critical, explaining:

> Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. [*Id*.]

Relying on *Ferguson*, the *Doe* court concluded that the urinalysis requirement violated the Fourth Amendment:

> Just like the testing program in *Ferguson*, testing in this case is characterized by a general interest in law enforcement. The magistrate imposed the urinalysis requirement during juvenile delinquency proceedings under the JCA, which are quasi-criminal in nature. The magistrate's order requires the Does to report to their daughter's probation officer, who is an officer of the county required by law to "enforce probation conditions." Nothing prevented the probation officer from conveying the Does' test results to law enforcement. Their failure to comply could result in contempt sanctions, which would be brought and pursued by the prosecuting attorney. Indeed, the juvenile probation officer in this case reported the parents' positive urinalysis results to the prosecutor. It also appears that such evidence could be used to obtain search warrants against the Does and would be admissible against the Does in further criminal proceedings for encouraging their daughter's delinquency.
>
> . . . Just as the urine-test requirement in *Ferguson* was intended to protect the health of unborn fetuses by detecting prenatal cocaine use, the drug testing here is intended to ensure the Does' daughter's rehabilitation by detecting drug use at home. The immediate method for attaining the goals in both cases is to report the drug use for criminal sanctions. [*Doe*, 149 Idaho at 359-360 (citations omitted).]

A similar conclusion was reached by the Utah Supreme Court in *State v Moreno*, 2009 Utah 15; 203 P3d 1000 (2009). In *Moreno*, the defendant's juvenile daughter was adjudicated "delinquent for possession of marijuana and attempted possession of methamphetamine." *Id*. at ¶ 1. As part of his daughter's probation, the juvenile court ordered the defendant to undergo drug testing. *Id*. The Utah Supreme Court concluded that the order violated the Fourth Amendment. *Id*. at ¶ 42.

Like the *Doe* court, the *Moreno* court concluded that the defendant enjoyed an undiminished expectation of privacy: "A parent does not surrender his expectation of privacy merely because he acquires the status of a parent of a minor who has been adjudicated delinquent." *Id*. at ¶ 29. The *Moreno* court also recognized the government's interest of ensuring "that the parent is drug free and therefore is not providing an inappropriate example to the minor or directly contributing to the minor's drug use." *Id*. at ¶ 32. However, the court held that this interest was of secondary importance:

> The focus of the juvenile court system . . . is on modifying the behavior of the juvenile. Because the focus is on the behavior of the juvenile, the behavior of parents of juveniles involved in the system is of secondary importance.
>
> Attempting to ensure that parents of delinquent juveniles are drug free also should not be confused with the goal of protecting children where there is a concern for their welfare. In the presence of a welfare concern related to the parent's drug use, the government's interest is decidedly increased, as are the possible consequences of waiting until there is probable cause for a search. By contrast, where the concern of the proceeding is the child's delinquent behavior, there is less necessity to obtain information about the parent's behavior. There is time to obtain information that will provide probable cause for a search of the parent. [*Id*. at ¶¶ 33-34.]

Though *Doe*, 149 Idaho 353, and *Moreno*, 2009 Utah 15, are not binding on this Court, their reasoning is persuasive. There is no dispute that the state has an interest in protecting and rehabilitating children who have been adjudicated delinquent. However, appellant did not enjoy a diminished expectation to privacy merely by virtue of the fact that her son had been adjudicated delinquent. *Doe*, 149 Idaho at 358; *Moreno*, 2009 Utah at ¶ 29. Appellant enjoyed the full measure of

Fourth Amendment protections. The ultimate goal of drug testing appellant may have been salutary, but the primary purpose was "ultimately indistinguishable from the general interest in crime control." *Edmond*, 531 US at 44. The order was imposed as part of a juvenile adjudication, which is quasi-criminal in nature. *People v Williams*, 147 Mich App 1, 6; 382 NW2d 191 (1985). Appellant was ordered to test at the direction of her son's probation officer, and nothing prevented the probation officer from turning over appellant's test results to law enforcement personnel. Additionally, appellant's failure to comply with the order could, and did, result in criminal contempt sanctions, which were pursued by the prosecutor. Therefore, the family court's order was unconstitutional under the Fourth Amendment and Const 1963, art 1, § 11.

The constitutionality of the order, however, is not the issue directly before this Court. Rather, the issue is whether appellant was required to follow the order. It is well settled that "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998); see also *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). The family court had jurisdiction over appellant under MCL 712A.6.

Appellant argues that MCL 712A.6 must be interpreted in a constitutional manner, and "MCL 712A.6 cannot be interpreted to grant the [family court] subject matter jurisdiction to issue unconstitutional orders." However, the longstanding policy is that "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed

and thus become a retrial of the original controversy." *United States v Rylander*, 460 US 752, 756; 103 S Ct 1548; 75 L Ed 2d 521 (1983) (quotation marks and citation omitted). Rather, the underlying challenge to the original order cannot be raised for the first time in a contempt proceeding. *Id*. Further, appellant waived the challenge to the order underlying the contempt. Forfeiture is the failure to timely assert a right. *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). Waiver is the "intentional relinquishment or abandonment of a known right." *Id*. (quotations marks and citation omitted). The failure to object deprives the "court of the opportunity to correct the error at the time it occurs." *People v Vaughn*, 491 Mich 642, 674; 821 NW2d 288 (2012). "[U]nequivocal indications" that one approved of a course of action taken in the trial court constitute waiver. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). "To hold otherwise would allow counsel to harbor error at trial and then use that error as an appellate parachute[.]" *Id*. (quotation marks and citation omitted). A person can waive his or her constitutional rights, including the right to a public trial, *Vaughn*, 491 Mich at 664, as well as statutory rights, *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 228; 821 NW2d 503 (2012).

Here, the family court issued an order dated January 14, 2011, requiring appellant to "submit to random drug testing as requested by Maurice Spear Campus or the probation department." The family court further ordered that appellant's home remain drug and alcohol free and subject to random searches. Appellant did not contest the authority of the family court to enter this order in the juvenile proceeding as opposed to the then concurrently pending abuse and neglect petition. Indeed, compliance with the drugs screens was a requirement to reunite appellant with her son. Further, the

DHS reported that appellant was in compliance. Nearly a year after the entry of the order, appellant objected to the case from which the order originated only after a show-cause order was entered. However, the order was in place for a year before appellant contested its origin. Therefore, appellant waived this challenge.

IV. SUFFICIENCY OF THE EVIDENCE OF CONTEMPT

Appellant raises two issues under this question. First, appellant argues that there was insufficient evidence to convict her of criminal contempt because the family court made its findings by a preponderance of the evidence. The family court entered two contempt orders in this case. Both included boxes labeled "preponderance of the evidence" and "beyond a reasonable doubt." The "preponderance of the evidence" box was checked on both orders. Appellant argues that she was found guilty under the preponderance of the evidence standard; therefore, there was insufficient evidence to convict. The family court, however, clarified that there was a clerical mistake and that its findings were under the beyond a reasonable doubt standard. Appellant takes issue with the trial court's action, stating that the burden of proof is a matter of substance. This argument is unpersuasive. The clerical mistake the trial court was referring to was the checking of the "preponderance of evidence box," not the applicable burden of proof.

Appellant next argues that the prosecutor presented insufficient evidence to convict her of criminal contempt. "To support a conviction for criminal contempt, two elements must be proven beyond a reasonable doubt. Those two elements are: (1) that the individual engage in a wilful disregard or disobedience of the order of the court, and (2) that the contempt must be clearly and unequivocally shown." *In re Contempt of O'Neil*,

154 Mich App 245, 247; 397 NW2d 191 (1986) (citations omitted); see also *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007). The defendant must have acted culpably. *People v Little*, 115 Mich App 662, 665; 321 NW2d 763 (1982).

Appellant argues that there was insufficient evidence that she willfully disregarded or disobeyed the family court's order. Specifically, appellant argues that she did not act willfully because she was confused about the order and intended to consult with counsel before testing. Appellant cites this Court's opinion in *In re Contempt of Rapanos*, 143 Mich App 483, 495; 372 NW2d 598 (1985), for the proposition that a person does not willfully violate an order when they act in good faith reliance on an attorney's advice. Appellant argues that "[i]f good faith reliance on an attorney's advice prevents willfulness then a good faith intent to seek legal advice . . . must also prevent the refusal from being willful." This argument is unpersuasive.

As stated above, appellant cites *Rapanos*, 143 Mich App 483, for the proposition that a person does not willfully violate an order when they act in good faith reliance on an attorney's advice. *Rapanos*, however, provides no such support. In *Rapanos*, this Court stated: "The federal courts have ruled that when an individual in good faith relies upon his attorney's advice or interpretation of a court order, he cannot be found guilty of criminal contempt since the element of an intentional violation of the court's order has not been established." *Id.* at 495. Though the *Rapanos* Court referred to the federal rule, there is no indication that it adopted it. Further, precedent from our Supreme Court holds that it is no defense that the contemnor violated a court order on the advice of counsel. *Brown v Brown*, 335 Mich 511, 518-519; 56 NW2d 367 (1953); *Chapel v*

Hull, 60 Mich 167, 175; 26 NW 874 (1886). Moreover, even if the federal rule was applicable, appellant has not cited any authority to support an extension of the rule to situations where an individual refuses because he or she intends to seek the advice of counsel. Accordingly, appellant's argument is without merit.

The evidence supports the family court's finding. There is no dispute that an order was entered on January 14, 2011, requiring appellant to submit to random drug testing at the request of the probation department. The probation department then made such a request, and appellant refused. Grohman testified that she did not show appellant a copy of the order; however, Grohman stated that she spoke with appellant and that appellant was aware of the order. Alcala was present when Grohman spoke with appellant and requested appellant take a drug test. Alcala stated that Grohman explained to appellant that there was a court order and that appellant appeared to understand. Thus, there was competent evidence to support the family court's finding that the elements of criminal contempt were proved beyond a reasonable doubt.

Affirmed.

K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ., concurred.

MOVIE MANIA METRO, INC v GZ DVD'S INC

Docket No. 311723. Submitted December 4, 2013, at Detroit. Decided September 9, 2014, at 9:15 a.m.

Movie Mania Metro, Inc., brought an action in the Macomb Circuit Court against GZ DVD's Inc., Hazim Jarbo, and Sandra A. Zielke, alleging (1) trademark infringement under the common law; the Michigan trademark act, MCL 429.31 *et seq*.; and the Lanham Act, 15 USC 1051 *et seq*., and (2) trademark dilution under the Lanham Act. Plaintiff operated a video-rental business in the Detroit area and used the trademark "Movie Mania" in connection with its stores. Thereafter, plaintiff engaged in naked licensing of the "Movie Mania" mark, which is the practice of allowing others to use a mark without exercising reasonable control over the nature and quality of the goods, services, or business on which the licensees use the mark. While plaintiff had originally registered the mark with the state, the registration expired in 2006. By 2007, six stores bearing the mark operated in the Detroit area, but plaintiff owned only two of them. In 2010, an unaffiliated licensee closed a Movie Mania location and sold his business assets to defendants. Defendants contacted plaintiff for permission to continue the use of the "Movie Mania" mark, but plaintiff demanded a fee and a licensing agreement. Defendants instead opened a video-rental store bearing the "Movie Mania" mark near the closed store. In January 2011, plaintiff demanded that defendants cease using the mark, after which plaintiff registered the mark again in April 2011. Following discovery in the lawsuit, defendants moved for summary disposition, asserting that plaintiff had abandoned the "Movie Mania" mark by (1) failing to renew the mark in 2006, (2) allowing other parties to use the mark without supervision, fees, or standards, and (3) generally failing to protect the mark as a source identifier. The court, Richard L. Caretti, J., granted the motion, concluding that plaintiff's trademark-infringement arguments were precluded because it had engaged in naked licensing from 1999 to 2005 and therefore had abandoned the mark before defendants used it. The court also rejected plaintiff's argument that defendants' activities constituted trademark dilution under the Lanham Act because the "Movie Mania" mark was not a famous mark. Plaintiff appealed.

The Court of Appeals *held*:

The Lanham Act provides that naked licensing constitutes abandonment of a trademark. Therefore, trademark holders that engage in naked licensing relinquish all rights to the mark. The Michigan trademark act does not provide that naked licensing constitutes abandonment of a trademark and instead defines abandonment as being the nonuse or implied nonuse of a trademark. Accordingly, a mark holder that engages in naked licensing of its trademark abandons the trademark under the Lanham Act but not under the Michigan act. Nevertheless, a mark holder that engages in naked licensing cannot sustain a trademark-infringement claim under the Michigan act or at common law because the naked licensing of a mark renders it not valid as a trademark.

1. A party alleging a trademark violation under the Lanham Act may litigate the action in state court. Plaintiff, however, abandoned its argument on appeal that the trial court erred by granting summary disposition to defendants on the federal claims when it discussed only naked licensing and the concept of trademark abandonment under Michigan law in its brief and failed to discuss the relevant legal standards necessary to establish trademark infringement and trademark dilution under federal law. Regardless, plaintiff's federal claims lacked merit.

2. Plaintiff's claim of trademark dilution was frivolous. Under 15 USC 1125(c)(1), only owners of a famous mark can prevail on a dilution claim. According to 15 USC 1125(c)(2)(A), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of the source of the goods or services of the mark's owner, which plaintiff's mark was not.

3. The trial court also correctly granted defendants summary disposition on plaintiff's claim of trademark infringement under the Lanham Act because plaintiff abandoned the "Movie Mania" mark under 15 USC 1127 when it engaged in naked licensing. When other businesses use the mark that is the subject of naked licensing, consumers are unable to use the mark to distinguish goods and services bearing the mark as originating exclusively from the mark holder. Because naked licensing destroys a mark's ability to serve as a source identifier for consumers, state courts held at common law that plaintiffs that engaged in naked licensing could not prevail in trademark-infringement actions because the mark was not distinctive and accordingly not a valid trademark protectable under trademark law. 15 USC 1127, on the other hand, deems naked licensing to be abandonment of a trademark, which is effectively the same as rendering the mark not valid. To avoid

abandonment, a trademark holder that licenses its mark to third parties must retain control of the mark, which could include supervision of the licensee's operations, store layout, advertising, sales and merchandising, or other incidences of business. The "Movie Mania" mark could not have served to consumers as an indication of consistent and predictable quality because several businesses used the "Movie Mania" name and had no uniform standard of control or quality between them.

4. The trial court incorrectly held that naked licensing of a mark constitutes abandonment of that mark under the Michigan trademark act. MCL 429.31(i) states that a mark is abandoned when its use has been discontinued with intent not to resume the use. During the time relevant to this litigation, plaintiff continuously operated a video-rental business bearing the "Movie Mania" mark. Accordingly, plaintiff never abandoned the mark under the Michigan trademark act because plaintiff never discontinued the mark's use. Engaging in naked licensing is irrelevant for purposes of abandonment under the trademark act because the act does not recognize that naked licensing constitutes abandonment.

5. The trial court, however, ultimately reached the correct result under the Michigan trademark act (that defendants were not liable for trademark infringement), because naked licensing of a mark destroys the mark's validity and therefore renders the mark not protectable as a trademark under Michigan law. Plaintiff's underlying claim was for trademark infringement. A plaintiff that claims infringement under MCL 429.42 must show (1) that the mark the plaintiff claims to hold is valid, that is, it actually functions as a trademark, (2) that the plaintiff holds priority in the mark, that is, the plaintiff used the mark before the defendant, (3) that consumers are likely to confuse the defendant's mark with the plaintiff's mark, and (4) that the defendant used the allegedly infringing mark. Under the Michigan trademark act and at common law, trademarks are valid when they are (1) used in connection with the sale and advertising of products or services and (2) distinctive in that consumers understand the mark to designate goods or services as the product of a particular manufacturer or trader. Therefore, to be distinctive and consequently a valid trademark, the trademark must serve as a source identifier to consumers. Plaintiff's naked licensing of the "Movie Mania" mark to other video-rental business operators destroyed whatever distinctiveness "Movie Mania" possessed. The mark was therefore not valid and not entitled to protection under the trademark act.

Affirmed.

1. INTELLECTUAL PROPERTY — TRADEMARKS — INFRINGEMENT LITIGATION — FEDERAL LANHAM ACT — JURISDICTION — STATE COURTS.

A party alleging a trademark violation under the Lanham Act, 15 USC 1051 *et seq*., may litigate the action in a state court.

2. INTELLECTUAL PROPERTY — TRADEMARKS — INFRINGEMENT LITIGATION — NAKED LICENSING — FEDERAL LANHAM ACT — MICHIGAN TRADEMARK ACT — ABANDONMENT OF TRADEMARKS — INVALID TRADEMARKS.

Naked licensing of a trademark is the practice of allowing others to use the mark without exercising reasonable control over the nature and quality of the goods, services, or business on which the licensees use the mark; under 15 USC 1127, part of the Lanham Act, 15 USC 1051 *et seq*., naked licensing constitutes abandonment of a trademark and trademark holders that engage in naked licensing relinquish all rights to the mark, precluding a trademark-infringement under that act; engaging in naked licensing does not constitute abandonment of the mark under the Michigan trademark act, MCL 429.31 *et seq*., but naked licensing precludes a trademark-infringement claim under that act or at common law because the naked licensing of a mark destroys its distinctiveness and renders it not valid as a trademark.

Aubrey H. Tobin, Attorney at Law, PC (by *Aubrey H. Tobin*), for plaintiff.

Kim Corbin, PLLC (by *Kim Corbin*), for defendants.

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

SAAD, J. Plaintiff appeals the trial court's order that granted summary disposition to defendants. For the reasons stated below, we affirm.

I. NATURE OF THE CASE

This case is a claim for trademark infringement. As our Court recently explained in *Janet Travis, Inc v Preka Holdings, LLC*, Michigan law has offered protection of trademark rights for the benefit of

> business owners, and the consuming public. Business owners, who invest significant amounts of money and effort to

> convince consumers to identify their marks with their products and services, needed a remedy against competitors who sought to free ride on this accumulated goodwill by copying or pirating already established marks. Consumers, who associated and expected a certain level of service and quality with certain marks, needed protection from imposters who copied or pirated already established marks to "pass off" their goods and services as those of the business associated with the marks. [*Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 267-268; 856 NW2d 206 (2014) (citation omitted).]

Trademark law, therefore, involves "the advancement of two distinct but related interests: the private right of the trademark holder to prevent others from using its mark to pass off the others' goods or services as the trademark holders, and the public right to protection from this deceptive practice." *Travis*, 306 Mich App at 268.

Because the right of a trademark holder to its trademark is a by-product of these two interests, trademark rights are a special kind of intellectual property in that the mark holder's right to exclusive use of its mark is tempered by and dependent on the perceptions of the consuming public. For a mark to serve as a trademark and be entitled to legal protection, the consuming public must be able to use the mark to "distinguish a good as originating from a particular source."[1] If the consuming public is unable to use the mark to distinguish a good as originating from a particular source, the mark does not function as a trademark and is thus not entitled to legal protection. Trademark rights are thus inherently mutable because they are dependent on whether the consuming public is able to use the mark to distinguish a good or service as originating from a particular source.

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[1] *Travis*, 306 Mich App at 281, citing MCL 429.32(e).

Consumer perception of a mark can be shaped by many factors, including the actions of the mark holder. Normally, as in *Travis*, the mark holder realizes the valuable nature of its trademark and will thus make every effort to ensure that, in the minds of consumers, the mark remains associated with the mark holder's products and services, and the mark holder's products and services alone. But on occasion, as here, a mark holder, through its own actions or omissions, destroys the value of the trademark by severing the link in the mind of the consumer between the mark holder's mark and the particular product or service. In other words, a mark holder's actions can cause its mark to no longer function as a trademark, and thus not be entitled to legal protection.

One common way that a mark holder may engage in this mark-destroying process is "naked licensing," or the practice of "allowing others to use [its] mark without exercising 'reasonable control over the nature and quality of the goods, services, or business on which the [mark] is used by the licensee'."[2] If other businesses are using the mark holder's mark, and operate independently and with little to no oversight from the mark holder, consumers will be unable to use the mark to distinguish goods and services bearing the mark as originating exclusively from the mark holder. In other words, a mark that is the subject of naked licensing can no longer function as a trademark and is accordingly not the proper subject of legal protection. In the parlance of trademark law, naked licensing destroys a mark's "distinctiveness" and renders it "not valid"[3] as a trademark.

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[2] *Eva's Bridal Ltd v Halanick Enterprises, Inc*, 639 F3d 788, 789 (CA 7, 2011) (Easterbrook, C.J.) (citation omitted) (second alteration in original).

[3] "Not valid" is a term of art in trademark law that refers to a trademark's lack of "validity." A "valid" trademark is one that is properly

Because this practice prevents consumers from being able to use the mark to identify goods and services as the products of a specific business, courts have refused to protect marks that are subject to naked licensing at common law, under Michigan law, and under federal law. Initially, both state and federal courts did so by holding that nakedly licensed marks were not valid trademarks and thus not properly protectable under trademark law. After revisions to the federal Lanham Act[4] in 1988, however, most federal decisions now hold that nakedly licensed trademarks have been "abandoned," while state courts continue to hold, under statutory and common law, that nakedly licensed trademarks are not valid.

This case requires us to make this doctrinal distinction between state and federal law. The Lanham Act explicitly states that naked licensing constitutes "abandonment" of a trademark, in that trademark holders who engage in naked licensing relinquish all rights to their mark.[5] The Michigan trademark and service mark act (Trademark Act)[6] does not state that naked licensing constitutes abandonment of a trademark and instead defines abandonment to mean mere nonuse, or implied nonuse, of the trademark.[7] Accordingly, a mark holder that engages in naked licensing of its trademark "abandons" the trademark under the Lanham Act, but does *not* "abandon" the trademark under the Trade-

the subject of trademark law—i.e., is protectable under trademark law. See *Abercrombie & Fitch Co v Hunting World, Inc*, 537 F2d 4, 9 (CA 2, 1976) (Friendly, J.). In this opinion, we use the terms "not valid" and "invalid" interchangeably to refer to a mark's lack of validity.

[4] 15 USC 1051 *et seq*.

[5] 15 USC 1127.

[6] MCL 429.31 *et seq*.

[7] MCL 429.31(i) states that "a mark is 'abandoned' when its use has been discontinued with intent not to resume."

mark Act. Nevertheless, a mark holder that engages in naked licensing is not able to sustain a trademark-infringement claim under the Trademark Act or at common law because the naked licensing of a mark renders that mark not valid as a trademark.

Plaintiff is a mark holder that engaged in naked licensing of its mark, "Movie Mania," for more than five years with multiple parties. It nonetheless sued defendants, who used the "Movie Mania" mark a decade after the first instance of plaintiff's naked licensing, for trademark infringement, under both the Lanham Act and the Trademark Act. The trial court granted defendants' request for summary disposition on the theory that plaintiff's naked licensing constituted abandonment of the "Movie Mania" mark under both the Lanham Act and the Trademark Act.

We affirm this decision, but the trial court reached the right result for the wrong reasons. Naked licensing constitutes abandonment under the Lanham Act, but it does not constitute abandonment under the Trademark Act's more narrow definition of that term. Even so, plaintiff's action for infringement fails because its naked licensing of "Movie Mania" has made the mark not valid, and defendants' use of the mark does not make it liable for trademark infringement under the Trademark Act.

We therefore reject plaintiff's arguments on appeal and affirm the order of the trial court.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff operated a video-rental business in metro Detroit, and began using the name "Movie Mania" in commerce in 1989. It subsequently registered the "Movie Mania" mark with the appropriate Michigan department in 1996. Thereafter, plaintiff acted as a

promiscuous licensor and allowed various unaffiliated parties in the Detroit area to use the "Movie Mania" mark in conjunction with those parties' video-rental businesses.

This lawsuit is the product of a series of such licensing transactions, which began in 1999. In that year, plaintiff sold one of its Movie Mania locations to another company, CLD, Inc, which sought to continue the store's video-rental business. Plaintiff allowed CLD to continue to use the "Movie Mania" mark for $1 in annual royalties. Yet the licensing agreement placed almost no restrictions on the use of the mark, nor did it contain standards on advertising or store operations, or include any requirements related to the rental or sale of merchandise at the CLD-owned Movie Mania.

CLD sold its Movie Mania store to Adnan Samona in 2005. Samona contacted plaintiff and asked permission to continue use of the "Movie Mania" mark, which plaintiff granted. Plaintiff did not require Samona to sign a licensing agreement or pay any royalty fee in return for use of the mark. Nor did plaintiff object or contact Samona as he expanded his business in 2006 and 2007, purchasing another, unaffiliated video-rental store and changing its name to "Movie Mania."[8] Again, as in its dealings with CLD, plaintiff provided Samona with almost no restrictions on the use of the mark, nor did it set standards on advertising or store operations or outline requirements related to the rental or sale of merchandise at the Samona-owned Movie Mania.

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[8] Plaintiff's lack of proprietary regard for the mark extended to its registration, which expired in 2006. See MCL 429.38(a) (providing that registered marks that are more than 10 years old and not renewed are canceled from the register). Nonetheless, the licensed (and unlicensed) use of the "Movie Mania" mark continued unabated: by the end of Samona's expansion in 2007, six stores bearing the mark operated in metro Detroit. Plaintiff owned only two of the locations.

In 2010, Samona closed his St. Clair Shores Movie Mania location and sold its business assets to defendants. As Samona had done in 2005 when he purchased CLD's Movie Mania store, defendant Sandra A. Zielke contacted plaintiff to ask permission to continue use of the "Movie Mania" mark. One of plaintiff's officers told Zielke that defendants could not use the mark unless they paid a fee and signed a licensing agreement. Defendants did not acquiesce to plaintiff's request and opened a video-rental store bearing the "Movie Mania" mark one block away from Samona's original location. In January 2011, plaintiff told defendants that "Movie Mania" was a registered Michigan service mark (actually, it was not—as noted, its registration expired in 2006 because plaintiff failed to renew the registration) and demanded that defendants cease and desist use of the mark. Plaintiff did not reregister the "Movie Mania" mark until an even later date, April 18, 2011, which further demonstrates that it places little value in its mark.

Plaintiff then initiated this action against defendants in the Macomb Circuit Court and alleged, among other things, (1) trademark infringement under the common law, the Trademark Act, and the Lanham Act and (2) trademark dilution under the Lanham Act. After discovery, defendants moved for summary disposition under MCR 2.116(C)(10) because plaintiff had abandoned the "Movie Mania" mark when it (1) failed to renew the mark in 2006, (2) allowed other parties to use the mark without supervision, fees, or standards, and (3) generally failed to protect the mark as a source identifier.

The trial court granted defendants' motion for summary disposition of plaintiff's claims. In a written opinion, it found that plaintiff's trademark-infringement arguments (under the common law, Trademark Act, and the Lanham Act) were precluded

because plaintiff engaged in naked licensing from 1999 to 2005 and thus abandoned the mark before defendants used it. The trial court also rejected plaintiff's argument that defendants' activities constituted trademark dilution under the Lanham Act because the "Movie Mania" mark was not a "famous" mark and thus not entitled to a trademark-dilution remedy.

Plaintiff makes three claims on appeal, two are under the Lanham Act (trademark infringement and trademark dilution) and one under the Trademark Act (trademark infringement). Defendants ask that we uphold the trial court's grant of summary disposition with respect to these claims.

III. STANDARD OF REVIEW AND JURISDICTION

A trial court's decision on a motion for summary disposition is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). When our Court reviews a motion for summary disposition brought under MCR 2.116(C)(10), it considers "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in a light most favorable to the party opposing the motion." *Id*. (citations and quotation marks omitted).[9]

"Although the federal courts have jurisdiction over trademark claims brought under the Lanham Act, that jurisdiction is not exclusive. . . . A party alleging a trademark violation under the statute may litigate in state court if it so chooses." *Bd of Regents of the Univ of Wisconsin Sys v Phoenix Int'l Software, Inc*, 653 F3d 448, 465 (CA 7, 2011).

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[9] The trial court did not specifically identify the appropriate summary disposition subrule, but it is apparent that it is MCR 2.116(C)(10), as the trial court's consideration went beyond the parties' pleadings. *Healing Place v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

Statutory interpretation is a question of law that is reviewed de novo. *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 112; 845 NW2d 81 (2014). When interpreting a statute, a court must "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. This requires courts to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Id*. (citations and quotation marks omitted). "The Trademark Act is based on the common law, and it is therefore appropriate, when interpreting the statute, to consider federal and state cases that apply the common law of trademark. It is also 'appropriate to look to federal case law when interpreting a state statute which parallels its federal counterpart,' as it appears the Michigan Trademark Act does the federal Lanham Act." *Travis*, 306 Mich App at 275 (citations omitted).

IV. ANALYSIS

A. FEDERAL CLAIMS UNDER THE LANHAM ACT

We note at the outset that plaintiff merely asserts trademark infringement and trademark dilution under the Lanham Act. It devotes almost the entirety of its brief to naked licensing and abandonment under *Michigan* law—only one claim among the three it brings—and fails to discuss the relevant legal standards necessary to establish trademark infringement and trademark dilution under *federal* law.[10] "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his

[10] "In Michigan, there are three sources of trademark law: common law, the state Trademark Act, and the federal Lanham Act. A plaintiff may bring separate trademark-related claims under each body of law." *Travis*, 306 Mich App at 276.

claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). Accordingly, plaintiff has abandoned its argument that the trial court erred when it granted summary disposition to defendants on these federal claims.

1. TRADEMARK DILUTION

In any event, plaintiff's federal claims, such as they are, lack merit. Its assertion of trademark dilution is particularly frivolous. 15 USC 1125(c)(1) states:

> [T]he owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

Therefore, only owners of a "famous mark" will prevail on a dilution claim. "[A] mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." 15 USC 1125(c)(2)(A). In addition, "[f]ame for likelihood of confusion [claims][11] and fame for dilution [claims] are distinct

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[11] "Likelihood of confusion" refers to an element plaintiffs must show to demonstrate trademark *infringement* (not trademark dilution, which is a wholly separate claim) under the Lanham Act, the Trademark Act, or the common law. See *Travis*, 306 Mich App at 275-276. Consumer perception and recognition of a mark are a necessary component of the likelihood-of-confusion analysis. The statement in *Coach* makes clear that the standard of consumer mark recognition required for a trademark-*dilution* claim is much more stringent—meaning truly na-

concepts, and dilution fame requires a more stringent showing." *Coach Servs, Inc v Triumph Learning LLC*, 668 F3d 1356, 1373 (CA Fed, 2012), citing 4 McCarthy, Trademarks & Unfair Competition (4th ed) § 24:104, p 24-325 (March 20, 2014) ("The standard for the kind of 'fame' needed to trigger anti-dilution protection is more rigorous and demanding than the 'fame' which is sufficient for the classic likelihood of confusion test.").

Needless to say, the "Movie Mania" mark is not "famous" under 15 USC 1125(c)(1) and (2)(A)—it is not "widely recognized by the general consuming public of the United States." Accordingly, the trial court correctly granted defendants summary disposition on plaintiff's trademark-dilution claim.

2. TRADEMARK INFRINGEMENT

Plaintiff's claim of trademark infringement under the Lanham Act is equally unavailing, because it abandoned the "Movie Mania" mark under 15 USC 1127 when it engaged in naked licensing.

a. NAKED LICENSING

As noted, naked licensing is the practice of "allowing others to use [a] mark without exercising 'reasonable control over the nature and quality of the goods, services, or business on which the [mark] is used by the licensee'."[12] When other businesses use the mark that is the subject of naked licensing, consumers are unable to use the mark to distinguish goods and services bearing the mark as originating exclusively from the mark

tional, widespread recognition—than that required for a likelihood-of-confusion analysis in a trademark-infringement claim.

[12] *Eva's Bridal*, 639 F3d at 789 (citation omitted) (second alteration in original).

holder. Because naked licensing of a mark destroys the mark's ability to serve as a source identifier for consumers—in other words, destroys the mark's ability to function as a trademark—state courts held at common law that plaintiffs who engaged in naked licensing could not prevail in trademark-infringement actions against defendants who used the mark that the plaintiff nakedly licensed.[13] In trademark-law terms, a mark that is the subject of naked licensing is not "distinctive" and therefore not a valid trademark that is properly protectable under trademark law.[14]

After the passage of the Lanham Act opened the federal judiciary to trademark-law disputes in 1946, federal courts also recognized that naked licensing rendered marks not valid and made them unworthy of protection under the Lanham Act:

> If the licensor is not compelled to take some reasonable steps to prevent misuses of his trademark in the hands of others the public will be deprived of its most effective

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[13] See, for example, *Detroit Creamery Co v Velvet Brand Ice Cream Co*, 187 Mich 312, 316; 153 NW 664 (1915) ("It has been universally held that a trade-mark, as such cannot be assigned separately and distinct from the property to which it has been attached, and likewise the rule has been laid down that a naked license to use a trade-mark is of no more validity than an assignment thereof."); *Broeg v Duchaine*, 319 Mass 711, 713; 67 NE2d 466 (1946) (holding under common law of trademark that "[o]ne who has developed a trade mark as a guaranty of the quality of his merchandise should not be permitted to license its use apart from his business to those who may sell an inferior product"); 3 McCarthy, Trademarks & Unfair Competition (4th ed), § 18:48.

[14] See, for example, *88¢ Stores, Inc v Martinez*, 227 Or 147, 160; 361 P2d 809 (1961) ("In the absence of [licensor control over licensees], the goods or services are not treated as emanating from a common source, an essential element of a common law trademark or trade name."); *Alexander Ave Kosher Restaurant Corp v Dragoon*, 306 AD2d 298, 300; 762 NYS2d 101 (2003) ("[A] licensor must have some quality control of the goods produced by the licensee."); 3 McCarthy, Trademarks & Unfair Competition (4th ed), § 18:48.

> protection against misleading uses of a trademark. The public is hardly in a position to uncover deceptive uses of a trademark before they occur and will be at best slow to detect them after they happen. Thus, unless the licensor exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precisely what the Act is in part designed to prevent. See Sen. Report No. 1333, 79th Cong., 2d Sess. (1946). Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees. [*Dawn Donut Co, Inc v Hart's Food Stores, Inc*, 267 F2d 358, 367 (CA 2, 1959).]

This mode of analysis shifted in 1988, when Congress revised 15 USC 1127 and codified the concept of naked licensing in a specific context: abandonment. Under the Lanham Act's revised definition of "abandoned," a trademark holder who engages in "acts of omission as well as commission" that cause the trademark to "lose its significance as a mark"—i.e., naked licensing—abandons the mark and relinquishes all rights to it. 15 USC 1127.

Accordingly, most federal cases now analyze naked licensing through the framework of abandonment: i.e., a plaintiff engaged in naked licensing and has thus abandoned its mark under 15 USC 1127.[15] However, this new analysis of naked licensing does not contradict the precodification approach, which analyzes naked licensing under the framework of the mark's validity. In fact, labeling naked licensing as "abandonment" of a mark is simply another way of saying that naked licensing renders a trademark *not valid*. In each classi-

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[15] See, for example, *Eva's Bridal*, 639 F3d at 789; *Exxon Corp v Oxxford Clothes, Inc*, 109 F3d 1070, 1075 (CA 5, 1997); *Doeblers' Pennsylvania Hybrids, Inc v Doebler*, 442 F3d 812, 823 (CA 3, 2006); *FreecycleSunnyvale v Freecycle Network*, 626 F3d 509, 515-516 (CA 9, 2010).

fication, the trademark holder's conduct—uncontrolled licensing—causes the mark to lose its ability to function as a source identifier to consumers. See 3 McCarthy, Trademarks & Unfair Competition (4th ed), § 18:48. Stated another way, naked licensing causes the trademark to lose all significance as a trademark. Calling the mark "abandoned," as 15 USC 1127 does, or focusing on the mark's validity, as the earlier cases did, are thus two ways of describing the same concept, and both mandate the same result: a trademark holder that engages in naked licensing cannot prevail in a trademark-infringement suit against an alleged infringer using the mark that was nakedly licensed.

Plaintiffs who engage in naked licensing thus lose their rights to their mark in two ways. First, at common law, and under the Trademark Act[16] and the Lanham Act, a mark that is nakedly licensed loses its ability to function as a source identifier for consumers and thus is no longer a valid trademark. Second, under the definition of "abandoned" in 15 USC 1127, a trademark holder that engages in naked licensing abandons its trademark and loses all rights to the use of the mark.

To analyze plaintiff's federal claim of trademark infringement under the Lanham Act, then, we turn to 15 USC 1127 and its definition of "abandoned."

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[16] As noted, "The Trademark Act is based on the common law, and it is therefore appropriate, when interpreting the statute, to consider federal and state cases that apply the common law of trademark." *Travis*, 306 Mich App at 275, citing MCL 429.44. Furthermore, "[i]t is also 'appropriate to look to federal case law when interpreting a state statute which parallels its federal counterpart,' as it appears the Michigan Trademark Act does the federal Lanham Act." *Travis*, 306 Mich App at 275 (citations omitted). Accordingly, a mark holder that engages in naked licensing of the mark renders it not valid under the Trademark Act—just as the same conduct would render the mark not valid under the common law and the Lanham Act.

b. PLAINTIFF'S TRADEMARK INFRINGEMENT CLAIM

15 USC 1125(a)(1) allows mark holders to bring a civil action against "any person" that, among other things, confuses consumers or misrepresents the origins of the goods and services on offer. 15 USC 1127 also provides that marks can be abandoned by mark holders, and thus cease to be a mark for purposes of the Lanham Act:

> A mark shall be deemed to be "abandoned" if either of the following occurs:
>
> (1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.
>
> (2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph.

To avoid abandonment, then, the trademark holder that licenses its mark to third parties must retain *control* of the mark—which might include supervision of the licensee's operations, store layout, advertising, sales and merchandising, or other incidences of business. See *Eva's Bridal*, 639 F3d at 790. This control is essential because "[t]rademarks [are] . . . indications of consistent and predictable quality assured through the trademark owner's control over the use of the designation." Restatement Unfair Competition, 3d, § 33, comment *a*, p 338. By retaining control over the licensee that uses its mark, the original trademark holder will

ensure that the trademark remains able "to tell shoppers what to expect—and whom to blame if a given outlet falls short," and thus retain its function as a source identifier for consumers. *Eva's Bridal*, 639 F3d at 790.

Conversely, when a trademark holder relinquishes control over its mark and allows others to use the mark with little to no supervision, the trademark holder engages in naked licensing and the mark becomes abandoned under 15 USC 1127. *Exxon Corp v Oxxford Clothes, Inc*, 109 F3d 1070, 1075 (CA 5, 1997). Naked licensing "is an '[u]ncontrolled licensing of a mark whereby the licensee can place the mark on any quality or type of goods or services,' raising 'a grave danger that the public will be deceived by such a usage.' " *Doeblers' Pennsylvania Hybrids, Inc v Doebler*, 442 F3d 812, 823 (CA 3, 2006), quoting an earlier version of McCarthy, Trademarks & Unfair Competition (alteration in the original). Stated another way, naked licensing also involves "allowing others to use the mark without exercising 'reasonable control over the nature and quality of the goods, services, or business on which the [mark] is used by the licensee'." *Eva's Bridal*, 639 F3d at 789 (citation omitted) (alteration in original).

A mark holder that engages in naked licensing thus destroys its mark—it is no longer able to serve as a meaningful source identifier to consumers and accordingly loses its significance as a mark—and the protections afforded to *actual* marks under the Lanham Act. *FreecycleSunnyvale v Freecycle Network*, 626 F3d 509, 516 (CA 9, 2010) (holding that "naked licensing is *inherently deceptive* and constitutes abandonment of any rights to the trademark by the licensor") (citation and quotation marks omitted); see also 3 McCarthy, Trademarks & Unfair Competition (4th ed), § 18:48.

Plaintiff's activity in this case is a textbook example of naked licensing. Its cavalier attitude toward use of the "Movie Mania" mark is reflected in its uncontrolled licensing of the mark to two business owners over a period of six years. In 1999, plaintiff entered into a licensing agreement with CLD and allowed CLD to use the "Movie Mania" mark in conjunction with its video-rental store. Yet plaintiff provided no standards for use of the mark, advertising, store operations, or any requirements related to the rental or sale of merchandise at the CLD-owned Movie Mania.

In 2005, plaintiff repeated these actions on a more audacious scale. After Adnan Samona purchased CLD, plaintiff allowed him use of the "Movie Mania" mark—and did not require him to sign a license agreement for that use, even as he expanded his business and used the "Movie Mania" mark at those new locations. And again, plaintiff placed almost no restrictions on Samona's use of the mark, nor did it set standards for his business on advertising or store operations or outline requirements related to the rental or sale of merchandise at the Samona-owned Movie Mania. To repeat: by 2007 there were six Movie Mania stores operating in metro Detroit, and only two were owned by plaintiff. It is not possible that the "Movie Mania" mark served as an "indication[] of consistent and predictable quality" to consumers at this point—multiple businesses used the "Movie Mania" name, and had no uniform standard of control or quality among them. Restatement Unfair Competition, 3d, § 33, comment *a*, p 338; see also *Eva's Bridal*, 639 F3d at 789.

Plaintiff's lax attitude toward its mark underwent a radical shift in 2010 when defendants expressed an interest in using "Movie Mania." But plaintiff's sudden discovery of responsible-trademark-holder religion

seems more like a conversion of convenience than a profession of genuine faith. And, in any event, plaintiff's actions by 2010—namely, its failure to control the activities and standards of the other businesses to which it had licensed the "Movie Mania" mark—had already destroyed any function of source identification that the mark possessed. The mark is thus abandoned under 15 USC 1127, and plaintiff has lost its "trademark rights against the world." *Exxon*, 109 F3d at 1075.

The trial court therefore correctly granted defendants summary disposition on plaintiff's claim of federal trademark infringement.

B. MICHIGAN TRADEMARK ACT

Plaintiff also appeals the trial court's determination under Michigan's Trademark Act that it "abandoned" the "Movie Mania" mark when it engaged in naked licensing. We agree that the trial court wrongly held that naked licensing of a mark constitutes abandonment of the mark under the Trademark Act. But the trial court's ultimate ruling—that defendants are not liable for trademark infringement—is correct because, as noted, naked licensing of a mark destroys the mark's validity and thus renders the mark not protectable as a trademark under Michigan law. We address each issue in turn.

1. ABANDONMENT

MCL 429.31(i) states that a mark is

> "abandoned" when its use has been discontinued with intent not to resume. Intent not to resume may be inferred from circumstances. Nonuse for 2 consecutive years shall be prima facie abandonment.

At the time period relevant to this litigation, plaintiff continuously operated a video-rental business bearing the "Movie Mania" mark. It is therefore not possible that plaintiff "abandoned" the mark under the Trademark Act's definition of that term because plaintiff never "discontinued" the mark's use. For the purposes of abandonment under the Trademark Act, it is irrelevant that plaintiff engaged in naked licensing because the Trademark Act does not recognize that naked licensing constitutes abandonment. Accordingly, the trial court improperly held that naked licensing of a mark constitutes abandonment of the mark under the Trademark Act.

2. TRADEMARK INFRINGEMENT

Plaintiff's underlying Trademark Act claim, however, is trademark infringement. A plaintiff that claims trademark infringement under MCL 429.42 must show that

> (1) the mark the plaintiff claims to hold is valid, in that it actually functions as a trademark, (2) the plaintiff holds priority in the mark, i.e., the plaintiff used the mark before the defendant, (3) consumers are likely to confuse the defendant's mark with the plaintiff's mark and (4) the defendant used the allegedly infringing mark. [*Travis*, 306 Mich App at 277-278 (citations omitted).]

If the plaintiff's mark is registered with the state, "the registration is prima facie evidence that the plaintiff's mark is valid, and the burden of production shifts to the defendant to demonstrate that the mark is not valid." *Id*. at 278. Under the Trademark Act and at common law, trademarks are valid when they are "(1) used in connection with the sale and advertising of products or services, and (2) distinctive, in that consumers understand the mark to designate goods or services as the

'product of a particular manufacturer or trader.' " *Id*. at 279, quoting *Shakespeare Co v Lippman's Tool Shop Sporting Goods Co*, 334 Mich 109, 113; 54 NW2d 268 (1952). Stated another way, to be "distinctive" and thus be a valid trademark, the trademark must serve as a "source identifier to consumers." *Travis*, 306 Mich App at 279, citing *Wal-Mart Stores, Inc v Samara Bros, Inc*, 529 US 205, 212; 120 S Ct 1339; 146 L Ed 2d 182 (2000).

There is no dispute that plaintiff "used" the mark "in connection with the sale and advertising" aspects of a video-rental business. However, defendants have offered convincing evidence—plaintiff's naked licensing of the "Movie Mania" mark—that "Movie Mania" is not "distinctive" and thus not valid.

Normally, the inquiry into whether a mark is distinctive focuses on the "now-classic test"[17] developed by Judge Friendly in *Abercrombie & Fitch Co v Hunting World, Inc*[18] that sorts marks into four categories—generic, descriptive, suggestive, and arbitrary or fanciful—to determine whether they distinguish a good as coming from a particular source. *Travis*, 306 Mich App at 280. But here, plaintiff's conduct makes this analysis unnecessary, because its naked licensing of the "Movie Mania" mark to other video-rental business operators has destroyed whatever distinctiveness "Movie Mania" possessed. The mark is thus not valid and is not entitled to protection under the Trademark Act. As noted in Part IV(A)(2)(a) of this opinion, plaintiffs who engage in naked licensing have *never* prevailed in a trademark-infringement suit under the common law or the Trademark Act against a defendant who uses the nakedly licensed mark for precisely this reason.

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[17] *Wal-Mart*, 529 US at 210.

[18] *Abercrombie & Fitch*, 537 F2d at 9.

Again, when plaintiff licensed the "Movie Mania" mark to CLD in 1999 and Samona in 2005, it placed almost no restrictions on the use of the mark, nor did it make provisions for advertising, store operations, or specify any requirements related to the rental or sale of merchandise at the CLD-owned and Samona-owned Movie Manias. Because plaintiff's licensing arrangements placed little to no control or restrictions on the business operations of its licensees, it was impossible for consumers to use the "Movie Mania" mark to distinguish the videos and other merchandise on offer as coming from a particular source. *Travis*, 306 Mich App at 280; *Eva's Bridal*, 639 F3d at 790. Videos rented at Samona's locations might have been of a completely different quality or type than those on hand at plaintiff's locations, and consumers had no ability, on the basis of the "Movie Mania" mark alone, to tell that the videos came from two separate providers. Accordingly, "Movie Mania" cannot be a valid mark because it is not distinctive, and therefore does not function as a trademark: the mark does not "tell shoppers what to expect—and whom to blame if a given outlet falls short." *Eva's Bridal*, 639 F3d at 790.

Plaintiff unskillfully, and wrongly, suggests that our adoption of defendants' argument against naked licensing applies to all trademark holders who choose to license their trademarks to other parties. This confuses the general practice of licensing (which *preserves* the validity of a trademark) with plaintiff's particular conduct (which destroys the validity of a trademark).

Trademark owners are of course permitted to license their trademarks and retain their trademark rights against infringers—but only if they are careful to ensure that their marks remain a source identifier to

consumers.[19] This is because, as noted, a trademark, to be valid, must, in the mind of the consuming public, designate goods or services as the product of a "particular manufacturer or trader." *Shakespeare Co*, 334 Mich at 113. To ensure that a mark retains its source-identifying capacity, trademark holders that license their trademarks place strict restrictions on licensees—ranging from the physical appearance and layout of the licensees' businesses, to what kind of merchandise a store can carry, to frequent inspections of the licensees' physical premises and merchandise by the trademark holder.[20]

Again, plaintiff does not show that it placed any of these restrictions on or exerted any sort of control over the business operations of its multiple licensees, who operated their Movie Mania stores almost entirely at their own discretion for more than a decade. It is thus impossible that the "Movie Mania" mark could have served to designate goods or services as the product of a particular manufacturer or trader to consumers in 2010 because, at that time, a series of completely different

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[19] " '[Trademark] licensing is permissible provided the licensor retains some degree of control over the quality of the goods or services market thereunder.' " *Vaad L'Hafotzas Sichos, Inc v Kehot Publication Society*, 935 F Supp 2d 595, 601 (ED NY, 2013) (citation omitted) (alteration in original). See also Restatement Unfair Competition, 3d, § 33, comments *b* and *c*, pp 339–342; 3 McCarthy, Trademarks & Unfair Competition (4th ed), § 18:42.

[20] *Kentucky Fried Chicken Corp v Diversified Packaging Corp*, 549 F2d 368, 387 (CA 5, 1977) ("Courts have long imposed upon trademark licensors a duty to oversee the quality of licensees' products."); *Gen Motors Corp v Gibson Chem & Oil Corp*, 786 F2d 105, 110 (CA 2, 1986) ("The critical question in determining whether a licensing program is controlled sufficiently by the licensor to protect his mark is whether the licensees' operations are policed adequately to guarantee the quality of the products sold under the mark."); *Eva's Bridal*, 639 F3d at 790 ("The sort of supervision required for a trademark license is the sort that produces *consistent* quality.").

video-rental stores had long used that mark, each with its own set of quality standards and separate business practices. Plaintiff cannot suddenly decide to enforce its trademark rights against defendants when it has already destroyed whatever validity its "Movie Mania" trademark had through its own actions.

Because the "Movie Mania" mark is not distinctive, in that it does not function as a source identifier to consumers, it is not a valid trademark. It is therefore unnecessary to discuss the other elements of trademark infringement under MCL 429.42. And though the trial court did not follow the above analysis in its holding on plaintiff's Trademark Act claim and incorrectly held that plaintiff's naked licensing constituted abandonment under the Trademark Act, it reached the correct result when it rejected plaintiff's arguments under the statute and granted defendants summary disposition.[21]

V. CONCLUSION

Accordingly, we reject plaintiff's claims under both the Lanham Act and the Michigan Trademark Act and affirm the trial court's grant of summary disposition to defendants under MCR 2.116(C)(10).

Affirmed.

METER, P.J., and CAVANAGH, J., concurred with SAAD, J.

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[21] "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Travelers Prop Cas Co of America v Peaker Servs, Inc*, 306 Mich App 178, 201; 855 NW2d 523 (2014) (citation and quotation marks omitted).

PEOPLE v STEVENS

Docket No. 312325. Submitted September 3, 2014, at Detroit. Decided September 11, 2014, at 9:00 a.m. Leave to appeal sought.

Roland H. Stevens was convicted of assault with intent to do great bodily harm, MCL 750.84, following a jury trial in the Wayne Circuit Court. The court, Gregory D. Bill, J., sentenced defendant as a fourth-offense habitual offender to 7 to 20 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. Prior record variable (PRV) 5, MCL 777.55, concerns prior misdemeanor convictions and prior misdemeanor juvenile adjudications. Under PRV 5, 20 points are to be assessed if the offender has seven or more prior misdemeanor convictions, 15 points are to be assessed if the offender has five or six misdemeanor convictions, 10 points are to be assessed if the offender has 3 or 4 prior misdemeanor convictions, 5 points are to be assessed if the offender has two prior misdemeanor convictions, and 2 points are to be assessed if the offender has one prior misdemeanor conviction. However, except as otherwise provided in MCL 777.55(2), a prior misdemeanor conviction may be counted only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. While the term "controlled substance offense" is not defined in the sentencing guidelines, it is appropriate to apply the definition of "controlled substance" from the Public Health Code, MCL 333.7104(2), for the purpose of scoring PRV 5. While drug paraphernalia is not itself a controlled substance, the definition of "drug paraphernalia" under the Public Health Code, MCL 333.7451, makes clear that certain acts related to drug paraphernalia have been criminalized because drug paraphernalia is inextricably linked to controlled substances. Further, the Legislature has specifically categorized offenses involving drug paraphernalia as controlled substance offenses under the Public Health Code. Therefore, offenses involving drug paraphernalia qualify as controlled substance offenses and may be counted when scoring PRV 5. In this case, the trial court properly counted defendant's prior misdemeanor convictions for possession of drug paraphernalia under PRV 5. Counting those offenses and also

accepting the prosecution's concession of error relating to several of defendant's other misdemeanor convictions, PRV 5 should have been scored at 15 points rather than 20 points. The error, however, did not require resentencing because the change to defendant's PRV score did not alter the appropriate guidelines range.

2. The elements of assault with intent to commit great bodily harm are (1) an attempt or threat with force or violence to do corporal harm to another, and (2) an intent to do great bodily harm less than murder. It is a specific intent crime, requiring an intent to do serious injury of an aggravated nature. In this case, the evidence—particularly defendant's instigation of the fight, his use of a knife, and the serious injury suffered by the victim—was sufficient to demonstrate that defendant intended to cause a serious injury of an aggravated nature. Ample evidence also existed to exclude beyond a reasonable doubt defendant's claim of self-defense. Therefore, the evidence presented at trial was sufficient to sustain defendant's conviction.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — PRIOR RECORD VARIABLES — PRIOR MISDEMEANOR CONVICTIONS — CONTROLLED SUBSTANCE OFFENSES — POSSESSION OF DRUG PARAPHERNALIA.

Prior record variable (PRV) 5, MCL 777.55, concerns prior misdemeanor convictions and prior misdemeanor juvenile adjudications; offenses involving drug paraphernalia qualify as "controlled substance offenses" as that term is used in PRV 5 and may be counted when scoring PRV 5.

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

Michael J. McCarthy, PC (by *Michael J. McCarthy*), for defendant.

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

PER CURIAM. Following a jury trial, defendant appeals as of right his conviction of assault with intent to do

great bodily harm (AWIGBH), MCL 750.84. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 7 to 20 years' imprisonment. Because the prosecution presented sufficient evidence to support defendant's conviction for AWIGBH and any error related to the scoring of prior record variable (PRV) 5 does not entitle defendant to resentencing, we affirm.

Defendant's conviction arises from a stabbing that occurred on March 7, 2012. At the time of the stabbing, the victim, Luther Allbright, lived with two women, Maria Castillo and Sandra Williams. The evening before the stabbing, defendant and Williams went to defendant's apartment, approximately two blocks from Allbright's house. When Williams did not return to Allbright's house, Castillo became concerned, and she and Allbright went to defendant's apartment. After Castillo aggressively knocked on the apartment door, defendant opened the door and punched Castillo, at which time Allbright departed from the building without entering defendant's apartment. Sometime later, Castillo and Williams also departed; but defendant ran after the women and stopped them. Defendant frisked Williams, supposedly looking for possessions he claimed were missing from his apartment.

The following afternoon, defendant went to Allbright's home and a fight ensued. In particular, according to Allbright, defendant entered his home uninvited and asked, "Why did you bring all that drama to my house?" Defendant then punched Allbright in the face, after which defendant wrestled him to the ground. While the two rolled on the ground, defendant stabbed Allbright twice in the left side of his back, once in the right side of his back (puncturing Allbright's lung), and once in his left arm. He then pinned Allbright to the

ground and told him, "I'm King Tut, bitch." Afterward, defendant left Allbright's house, purchased beer at a party store, and returned to his apartment.

At trial, defendant conceded that he brought a knife to Allbright's home and that he stabbed Allbright, but he claimed that he acted in self-defense. According to defendant's version of events, he suffers from several medical conditions, including congestive heart failure. Defendant maintained that, during the fight, Allbright ended up on top of defendant while they were wrestling on the ground and, because of his medical conditions, defendant could not breathe, which prompted him to pull a knife and stab Allbright several times.

The trial court instructed the jury on the theory of self-defense; however, the jury convicted defendant of AWIGBH.[1] The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 7 to 20 years' imprisonment. Defendant now appeals as of right.

On appeal, defendant first argues that the trial court erred when it assessed 20 points under PRV 5 on the basis of defendant's prior misdemeanor convictions. Defendant failed to preserve his challenge to the scoring of PRV 5 for appeal, meaning his claim is unpreserved and reviewed for plain error affecting his substantial rights. *People v Loper*, 299 Mich App 451, 456-457; 830 NW2d 836 (2013); MCL 769.34(10).

Relevant to defendant's claim, under MCL 777.55(1)(a), PRV 5 should be scored at 20 points when the offender has seven or more prior misdemeanor convictions. The phrase "prior misdemeanor conviction" refers to "a conviction for a misdemeanor under a

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[1] The jury found defendant not guilty of assault with intent to murder, felonious assault, and first-degree home invasion.

law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed." MCL 777.55(3)(a). However, for purposes of PRV 5, not all prior misdemeanor convictions may be counted when determining how many prior misdemeanor convictions a defendant has. MCL 777.55(2). Specifically, except as provided in MCL 777.55(2)(b), which does not apply in this case, a prior misdemeanor conviction may be counted "only if it is an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a).

In this case, defendant has numerous misdemeanor convictions that the trial court considered when it assessed defendant 20 points under PRV 5. On appeal, defendant acknowledges that he has 13 misdemeanor convictions, including four for possession of drug paraphernalia, but he asserts that he should have been assessed only 10 points, the score appropriate when the offender has 3 or 4 misdemeanor convictions. See MCL 777.55(1)(c). Defendant argues that only four of his misdemeanor offenses—aggravated assault, resisting and obstructing a police officer, and two trespassing convictions—qualify as offenses against a person or property, a controlled substance offense, or a weapon offense. He specifically asserts that his four convictions for possession of drug paraphernalia may not be counted as controlled substance offenses.

The prosecution concedes error in the scoring of PRV 5, acknowledging that not all of defendant's misdemeanor convictions should have been counted. However, the prosecution identifies what it considers to be six offenses that could have been properly counted under PRV 5: aggravated assault, resisting and ob-

structing, and four convictions for possession of drug paraphernalia.[2] By the prosecution's count, defendant's prior misdemeanors merit a PRV 5 score of 15 points. See MCL 777.55(1)(b).

If the prosecution is correct, any error in the trial court's scoring was harmless as it did not affect defendant's ultimate PRV score and therefore did not alter the appropriate guideline range. In contrast, if defendant's view is correct, a PRV 5 score of 10 points would necessitate resentencing because it would affect defendant's ultimate PRV score and thus alter the appropriate guidelines range. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) ("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required."). Specifically, with a PRV 5 score of 20 points, defendant's total PRV score was 55 points, placing him in PRV Level E. MCL 777.65. A reduction to 15 points, as advanced by the prosecution, results in a total PRV score of 50 points, which still places defendant in PRV Level E. In contrast, a 10-point score for PRV 5, as championed by defendant, reduces defendant's total PRV score to 45 points, placing him in PRV Level D. *Id*. Because error, if there is error, in the counting of defendant's misdemeanor drug paraphernalia offenses would necessitate resentencing, we must decide whether misdemeanor convictions for possession of drug paraphernalia qualify as controlled substance offenses for purposes of scoring PRV 5.

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[2] We note that, in contrast to the prosecution, defendant includes two trespassing convictions as misdemeanors that may be scored under PRV 5, presumably on the premise that they constitute crimes against property. Because, in this case, scoring of these trespassing offenses will not alter the appropriate guideline range, we find it unnecessary to consider whether misdemeanor trespassing convictions may be scored under PRV 5. Cf. *People v Crews*, 299 Mich App 381, 399 n 10; 829 NW2d 898 (2013).

To make this determination, we must ascertain what the Legislature intended when it authorized the counting of a prior misdemeanor conviction under PRV 5 that qualified as a "controlled substance offense." MCL 777.55(2)(a). The Code of Criminal Procedure and, in particular, the statutory provisions relating to the scoring of PRV 5 do not include a definition of the phrase "controlled substance offense." However, this Court has previously recognized that the phrase relates to Article 7 of the Public Health Code. See *People v Endres*, 269 Mich App 414, 418; 711 NW2d 398 (2006), overruled in part on other grounds by *People v Hardy*, 494 Mich 430, 438 n 18 (2013). Specifically, Article 7, which is titled "controlled substances,"[3] includes a definition for the term "controlled substance" and it penalizes offenses involving controlled substances. Because Article 7 governs controlled substances, in *Endres*, this Court ruled "it appropriate to apply the Public Health Code definition of 'controlled substance' for purposes of PRV 5," and, because alcohol was not identified as a controlled substance under the Public Health Code definition, this Court reasoned that the defendant's alcohol-related misdemeanor convictions could not be counted under PRV 5 as controlled substance offenses. *Id*. at 418-420.

In keeping with *Endres*, we again turn to Article 7 of the Public Health Code to ascertain whether misdemeanor convictions for possession of drug paraphernalia may be counted toward the scoring of PRV 5 as controlled substance offenses. A definition of drug paraphernalia is specifically provided in Article 7 at MCL 333.7451, and this definition makes plain that, while drug paraphernalia is not itself a controlled substance, certain acts related to drug paraphernalia have been criminalized because drug paraphernalia is inextricably

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[3] Capitalization altered.

linked to controlled substances. For this reason, offenses involving drug paraphernalia qualify as controlled substance offenses. Specifically, "drug paraphernalia" refers to "any equipment, product, material, or combination of equipment, products, or materials, which is specifically designed for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body *a controlled substance* . . . ." MCL 333.7451 (emphasis added). Acts involving drug paraphernalia are then criminalized in MCL 333.7453 and MCL 333.7455. Notably, the statutory definition of drug paraphernalia and the related provisions criminalizing activities associated with drug paraphernalia are found in Part 74 of Article 7, and Part 74 is specifically titled "offenses and penalties."[4] Thus, offenses involving drug paraphernalia have been specifically categorized by the Legislature as offenses within the controlled substances article of the Public Health Code. Given this classification, it is apparent that such offenses may be counted as controlled substance offenses for purposes of PRV 5.

Accordingly, we conclude that, in this case, the trial court properly counted defendant's misdemeanor convictions for possession of drug paraphernalia under PRV 5.[5] Counting these offenses and also accepting the

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[4] Capitalization altered; italicization omitted.

[5] Given this result, we see no merit in defendant's claim that counsel rendered ineffective assistance by failing to object to the scoring of defendant's misdemeanor convictions for possession of drug paraphernalia. Because these convictions were properly scored, any objection by counsel would have been futile, and counsel cannot be considered ineffective for failing to raise a futile objection. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

prosecution's concession of error relating to several of defendant's other misdemeanor convictions, PRV 5 should have been scored at 15 points rather than 20 points. However, this error does not require resentencing because the change to defendant's PRV score does not alter the appropriate guidelines range. See *Francisco*, 474 Mich at 89 n 8.

On appeal, defendant also argues that the evidence presented at trial was insufficient to sustain his conviction for AWIGBH. Specifically, defendant maintains that the prosecution failed to establish that he possessed the requisite intent to cause great bodily harm. He also asserts that the prosecution failed to disprove his claim of self-defense.

Challenges to the sufficiency of the evidence are reviewed de novo, in the light most favorable to the prosecution, to determine if any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012). All conflicts in the evidence are resolved in favor of the prosecution. *Id*. This Court will not interfere with the trier of fact's determinations regarding the weight of the evidence or the credibility of witnesses. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The elements of AWIGBH are "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). AWIGBH is a specific intent crime. *Id*. The intent to do great bodily harm less than murder is "an intent to do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation marks and citation omitted). "If a defendant has such intent, the fact

that he was provoked or that he acted in the heat of passion is irrelevant to a conviction." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Because of the difficulty in proving an actor's intent, only minimal circumstantial evidence is necessary to show that a defendant had the requisite intent. *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010). Intent to cause serious harm can be inferred from the defendant's actions, including the use of a dangerous weapon or the making of threats. See *Parcha*, 227 Mich App at 239; *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970). Although actual injury to the victim is not an element of the crime, *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992), injuries suffered by the victim may also be indicative of a defendant's intent, see *Cunningham*, 21 Mich App at 384.

In this case, defendant went to Allbright's home armed with a knife to confront him over a perceived wrong from the previous evening. Allbright testified that defendant entered his home without invitation, threatened him, instigated a fight, and wrestled him to the ground. Defendant then took out his knife and stabbed Allbright four times. Three of the stab wounds were to Allbright's back, and one succeeded in puncturing his lung. After stabbing Allbright, defendant pinned him to the ground and proclaimed that he was "King Tut, bitch." Defendant then walked away from the incident, purchased beer, and went home. On the whole, this evidence—particularly defendant's instigation of the fight, his use of a knife, and the serious injury suffered by Allbright—was sufficient to demonstrate that defendant intended to cause a serious injury of an aggravated nature.

To the extent defendant argues that the prosecution failed to disprove his claim of self-defense, his claim is

equally without merit. Once a defendant raises the issue of self-defense and "satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist," the prosecution must "exclude the possibility" of self-defense beyond a reasonable doubt. *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010) (quotation marks and citations omitted). Under MCL 780.972(1):

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if . . .
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

In this case, ample evidence existed to discount defendant's claim of self-defense. According to Allbright, defendant entered his home uninvited and attacked him. From this, it appears defendant had no legal right to be in the home, and that, by attacking Allbright, defendant engaged in the commission of a crime. In these circumstances, defendant could not justifiably claim self-defense. See MCL 780.972(1)(a). Further, Allbright was never armed with any sort of weapon, and there is no indication that Allbright used deadly force against defendant. The only evidence that defendant had reason to fear for his life came from defendant's testimony, in particular defendant's claim that Allbright was on top of him during their struggle, causing him difficulty breathing. But this testimony was in conflict with Allbright's description of events, and the credibility of defendant's testimony was a question for the jury. See *Kanaan*, 278 Mich App at 619.

And, indeed, a jury could well disbelieve, even from defendant's description, that stabbing Allbright four times was necessary to prevent defendant's imminent death. On the whole, the prosecution provided sufficient evidence to exclude beyond a reasonable doubt defendant's claim of self-defense. See MCL 780.972(1)(a).

Affirmed.

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

JESPERSON v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 315942. Submitted July 6, 2014, at Detroit. Decided September 16, 2014, at 9:00 a.m. Leave to appeal sought.

Alan Jesperson initially brought an action in the Macomb Circuit Court against Matthew Badelalla, Mary Basha, and Jet's Pizza, seeking damages for injuries he sustained in a motor vehicle accident on May 12, 2009. While stopped, Jesperson's motorcycle was struck from behind by a vehicle owned by Basha and driven by Badelalla while Badelalla was delivering pizza for Jet's. On June 2, 2010, Auto Club Insurance Association was notified of Jesperson's injuries and that it was the highest-priority no-fault insurer. Auto Club began making payments to Jesperson on July 23, 2010. On December 1, 2010, Jesperson filed suit against Badelalla, Basha, and Jet's. The court, Mark S. Switalski, J., entered a default judgment against Badelalla and Basha after they failed to respond. Jesperson later moved to amend his complaint to add a claim against Auto Club after Auto Club stopped paying benefits to him. The court entered an order allowing the amendment and subsequently entered an order severing Jesperson's claims for trial. A jury returned a verdict of no cause of action with regard to Jesperson's claims against Jet's. Auto Club then moved for summary disposition, arguing in part that Jesperson's claim against it was barred by the statute of limitations provision in MCL 500.3145(1). Jesperson asserted in response that Auto Club had waived the statute of limitations defense. The court granted summary disposition in favor of Auto Club, but did not specifically decide the issue of waiver. The court denied Jesperson's motion for reconsideration. Jesperson appealed.

The Court of Appeals *held*:

1. MCL 500.3145(1) states that an action for recovery of personal protection insurance benefits may not be commenced later than one year after the date of the accident causing the injury unless written notice of injury has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If notice has been given or a payment has been made, the action may be commenced at any time within one year after the most

recent allowable expense, work loss, or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than one year before the date on which the action was commenced. As used in MCL 500.3145(1), "previously" means previous to one year after the date of the accident causing the injury. Therefore, for the second exception to the statute of limitations set forth in MCL 500.3145(1) to apply, a payment of personal protection insurance benefits must have been made within one year of the accident. To hold, as Jesperson contrarily suggested, that a payment only had to be made before the filing of the claim, would have rendered an absurd result by allowing even decades-old claims to be asserted in contravention of the legislative purpose of the no-fault act: to protect against stale claims and protracted litigation.

2. A party generally must raise an affirmative defense in his or her first responsive pleading or it is waived, but leave to amend pleadings should be freely granted to a nonprevailing party at summary disposition unless amendment would be futile or otherwise unjustified. In this case, Auto Club cited MCL 500.3145(1) as an affirmative defense in its first responsive pleading, but specifically referred to the one-year-back provision contained in that statute and not the statute of limitations. But had the trial court found that Auto Club failed to plead the statute of limitations defense with sufficient clarity, it could have granted Auto Club leave to amend the pleading, in which case the result would have been the same: the limitations period of MCL 500.3145(1) barred Jesperson's claim. Given the interest of judicial efficiency, there was no need to remand the case for the trial court to specifically allow amendment of the pleading, and Auto Club did not waive the statute of limitations. Because Jesperson filed his claim for first-party no-fault benefits more than one year after the date of the accident, neither exception to the one-year period of limitations set forth in MCL 500.3145(1) was applicable, and the statute of limitations defense was not waived; Jesperson's claim was barred.

Affirmed.

SERVITTO, J., dissenting, would have reversed the trial court's grant of summary disposition in favor of Auto Club and remanded for further proceedings. Under MCR 2.111(F)(3), a party must state the facts constituting an affirmative defense in its responsive pleading. In this case, Auto Club failed to plead the statute of limitations provision contained in MCL 500.3145(1) as an affirmative defense. Given that there is more than one provision set forth in the applicable statute and Auto Club specifically referred to only one of those statutory provisions in its list of affirmative defenses, the statutory reference in

Auto Club's list of affirmative defenses did not apprise Jesperson that Auto Club intended to rely on any provision other than the one specifically referred to. And, as a result, Jesperson was not able to take a responsive position to those provisions that were not referred to. Any affirmative defense that was dependent on those other provisions was therefore waived. While the trial court could have allowed Auto Club to amend its pleadings, there was no indication in the record that it did so. Because Auto Club did not assert the statute of limitations defense set forth in MCL 500.3145(1) in its first responsive pleading or an amended pleading, Auto Club waived that defense and the trial court erred by granting summary disposition in Auto Club's favor.

INSURANCE — NO-FAULT INSURANCE — PERSONAL PROTECTION BENEFITS — AFFIRMATIVE DEFENSES — STATUTE OF LIMITATIONS — EXCEPTIONS — PAYMENT OF BENEFITS.

MCL 500.3145(1) states that an action for recovery of personal protection insurance benefits may not be commenced later than one year after the date of the accident causing the injury unless written notice of injury has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury; if notice has been given or a payment has been made, the action may be commenced at any time within one year after the most recent allowable expense, work loss, or survivor's loss has been incurred; however, the claimant may not recover benefits for any portion of the loss incurred more than one year before the date on which the action was commenced; for the second exception to the statute of limitations set forth in MCL 500.3145(1) to apply, a payment of personal protection insurance benefits must have been made within one year after the accident.

The Law Offices of Michael J. Morse, PC (by *Michael J. Morse*, *Eric M. Simpson*, *Lewis A. Melfi*, and *Meaghan B. McKay*), for Alan Jesperson.

Secrest Wardle (by *Brian E. Fischer* and *Drew W. Broaddus*) for Auto Club Insurance Association.

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

BOONSTRA, P.J. In this action for unpaid first-party no-fault benefits, plaintiff appeals as of right the Feb-

ruary 19, 2013 order of the trial court granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On May 12, 2009, Matthew Badelalla, an employee of Jet's Pizza, was driving a 1993 Toyota Camry owned by his mother, Mary Basha, while delivering pizzas. Plaintiff was operating a motorcycle, and stopped on 18 Mile Road at an intersection with Mound Road in Sterling Heights. While stopped, plaintiff's motorcycle was struck from behind by Badelalla's slow-moving vehicle. The impact caused plaintiff's motorcycle to fall to plaintiff's left side. Plaintiff jumped off of the motorcycle and was able to land on his feet without falling to the ground. His motorcycle suffered $2,000 in damage, but was still drivable. Plaintiff reported no injuries, received no medical treatment at the scene, and drove his motorcycle back to work. Plaintiff had no complaints of injury the day of the accident. However, plaintiff alleged that he developed back and shoulder pain as a result of the accident, eventually resulting in surgeries on his right shoulder, neck, and back. Plaintiff's treating physician indicated that he had restricted plaintiff from returning to work and that plaintiff would likely never return to his same position as a carpenter at the Ford Sterling Axle Plant.

On June 2, 2010, more than one year after the accident, defendant was provided with notice that plaintiff had been injured and that defendant was the highest priority no-fault insurer. An employee of defendant stated during her deposition that defendant had paid plaintiff $21,714.87 in medical expenses for doctor visits and physical therapy. Defendant's first payment to plaintiff was made on July 23, 2010.

On December 1, 2010, plaintiff filed suit against Badelalla, Basha, and Jet's Pizza, alleging that Badelalla's negligence caused plaintiff's injury, Basha negligently allowed Badelalla to drive her car, and Jet's Pizza was vicariously liable for the actions of Badelalla. After failing to respond to the summons and complaint, an order of default was entered against Badelalla and Basha on January 19, 2011.

At some point after plaintiff filed the complaint, defendant stopped paying benefits to plaintiff. Plaintiff then moved the trial court to allow him to amend his original complaint to add a first-party no-fault claim against defendant. The trial court entered an order allowing plaintiff to file an amended complaint to add defendant to the suit. In response to the trial court's order, plaintiff filed his amended complaint alleging that defendant had violated the no-fault act by refusing to pay plaintiff's benefits. Defendant filed an answer and affirmative defenses. Among the affirmative defenses asserted by defendant was the following:

> 3. That since notice was given, or payment has been previously made, Plaintiff may not recover benefits for any alleged expenses incurred more than one (1) year before the date on which the action was commenced, pursuant to MCL 500.3145(1).

While thus referring to MCL 500.3145(1) and the one-year-back rule that is reflected in that statutory provision, defendant did not assert an affirmative defense that specifically referred to the separate statute of limitations provision that is also reflected in MCL 500.3145(1).

The matter proceeded through discovery relative to both plaintiff's first-party and third-party no-fault claims, but the trial court eventually entered an order severing the claims for trial, with the trial on plaintiff's third-party no-fault claims against Jet's Pizza to take

place first and the trial on plaintiff's first-party no-fault claims against defendant to take place thereafter. Plaintiff's third-party no-fault claims against Jet's Pizza proceeded to trial before a jury. On December 6, 2012, the jury returned a verdict of no cause of action, explicitly deciding that plaintiff was injured but that Jet's Pizza did not proximately cause plaintiff's injuries.

Shortly after the disposition of the third-party no-fault claim, defendant filed two separate motions for summary disposition against plaintiff on this first-party no-fault claim. The first motion, filed on January 22, 2013, pursuant to MCR 2.116(C)(7) and (10), asserted that a motorcycle is not a motor vehicle under the no-fault act and therefore does not fall under the act's protection, and further that the jury verdict on the third-party no-fault claim conclusively determined that Badelalla's vehicle was not "involved" in the accident.

One week later, on January 29, 2013, defendant filed a second motion for summary disposition under MCR 2.116(C)(7) and (10). In that motion, defendant argued that plaintiff's claim was barred by the statute of limitations provision of MCL 500.3145(1). Specifically, defendant argued that MCL 500.3145(1) barred a claim for first-party no-fault benefits filed more than one year after the date of the accident, absent certain conditions. According to defendant, because the accident occurred on May 12, 2009, and the amended complaint asserting a first-party no-fault claim against defendant was not filed until May 16, 2011, plaintiff could not survive summary disposition unless he had provided written notice or received payment from defendant within one year of the accident. Notice, however, was not provided until June 2, 2010, and a payment from defendant was not received until July 23, 2010, both more than one year after the accident.

Plaintiff responded to defendant's motions on February 12, 2013. Plaintiff argued that defendant had waived the statute of limitations defense by failing to assert it in its first responsive pleading as an affirmative defense. Plaintiff also argued that he had not violated the statute of limitations because defendant's July 23, 2010 payment of benefits revived his claim. According to plaintiff, MCL 500.3145(1) does not require any payments be made within one year of the accident; it instead provides an exception to the statute of limitations when an insurer has at any time made a payment on a claim.

On February 19, 2013, the trial court heard defendant's motions for summary disposition. During the hearing, defendant acknowledged that the caselaw was sparse on the precise statute of limitations issue before the court. But, defendant argued on the basis of the language of the statute, a payment was required to be made within one year of the accident in order to fulfill the requirements of the second exception found in MCL 500.3145(1). Defendant also argued that it had not waived the statute of limitations defense. While defendant had not identified that specific defense in its first responsive pleading, it had cited the statute containing the limitations provision, although it had cited it in asserting the one-year-back rule. Defendant argued that citation of the statute should have been enough to provide plaintiff with notice of defendant's intent to use the affirmative defense, and that, if it was not, then defendant requested that it be allowed to amend its pleading to include the affirmative defense, which the trial court could permit within its discretion.

The trial court found defendant's position to be persuasive. Therefore, because plaintiff had not provided notice or received a payment within one year of

the accident, the statute of limitations had run and summary disposition was proper in favor of defendant. The trial court did not address the waiver issue. On February 20, 2013, the trial court entered an order granting defendant's motion for summary disposition, on statute of limitations grounds, "for the reasons stated on the record."[1] The trial court did not rule on defendant's earlier-filed motion for summary disposition.

Plaintiff moved for reconsideration. The trial court denied that motion, stating that its determination was supported by the plain language of the statute and this Court's decision in *Velazquez v MEEMIC*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2006 (Docket No. 264776).[2] Specifically, the trial court reasoned:

> In light of the plain language of MCL 500.3145(1) and the Court of Appeals' decision in *Velazquez*, *supra*, the Court was — and remains — convinced that an insurer must either (1) be given notice within one year after the accident, or (2) have paid benefits within one year of the accident, in order for an insured to be entitled to bring suit under the No-Fault Act. Accordingly, plaintiff's motion for reconsideration is properly denied.

This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). "Subrule (C)(7) permits summary disposition where the claim is barred

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[1] Capitalization altered.

[2] Unpublished opinions of this Court are not binding precedent, but may be persuasive authority. MCR 7.215(C)(1).

by an applicable statute of limitations." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). In considering a motion under MCR 2.116(C)(7), "[w]e consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001), citing MCR 2.116(G)(5). For purposes of MCR 2.116(C)(7), this Court must consider the provided documentary evidence in a light most favorable to the nonmoving party. *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Further, "[t]his Court reviews de novo questions of law involving statutory interpretation." *Mich Muni Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999).

III. INTERPRETATION OF MCL 500.3145(1)

Plaintiff argues that the trial court erred by grafting a temporal limitation onto the portion of MCL 500.3145(1) at issue, and by concluding that plaintiff's claim was barred under the limitations period it prescribes. That is, plaintiff maintains that when an insurer has made a payment of benefits, the one-year statute of limitations provision of the statute does not apply even if the payment was not made within one year of the accident. We disagree.

Recently, in *In re Harper*, 302 Mich App 349, 354-355; 839 NW2d 44 (2013), this Court set out the proper process for interpreting statutory law:

> The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). A statutory provision

> must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks and citation omitted). Only when the statutory language is ambiguous may a court consider evidence outside the words of the statute to determine the Legislature's intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). However, "[a]n ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute, as used in its particular context, has more than one common and accepted meaning." *Papas* [*v Gaming Control Bd*], 257 Mich App [647, 658; 669 NW2d 326 (2003)].

Therefore, the starting point of this Court's analysis is the plain language of the statute. MCL 500.3145(1) states, in pertinent part:

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

The statute begins by establishing a general rule that an action for first-party personal protection insurance

benefits "may not be commenced later than 1 year after the date of the accident causing the injury . . . ." MCL 500.3145(1). However, the statute then provides two exceptions to the general rule, under which a suit may be brought more than one year after the date of the accident. The first exception is when "written notice of injury as provided herein has been given to the insurer within 1 year after the accident . . . ." The second exception is when "the insurer has previously made a payment of personal protection insurance benefits for the injury." Although the first exception explicitly requires that notice have been provided within one year of the accident, the second exception requires that the insurer have "previously" made a payment of insurance benefits.[3]

The question then becomes what the adverb "previously" means in the context of this statutory language. As the parties note, no published authority exists that is precisely on point in deciding this issue, nor has the Legislature provided a definition of the word "previously," as used in this statute. In such situations, words and phrases in a statute should be read in context and given their ordinary meanings. *Harper*, 302 Mich App at 354. A reviewing Court may consult a dictionary as an aid to interpretation. *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). The word "previously" means "coming or occurring before something else; prior[.]" *Random House Webster's College Dictionary* (2d ed, 2001), p 1049. The pertinent issue before this Court is what the "something else" is before which the payment by

[3] After setting forth the general one-year limitations period and the two exceptions, the statute then states the one-year-back rule, which limits a claimant from recovering benefits "for any portion of the loss incurred more than 1 year before the date on which the action was commenced." MCL 500.3145(1). Neither the first exception to the general limitations period nor the one-year-back rule is at issue in this case.

an insurer must have come or occurred. Plaintiff essentially argues that the "something else" is simply the filing of a plaintiff's first-party claim against a defendant;[4] defendant argues, and the trial court held, that the "something else" is the expiration of one year following the accident. We agree with defendant and the trial court.

The two exceptions in MCL 500.3145(1) to its one-year limitations period are clearly separated by the word "or." The word "or" is a disjunctive term indicating a choice between alternatives. See *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). In the context of this statute, those alternatives are the two exceptions to the one-year limitations period. Since the first exception is inapplicable in this case, our interpretation of the plain language of the statute is facilitated by removing the language of the first exception, such that the relevant statutory language becomes:

> An action for recovery of personal protection insurance benefits . . . may not be commenced later than 1 year after

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[4] We note that plaintiff's first-party no-fault claim against defendant was added by way of an amended complaint in a previously filed action for third-party no-fault benefits against Badelalla, Basha, and Jet's Pizza. The date of filing of plaintiff's original complaint does not control, however, because the action at that time was for third-party no-fault benefits and, thus, was not "[a]n action for recovery of personal protection insurance benefits . . . ." MCL 500.3145(1). See *McCormick v Carrier*, 487 Mich 180, 279-280; 795 NW2d 517 (2010) (MARKMAN, J., dissenting) (explaining the difference between first-party and third-party benefits); *Hunt v Citizens Ins Co*, 183 Mich App 660, 666; 455 NW2d 384 (1990), citing *Taulbee v Mosley*, 127 Mich App 45, 47-48; 338 NW2d 547 (1983) (holding that the filing of third-party claims against other parties does not toll the running of the limitations period under MCL 500.3145(1) with regard to a defendant against whom first-party claims are asserted when the first-party claims are added to the original suit by amended complaint). In any event, even plaintiff's original complaint seeking third-party no-fault benefits was filed more than "1 year after the date of the accident causing injury . . . ." MCL 500.3145(1).

> the date of the accident causing the injury . . . unless the insurer has previously made a payment of personal protection insurance benefits for the injury. [MCL 500.3145(1).]

We conclude from this plain statutory language that the Legislature intended that the word "previously" mean previous to "1 year after the date of the accident causing the injury . . . ." This interpretation is supported by the fact that the Legislature juxtaposed "previously" with "1 year after the date of the accident causing injury," which language thus appears much closer in proximity to the word "previously" than does the Legislature's earlier reference to the commencement of "[a]n action." This interpretation also is supported by two principles of statutory construction: our directive to avoid interpretations that result in absurd consequences, and our directive to avoid interpretations that render portions of a statute nugatory. See *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008); *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). To hold, as plaintiff suggests, that any payment made by an insurer would revive a stale claim, no matter how much time has elapsed, would render an absurd result by allowing, potentially, even decades-old claims to be asserted. Further, that interpretation would essentially eliminate the limitations period of MCL 500.3145(1) in cases in which an insurer has ever paid anything on a claim, rather than providing a limited exception that allows for the filing of suit more than one year after the accident in certain circumstances. We decline to adopt plaintiff's preferred interpretation, which we find would be in contravention of the "legislative purpose in the no-fault act in encouraging claimants to bring their claims to court within a reasonable time and the reciprocal obligations of insurers to adjust and pay claims seasonably" and to "protect against stale claims and protracted

litigations." *Pendergast v American Fidelity Fire Ins Co*, 118 Mich App 838, 841-842; 325 NW2d 602 (1982).

In reaching this conclusion, we are mindful of the fact that in crafting the first exception the Legislature chose language that expressly required written notice of injury "within 1 year after the accident," whereas in crafting the second exception it chose to use the word "previously." However, in the context of this statute, we conclude that the two phraseologies mean precisely the same thing. The Legislature was not required to use identical terminology in crafting the two exceptions, particularly when doing so in the context of a single statutory sentence would be repetitive. We conclude in this circumstance that the Legislature did not intend different temporal meanings in the two exceptions, but instead intended that the second exception's use of the word "previously" conveyed the same temporal meaning as did the quoted language of the first exception.

We therefore hold that MCL 500.3145(1) allows for suit to be filed more than one year after the date of the accident causing injury only if the insurer has either received notice of the injury within one year of the accident *or* made a payment of personal protection insurance benefits for the injury within one year of the accident.

IV. WAIVER OF AFFIRMATIVE DEFENSE

Plaintiff also argues that, even if the statute of limitations bars his claim, defendant has waived the defense by failing to assert it in its first responsive pleading. We disagree.

A party generally must raise an affirmative defense in his or her first responsive pleading or it is waived. *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On*

Remand), 242 Mich App 645, 647; 620 NW2d 310 (2000). MCR 2.111(F)(3) provides:

> Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting
>
> (a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery;
>
> (b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part;
>
> (c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.

In this case, defendant cited MCL 500.3145(1) in an affirmative defense, but only referred to the one-year-back rule contained in that statute. Specifically, defendant stated, "That since notice was given, or payment has been previously made, Plaintiff may not recover benefits for any alleged expenses incurred more than one (1) year before the date on which the action was commenced, pursuant to MCL 500.3145(1)." At the summary-disposition motion hearing, defendant argued that its citation of the statute should have been enough to provide plaintiff with notice of defendant's intent to rely on the affirmative defenses of the statute, including the statute of limitations provision, and that, if it was not, then defendant requested that it be allowed to amend its pleading to include the affirmative defense, which the trial court could permit within its discretion. The trial court did not specifically rule on the waiver issue, or on the

alternative request to amend, but granted summary disposition in favor of defendant as previously described in this opinion.

"[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). Given defendant's citation of MCL 500.3145(1) in its affirmative defenses, plaintiff arguably was made aware of the limitations period of that statute and not unfairly surprised by defendant's assertion of the defense. See *Stanke*, 200 Mich App at 317. However, the fact is that defendant did not refer to the statute of limitations in any fashion, and instead specifically described its affirmative defense as relating to the one-year-back provision of the statute, thereby arguably suggesting that it was not citing the statute for any other purpose.

However, leave to amend pleadings should be freely granted to a nonprevailing party at summary disposition, unless amendment would be futile or otherwise unjustified. *Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 126-127; 724 NW2d 718 (2006). Therefore, had the trial court found that defendant had failed to plead the statute of limitations defense with sufficient clarity, it could have, in its discretion, granted defendant leave to amend its pleading, in which case the result would be the same—the limitations period of MCL 500.3145(1) would still bar plaintiff's claim. Given the trial court's discretion to simply allow amendment of the pleading, and in the interest of judicial efficiency, we see no need to remand the case for the trial court to do just that. Accordingly, we conclude that defendant did not waive the affirmative defense of the statute of limitations.

Affirmed.

METER, J., concurred with BOONSTRA, P.J.

SERVITTO, J. (*dissenting*). I respectfully dissent.

MCR 2.111(F)(3) requires that affirmative defenses be stated in a party's responsive pleading, either as originally filed or as amended and states that a party must state the facts constituting:

> (a) an affirmative defense . . . ;
>
> (b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part;
>
> (c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.

Under this rule, it is insufficient for a defendant to merely list the defense; the defendant must identify the affirmative defense under a separate heading and must plead specific facts indicating, when a statute of limitations is at issue, that the statute "is applicable as a special defense which prevented recovery against this defendant." *Kincaid v Cardwell*, 300 Mich App 513, 536 n 5; 834 NW2d 122 (2013) (citation and quotation marks omitted).

Under MCR 2.111(F)(2), "[a] party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim *must* assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as provided by these rules is waived . . . ." (Emphasis added.) Given the requirement that specific facts must be stated to support an affirmative defense, it is only logical that a defendant is thus restricted to the specific defenses and the specific facts underlying those defenses that he or she has pleaded. That is, if the defendant has not pleaded a specific

defense, the defendant has waived it, just as stated in the court rule. It is undisputed that defendant here did not plead the statute of limitations provision contained in MCL 500.3145 as an affirmative defense.

Relevant to the instant matter, our Supreme Court has explicitly held that MCL 500.3145 "contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered[.]" *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005). Thus, there are at least two specific affirmative defenses contained within MCL 500.3145: a statute of limitations defense and a defense limiting the amount of damages recoverable. Though they appear in the same statute, they are two very different affirmative defenses. Therefore, I disagree with the majority's conclusion that plaintiff was not unfairly surprised by defendant's assertion of the statute of limitations defense in its summary disposition motion, given that defendant had only referred to the one-year-back provision of MCL 500.3145.

Statutes of limitations are procedural devices intended to promote judicial economy and protect the rights of defendants by precluding litigation of stale claims. *Attorney General v Harkins*, 257 Mich App 564, 569; 669 NW2d 296 (2003). "A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action." *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982). Statutes of limitations bar a claimant from filing suit after the statutory period has expired. See *id*. at 165-167. The one-year-back provision, in contrast, is "[s]imply stated, . . . not [a] statute[] that limit[s] the period of time in which a claimant may file an action. Rather, [it] concern[s] the time period for which compensation may be awarded

once a determination of rights thereto has been made." *Howard v Gen Motors Corp*, 427 Mich 358, 385; 399 NW2d 10 (1986) (opinion by BRICKLEY, J.). It does not, as a statute of limitations does, act as a complete bar to a claimant's filing of suit, but instead serves as a limitation on the period for which damages are recoverable in a properly filed suit.

The principle that an affirmative defense must be specifically pleaded and supported by specific factual assertions or it is waived is supported by *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 850 NW2d 667 (2013). In that case, a medical malpractice action, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). The plaintiff had sent notices of intent to defendants pursuant to MCL 600.2912b, but filed her complaint 112 days later instead of waiting 182 days or more as required by MCL 600.2912b(1). One group of defendants presented a list of affirmative defenses that, in relevant part, stated, " 'Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A.2912b and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition.' " *Id*. at 214. These defendants moved for summary disposition, contending that because the plaintiff had failed to comply with the requisite notice period before filing suit, her complaint was insufficient to commence the action and, because by then the statute of limitations had expired, dismissal with prejudice was warranted. The trial court agreed. A panel of this Court, however, agreed with plaintiff's position that because defendants' responsive pleadings asserting their affirmative defenses had failed to set forth sufficient facts to put plaintiff on notice that she had failed to comply with the notice period requirement, defendants had waived that affirmative defense under MCR 2.111(F).

Noting that "MCR 2.111(F)(3) requires that the party '*must state the facts constituting*' any affirmative defense so raised," the *Tyra* Court indicated that an affirmative defense must thus contain facts setting forth *why and how* the party asserting it believes the specific affirmative defense is applicable in order to apprise the plaintiff of the defense relied upon and take a responsive position. *Id*. at 213-214. In *Tyra*, the defendants had simply asserted that the plaintiff had "failed to comply with the notice provisions of MCL 600.2912b," but, in fact, the defendants were specifically relying upon the notice *period* in support of their motion for summary disposition. *Id*. at 214.

MCL 600.2912b does set forth the notice period, but also sets forth statements that must be contained within the notice including the applicable standard of care and the manner in which the claimant alleges the standard has been breached, and a requirement that the claimant allow the person or facility receiving the notice access to all medical records relating to the claim within a specified period. The failure to comply with any or all of these provisions could have been the basis of the defendants' affirmative defense. As the *Tyra* Court stated:

> MCL 600.2912b(4) specifically addresses "the notice given to a health professional or health facility." An ordinary reading of the affirmative defense alongside the statute could reasonably induce a reader to believe that plaintiff's only alleged violation of MCL 600.2912b—specifically, the "notice provisions" thereof—pertained to the notice *itself*, as distinct from the notice period. It is true that "the primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." Therefore, by extension to other filings, the statement of facts required under MCR 2.111(F) should not need to be extensive or detailed. However, the statement here is

> merely a conclusion, not even a vague statement of "facts *constituting*" an affirmative defense. MCL 2.111(F)(3). The statement fails to explain why defendants believed plaintiff "failed to comply with the notice provisions of MCL 600.2912b." [*Tyra*, 302 Mich App at 215.]

The *Tyra* court concluded, "Because defendants failed to provide any, let alone a comprehensible or adequate, statement of facts supporting the relevant affirmative defense, we find the affirmative-defense statement by the defendants insufficient to raise the affirmative defense of plaintiff's failure to comply with the notice-*period* requirement of MCL 600.2912b. Under a plain application of MCR 2.111(F), the affirmative defense would be waived." *Id*. at 216-217.

In this case, in which there is more than one provision set forth in the applicable statute and defendant specifically referred to only one of those statutory provisions in its list of affirmative defenses, the statutory reference in defendant's list of affirmative defenses did not apprise plaintiff that defendant intended to rely on any provision other than the one specifically referred to. And, as a result, plaintiff was not able to take a responsive position to those provisions that were not referred to. *Tyra*, at 213-214. Any affirmative defense that was dependent on those other provisions was therefore waived.

While the trial court could have, in its discretion, allowed defendant to amend its pleadings to include a statute of limitations defense, there is no indication that it did so. Whether it would have granted such a motion, given that the matter had proceeded for over 1½ years and was essentially on the brink of trial, would be conjecture. Moreover, MCR 2.111(F)(3) is clear that an amended pleading must fulfill the requirements of MCR 2.118. MCR 2.118(A)(4) states that

"[a]mendments must be filed in writing, dated, and numbered consecutively . . . ." The record here is devoid of any written amendment provided by defendant to include a statute of limitations defense, precluding this Court from treating such a defense as pleaded.

Again, because defendant did not assert the statute of limitations defense set forth in MCL 500.3145(1) in its first responsive pleading or an amended pleading, I would find that defendant waived that defense, and I would thus hold that the trial court erred by granting summary disposition in defendant's favor. Based on this ruling, I would not reach the issue of whether, as the majority held, under MCL 500.3145(1), suit to recover PIP benefits may be filed more than one year after the date of an accident causing accidental bodily injury only if the insurer has either received notice of the injury within one year of the accident or made a payment of PIP benefits for the injury within one year of the accident. This Court does not render advisory opinions on issues unnecessary to the disposition of the case. See, e.g., *People v Wilcox*, 183 Mich App 616, 620; 456 NW2d 421 (1990). Because defendant waived any statute of limitations defense found in MCL 500.3145(1), interpretation of the statute of limitations provision contained therein is unnecessary.

I would reverse the trial court's grant of summary disposition in favor of defendant and remand.

HANTON v HANTZ FINANCIAL SERVICES, INC

Docket No. 314889. Submitted September 4, 2014, at Detroit. Decided September 23, 2014, at 9:00 a.m. Leave to appeal sought.

Anne M. Hanton, trustee of the Anne M. Hanton trust dated May 18, 2006, brought an action in the Montmorency Circuit Court against Hantz Financial Services, Inc. (HFS), and others, seeking to recover investment losses arising from the sale of promissory notes by HFS. Plaintiff alleged that the issuers of the notes were engaged in a Ponzi scheme and defendants failed to exercise due diligence regarding the sale. Plaintiff alleged that she was filing the action individually and as a class action on behalf of all persons and entities to whom HFS publically offered, distributed, and sold the promissory notes, except for defendants, various individuals related to defendants, and Raymond Bergin. Plaintiff alleged that Bergin had brought a civil action in the Oakland Circuit Court against the same defendants based on the sale of the promissory notes and that the action was still pending. *Bergin v Hantz Fin Servs, Inc* (Oakland Circuit Court Docket No. 10-114541-NZ). In the *Bergin* action, the defendants filed a notice under MCR 3.501(B)(2), seeking to strike the class action allegations on the basis of Bergin's failure to timely move for class certification. The trial court determined that Bergin had failed to timely move for class certification and denied Bergin's motion for an extension of time. On March 10, 2011, the court in *Bergin* granted Bergin's motion to dismiss, without prejudice, subject to a condition providing that any rulings or orders in the case shall be deemed final and binding in any refiled case where Bergin is a named plaintiff individually or is a class member and the same or substantially similar claims are made against the defendants named in *Bergin*. The *Bergin* case was ultimately dismissed pursuant to a stipulated order that was expressly made subject to the terms of a settlement agreement entered into by the parties. The settlement agreement provided, in part, that Bergin agreed not to opt out of, or consent to be excluded from, any refiled case where Bergin would qualify as a class member and where the same or substantially similar claims are made against the named defendants in *Bergin*. The agreement provided that, in such an event, Bergin will not participate as, or apply for the status of, lead plaintiff and shall be entitled to his pro

rata portion of any benefits or award he would otherwise be entitled to as a class participant. The agreement also provided that Bergin acknowledged that any rulings or orders made by the court in *Bergin* shall be deemed final and binding in any refiled case. Shortly before the *Bergin* case was dismissed, Hanton moved in the Montmorency Circuit Court for a change of venue to Oakland County. The court held that venue was proper in Montmorency County if Hanton pursued the action as an individual and that, if Hanton wanted to proceed with a class action, venue would be transferred to Oakland County. Hanton filed a motion for class certification in the Montmorency Circuit Court and the court entered a stipulated order transferring venue to the Oakland Circuit Court, where the case was assigned to the same judge who dismissed the *Bergin* case. Hanton then brought a motion for class certification and defendants responded by alleging that the action was barred by the March 10, 2011 order in the *Bergin* case. Following a hearing, the trial court, Leo Bowman, J., denied Hanton's motion for class certification and struck the class action allegations on the basis that the order in the *Bergin* case was binding on Hanton. The Court of Appeals granted Hanton's application for leave to appeal in an unpublished order.

The Court of Appeals *held*:

1. The plain language of MCR 3.501 does not support a holding that Bergin's failure to comply with MCR 3.501(B)(1) should apply to Hanton, who was an unnamed putative class member in the *Bergin* case. The language in the court rule states that the time limit applies to a specific plaintiff. This language cannot be generalized to apply to unnamed putative class members. As applied to the *Bergin* case, MCR 3.501(B) applied to Bergin, the named plaintiff who commenced the action, not all unnamed putative class members.

2. Bergin was not acting as a class representative at the time he commenced his action. After the class action allegations were stricken, the action was continued by Bergin as an individual, not as a class representative. Any subsequent orders in the *Bergin* case accordingly applied only to Bergin himself.

3. The fact that Hanton retained the same attorney to file her action as did Bergin is not dispositive.

4. The purpose of MCR 3.501(B) is not rendered meaningless by allowing more than one complaint containing similar class action allegations. Every complaint is subject to the 91-day deadline provided in the court rule.

5. Hanton could not have intervened in the *Bergin* case pursuant to MCR 3.501(A)(4) because there was no class certification and, thus, Hanton was not a member. The order of the trial court is reversed and the matter is remanded to the trial court for further proceedings.

Reversed and remanded.

McGraw Morris PC (by *Thomas J. McGraw* and *Christopher J. Raiti*) and *Scarlett, Gucciardo & Hirsch, PA* (by *Scott D. Hirsch, Bradford M. Gucciardo*, and *Charles E. Scarlett*), and *Giarmarco Mullins & Horton PC* (by *Larry W. Bennett*) for plaintiff.

Jaffe Raitt Heuer & Weiss PC (by *Peter M. Alter*, *Brian G. Shannon*, and *James W. Rose*) for defendants Allen J. Klein, Edward E. Vettel, Jr., and Stephen R. Zurawski.

The Miller Law Firm, PC (by *E. Powell Miller* and *Brian E. Etzel*), for defendants Hantz Financial Services, Inc., Hantz Group, Inc., John F. Beebe, John F. MacIntosh, Lisa C. McClain, Duane A. McCollum, Jamie M. Racine, Michael O. Reid, Jeffrey H. Soper, Charles F. Tourangeau, Renee A. Yaroch, and John R. Hantz.

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

FORT HOOD, J. Plaintiff appeals by leave granted from the trial court's order denying her motion for class certification, striking class allegations from plaintiff's amended complaint, and allowing plaintiff's action to proceed only as an individual action. We reverse and remand for further proceedings.

This class action involves various claims brought by plaintiff, Anne M. Hanton, as trustee of the Anne M. Hanton Trust dated May 18, 2006, against defendant

Hantz Financial Services, Inc. (HFS), and various other defendants who allegedly controlled HFS, to recover investment losses arising from HFS's sale of promissory notes issued by Medical Capital Holdings, Inc. (Med Cap), and its subsidiary Medical Provider Funding Corporation V (Med Cap V). Plaintiff alleged that Med Cap and Med Cap V were engaged in a Ponzi scheme and that defendants failed to exercise due diligence regarding the matter.

Plaintiff initially filed this action in the Montmorency Circuit Court in October 2011. In an amended complaint filed on October 19, 2011, plaintiff alleged that another civil action arising out of the same occurrence, *Bergin v Hantz Fin Servs, Inc* (Oakland Circuit Court Docket No. 10-114541-NZ) (the "*Bergin* case"), was previously filed in the Oakland Circuit Court, where it was still pending. Plaintiff alleged that she was filing the class action individually and on behalf of all persons and entities to whom HFS publically offered, distributed, and sold promissory notes issued by Med Cap and Med Cap V, except for defendants, various individuals related to defendants, and Raymond Bergin.

Raymond Bergin was the plaintiff in the *Bergin* case. Similar to this case, Bergin filed a complaint against the defendants and sought class certification to represent the interests of various individuals who allegedly suffered investment losses involving HFS's sale of promissory notes issued by Med Cap. Bergin's complaint was filed in the Oakland Circuit Court in October 2010, and was amended in November 2010. The defendants filed a notice under MCR 3.501(B)(2), seeking to strike the class action allegations on the basis of Bergin's failure to timely move for class certification. At a hearing on February 9, 2011, the trial court agreed that Bergin had failed to timely move for class certification and denied

Bergin's motion for an extension of time. On March 10, 2011, the court entered an order granting Bergin's motion to dismiss, without prejudice, subject to the following two conditions:

> (1) Any rulings and/or orders made by this Court in the case of Raymond L. Bergin, on his own behalf and on behalf of those similarly situated v. Hantz Financial Inc., et al 2010-114541-NZ, shall be deemed final and binding in any refiled case where Plaintiff Bergin is a named Plaintiff individually and/or is a class member and the same or substantially similar claims are made against the named Defendants herein; (2) Costs and reasonable attorney fees shall be paid and are awarded to Defendants for defense of the herein claims Plaintiff now seeks to dismiss.

The *Bergin* case was ultimately dismissed in November 2011 pursuant to a stipulated order that was expressly made subject to the terms of a settlement agreement entered into by Bergin and the defendants and "for the reasons set forth on the record and stated set [sic] in the Opinion and Order dated March 10, 2011[.]" The settlement agreement further provided:

> 5. Refiled Class Action. . . . [N]otwithstanding Defendants' position that any future attempt to pursue class claims similar to Bergin's putative class claims (that were stricken) is improper, Bergin hereby agrees not to opt out of, or consent to be excluded from, any refiled case, whether currently pending or not, where Bergin would qualify as a class member and where the same or substantially similar claims are made against the named Defendants herein. In such an event, Bergin will not participate as, or apply for the status of, lead plaintiff, and shall be entitled to his pro rata portion of any benefits or award he would otherwise be entitled to as a class participant.
>
> 6. Bergin acknowledges that, consistent with the March 10, 2011 Opinion and Order, "Any rulings and/or orders made by this Court in the case of Raymond L. Bergin, on his own behalf and on behalf of those simi-

> larly situated v. Hantz Financial Inc., . . . shall be deemed final and binding in any refiled case."

Shortly before the *Bergin* case was dismissed, defendants in this case moved for a change of venue to Oakland County. In December 2011, the Montmorency Circuit Court held that venue was proper in Montmorency County if plaintiff pursued this action as an individual. If plaintiff wanted to proceed with a class action, venue would be transferred to Oakland County. In January 2012, plaintiff filed a motion for class certification in the Montmorency Circuit Court, and on February 13, 2012, the Montmorency Circuit Court entered a stipulated order transferring venue to the Oakland Circuit Court, where the case was assigned to the same judge who dismissed the *Bergin* case.

In September 2012, defendants filed a joint response to plaintiff's motion for class certification in which they argued, in part, that a class action was barred by the trial court's March 10, 2011 order in the *Bergin* case. Following a hearing, the trial court denied plaintiff's motion for class certification and struck the class action allegations. The court determined that the March 10, 2011 order in the *Bergin* case, which denied the request to extend the time for filing a motion for class certification because Bergin did not meet the time requirements of MCR 3.501(B), was binding on plaintiff in this case. The court further held:

> Having reviewed Confidential Settlement Agreement and Mutual Release, this Court finds that the unambiguous language states that Bergin (1) agreed not to opt out of, or consent to be excluded from any refiled cases where he would qualify as a class member and where the same or substantially similar claims are made against defendants and (2) acknowledged that any rulings in the *Bergin* case are deemed final and binding in any refiled case. When this

> Court considers plaintiff's decision to expressly exclude Plaintiff Bergin in the class allegations, it is left with the distinct impression that plaintiff was attempting to avoid the ramifications of the rulings in the *Bergin* case and specifically the ruling that plaintiff's retained counsel failed to file a timely motion to certify the class action pursuant to MCR 3.501(B)(1). In the *Bergin* case, defendants filed a notice pursuant to MCR 3.501(B)(2) to strike class action allegations and to allow the lawsuit to continue against the named parties alone. Additionally, this Court denied plaintiff's motion to allow filing of class certification motion beyond ninety-one days pursuant to MCR 3.501(B)(1) based on excusable negligence. Plaintiff failed to direct this Court's attention to any statute, court rule, or case law to support that it could merely file a subsequent class action with a new named plaintiff when the prior attempt to certify the class contains both a failure to certify within 91 days and an order that all rulings are binding on future cases based on substantially similar claims made against named defendants. As such, this Court finds that it is appropriate to strike the class allegations from plaintiff's amended complaint and to allow this matter may [sic] proceed as an individual action only based on the ruling in the *Bergin* case.

Plaintiff thereafter sought leave to appeal, which was granted by this Court.[1] On appeal, plaintiff argues that the trial court erred by denying plaintiff's motion for class certification and striking the class allegations in plaintiff's complaint. Plaintiff asserts that the trial court erroneously determined that her class action was barred because Bergin failed to comply with MCR 3.501(B)(1)(a), or because of any order entered in the *Bergin* case. We agree.

"Interpreting the meaning of a court order involves questions of law that we review de novo on appeal."

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[1] *Anne M Hanton Trust Dated May 18, 2006 v Hantz Fin Servs Inc*, unpublished order of the Court of Appeals, entered April 26, 2013 (Docket No. 314889).

Silberstein v Pro-Golf of America, Inc, 278 Mich App 446, 460; 750 NW2d 615 (2008). We review the proper interpretation and application of a court rule, including MCR 3.501, de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). "The analysis a court must undertake regarding class certification may involve making both factual findings and discretionary decisions." *Mich Ass'n of Chiropractors v Blue Cross Blue Shield of Mich*, 300 Mich App 551, 559; 834 NW2d 148 (2013). "We review the trial court's factual findings for clear error and the decisions that are within the trial court's discretion for an abuse of discretion." *Id*. The burden of establishing that the requirements for a certifiable class are satisfied is on the party seeking to maintain the certification. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 562; 692 NW2d 58 (2004); see also *Henry*, 484 Mich at 509.[2]

The principal issue in this appeal is whether the March 10, 2011 order in the *Bergin* case binds plaintiff, an unnamed putative class member. To decide the issue, we consider the construction and effect of the time limit in MCR 3.501(B)(1) as it applies to an unnamed putative class member.

When construing a court rule, a court applies principles of statutory construction to determine the intent of the rule. *Badeen v PAR, Inc*, 300 Mich App 430, 439; 834 NW2d 85 (2013), vacated in part and remanded on other grounds 496 Mich 75 (2014). A court first consid-

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[2] The record does not support defendants' argument that the trial court denied class certification and struck the class allegations from plaintiff's complaint as a sanction for failure to comply with a court order and therefore its determinations should be reviewed for an abuse of discretion. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The trial court did not impose any sanctions in this case, but instead determined that plaintiff was bound by the order issued in the *Bergin* case.

ers the plain language of the rule in order to determine its meaning. *Henry*, 484 Mich at 495. The intent is determined by examining the rule itself and its placement within the Michigan Court Rules as a whole. *Id*.

MCR 3.501(B) provides the following relevant procedures for certifying a class action:

> (1) *Motion*.
>
> (a) Within 91 days after the filing of *a complaint* that includes class action allegations, *the plaintiff* must move for certification that the action may be maintained as a class action.
>
> (b) The time for filing the motion may be extended by order on stipulation of the parties or on motion for cause shown.
>
> (2) *Effect of Failure To File Motion*. If *the plaintiff* fails to file a certification motion within the time allowed by subrule (B)(1), the defendant may file a notice of the failure. On the filing of such a notice, the class action allegations are deemed stricken, and the action continues by or against *the named parties* alone. The class action allegations may be reinstated only if *the plaintiff* shows that the failure was due to excusable neglect. [Emphasis added.]

Although "plaintiff" is not defined in this court rule, MCR 2.201(A) provides that "[t]he party who commences a civil action is designated as plaintiff . . . ." Pursuant to MCR 2.101(B), "[a] civil action is commenced by filing a complaint with a court."

We hold that the plain language of MCR 3.501 does not support a holding that Bergin's failure to comply with MCR 3.501(B)(1) should apply to plaintiff, who was an unnamed putative class member in the *Bergin* case. First, the language in the court rule states that the time limit applies to a specific plaintiff, and this language should not and cannot be generalized to apply to

unnamed putative class members. The use of the indefinite article "a" before "complaint" in MCR 3.501(B)(1)(a) "indicates that a plaintiff may file more than one complaint containing class action allegations . . . ." *Badeen*, 300 Mich App at 440. In juxtaposition, the definite article "the" before "plaintiff" in MCR 3.501(B)(1) and (2) reflects an intent to refer to a particular plaintiff. See *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) (noting that "the" and "a" have different meanings and that "the" is a definite article "with a specifying or particularizing effect," and "a" is an indefinite article with a generalizing effect) (quotation marks and citations omitted); see also *Barrow v Detroit Election Comm*, 301 Mich App 404, 414; 836 NW2d 498 (2013) (noting that the definite article "the" denotes a particular item instead of a general item). Similarly, the use of the word "the" before "named parties" in MCR 3.501(B)(2) indicates an intent to refer to particular named parties. As applied to the *Bergin* case, MCR 3.501(B) applied to Raymond Bergin, who was the named plaintiff who commenced the civil action. We do not agree that the plain language of MCR 3.501(B) applies to all unnamed putative class members, such as plaintiff.

Second, we also reject any assertion that Raymond Bergin was acting as a class representative at the time he commenced the action. "Pursuant to MCR 3.501(A)(1), members of a class may *only* sue . . . as a representative party of all class members *if* the prerequisites dictated by the court rule are met." *Henry*, 484 Mich at 496. "[N]ot until the class is certified does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it . . . ." *Cowles v Bank West*, 476 Mich 1, 18; 719 NW2d 94 (2006) (quotation marks and citation omitted). In the *Bergin* case, the requirements for class certification had

not been established or considered. Therefore, the class did not exist, and unnamed class members had no duty or obligation in relation to the suit. In addition, MCR 3.501(B)(2) provides that after the defendant files a notice of the failure to file a certification motion, "the action continues by or against the named parties alone." In the *Bergin* case, the defendants had filed a notice of the failure to file a certification motion. Pursuant to MCR 3.501(B)(2), the class action allegations were therefore stricken and the action was continued by the named party only. Thus, the action was continued by Raymond Bergin as an individual, and not as a class representative. Accordingly, any subsequent orders in the case would only apply to Bergin. The fact that Bergin went on to settle his claims against the *Bergin* defendants by entering into a settlement agreement lends further support to our holding that Bergin continued as an individual in the *Bergin* case. There is no indication that the monetary relief provided to Bergin was shared among all putative class members in the *Bergin* case. Moreover, the compromise reached was never approved by the trial court, and putative class members were not given notice of the settlement. MCR 3.501(E).

Third, additional provisions in the court rule lend further support to our interpretation that unnamed putative class members were not bound by the *Bergin* case. MCR 3.501(B)(3)(e) provides that "[i]f certification is denied or revoked, the action shall continue by or against the named parties alone." MCR 3.501(D)(2) provides that a "judgment entered before certification of a class binds only the named parties." While these provisions do not directly apply in this case,[3] they lend

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[3] Plaintiff's reliance on MCR 3.501(B)(3)(e) is incorrect because the trial court did not deny class certification. In the *Bergin* case, the trial

further support to our interpretation that plaintiff, as an unnamed putative class member, was not bound by the orders in the *Bergin* case.

For these reasons, we conclude that MCR 3.501 affords no support for defendants' claim that plaintiff's class action allegations were barred by the March 10, 2011 order in the *Bergin* case. However, we further note as significant the fact that the trial court in the *Bergin* case did not rule on the merits of the class certification in the *Bergin* case. Prior class actions that have been uncertified for a reason that was not substantive should not preclude subsequent actions. See *Cowles*, 476 Mich at 30 (holding that the named plaintiff's claim was tolled because the "initial class action was decertified on grounds other than the appropriateness of the substantive claims for class treatment"). Here, the trial court in the *Bergin* case never ruled on the merits of the class certification and dismissed only for procedural deficiencies in the *Bergin* case.

We also agree with plaintiff that the United States Supreme Court's decision in *Smith v Bayer Corp*, 564 US ___; 131 S Ct 2368; 180 L Ed 2d 341 (2011), lends further support to our ruling. While Michigan courts are not bound by federal decisions regarding requirements for class actions, our Court finds it "reasonable to conclude that similar purposes, goals, and cautions are applicable to both" because "Michigan's requirements for class certification are nearly identical to the federal requirements . . . ." *Henry*, 484 Mich at 499. In *Smith*, the Court addressed the principle that "[a] court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions" in

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court denied Bergin's motion to extend the time to file a motion for class certification, but did not deny a motion for class certification.

relation to class actions.[4] *Smith*, 564 US at ___; 131 S Ct at 2379; 180 L Ed 2d at 353. The *Smith* case involved two West Virginia class action lawsuits with similar claims and classes, but with different named plaintiffs, one in federal court and one in state court. *Id*. at ___; 131 S Ct at 2373; 180 L Ed 2d at 346-347. After the federal court denied class certification and dismissed the federal case, the defendants requested that the federal court enjoin the state court from considering class certification. *Id*. at ___; 131 S Ct at 2374; 180 L Ed 2d at 347-349. The federal court granted the request, and the United States Supreme Court ultimately reversed the decision. *Id*. at ___; 131 S Ct at 2374, 2379-2380; 180 L Ed 2d at 348, 353-354. The Court rejected the argument that an unnamed class member may be a party to a class action before certification of the class or after the denial of class certification. *Id*. at ___; 131 S Ct at 2379-2380; 180 L Ed 2d at 353-354. "Neither a proposed class action nor a rejected class action may bind nonparties." *Id*. at ___; 131 S Ct at 2380; 180 L Ed 2d at 354. While we acknowledge that *Smith* did not interpret MCR 3.501 or present facts identical to the current case, we do find that the discussion supports our holding that plaintiff, as an unnamed putative class member in the *Bergin* case, is not bound by orders and decisions from the *Bergin* case.

Defendants make several unsuccessful arguments in support of their position that we now address. First, we note that defendants rely heavily on the fact that the same counsel represented Raymond Bergin and plaintiff in the two cases. Although the trial court expressed concern that the same counsel represented both Bergin

[4] In *Taylor v Sturgell*, 553 US 880, 893-895; 128 S Ct 2161; 171 L Ed 2d 155 (2008), the Supreme Court discussed the types of exceptions that can bind a nonparty, none of which are applicable here.

and plaintiff, the conditions imposed on the dismissal of the *Bergin* case are silent with respect to counsel. We also do not agree that plaintiff's retaining the same attorney from the *Bergin* case to file her class action is dispositive, especially in light of the fact that plaintiff was an unnamed putative class member in the *Bergin* action.

Defendants also assert that allowing another potential representative party (such as plaintiff Hanton) to file a class action suit following Bergin's failure to timely move for class certification would render the time limitations in MCR 3.501(B) meaningless. Defendants rely on this Court's decision in *Hill v City of Warren*, 276 Mich App 299, 306; 740 NW2d 706 (2007), which explained that the purpose of MCR 3.501(B)(1) is to "prevent cases from remaining pending for extended periods without the propriety of a class action being raised." (Quotation marks and citation omitted.) We do not agree with defendants that the purpose of MCR 3.501(B) is rendered meaningless by allowing more than one complaint containing similar class action allegations. Every complaint filed is subject to the 91-day deadline. Additionally, this Court has held that more than one complaint is permitted. *Badeen*, 300 Mich App at 440. Our holding is further supported by the reasoning in *Smith*, where the United States Supreme Court rejected a similar argument. In *Smith*, the defendant argued that only binding the named plaintiff to an order denying class certification would result in " 'serial relitigation.' " *Smith*, 564 US at ___; 131 S Ct at 2381; 180 L Ed 2d at 355. The Court rejected that argument and held that there were other approaches, including "*stare decisis* and comity," that were more appropriate to avoid this result other than binding nonparties to a judgment. *Id*. Again, we note the

distinctions between the current case and *Smith*, but find the reasoning in *Smith* to be applicable and persuasive.

Defendants also suggest that plaintiff could have intervened in the *Bergin* case under MCR 3.501(A)(4), which provides that "[*c*]*lass members* have the right to intervene in the action, subject to the authority of the court to regulate the orderly course of the action" (emphasis added). Here, plaintiff was not a class member because the class was not certified. Thus, plaintiff could not have intervened in the *Bergin* case pursuant to MCR 3.501(A)(4) because there was no class certification, and, thus, she was not a class member. Moreover, a class member does not have any duty to take note of or to exercise any responsibility with respect to the lawsuit before the class is certified. *Cowles*, 476 Mich at 18.

Finally, defendants present caselaw that they believe supports their claim that unnamed parties can be bound by orders from prior litigation. Many of these cases involve the tolling of the statute of limitations, which the parties agree is not at issue here. Therefore, we do not address these cases. Defendants also relied on *Robinson v Dep't of Transp*, 120 Mich App 656; 327 NW2d 317 (1981), in support of their claim that plaintiff cannot refile a class action to avoid the application of a court rule. In *Robinson*, the trial court dismissed the plaintiffs' case and request for injunctive relief because there was a separate case in another county where the same relief had been requested and denied. *Id*. at 657-659. We do not agree that *Robinson* is applicable to the instant case. *Robinson* involved a request for injunctive relief, as opposed to class certification, and a court rule specifically barred injunctive relief where a previous application on the matter had been denied. *Id*. at 661. The additional cases cited by

defendants involved situations where there was a decision regarding class certification on the merits, which we have already noted was not decided in this case. Therefore, we do not find those cases persuasive with regard to the issue.

Plaintiff next argues that, even assuming that the March 10, 2011 order in the *Bergin* case bound plaintiff in the present class action, the plain language of the order would not apply to plaintiff's claim. Because we hold that plaintiff was not bound by the *Bergin* order as an unnamed putative class member, we do not address whether the specific language of the order applied to this case.

We also reject defendants' argument that we should decide the merits of plaintiff's motion for class certification. An appellee may argue alternative grounds for affirmance without filing a cross-appeal if the appellee does not seek a more favorable decision. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). However, considering that this Court's grant of plaintiff's application for leave to appeal was "limited to the issues raised in the application and supporting brief," and that plaintiff did not raise an issue concerning the merits of her motion for class certification, we conclude that this issue is not properly before us. *Anne M Hanton Trust Dated May 18, 2006 v Hantz Fin Servs Inc*, unpublished order of the Court of Appeals, entered April 26, 2013 (Docket No. 314889). In addition, our consideration of this issue would be premature because the trial court has not yet addressed the merits of plaintiff's motion for class certification. "The analysis a court must undertake regarding class certification may involve making both factual findings and discretionary decisions." *Mich Ass'n of Chiropractors*, 300 Mich App at 559.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

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

YONO v DEPARTMENT OF TRANSPORTATION (ON REMAND)

Docket No. 308968. Submitted April 21, 2014, at Lansing. Decided September 23, 2014, at 9:05 a.m. Leave to appeal sought.

Helen Yono brought an action in the Court of Claims against the Department of Transportation, seeking damages for injuries sustained when she fell while walking near the sidewalk next to her car that was parked in a paved and striped area of M-22 designated for parallel parking. The court, Clinton Canady, III, J., denied the department's motion for summary disposition, holding that that the highway exception to governmental immunity from tort liability, MCL 691.1402(1), applied. The court determined that the portion of the highway designated for parallel parking was designed for vehicular travel within the meaning of MCL 691.1402(1). The department appealed. The Court of Appeals, BECKERING and M. J. KELLY, JJ. (TALBOT, P.J., dissenting), affirmed. 299 Mich App 102 (2012). The department sought leave to appeal. The Michigan Supreme Court heard oral argument on the application. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals, directing the Court of Appeals to consider on remand what standard a court should apply in determining as a matter of law whether a portion of highway was designed for vehicular travel and whether Yono had pleaded sufficient facts to create a genuine issue of material fact under that standard. 495 Mich 982 (2014).

On remand, the Court of Appeals *held*:

1. Governmental immunity inheres in governmental agencies as a characteristic of government and, accordingly, there is a presumption that a governmental agency is immune from suit unless an exception to governmental immunity applies to the facts of the case. In order to rebut the presumption of immunity, a party suing a unit of government must plead in avoidance of governmental immunity by stating a claim that fits within a statutory exception to immunity or stating facts that demonstrate the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function. Under the highway exception to governmental immunity, MCL 691.1402(1), a person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a

highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover damages from the governmental agency. The agency's duty keep the highway in reasonable repair extends only to the improved portion of the highway designed for vehicular travel. In order to plead in avoidance of governmental immunity under the highway exception, Yono only had to allege facts sufficient to place the department on notice that she suffered an injury caused by the department's failure to maintain the highway in reasonable repair and that the condition that caused her injury was located within an area of the improved portion of the highway that was designed for vehicular travel. In her complaint, Yono alleged that she was a pedestrian walking on the improved portion of M-22 when she fell and suffered an injury. She further alleged that the department had exclusive jurisdiction over that improved portion of the highway and had failed to properly maintain it, which proximately caused her fall and injury. Yono specifically identified the applicable statutory exception to governmental immunity and correctly identified the duty that applied to the department as the agency with jurisdiction. Considering her complaint as a whole and in the light most favorable to her, Yono alleged sufficient facts to place the department on notice that it was her position that the department had a statutory duty to maintain the improved portion of the highway at issue under the highway exception to governmental immunity and she sufficiently identified the location in order to permit the department to take a responsive position regarding whether that portion of the highway fell within the exception. Therefore, Yono's complaint met the minimum requirements for pleading in avoidance of governmental immunity.

2. The phrase "designed for vehicular travel" limits the scope of the agency's duty to maintain the improved portion of the highway. The phrase "vehicular travel" means journeying or going from one place to another in any wheeled carriage, conveyance, or transport, including human-powered, animal-powered, and motorized vehicles. In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000), the Michigan Supreme Court concluded that the only part of a highway designed for vehicular travel is the traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel. While the Supreme Court refused to give the term "travel" its broadest possible definition, it did not limit the duty to maintain the improved portion of the highway designed for vehicular travel to that portion of the highway used as a thoroughfare. Rather, the agency with jurisdiction has a duty to maintain in reasonable repair any part of the highway that was specifically designed—that is, planned, purposed, or intended—to support travel by vehicles, even if the lanes were designed as specialized, dual-purpose, or limited-access travel

lanes. Therefore, in order to establish that it was entitled to summary disposition notwithstanding that Yono pleaded in avoidance of governmental immunity, the department had to present evidence that, if left unrebutted, would establish that the area of the highway at issue fell outside the improved portion of the highway that was planned, purposed, or intended to support regular travel by vehicles. The department relied on an affidavit submitted by Gary Niemi, an employee of the department, in arguing that the area where Yono fell was not designed for vehicular travel. But Niemi's affidavit presumed that the highway exception to governmental immunity applied only to the portion of the highway designed to sustain the heaviest regular travel. Niemi's presumption in that regard was contrary to the statutory language, rendering his opinion that the parking lanes were not designed for vehicular travel irrelevant. The department's arguments regarding paint markings were also inapposite because one cannot infer the nature of a highway's design from the markings painted on the highway. Vehicles must travel into and out of the parallel parking lanes in order for those lanes to serve their purpose, and it was obvious from the photos submitted by the parties that the designers of M-22 designed the parking lanes, at a minimum, to support limited, albeit regular, vehicular travel beyond that which accompanies the use of the lanes for parking. Because the department did not present any admissible evidence to rebut Yono's allegations that the area of the highway at issue was part of the improved portion of the highway designed for vehicular travel, the department failed to establish that it was entitled to summary disposition under MCR 2.116(C)(7). The trial court did not err when it denied the department's motion for summary disposition.

Affirmed.

1. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — PLEADING IN AVOIDANCE OF GOVERNMENTAL IMMUNITY.

Under the highway exception to governmental immunity, MCL 691.1402(1), a person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover damages from the governmental agency; the agency's duty keep the highway in reasonable repair extends only to the improved portion of the highway designed for vehicular travel; in order to plead in avoidance of governmental immunity under the highway exception, the plaintiff only has to allege facts sufficient to place the agency on notice that the plaintiff suffered an injury caused by the agency's failure to maintain the highway in reasonable repair and

the condition that caused the plaintiff's injury was located within an area of the improved portion of the highway that was designed for vehicular travel.

2. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — EXTENT OF THE AGENCY'S DUTY — THE IMPROVED PORTION OF THE HIGHWAY DESIGNED FOR VEHICULAR TRAVEL.

Under the highway exception to governmental immunity, MCL 691.1402(1), a person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover damages from the governmental agency; the agency with jurisdiction has a duty to maintain in reasonable repair any part of the highway that was specifically designed—that is, planned, purposed, or intended—to support travel by vehicles whether those vehicles are human powered, animal powered, or motorized, even if the lanes were designed as specialized, dual-purpose, or limited-access travel lanes; one cannot generally infer the nature of a highway's design from the markings painted on the highway.

Smith & Johnson, Attorneys, PC (by *L. Page Graves*), for Helen Yono.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Michael J. Dittenber*, Assistant Attorney General, for the Department of Transportation.

Amicus Curiae:

Lacey & Jones LLP (by *Carson J. Tucker*) for the Michigan Municipal League and the Michigan Townships Association.

ON REMAND

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

M. J. KELLY, J. This case returns to us on remand from our Supreme Court to consider two issues: "(1)

what standard a court should apply in determining as a matter of law whether a portion of highway was 'designed for vehicular travel,' as used in MCL 691.1402(1); and (2) whether the plaintiff has pled sufficient facts to create a genuine issue of material fact under this standard." *Yono v Dep't of Transp*, 495 Mich 982, 983 (2014). In accordance with these instructions, we explain the procedure for evaluating a motion under MCR 2.116(C)(7). We also discuss the minimum requirements for pleading the highway exception to governmental immunity and the nature of the proofs that a governmental entity must establish in order to show that it is entitled to immunity as a matter of law even after a plaintiff has adequately pleaded in avoidance of governmental immunity under the highway exception. After discussing these areas of the law, we examine whether plaintiff, Helen Yono, pleaded in avoidance of governmental immunity and whether defendant, the Department of Transportation, established grounds for dismissing Yono's claim under MCR 2.116(C)(7). For the reasons more fully explained later in this opinion, we conclude the Department failed to properly support its motion under MCR 2.116(C)(7) and, therefore, the trial court did not err when it denied the Department's motion. Accordingly, we again affirm.

I. BASIC FACTS

As we discussed in more detail in our prior opinion, Yono sued the Department after she fell and was injured while walking to her car, which was parked in that portion of M-22 where parking is permitted. See *Yono v Dep't of Transp*, 299 Mich App 102, 104; 829 NW2d 249 (2012). The Department responded by moving for summary disposition under MCR 2.116(C)(7). The Department supported its motion with evidence that purported to show that the area at issue was not *in fact*

designed for vehicular travel, contrary to Yono's pleadings. It argued that, given this undisputed evidence, it had no obligation under MCL 691.1402(1) to maintain the areas where parking was permitted. *Yono*, 299 Mich App at 104-105. Because it had no duty to maintain those areas, it argued, the trial court had to dismiss Yono's claim as a matter of law. *Id*. at 105. The trial court disagreed and determined that the undisputed evidence showed that the area where parking was permitted was designed for vehicular travel and, on that basis, denied the Department's motion. *Id*. at 105-106.

On appeal to this Court, a majority of the panel hearing this case agreed that the Department failed to establish that it was entitled to governmental immunity as a matter of law. *Id*. at 114. Specifically, after examining the record evidence, the majority concluded that the undisputed evidence showed the portion of M-22 where parking is permitted was designed for regular vehicular travel—even if it was not regularly used as a thoroughfare. *Id*. at 110-114. Consequently, the majority affirmed the trial court's order denying the Department's motion for summary disposition. *Id*. at 115. The Department then appealed to our Supreme Court and, in lieu of granting leave to appeal, the Supreme Court remanded the case back to this Court for additional consideration.

We now examine the proper procedure for considering a motion for summary disposition premised on governmental immunity under MCR 2.116(C)(7).

II. GOVERNMENTAL IMMUNITY

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 the applicable statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

B. ORDER ON REMAND

Our Supreme Court has ordered us to consider "(1) what standard a court should apply in determining as a matter of law whether a portion of highway was 'designed for vehicular travel,' as used in MCL 691.1402(1); and (2) whether the plaintiff has pled sufficient facts to create a genuine issue of material fact under this standard." *Yono*, 495 Mich at 983. Although a trial court may consider a party's pleadings when deciding whether there is a genuine issue of material fact, see MCR 2.116(G)(5), the nonmoving party cannot rely on his or her allegations alone when responding to a properly supported motion arguing there is no genuine issue of material fact. See MCR 2.116(G)(4).[1] The nonmoving party simply cannot plead a genuine issue of material fact into existence. Instead, when a moving party presents evidence that he or she is entitled to immunity by law, the nonmoving party cannot rely on his or her allegations to establish a question of fact; the nonmoving party must respond by presenting evidence sufficient to establish, at the very least, that there is a genuine issue of fact as to the existence of immunity. Accordingly, it is unclear what our Supreme Court

[1] We are cognizant that MCR 2.116(G)(4) applies to motions brought under MCR 2.116(C)(10). However, we conclude that the relevant rules applicable to a motion under MCR 2.116(C)(10) apply equally to a factual challenge under MCR 2.116(C)(7). See *Kincaid v Cardwell*, 300 Mich App 513, 537 n 6; 834 NW2d 122 (2013).

meant when it ordered us to consider whether Yono "has pled sufficient facts to create a genuine issue of material fact . . . ." *Yono*, 495 Mich at 983. It may have meant for this Court to consider solely what evidence is necessary to establish whether "the improved portion of the highway" at issue was "designed for vehicular travel," MCL 691.1402(1), or it may have meant that this Court should examine the standard applicable to pleading in avoidance of governmental immunity under MCL 691.1402(1). Therefore, in order to ensure that we have considered everything that our Supreme Court has asked of us, we first consider whether Yono properly pleaded in avoidance of governmental immunity. We then examine the evidence that is sufficient to establish that the condition at issue was in the "improved portion of the highway designed for vehicular travel." MCL 691.1402(1).

C. MOTIONS UNDER MCR 2.116(C)(7)

A trial court properly dismisses a claim under MCR 2.116(C)(7) when, in relevant part, the claim is barred by "immunity granted by law . . . ." The party moving for summary disposition under MCR 2.116(C)(7) may show that he or she is entitled to immunity granted by law in two distinct ways. First, the moving party may show that immunity is apparent on the face of the plaintiff's pleadings. See MCR 2.116(G)(2) (stating that the moving party may, but is not required, to support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence). In this sense, the motion is similar to one under MCR 2.116(C)(8). See *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994) (noting that the distinction between a motion under MCR 2.116(C)(7) and one under MCR 2.116(C)(8) is that the movant under MCR

2.116(C)(7) may support his or her motion with documentary evidence that contradicts the allegations in the plaintiff's complaint). In reviewing a motion under MCR 2.116(C)(7) that challenges whether the movant is entitled to immunity on the face of the plaintiff's pleadings, the trial court must accept all well-pleaded allegations as true. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Similarly, as with a motion under MCR 2.116(C)(8), the court must construe the allegations in the light most favorable to the nonmoving party. *Id*. If it is evident on the face of the allegations, even when considered in the light most favorable to the nonmoving party and accepting the allegations as true, that the movant is entitled to immunity as a matter of law, the trial court should grant the motion to dismiss under MCR 2.116(C)(7).

In contrast to a motion under MCR 2.116(C)(8), a party moving for summary disposition under MCR 2.116(C)(7) is not limited to challenging the facial validity of the pleadings. See MCR 2.116(G)(5) (providing that, when considering a motion brought under MCR 2.116(C)(8), the trial court may only consider the pleadings); *Patterson*, 447 Mich at 434. Rather, the movant may establish that, given the undisputed facts of the case, he or she is entitled to immunity as a matter of law, notwithstanding the plaintiff's allegations. See MCR 2.116(G)(5); MCR 2.116(G)(6). Such a challenge is similar to one under MCR 2.116(C)(10). See *Dextrom v Wexford Co*, 287 Mich App 406, 430-433; 789 NW2d 211 (2010). And, as with a motion under MCR 2.116(C)(10), the movant bears the initial burden to show that he or she is entitled to immunity as a matter of law. See *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). If the movant properly supports the motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the

movant has immunity, the burden shifts to the nonmoving party to present evidence that establishes a question of fact as to whether the movant is entitled to immunity as a matter of law. *Id*. at 537 n 6. If the trial court determines that there is a question of fact as to whether the movant has immunity, the court must deny the motion. *Dextrom*, 287 Mich App at 431.[2]

D. PLEADING IN AVOIDANCE OF GOVERNMENTAL IMMUNITY

1. PROCEDURAL POSTURE

Before examining the adequacy of Yono's pleadings, we note that the Department did not move to dismiss Yono's claim on the ground that she failed to plead in avoidance of governmental immunity. Rather, the Department recognized that Yono was relying on the highway exception to governmental immunity, MCL 691.1402(1), and had pleaded that the Department breached its duty under that statute to maintain the improved portion of the highway at issue in reasonable repair. In its motion for summary disposition, the Department focused its argument on the evidence;

[2] We note a potential conflict in the manner by which such a dispute should be resolved. In *Dextrom*, the Court held that, when there is a question of fact on a motion for summary disposition under MCR 2.116(C)(7) involving governmental immunity, the factual dispute must be resolved by the trial court at a hearing. *Dextrom*, 287 Mich App at 432. In contrast, the Court in *Kincaid* determined that a question of fact under MCR 2.116(C)(7) involving the application of a statute of limitations must be submitted to the jury. *Kincaid*, 300 Mich App at 523, citing *Tumey v Detroit*, 316 Mich 400, 411; 25 NW2d 571 (1947) ("In the case at bar it cannot be said as a matter of law that plaintiffs' rights of recovery were barred by the statute. Under the proofs the issue was one of fact for the determination of the jury."). Because we conclude the Department failed to establish grounds for relief under MCR 2.116(C)(7), we need not determine the appropriate method for resolving factual disputes under MCR 2.116(C)(7) or whether the manner for resolving such disputes varies depending on the grounds for dismissal asserted in the motion.

specifically, it argued that Yono's claim was barred by immunity because she fell in an area that was—as a matter of undisputed fact—not part of the highway designed for vehicular travel. The Department even conceded that the area of the highway where parking was permitted involved vehicular travel, but argued that the phrase "designed for vehicular travel" should be construed to mean the lanes used as a thoroughfare, as opposed to lanes used for more limited vehicular travel. The Department supported its motion with photographic evidence of the area of the highway at issue and proffered an affidavit wherein an expert opined that the area of the highway where Yono fell was not designed for vehicular travel.

Even on appeal, the Department did not specifically address the sufficiency of Yono's pleadings in its question presented or main argument; it focused its argument on whether the phrase "designed for vehicular travel" means that the only area that it has a duty to maintain in reasonable repair are those portions of the highway actually used as a thoroughfare. The Department only raised the sufficiency of Yono's pleadings as an afterthought in the final paragraph of its brief on appeal. It is for that reason that the majority in our prior opinion limited its discussion to the evidence presented by the parties in support and opposition to the motion for summary disposition. See *Yono*, 299 Mich App at 114 n 4. Despite the fact that the Department failed to properly preserve this issue by contesting the sufficiency of Yono's allegations in its motion before the trial court, see *Bailey v Schaaf (On Remand)*, 304 Mich App 324, 344-346; 852 NW2d 180 (2014), and abandoned the issue on appeal, see *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Yono*, 299 Mich App at 114 n 4, we now examine Yono's complaint to determine whether she adequately pleaded in avoidance of governmental immunity.

2. THE COMPLAINT

Governmental immunity inheres in governmental agencies as a characteristic of government and, accordingly, there is a presumption that "a governmental agency *is* immune" from suit unless an exception to governmental immunity applies to the facts of the case. *Mack v Detroit*, 467 Mich 186, 201; 649 NW2d 47 (2002). In order to rebut the presumption of immunity, a "party suing a unit of government must plead in avoidance of governmental immunity." *Id*. at 203. The party suing the governmental agency must plead facts that—if true—demonstrate that an exception to governmental immunity applies: "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id*. at 204.

The present case involves the highway exception to governmental immunity provided under MCL 691.1402(1). The Legislature determined that a "governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." *Id*. Moreover, a "person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." *Id*. The agency's duty to keep highways in reasonable repair, however, "extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved

portion of the highway designed for vehicular travel." *Id*. See also *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 171; 615 NW2d 702 (2000) ("[I]f the condition proximately causing injury or property damage is located in the improved portion of the highway designed for vehicular travel, not otherwise expressly excluded, the state or county road commissioners' statutory duty under the highway exception is implicated and a plaintiff is capable of pleading in avoidance of governmental immunity.").

Under Michigan's notice-pleading standard, the primary function of a pleading is to "give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). A party asserting a claim does not have to use any particular formula or special wording in order to properly state his or her claim. Rather, the complaint need only contain a "statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]" MCR 2.111(B)(1). Consequently, in order to plead in avoidance of governmental immunity under the highway exception, as that exception applies to the Department, Yono only had to allege facts sufficient to place the department on *notice* that she suffered an injury caused by the Department's failure to maintain the highway in reasonable repair and the condition that caused her injury was located within an area of the improved portion of the highway that was designed for vehicular travel.

In her complaint, Yono alleged that she was a pedestrian walking on the improved portion of M-22 when

she fell and suffered an injury. She further alleged that the Department had exclusive jurisdiction over that improved portion of the highway and had failed to properly maintain it, which proximately caused her fall and injury. Although she did not specifically allege that she fell in the improved portion "designed for vehicular travel," she was not required to use any specific "magic words" in order to plead in avoidance of governmental immunity. She only needed to allege sufficient facts to give the Department notice of her theory of recovery, including notice of the applicable exception to governmental immunity. See *Stanke*, 200 Mich App at 317. Yono specifically identified the applicable statutory exception to governmental immunity and correctly identified the duty that applied to the Department as the agency with jurisdiction: "[The Department] owed [Yono] the statutory duty to repair and maintain the improved portion of M-22 in a condition reasonabl[y] safe and convenient for *public* travel." Cf. MCL 691.1402(1) ("Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel."). That is, she identified the defect as being in the "improved portion" of the Highway that the Department had a duty to maintain and repair under MCL 691.1402(1), which—when read in light of that statute—necessarily means the improved portion of the highway designed for vehicular travel. Considering her complaint as a whole and in the light most favorable to her, Yono alleged sufficient facts to place the Department on notice that it was her position that the Department had a statutory duty to maintain the improved portion of the highway at issue under the highway exception to governmental immunity and sufficiently identified the location to permit the Department to take a responsive position as to

whether that portion of the highway fell within the exception. Therefore, Yono's complaint met the minimum requirements for pleading in avoidance of governmental immunity. See *Mack*, 467 Mich at 204.

Even if Yono could only plead in avoidance of governmental immunity by specifically alleging that the defect at issue was in the improved portion of the highway "designed for vehicular travel," as opposed to alleging that it was part of the improved portion that the Department had a duty to maintain, under the facts of this case, that deficiency would not be fatal to her claim. A plaintiff may generally cure defective pleadings by amendment before trial, and leave to amend to correct such deficiencies should be freely granted "when justice so requires." MCR 2.118(A)(2). As our Supreme Court has stated, a trial court's discretion to permit amendment to cure deficiencies under this rule is not a matter of grace, but a right of a litigant seeking to amend in the absence of any apparent or declared reason that would justify denial—such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice, or futility of amendment. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). For that reason, a trial court abuses its discretion when it uses its discretion "to obviate a recognized claim or defense." *Id*. Accordingly, even if Michigan courts were to apply a hypertechnical requirement for pleading in avoidance of governmental immunity, a plaintiff could nevertheless survive a motion for summary disposition under MCR 2.116(C)(7) by demonstrating that he or she would be entitled to amend the complaint to cure the deficiency. See *Kincaid*, 300 Mich App at 531.

Although Yono did not specifically allege that the defect at issue was in the improved portion of the highway designed for vehicular travel, she placed the

Department on notice that it was her position that the highway exception to governmental immunity applied under the facts and identified the location of the defect with sufficient precision to allow the Department to respond. Indeed, the Department plainly understood that it was Yono's position that her claim fell under that exception and it immediately challenged her ability to factually support that position. Within the same month that Yono filed her complaint, the Department moved for summary disposition on the ground that the defect at issue was not within the improved portion of the highway designed for vehicular travel. Moreover, it supported its position with evidence and an expert's affidavit. The trial court then held a hearing on the motion and determined that the undisputed evidence established that the defect at issue was within the improved portion of the highway designed for vehicular travel. Under these circumstances, even if the Department had challenged whether Yono pleaded in avoidance of governmental immunity, it would have been patently unjust for the trial court to have denied Yono leave to correct the technical deficiency in her pleadings. See *Ben P Fyke*, 390 Mich at 659. Therefore, that claim of error would not warrant relief.

Yono properly pleaded in avoidance of the Department's governmental immunity. Even if she did not, she would have been entitled to amend her complaint to correct the technical deficiency. The trial court did not err to the extent that it refused to dismiss Yono's claim for failing to plead in avoidance of governmental immunity.

E. CHALLENGING THE FACTUAL BASIS FOR IMMUNITY

Before the trial court, the Department did not challenge the facial validity of Yono's claim—it challenged her

factual support for the allegation that the condition giving rise to her injury was within the improved portion of the highway designed for vehicular travel. See MCL 691.1402(1). As the moving party, the Department had the initial burden to show that the condition at issue fell outside the improved portion of the highway designed for vehicular travel. See *Kincaid*, 300 Mich App at 522.

The Legislature did not define the phrase "improved portion of the highway designed for vehicular travel" and, for that reason, courts would normally construe the phrase by giving the words their ordinary meaning. MCL 8.3a. A plain reading of MCL 691.1402(1) shows that the Legislature intended to limit the application of the highway exception so that governmental agencies with jurisdiction over highways would not have the same scope of liability for dangerous conditions on their lands as a private premises possessor or landowner would have. To accomplish that goal, the Legislature limited the scope of liability to the improved portions of the highway, as opposed to unimproved portions. Accordingly, even though the highway may include significant portions of unimproved land, the state would have no duty to maintain those unimproved portions. See, e.g., *Kentwood v Sommerdyke Estate*, 458 Mich 642, 665; 581 NW2d 670 (1998) (holding that a highway established under the highway-by-user statute is dedicated to the "full extent of the four-rod width" even if the state does not use or improve the highway to the full width). The Legislature then further limited the duty to maintain the improved portion of the highway in reasonable repair to a specific subset of the improved portion: "the improved portion of the highway designed for vehicular travel." MCL 691.1402(1).

The phrase "designed for vehicular travel" limits the scope of the duty to maintain the improved portion and

the key to that phrase is the word "designed." Something is designed for a particular purpose when it is "[p]lanned, purposed, [or] intended" for that purpose. *The Oxford English Dictionary* (2d ed, 1991). Further, to design something (designed being the past participle of the verb design) means—at least in the context of highway improvements—"[t]o purpose or intend (a thing) *to be* or *do* (something); to mean (a thing) to serve some purpose or fulfil some plan," or to "have in view, [to] contemplate" a particular purpose. *Id*. Thus, the Legislature limited the state's duty to maintain and repair to that portion of the highway that contains improvements that were planned, purposed, or intended to be used for "vehicular travel"—that is, the duty to repair and maintain extends only to those improvements that were intended to serve the purpose or plan of "vehicular travel."[3]

The adjective "vehicular" means "[o]f or pertaining to, associated or connected with, a (wheeled) vehicle," and the word "vehicle" means "[a]ny means of carriage, conveyance, or transport; a receptacle in which anything is placed in order to be moved." *Id*. In the context of a highway, the term "vehicle" will commonly refer to "[a] means of conveyance provided with wheels or runners and used for the carriage of persons or goods; a carriage, cart, wagon, sledge, or similar contrivance." *Id*. The term "travel," finally, means "[t]o make a journey; to go from one place to another; to journey." *Id*. Vehicular travel, then, means journeying or going from one place to another in any wheeled carriage, conveyance, or transport.

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[3] Placed in its proper context, the statute clearly imposes a duty to maintain in reasonable repair all improvements within the highway that were purposed or intended to support vehicular travel, not just the roadbed.

It is notable that the Legislature used the rather broad term "vehicle" in MCL 691.1402(1) and did not limit that term to motor vehicles or some other subset of vehicles. Giving this word its ordinary meaning, the Legislature plainly intended to impose a duty on governmental agencies to maintain the improved portion of the highway designed for vehicular travel in reasonable repair for all manner of vehicles, not just motor vehicles. As such, a governmental agency ordinarily would have a duty to maintain its highways in reasonable repair so that it is reasonably safe for cyclists as well as motorists. But see *Gregg v State Hwy Dep't*, 435 Mich 307, 312-317; 458 NW2d 619 (1990) (stating—without examining the common meaning of the word "vehicle"—that a bicycle is not a vehicular means of travel because "vehicular travel" refers to travel by motor vehicles), overruled by *Grimes v Dep't of Transp*, 475 Mich 72, 84; 715 NW2d 275 (2006) (characterizing the decision in *Gregg* as flawed because that Court did not construe the statute according to the plain meaning of the words used in the statute); *Roy v Dep't of Transp*, 428 Mich 330, 340; 408 NW2d 783 (1987) (using the definition for "vehicle" found in the Michigan Vehicle Code to show that the term "vehicle," as used in MCL 691.1402(1), does not encompass human-powered vehicles such as bicycles), impliedly overruled in relevant part by *Grimes*, 475 Mich at 85-87 (holding that the Court in *Gregg*, which relied on the definition provided in *Roy*, erred when it used a definition found in the Michigan Vehicle Code to interpret the completely separate statutory provisions found in the governmental tort liability act). The ordinary meaning of the word "vehicle," therefore, is not limited to trucks or cars—it is not even limited to motor vehicles. Rather, the word encompasses every type of wheeled vehicle that can be used to travel from one place to another; it includes

human-powered vehicles (such as bicycles, tricycles, and wheelchairs) and animal-powered vehicles (such as the horse-drawn buggies one finds in Amish country or the horse-drawn carts one finds on Mackinac Island),[4] in addition to the motorized vehicles that are more commonly found along Michigan's highways.[5]

Considering the meaning of the phrase as a whole and in context, were we writing on a clean slate, we would conclude that the phrase "improved portion of the highway designed for vehicular travel" means that portion of the highway that has been improved—as opposed to the unimproved portion—but only to the extent that the improvements were planned, purposed, or intended to allow persons to safely journey or go from place to place by a means of a wheeled carriage, conveyance, or transport. We are not, however, writing on a clean slate.

In *Nawrocki*, our Supreme Court considered the nature of the improvements contemplated by the Legislature when it limited the duty to maintain or repair highways to the "improved portion of the highway designed for vehicular travel" and concluded that the only part of a highway designed for vehicular travel was the " 'travelled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.' "

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[4] If "designed for vehicular travel" meant designed for regular travel by motorized vehicles, we would be forced to hold that there are no highways on Mackinac Island.

[5] We do not mean to imply that it is legal for any type of vehicle to travel on any or all highways. The term highway applies to a broad array of streets and roads, which includes some limited access highways. See MCL 691.1401(c) (defining highway to mean "a public highway, road, or street"). Nevertheless, the Legislature did not limit the duty at issue to the improved portion of the highway designed for *legal* vehicular travel or even *contemplated* vehicular travel—it elected to impose a duty premised on whether the improved portion of the highway was designed for vehicular travel *in general*.

Nawrocki, 463 Mich at 180, quoting *Scheurman v Dep't of Transp*, 434 Mich 619, 631; 456 NW2d 66 (1990). The "improved portion of the highway designed for vehicular travel," as construed in this way, means only that part of the highway that was designed to physically support the vehicle while traveling—the point where the rubber meets the road, so to speak. The Court returned to and reiterated this limited understanding of the phrase in *Grimes*, 475 Mich 72.

In *Grimes*, our Supreme Court had to determine whether the shoulder of the highway at issue in that case was "designed for vehicular travel" within the meaning of MCL 691.1402(1). *Grimes*, 475 Mich at 88-91. The Court conceded that travel refers to a continuum of activity and that a momentary swerve onto the shoulder of a highway amounts to travel in a limited sense, but it rejected this definition as too broad. *Id*. at 89. The Court noted that there was a distinction between design and contemplated use and,[6] from that, rejected the argument that a shoulder necessarily fell within the definition simply because the design contemplated that it might be used for travel—albeit limited and emergent travel. *Id*. at 90. Instead, it

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[6] The Court did not discuss the possibility that a governmental agency might have designed a particular surface to support regular vehicular travel even though it did not contemplate that the surface would be immediately used in that way, such as might be the case with a surface designed to accommodate vehicular travel in anticipation of a planned future expansion. Thus, it is unclear how it would address those situations in which the agency designed a highway improvement to fully support vehicular travel, but nevertheless marked the area off as a shoulder for purposes of the immediate future. It also did not address those highways that have a shoulder that was in fact designed to support regular vehicular travel other than motor vehicle travel (such as a shoulder used as a bicycle lane), but which was also designed to serve the emergent need discussed in *Grimes*. As the Court aptly noted, one ought not to conflate purposeful design with contemplated use. *Grimes*, 475 Mich at 90.

stated that the term "travel" excludes "the shoulder"[7] and then went a step further and held "that only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)." *Id*.

As the majority recognized in this Court's prior opinion, "while our Supreme Court refused to give the term 'travel' its broadest possible definition, it also did not narrow it to exclude specialized, dual-purpose, or limited-access travel lanes." *Yono*, 299 Mich App at 110, citing *Grimes*, 475 Mich at 89-91. The majority rejected the Department's attempt to give the term "travel" its narrowest possible definition—namely, to limit the term to "that portion of the highway that is mainly used for travel." *Id*. at 111. Although we are no longer free to give MCL 691.1402(1) its ordinary meaning, we continue to believe that our Supreme Court's construction of the phrase "improved portion of the highway designed for vehicular travel," did not limit the State's duty to maintain to only that portion of the highway that is used as the main or primary travel lane—stated another way, our Supreme Court did not limit the duty to that portion of the highway used as a thoroughfare. Rather, the Department continues to have a duty to maintain in reasonable repair any part of the highway that was specifically designed—that is, planned, purposed, or intended—to support travel by vehicles (man-powered, animal-powered, or motorized), even if the lanes were designed as "specialized, dual-purpose, or limited-access travel lanes." *Yono*, 299 Mich App at 110. Therefore, in order to establish that it was entitled to

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[7] The Court apparently determined on the basis of the design of the shoulder at issue in *Grimes*, that no shoulders, without regard to the fact that the design might vary from one highway to another, are designed for vehicular travel. See *Grimes*, 475 Mich at 91.

summary disposition notwithstanding that Yono pleaded in avoidance of governmental immunity, the Department had to present evidence that, if left unrebutted, would establish that the area of the highway at issue fell outside the improved portion of the highway that was planned, purposed, or intended to support regular travel by vehicles.

In its brief in support of its motion for summary disposition, the Department attached photos that identified the specific defect at issue and also generally demonstrated the physical characteristics of the highway at issue. But it did not rely on those photos as supporting an inference that the highway must not have been designed for vehicular travel. Instead, the Department relied exclusively on an affidavit by Gary R. Niemi to establish that the section of the highway where Yono fell was not designed for vehicular travel. Unfortunately for the Department, Niemi's averments did not establish that the area at issue fell outside the improved portion of the highway designed for vehicular travel.

Niemi averred that he was and remains a developmental engineer with the Department and that his duties include "managing designs on highway and bridge reconstruction projects." He further averred that he researched the highway and inspected it. He then described the highway as having a northbound lane, a southbound lane, and two parallel parking lanes. He then asserted that the portion of the highway that was "designed for through traffic" measures 11 feet on either side of the center line of the highway. He explained that 11 feet meets the Department's standards as well as federal standards. He then asserted that everything outside the 22 feet in the center of the highway was either a buffer zone or a parallel parking

lane and then concluded, without stating how he reached this conclusion, that parallel parking lanes are not "designed for vehicular traffic."

Niemi never averred that he participated in or otherwise had knowledge of the actual design of the particular section of M-22 at issue in this case and, likely for that reason, was unable to state whether the surface of the highway outside the 11 feet on either side of the center line was actually designed—that is, planned, purposed, or intended—to support vehicular travel. Rather, his affidavit assumes, contrary to our construction of the statute at issue, that the statute applies only to that portion of the highway designed to sustain the heaviest regular travel. But as we have been at pains to explain in this opinion and our prior opinion, the Legislature did not limit the state's duty to repair and maintain highways to the improved portion of the highway designed as a thoroughfare—it limited the duty to the "improved portion of the highway designed for *vehicular travel*"—any vehicular travel, not just the heaviest, most continuous, or fastest vehicular travel. MCL 691.1402(1) (emphasis added). Therefore, Niemi's opinion that the statute applies only to the center-most portion of the highway at issue is irrelevant.[8]

Similarly, while he asserted that parallel parking lanes are not designed for vehicular travel, Niemi did not explain the basis for that assertion and it appears to follow from his erroneous understanding that only the most heavily trafficked portions of the highway are "designed for vehicular travel" within the meaning of

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[8] It is for that reason that we disregarded the conclusions from both experts' affidavits. See *Yono*, 299 Mich App at 114 n 3 ("When the facts concerning the physical attributes [of the highway] are not in dispute, it is for the court to decide whether the improvement at issue was designed for vehicular travel.").

MCL 691.1402(1). It is, however, abundantly clear that vehicles must travel into and out of parallel parking lanes in order for those lanes to serve their purpose and it also obvious from the photos submitted by the parties that the designers of M-22, at minimum, must have designed the parallel parking lanes at issue to support limited, albeit regular, vehicular travel beyond that which accompanies the use of the lanes for parking. Moreover, as we explained in our prior opinion, a governmental entity can design a highway to include surface improvements that are outside the center lanes designed to serve as the primary thoroughfare, but that are nevertheless unequivocally designed to support intermittent, but regular, vehicular travel; these include "left-turn lanes, merge lanes, on- and off- ramps, right-turn lanes, lanes designed to permit vehicles to access the opposite side of a divided highway, such as median U-turn lanes and emergency turn-arounds, or even the excess width provided on rural highways to permit drivers to proceed around vehicles that are waiting to turn left." *Yono*, 299 Mich App at 110. Consequently, Niemi's affidavit failed to establish that the area of M-22 at issue fell, contrary to Yono's allegations, outside the improved portion of the highway designed for vehicular travel.

We also reject the Department's repeated contention that the paint markings used on a highway permit an inference concerning a highway's actual design. Paint markings might permit one to infer how the governmental entity with jurisdiction over the highway intended the highway to be used at the point in time when the paint was applied, but it does not permit one to infer anything about its actual design. A governmental entity might have designed a particular highway to support vehicular travel for its full width, but might have later decided to limit the traffic to a narrow portion in the

center of the highway for safety reasons or even to facilitate parking for businesses. In such a case, the governmental entity's decision to paint markings on the highway does not alter the fact that the highway was actually designed for vehicular travel over its full width. Indeed, in the case of median U-turn lanes, as any ordinary driver can attest, the width of the U-turn lane is frequently limited to a single lane by painted hash marks, but such lanes evidently include the extra width to allow very long vehicles (such as semitrailers) to use the U-turn—that is, the extra width of the lane was plainly designed for vehicular travel even though the paint would suggest otherwise. One can imagine an endless array of similar circumstances when the paint markings on the highway do not correspond to the actual design. Accordingly, the Department's arguments premised on the paint markings are inapposite; in the absence of specific evidence connecting the design with the proposed markings, one simply cannot infer the nature of a highway's design from the markings painted on the highway.

Because the Department did not present any admissible evidence to rebut Yono's allegations that the area of the highway at issue was part of the improved portion of the highway designed for vehicular travel, the Department failed to establish that it was entitled to summary disposition under MCR 2.116(C)(7). Indeed, as we noted in our prior opinion, the only admissible evidence submitted by the parties actually supported an inference that the lanes at issue were, in fact, designed for vehicular travel. See *Yono*, 299 Mich App at 114. Because the Department failed to contradict Yono's allegations by presenting evidence sufficient to establish that the area of M-22 at issue here fell outside the improved portion of the highway designed for vehicular

travel, the trial court did not err when it denied the Department's motion for summary disposition under MCR 2.116(C)(7).[9]

III. CONCLUSION

Yono properly pleaded in avoidance of governmental immunity. Therefore, the Department was not entitled to have her complaint dismissed under MCR 2.116(C)(7) for failing to plead in avoidance of governmental immunity. Likewise, because the Department failed to present any admissible evidence that the area of M-22 at issue fell outside the improved portion of the highway designed for vehicular travel, the trial court did not err when it denied the Department's motion.

Affirmed. There being an important question of public policy, we again order that neither party may tax costs. MCR 7.219(A).

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

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[9] Nothing in this opinion should be understood to preclude the Department from making a properly supported motion for summary disposition at some later point.

In re TK

Docket No. 316944. Submitted June 3, 2014, at Detroit. Decided September 23, 2014, at 9:15 a.m.

The Department of Human Services filed a petition in the Oakland Circuit Court, Family Division, requesting that the court exercise jurisdiction over five minor children of Kenneth Sturm. The petition listed only Sturm as a respondent and alleged that he had admitted that he had sexually assaulted one of the children, his daughter TK. The petition sought termination of Sturm's parental rights. The court authorized the petition. Because of Sturm's incarceration and the lack of evidence of neglect on the part of the children's mother, the children were allowed to remain in the mother's home. Although the mother thereafter received services from the department, a petition was filed by the department seeking the removal of the children from the care of their mother (hereafter "respondent") because one of the children had been acting out sexually toward a sibling. The court entered an order dated May 4, 2011, that authorized the petition and the children were removed and placed under the care and supervision of the department. Respondent entered a no contest plea to allegations that she failed to properly protect and supervise the children, thereby providing the court with jurisdiction over the children. Although the four minor boys were placed in residential childcare facilities, TK was placed in a licensed foster home. A permanency planning hearing was conducted in July 2012. At that time, TK was 14 years old and had been in the department's care for 14 months and in the same foster home for 12 months. At the hearing, two foster-care workers and TK's therapist opined that a guardianship would be in TK's best interests. A clinician who conducted a psychological evaluation of respondent stated that respondent had difficulty identifying and responding to her children's needs and that it was unlikely that respondent would make any meaningful progress in the future. The clinician recommended a long-term permanent placement that could allow respondent to maintain contact with the children. At the conclusion of the hearing, the court, Linda S. Hallmark, J., adopted the department's recommendations.

An order was subsequently entered appointing TK's foster mother as TK's guardian. Respondent, whose parental rights were not terminated, appealed challenging the imposition of a guardianship.

The Court of Appeals *held*:

1. The appointment of a guardian under MCL 712A.19a(7)(c) is not tantamount to a de facto termination of parental rights. Therefore, the department was not required to prove statutory grounds for termination of parental rights by clear and convincing evidence.

2. Respondent was afforded procedural due process in the child protective proceedings. The statutory provisions governing guardianships for juveniles do not violate procedural due process principles. There was nothing arbitrary about the trial court's imposition of a guardianship under the facts of this case. There is no merit to respondent's challenge on substantive due process grounds.

3. The trial court did not abuse its discretion when it imposed a guardianship rather than choosing to continue long-term foster care or returning TK to respondent's home.

4. The trial court did not clearly err when it concluded that reasonable efforts had been made by the department toward reunification and that contact between TK and respondent was not reasonable under the circumstances.

Affirmed.

PARENT AND CHILD — GUARDIANSHIPS.

The appointment of a guardian for a child under MCL 712A.19a(7)(c) is not tantamount to a de facto termination of parental rights.

Jessica R. Cooper, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Julie A. McMurtry*, Assistant Prosecuting Attorney, for the Department of Human Services.

Nancy A. Plasterer, guardian ad litem for TK.

William Lansat for respondent.

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

WILDER, P.J. In this child protective proceeding, respondent appeals as of right the trial court's decision to place respondent's teenage daughter, TK, with a foster mother appointed as her guardian pursuant to MCL 712A.19a(7)(c) after the child had been made a temporary ward of the court. Respondent's parental rights were not terminated. We affirm.

I

Respondent is the mother of seven children. The five youngest children (four boys and one girl, TK—the child at issue in this appeal) have the same biological father, Kenneth Sturm. In 1998, respondent's children were removed from her care following allegations that Sturm had physically abused respondent's two oldest sons from a prior relationship. Respondent was provided with services and the court's jurisdiction was terminated in 2000. In January 2011, Sturm admitted to the police that he had been sexually abusing TK for several years. As a result of the abuse, TK suffered from posttraumatic stress disorder. A petition was filed on February 4, 2011, requesting that the court exercise jurisdiction over the children[1] and terminate Sturm's parental rights at the initial dispositional hearing. Only Sturm was listed as a respondent in this petition. After a preliminary hearing, the petition was authorized and, because of Sturm's incarceration[2] and no evidence of neglect on respondent's part, the five children were allowed to remain in respondent's home.

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[1] By this time, respondent's two oldest children were adults and, therefore, not subject to any of the relevant petitions.

[2] Sturm was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). On August 10, 2011, he was sentenced to 25 to 60 years' imprisonment for each conviction. His parental rights were eventually terminated by an order entered on November 16, 2011.

After the filing of the initial petition, respondent and the children were offered wide-ranging services.[3] Despite the provision of these services, a separate petition was filed on May 2, 2011, seeking removal of the children from respondent's care because one of respondent's male children had been acting out sexually toward a sibling. By an order dated May 4, 2011, the petition was authorized and the children were removed and placed under the care and supervision of the Department of Human Services. Respondent entered a no contest plea to allegations that she failed to properly protect and supervise her children, thereby providing the court with jurisdiction over the children. A parent-agency treatment plan was initiated and dispositional review hearings were regularly conducted.

Each of respondent's five children in petitioner's care had varying needs that necessitated different placements. Generally, however, the four boys were placed in residential childcare facilities and respondent thereafter had difficulty during parenting time with them. During certain periods, some of the boys were briefly returned to respondent's care. By contrast, TK was placed in a licensed foster home in July 2011, where she remained throughout these proceedings. By all accounts, TK flourished in the foster home, did well in school, and participated in extracurricular activities.

By the time of the July 30, 2012 permanency planning hearing, TK was 14 years old and had been in petitioner's care for 14 months and in the same foster home continuously for 12 months. Two foster-care workers and TK's therapist opined that a guardianship would be in the child's best interests. The therapist

[3] Services the family received during the lower court proceedings included individual counseling, a psychological assessment, family therapy, a parent coordinator, and employment and financial assistance.

explained that TK required "certainty." TK was fearful and anxious about contact with respondent as a result of respondent's failure to protect TK from her father and inappropriate comments respondent made during supervised visitation. TK requested that there be no visitation or, alternatively, extremely close supervision by the foster-care workers. According to a foster-care worker, if a guardian was appointed, the guardian would dictate whether visitation occurred. The therapist opined that TK's participation in family therapy with her mother would not be appropriate at that time.

A foster-care worker explained that the progress made in this case was not what one would have expected in the time it had been opened; despite the services received by the family, it appeared as if they were at "day one" in the case. A clinician who conducted respondent's psychological evaluation opined that respondent had difficulty identifying her children's needs and responding to them and that it was unlikely that respondent would make any meaningful progress in the future. The clinician recommended a long-term permanent placement that could allow respondent to maintain contact with her children.

At the conclusion of the July 30, 2012 permanency planning hearing, the trial court, adopting petitioner's recommendations, changed TK's permanency plan from one seeking reunification to one that sought appointment of the child's foster mother as guardian. Respondent was opposed to the guardianship and requested additional time to work toward reunification with her daughter. Respondent ultimately spent several additional months participating in her treatment plan because a guardianship was not formally established by order until April 29, 2013. On June 27, 2013, respon-

dent filed her claim of appeal, challenging the lower court's imposition of a guardianship.

II

For her first claim of error, respondent argues that the guardianship imposed under MCL 712A.19a violates her due process rights because the guardianship constitutes a de facto termination of her parental rights without establishing, by clear and convincing evidence, a statutory ground for termination. We disagree. In general, issues that are raised, addressed, and decided by the trial court are preserved for appeal. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). While respondent objected to the appointment of a guardian, she did not object on constitutional grounds. Therefore, this issue has not been preserved. Generally, whether child protective proceedings complied with a respondent's substantive and procedural due process rights is a question of law that this Court reviews de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). However, because the issue presented is an unpreserved claim of constitutional error, this Court will review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

At the outset we note that, for purposes of this issue, respondent does not claim that the trial court failed to comply with the applicable statutes and court rules governing guardianships for juveniles. Instead, respondent claims that the statutory provisions regarding guardianships for juveniles are constitutionally infirm. Thus, the analysis of this issue begins with the provisions of MCL 712A.19a.

MCL 712A.19a(1) mandates that if a child remains in foster care and parental rights to the child have not been terminated, the court shall conduct a permanency planning hearing within 12 months after the child was removed from his or her home. If the parental rights to the child have not been terminated and the court determines at a permanency planning hearing that the return of the child to the child's parent would not cause a substantial risk of harm, the court shall order the child returned to his or her parent. MCL 712A.19a(5). However, if the court determines at a permanency planning hearing that a child should not be returned to his or her parent, the court may order the agency to initiate proceedings to terminate parental rights. MCL 712A.19a(6). Further, and most relevant to this case, MCL 712A.19a(7) provides yet additional alternatives:

> (7) If the agency demonstrates under subsection (6) that initiating the termination of parental rights to the child is clearly not in the child's best interests, or the court does not order the agency to initiate termination of parental rights to the child under subsection (6), then the court shall order 1 or more of the following alternative placement plans:
>
> (a) If the court determines that other permanent placement is not possible, the child's placement in foster care shall continue for a limited period to be stated by the court.
>
> (b) If the court determines that it is in the child's best interests based upon compelling reasons, the child's placement in foster care may continue on a long-term basis.
>
> (c) *Subject to subsection (9), if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated.* [Emphasis added.]

Contrary to respondent's assertions, the appointment of a guardian is not tantamount to a de facto termination of parental rights. As petitioner argues, the

guardianship for a juvenile contemplated by MCL 712A.19a(7)(c) does not permanently separate a parent and child. It allows the child to keep a relationship with the parent when placement with the parent is not possible. Indeed, the appointment of a guardian is done in an effort to avoid termination of parental rights. See *In re Mason*, 486 Mich 142, 168-169; 782 NW2d 747 (2010). Unlike termination of parental rights, the appointment of a guardian for a juvenile is not necessarily permanent. The court is required to review the guardianship annually and may conduct additional reviews, if necessary. MCL 712A.19a(11). Under MCL 712A.19a(13), the court may, on its own motion or upon petition from the Department of Human Services or the child's lawyer guardian ad litem, hold a hearing to determine whether a guardianship shall be revoked. Under MCL 712A.19a(14), a guardian may petition the court for permission to terminate the guardianship. Even the parent has the ability to seek termination of the guardianship. MCR 3.979(F)(1)(b) provides that "[a] juvenile guardian *or other interested person* may petition the court for permission to terminate the guardianship." (Emphasis added.) Further, while the guardian assumes the legal duties of a parent pursuant to MCL 712A.19a(8) and MCL 700.5215, the parent is still under many circumstances permitted to maintain a relationship with the child.

We agree that, if the appointment of a guardian for a juvenile were the equivalent of a termination of parental rights, petitioner, to comply with due process, would have been required to prove parental unfitness, i.e., statutory grounds for termination by clear and convincing evidence. *In re B & J*, 279 Mich App 12, 23; 756 NW2d 234 (2008). However, the appointment of a guardian for a juvenile is not tantamount to a de facto termination of parental rights. Petitioner was not re-

quired to prove statutory grounds for termination of parental rights by clear and convincing evidence.

Respondent has also failed to establish a violation of her right to due process before the appointment of the guardian for TK. It is axiomatic that a parent has a fundamental liberty interest in the care, custody, and management of his or her child, which is constitutionally protected. *In re Rood*, 483 Mich at 91 (opinion by CORRIGAN, J.). "Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005).

There are two types of due process: procedural and substantive. Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker. *In re Rood*, 483 Mich at 92 (opinion by CORRIGAN, J.). The essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests. *AFT Mich v Michigan*, 297 Mich App 597, 622; 825 NW2d 595 (2012). Ultimately, due process requires fundamental fairness. *In re Rood*, 483 Mich at 92 (opinion by CORRIGAN, J.).

A

Generally, three factors should be considered to determine what is required by procedural due process:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [*In re Brock*, 442 Mich

101, 111; 499 NW2d 752 (1993), quoting *Mathews v Eldridge*, 424 US 319, 332, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).]

Applying the foregoing factors, we conclude that respondent was afforded procedural due process in this child protective proceeding.

First, the private interest involved is a parent's fundamental liberty interest in the care, custody, and management of her child. Second, a review of the applicable statutes and corresponding court rules indicates that the procedures employed in the appointment of a guardian for a juvenile ensure that there will not be an erroneous deprivation of these interests. The statute authorizing the guardianship contemplates the appointment of a guardian only after the permanency planning hearing. MCL 712A.19a; MCR 3.976. Under MCL 712A.19a(4) and MCR 3.976(C), a parent must be given written notice of the hearing no less than 14 days before it is held. The notice must advise the parent that "the hearing may result in further proceedings to terminate parental rights." *Id*. Of particular note, MCL 712A.19a(12) requires that the court consider "any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, or guardian ad litem in addition to any other evidence, including the appropriateness of parenting time, offered at the hearing." Further, the appointment of a guardian is only appropriate after the court has made a finding that the child cannot be safely returned to the home, yet initiating termination of parental rights is clearly not in the child's best interests. MCL 712A.19a(7). Then, the court must find that it is in the child's best interests to appoint a guardian. MCL 712A.19a(7)(c) and MCR 3.979(A).

Turning to the third factor, we must consider the government's interest. In this case, there would clearly be a burden on the system to maintain the court wardship or to implement additional procedures. However, the primary governmental interest is the welfare of the minor child. In this case, reunification was not a viable option and TK had been flourishing in the appointed guardian's foster home for 21 months. As petitioner argues, the guardianship also fostered the continued relationship between TK and her siblings. This factor weighs in favor of a finding that the guardianship provisions pertaining to juveniles withstand constitutional scrutiny.

A parent is given notice and an opportunity to be heard before the appointment of a guardian. The statutory scheme employs multiple safeguards to ensure that there is not an erroneous deprivation of a parent's liberty interest in caring for his or her child. Thus, we find no merit to respondent's argument that the statutory provisions governing guardianships for juveniles violate procedural due process principles.

B

There is also no merit to a challenge on substantive due process grounds. As indicated, the arbitrary deprivation of a liberty or property interest is the essence of a substantive due process claim. The person claiming a deprivation of substantive due process must show that the action was so arbitrary as to shock the conscience. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 200; 761 NW2d 293 (2008). A thorough review of the record demonstrates nothing arbitrary about the trial court's imposition of a guardianship under the facts in this case. TK's father sexually abused her and she suffered from posttraumatic stress disorder, requiring

therapy. In therapy, TK addressed anger issues related to respondent's failure to protect her from her father's abuse. While respondent had difficulty responding to TK's needs and had poor prospects for progress, TK's foster home allowed her to flourish and provided "certainty" and stability. Based upon these facts, there was nothing arbitrary about the trial court's decision to appoint a guardian.

While respondent had a due process liberty interest in caring for her daughter, she has failed to demonstrate plain error in her claim that the appointment of a guardian amounted to a de facto termination of parental rights without due process of law.

III

Next, respondent argues that rather than impose a guardianship, the trial court should have considered as the permanency plan continuing TK in long-term foster care or, alternatively, returning her to respondent's home. We disagree. A trial court's factual findings are reviewed for clear error and its decision to appoint a guardian is reviewed for an abuse of discretion. See *In re COH*, 495 Mich 184; 848 NW2d 107 (2014).

At the time of the July 2012 permanency planning hearing, TK was 14 years old and thriving in the foster home. Three experts opined that a guardianship would be in the child's best interests. At that time, TK had requested not to have contact with respondent and a guardian could decide if visitation would be appropriate in the future.

In the nine months between the July 2012 decision to change the permanency plan to one that sought a guardianship and the April 2013 order for a guardianship, little changed. TK continued to do very well in the foster home, but she still reported that she did not

want to see respondent, even in a therapeutic setting, because she was not "ready."

The trial court also had the benefit of the opinion of the clinician who performed a psychological evaluation on respondent on July 18, 2012. The clinician noted that respondent lacked the ability to identify her children's needs and lacked the stability that her children required. More importantly, the clinician noted that given the myriad services provided in the past, it was unlikely that respondent would make significant gains in the future. On the basis of this assessment, the clinician concluded that in light of the existing bond, a long-term permanent placement that could allow respondent to maintain contact with her children would be beneficial.

In light of TK's wishes and the clinician's assessment that respondent was unlikely to make significant gains, it was not clear error to conclude that returning TK to respondent's care or adopting long-term foster care were not dispositions in TK's best interests. Moreover, the appointment of a guardian would allow TK the "certainty" that the therapist indicated was necessary for the child's well-being, but still leave open the possibility for respondent to have contact with her daughter. This Court gives deference to a trial court's special opportunity to judge the weight of the evidence and the credibility of the witnesses who appear before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The trial court did not abuse its discretion by appointing a guardian for TK.

IV

Respondent also argues that the trial court clearly erred when it concluded that reasonable efforts had been made toward reunification. We disagree. In gen-

eral, petitioner must make reasonable efforts to rectify conditions and reunify families. *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008).

The record establishes that respondent was provided with a multitude of intensive services. Although respondent had cooperated, she had made little progress. She lacked insight into the needs of her children and had not internalized what she had been taught. Not only must respondent cooperate and participate in the services, she must benefit from them. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

Contrary to respondent's claim, the fact that she was denied contact with TK in an unsupervised setting did not prove a failure to make reasonable efforts. Respondent was originally granted supervised parenting time with TK, but respondent's actions during visitation made the child uncomfortable and the trial court was told that respondent impeded the therapeutic process. The foster-care worker and TK's therapist agreed that visitation was not recommended. Although respondent may have desired to have unsupervised contact with TK, the evidence establishes that it would not have been beneficial to TK's recovery.

Respondent also claims that TK should have been treated the same as her siblings, who were periodically returned to respondent's home and allowed visitation. But the record demonstrates that respondent never progressed to the point where she could safely parent more than one child at a time. In any event, TK and her brothers were not similarly situated. The trial court was obligated to consider each child individually and assess the best interests of the children separately. *In re Olive/Metts Minors*, 297 Mich App 35, 42; 823 NW2d 144 (2012).

We conclude that the trial court did not clearly err when it found that reasonable efforts had been made toward reunification. Contact with respondent was not reasonable under the circumstances.

V

Finally, respondent attempts to raise an issue apparently related to the statutory authority granted to guardians of juveniles. Respondent has devoted approximately one page to this argument. In her discussion, she simply cites several of the statutory provisions that govern the rights and duties of a juvenile's guardian and abruptly concludes that nothing in the law specifically addresses a pretermination juvenile guardianship. Respondent has failed to coherently present and discuss any perceived error. "A party cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for [her] claims, or unravel and elaborate for [her her] argument, and then search for authority either to sustain or reject [her] position." *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012) (quotation marks and citation omitted). We, therefore, decline to address this issue.

Affirmed.

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

In re LAFRANCE MINORS

Docket Nos. 319219 and 319222. Submitted June 3, 2014, at Grand Rapids. Decided September 23, 2014, at 9:20 a.m.

The Department of Human Services petitioned the Mecosta Circuit Court, Family Division, to terminate the parental rights of the mother and father of four minor children after the youngest child, an infant, was hospitalized for dehydration that resulted in severe but temporary kidney damage. Evidence indicated that the infant had gone without liquid for approximately 16 hours while in her father's care. The mother, who had tested positive for illegal drugs while pregnant, had agreed with Child Protective Services shortly after the child was born to see the infant only with supervision. The petition did not allege any abuse or neglect in connection with the older three children. The court, Marco S. Menezes, J., terminated the parental rights of both parents with respect to all four children, ruling that grounds for doing so had been established under MCL 712A.19b(3)(b)(*ii*) (child or sibling suffered physical injury or abuse that the parent could have prevented), (c)(*i*) (conditions that led to adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood child will be harmed if returned to the parent). In Docket No. 319219, the mother appealed this decision; the father appealed separately in Docket No. 319222; and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. The court erred as a matter of law by concluding that the medical neglect involved in this case constituted failure to prevent physical harm for purposes of MCL 712A.19b(3)(b)(*ii*). Reading MCL 712A.19b(3)(b)(*ii*) in the context of MCL 712A.19b(3)(b)(*i*) and (*iii*) under the doctrine of *noscitur a sociis* indicated that, for a physical injury to fall within MCL 712A.19b(3), it must have been caused by the act of a parent or nonparent adult and not merely contributed to by an unintentional omission.

2. The trial court did not err by concluding that termination of respondents' parental rights was warranted with respect to the youngest child under MCL 712A.19b(3)(c)(i), (3)(g), and (3)(j);

however, it erred by extending its reasoning to the three older children on a theory of anticipatory neglect.

3. It was not necessary to review the court's best-interest determinations with regard to the three older children because none of the statutory bases for termination were proved with regard to them. However, because the decision was expected to result in the return of the three oldest children to respondents, which would significantly change the family dynamics from those the trial court envisioned when making its original decision, the case was remanded to the trial court to determine anew whether termination of respondents' parental rights to the youngest child was in the child's best interests.

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

TERMINATION OF PARENTAL RIGHTS — GROUNDS FOR TERMINATION — PHYSICAL INJURY OR ABUSE — UNINTENTIONAL ACTS OR OMISSIONS.

MCL 712A.19b(3)(b)(*ii*) authorizes termination of a person's parental rights if a child or a sibling of the child suffered physical injury or physical abuse or sexual abuse if the parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and there was a reasonable likelihood that the child would suffer injury or abuse in the foreseeable future if placed in the parent's home; for a physical injury to fall within MCL 712A.19b(3)(b)(*ii*), it must have been caused by the act of a parent or nonparent adult and not merely contributed to by an unintentional omission.

Margaret C. Van Black for appellant in Docket No. 319219.

Susan Haut for appellant in Docket No. 319222.

Samuels Law Office (by *Erin Barnhart*) for the minors in Docket Nos. 319219 and 319222.

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

SHAPIRO, J. In these consolidated cases, respondents, parents of four minor children, appeal as of right the order of the family division of the circuit court terminating their parental rights. We reverse as regards the

three older children and remand this case to the trial court for redetermination of the youngest child's best interests in light of our decision.[1]

I. FACTS

The children involved in this case are the issue of a 10-year relationship between respondents, who never married. The petition asking the court to take jurisdiction arose from allegations that respondent-father negligently failed to recognize that the youngest child, then only several weeks old and ill with a virus, was becoming dangerously dehydrated, and as a result suffered severe, albeit temporary, kidney damage, and had to be admitted to the hospital for intensive treatment. The petition did not allege any abuse or neglect in connection with the older three children, then aged three, five, and ten years, nor has any abuse or neglect of the three older children ever been alleged anywhere in the course of these proceedings.

While pregnant with the youngest child, respondent-mother tested positive for methadone and THC, and admitted using opiates for years. At birth, in late July 2011, the child tested positive for THC. In light of respondent-mother's drug use, along with some observations of questionable behavior while in the hospital, social workers at the hospital were concerned for her ability to care for the newborn and so contacted Child Protective Services (CPS). Three days after the child's birth, CPS initiated a child protection case. That case did not result in any court action, and so that file is not available to us. However, the parties indicate that respondent-mother agreed to move out of the family

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[1] We are deciding this case without the benefit of any briefing from petitioner, although the children's lawyer-guardian ad litem (L-GAL) submitted briefs in support of petitioner's position.

home for some time and to see the infant only with supervision. The record before us does not suggest that the agreement between respondent-mother and CPS limited her access to the three older children.

As noted earlier, several weeks later while in the care of respondent-father, the infant became severely dehydrated and required emergency hospitalization. According to the medical records contained in the court file and subsequently provided testimony, the child had been ill for some time with a virus[2] and was listless when she awoke on the morning in question. Respondent father failed to recognize the severity and speed of the infant's deterioration and regarded her as having gone back to sleep when she may in fact have been losing consciousness. He stated that he attempted to give her a bottle, but that she drank nothing from it. He left for work in the early afternoon, upon which his mother took over as babysitter. After an hour or two, the grandmother became concerned that she was unable to rouse the child, and so called 911. Emergency responders stabilized the child and took her to the hospital, where she was diagnosed as suffering from severe dehydration with resulting acute kidney failure, and placed in intensive care. It was estimated that she had gone without liquid intake for approximately 16 hours. Fortunately the child was successfully rehydrated and over several days recovered completely.

Upon admission of the child to the hospital, the case was flagged by the medical staff as possibly involving medical neglect or even physical abuse. The latter was initially a concern because imaging studies revealed that the child had chronic subdural hematomas. Fur-

[2] The medical records show that respondent-father brought the child to the emergency room with viral symptoms three weeks earlier.

ther medical examination ruled out that the hematomas were caused by external trauma, but that fact was not immediately known.[3]

Given the suspicious circumstances, and the infant's critical medical condition, the Department of Human Services immediately sought and obtained emergency removal of all four children from respondents' care the following day, November 17, 2011. The petition contained allegations concerning respondent-mother's prenatal drug use as well as the events concerning the infant's emergency hospitalization. Though the other three children were not mentioned in any factual allegations, petitioner requested their emergency removal as well, stating, "the Department feels that the children are at imminent risk of further harm if they are to return to the home of their mother or their father."

On November 30, 2011, petitioner filed an amended petition adding allegations concerning the infant's kidney damage and the discovery of subdural hematomas, which, as noted, raised concerns about physical abuse until further investigation ruled that out. At the preliminary hearing, which was held the next day, the court noted that the other three children "have been raised by the two parents and they seem to be fine right now." The CPS worker agreed that there was no history of medical neglect by the father before the November 2011 incident, and that there was "no allegation regarding the three older children that any of those children were neglected in any way[.]" She also agreed that "all [three older] children appear to be happy and healthy and

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[3] In a December 15, 2011 letter to CPS, the hospital's child-abuse pediatrician opined that the records of the infant's neonatal care following premature birth indicated a very small head circumference, and that a "diagnosis of diffuse atrophy is more likely as opposed to trauma." Subsequently, the child was diagnosed with mild cerebral palsy, but that condition was neither a cause nor an effect of the dehydration incident.

they've been described as polite and well-behaved," that they "are all very bonded to their parents," and that they "are adamant that they want to see their parents[.]" The children's lawyer-guardian ad litem stated that she had met with "the three older children and . . . all they ask about is when they can see mom, when can they see dad. They're clearly very bonded to both of their parents. . . . [A]ll three of the older children are very well-mannered, very appropriate for their ages; very smart kids, very lovely children." She recommended that the parents be allowed to see the children as often as possible.

The court issued an order finding probable cause to believe that the "conditions of custody in the home and with the individual with whom the children reside are not adequate to safeguard the children from the risk of harm to the children's life, physical health and mental well-being."

A pretrial hearing was held on January 19, 2012, two months after the children's removal. The foster care worker testified that the placement of the three older children was appropriate, and that, although she had no objection to increased supervised visitation, it might be difficult to achieve because of the limited availability of supervision. She recommended that the children remain in their placements.

The foster care worker further testified that she was unaware of "any reason to believe whatsoever that any of the three older children have ever been abused or neglected by [respondent-father]," adding that respondent-father had been completely compliant with services and that his drug screens were all negative. She also testified that the medical concerns regarding the infant were the only reasons for removal, and agreed that the three older children had "been well-parented up to this time." Even

so, the foster care worker opined that respondents would benefit from parenting classes, and stated that she opposed any return of the children to their home until the parents demonstrated additional compliance with the initial service plan. She continued that she would "consider" unsupervised visitation for the older children if the drug screens stayed negative, but expressed the concern that especially respondent-mother might be continuing her problematic drug usage.

After this testimony, counsel for respondent-father addressed the court:

> I feel that the three older children should be returned to Mr. LaFrance's custody, if not now, then in the very near future. . . .
>
> . . . There is not [an] allegation, no evidence, no claim whatsoever that the . . . older children were abused or neglected in any way. . . . [They] are bonded with their father. They enjoy being with their father and it's in their interest as well as Mr. LaFrance's interest for them to be reunited with their father.

Respondent-mother's counsel similarly stated that this was a case of "a very special needs child and the others have been well-cared for." The L-GAL opposed the request, noting that respondent-mother had moved back in with the respondent-father, and that, unlike respondent-father, she continued to test positive for drugs and had not complied with services.

The trial court stated that, although it could not order compliance with services until the court acquired jurisdiction through an adjudication, the more the parents complied with, and benefited from, services, "the sooner they'll be reunified with their children," and that absent such progress it was "unlikely that they'll be returned . . . until and unless there is a finding that the Court does not have jurisdiction." The

court left placement and parenting time to the discretion of petitioner, but stated, "[t]hat's not to say that the parent/child relationship shouldn't be maintained and strengthened . . . to the extent that's possible by providing . . . liberal parenting time and I would recommend that to the Department[.]"

The case was adjudicated on February 17, 2012, when the prosecuting authority advised the court that respondent-father would plead to the allegations that he failed to get his infant daughter timely medical attention on November 17, 2011. Respondent-father did so, and the court took jurisdiction over all four children on the sole statutory ground that there had been a "failure to provide, when able to do so, support, education, medical, surgical, or other necessary care for health or morals." There was no separate adjudication in connection with respondent-mother,[4] but both were ordered to participate in services, and were allowed only supervised visitation at petitioner's discretion.

Through the course of the case, respondents were compliant with some, but not all, services, with respondent-mother being less compliant than respondent-father. The primary area of noncompliance concerned the drug testing and the goal of ending respondents' respective drug dependencies.[5] A second-

[4] Respondent-mother complains in general terms about the trial court's having imposed services on her when her parental fitness was never adjudicated, even as she concedes that she had already consented to adhere to petitioner's requirements during her pregnancy. In any event, because she did not argue in her brief on appeal that the lack of a separate adjudication in connection with her was itself grounds for relief, and has not sought to supplement her brief in order to urge retroactive application of our Supreme Court's recent overruling of the one-parent doctrine in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), we do not address those issues.

[5] During much, but not all, of the relevant time period, respondents tested positive variously for THC and opiates—particularly hydrocodone,

ary area of concern arose from the youngest child's mild cerebral palsy,[6] which was diagnosed while she was in foster care. Specifically, respondents failed to take advantage of services offered to help them learn to address that child's resulting special needs. Despite being encouraged to attend the child's many medical appointments, respondents missed the great majority of them.

At the same time, the evidence consistently indicated that when respondents had parenting time with the children it went very well, that respondents behaved appropriately and showed no signs of drug-induced impairment, and that it was apparent that strong bonds existed between respondents and the three older children, who ardently wished to be reunited with their parents.

Petitioner sought termination of respondents' parental rights on May 22, 2013, alleging four statutory grounds. The court conducted a two-day evidentiary hearing on the petition, then concluded that each of the four statutory grounds had been demonstrated by clear and convincing evidence and that termination was in the children's best interests. Accordingly, the court entered an order terminating the parental rights of both respondents.

II. LEGAL ANALYSIS

The trial court concluded that termination of respondents' parental rights was warranted under

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a derivative of codeine. It appears that for at least some of the period, at least respondent-father had a prescription for hydrocodone and was testing for that substance within therapeutic levels. However, in time, he continued to use the drug without a prescription. Respondent-mother refused to participate in a detoxification program or an inpatient substance-abuse program and regularly tested positive for opiates. While respondent-father participated in both programs, he does not appear to have successfully conquered his dependency.

[6] As noted, this condition was not a result of the dehydration incident.

MCL 712A.19b(3)(b)(*ii*), (c)(*i*), (g), and (j). Those provisions authorize termination under the following circumstances:

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> * * *
>
> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

"If the court finds that there are grounds for termination of parental rights and that termination of parental

rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5).

An appellate court "review[s] for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and . . . the court's decision regarding the child's best interest." *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). A reviewing court must defer to the special ability of the trial court to judge the credibility of witnesses. *Id*. Statutory interpretation, however, is a question of law calling for review de novo. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

Parents have a fundamental liberty interest in the "companionship, care, custody, and management of their children." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). See also *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (stating that "the interest of parents in the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court") (O'Connor, J., joined by Rehnquist, C.J., and Ginsburg and Breyer, JJ.); see also *id*. at 77 (Souter, J., concurring), 80 (Thomas, J., concurring in the result), 86-87 (Stevens, J., dissenting on other grounds), and 95 (Kennedy, J., dissenting on other grounds); 147 L Ed 2d 49 (2000). That dire interest " 'does not evaporate simply because they have not been model parents or have lost temporary custody of their child[ren] to the state.' " *In re Trejo*, 462 Mich at 373-374, quoting

Santosky v Kramer, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Accordingly, that custody with natural parents serves a child's best interests " 're-mains a presumption of the strongest order and it must be seriously considered and heavily weighted in favor of the parent.' " *Heltzel v Heltzel*, 248 Mich App 1, 25; 638 NW2d 123 (2001), quoting *Deel v Deel*, 113 Mich App 556, 561; 317 NW2d 685 (1982) (emphasis omitted).

A. TERMINATION UNDER MCL 712A.19b(3)(b)(*ii*)

The only injury alleged to have occurred in connection with this case is the dehydration of the youngest child, and the kidney failure and other complications that resulted.

MCL 712A.19b(3)(b) authorizes termination of parental rights where the child, or the sibling of the child suffers physical injury or physical abuse or sexual abuse under any of the following conditions:

> (*i*) The parent's act caused the physical injury or physical or sexual abuse and . . . there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
>
> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and . . . there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
>
> (*iii*) A nonparent adult's act caused the physical injury or physical or sexual abuse and . . . there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.

Petitioner has not alleged grounds under subparagraph (*i*) or alleged that respondent-father's act "caused the physical injury." Rather, it relies on only

subparagraph (*ii*) and argues that respondent-father "had the opportunity" to prevent the harm caused by the dehydration.

"Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: '[i]t is known from its associates' . . . . This doctrine stands for the principle that a word or phrase is given meaning by its context or setting." *Koontz v Ameritech Servs*, *Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002) (quotation marks and citations omitted).

Applying this principle, we conclude that subparagraph (b)(*ii*) must be interpreted in the context of its sister subparagraphs, (b)(*i*) and (b)(*iii*). It is clear under these provisions that for physical injury to fall within MCL 712A.19b(3), it must be caused by a "parent's act" or a "nonparent adult's act" and not merely contributed to by an unintentional omission. Accordingly, subparagraph (*ii*) is intended to address the parent who, while not the abuser, failed to protect the child from the other parent or nonparent adult who is an abuser. We reject the suggestion that subparagraph (*ii*) was intended to be broader than subparagraphs (*i*) and (*iii*) in that it could apply merely to a negligent failure to respond to an accidental injury or naturally occurring medical condition not caused by an "act" of a parent or other adult.

Indeed, the caselaw applying this subparagraph has invariably involved abusive contact with the child. See *In re Sours Minors*, 459 Mich 624, 635-636; 593 NW2d 520 (1999) (several assaultive acts, including domestic violence); *In re Ellis*, 294 Mich App 30, 31-33; 817 NW2d 111 (2011) (severe physical injuries resulting from physical abuse); *In re HRC*, 286 Mich App 444, 449-461; 781 NW2d 105 (2009) (sexual abuse); *In re*

Archer, 277 Mich App 71, 73-75; 744 NW2d 1 (2007) (excessive corporal punishment).

For these reasons, we conclude that MCL 712A.19b(3)(b)(*ii*) did not apply to this case. As we will now discuss, however, medical neglect may constitute statutory grounds for termination under the three other provisions of MCL 712A.19b(3) on which the trial court relied.

B. TERMINATION UNDER MCL 712A.19b(3)(c)(*i*), (3)(g), AND (3)(j)

The trial court concluded that termination of respondents' parental rights was warranted under MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist), (3)(g) (failure to provide proper care and custody), and (3)(j) (children will likely be harmed if returned). We agree with the trial court regarding the youngest child, but hold that the court erred by extending its reasoning to the three older children.

1. THE YOUNGEST CHILD

In the course of pleading to the court's exercise of jurisdiction over the children, respondent-father agreed that respondents' youngest child was in his care and custody when she went approximately 16 hours without consuming food or fluid, that he should have known that the child needed medical care but failed to obtain it, and that as a result medical professionals found the child to be severely dehydrated and profoundly ill.

A pediatric nephrologist testified that she was consulted to evaluate the child's acute kidney injury and found her "still in the process of being re-hydrated," but "[t]he rest of it was pretty normal." The expert advised that children become dehydrated more easily than adults and so the condition can arise "very quickly," and

elaborated that a three-month-old child "should be feeding every two to three hours," and that doing without for 16 hours "would cause the child to be severely dehydrated." The nephrologist stated that, of the various signs of infant dehydration, she would expect a parent in respondent-father's position to notice decreased urination and saliva production.

The nephrologist described the child's kidney failure as an acute condition, meaning an "isolated event," not something that had been ongoing for her entire three months. She further reported that the child was now off her medications and "doing well," with kidney size and electrolytes normal.

The expert testified that although the infant was born after only 33 weeks of gestation, at the time of the dehydration incident she was "pretty much term as far as . . . gestational age" and thus required no handling different from what would be appropriate for a normal newborn; she further agreed that nothing about the child's premature birth predisposed her to becoming dehydrated more easily than other infants of her gestational age. According to the witness, "while she was premature, she had a pretty uneventful course" with no "infections or anything . . . that could have injured her kidneys at that time," and so "didn't have any increased susceptibility other than being a baby[.]"

Respondents' family pediatrician testified on respondents' behalf, stating that he started caring for respondents' oldest child when that child was a toddler and thereafter saw all the children regularly for both illnesses and routine examinations and that he had never detected any signs of neglect or abuse. He further stated that "they were pretty normal kids and I didn't have specific concerns about their care," and that they were all well fed and generally healthy. Asked if consumption

of the controlled substances associated with respondent-mother during pregnancy could contribute to a premature birth, the doctor answered that it "might," but elaborated, "on the other hand, there are babies . . . whose mothers have used the substances [who] were born on time," and that "there are lots of things that can trigger a premature birth." Similarly, the nephrologist stated that substance abuse, including tobacco smoking, can cause premature birth, but declined to testify that there was a causal link in this case.

a. RESPONDENT-FATHER

Respondent-father's responsibility for neglecting to notice something amiss with, or otherwise attend to, his youngest child as she went several hours without taking nourishment or fluid before rapidly slipping into a life-threatening condition is a matter admitted by him, and well emphasized by the trial court. Also of concern, as the trial court noted, is that the child's cerebral palsy presents serious and enduring parenting challenges. Although there was no evidence that respondent-father was intoxicated at the time of the dehydration incident, the trial court did not clearly err by regarding respondent-father's persistent substance-abuse problem as heightening concerns that such neglect could recur. Nor did the court err by attaching significance to respondent-father's failure to participate in, or benefit from, services relating to caring for a child with cerebral palsy, or to attend most of that child's medical appointments. The seriousness of the incident of medical neglect, considered along with the child's special needs, respondent-father's failure to demonstrate a willingness to undertake the special efforts that those special needs demanded, and his failure to get his substance-abuse problem under control, supported the trial

court's conclusions for purposes of MCL 712A.19b(3)(c)(*i*) and (3)(g) that respondent-father might well again fail to respond properly to a serious medical condition that might arise with the child, and for purposes of (3)(j) that the child faced a reasonable likelihood of harm if returned to respondent-father's care.

b. RESPONDENT-MOTHER

Respondent-mother was not present for any part of the dehydration incident and thus cannot be deemed negligent in that regard. Her admitted drug use during pregnancy raises serious concerns, however, even though there was no medical testimony linking that drug use to the child's prematurity, her bout with dehydration, or her mild cerebral palsy.

Significantly, the drug use does not stand alone. Evidence was introduced of several behaviors of respondent-mother immediately after giving birth that raised concerns among the medical staff about her ability to care for a newborn. More significantly, even after the infant's cerebral palsy diagnosis, respondent-mother failed to attend virtually all of the dozens of medical appointments for the baby, failed to attend programs intended to educate her about that condition, and refused to sign paperwork to facilitate the child's receiving physical therapy.

A lack of cooperation with reunification services, or other court-ordered conditions, can bear on a termination decision, if that lack of cooperation relates to issues of abuse or neglect. See *In re Trejo Minors*, 462 Mich at 346 n 3. Such a failure "should not be over-emphasized and . . . is not determinative of the outcome of a termination hearing." *In re Bedwell*, 160 Mich App 168, 176; 408 NW2d 65 (1987). However, the failure to participate

in services directly linked to the ability to care for a special needs, or medically fragile, child bears directly on issues of neglect.

For these reasons, the trial court did not clear err by concluding that termination was warranted under MCL 712A.19b(3)(c)(*i*), (3)(g), and (3)(j).

2. ANTICIPATORY NEGLECT

The trial court terminated respondents' parental rights to their three older children by emphasizing respondents' respective failures to gain control over their substance-abuse habits and heavily relied on the doctrine of anticipatory neglect, according to which "[h]ow a parent treats one child is certainly probative of how that parent may treat other children." *In the Matter of LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973); see also *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). However, the trial court nowhere suggested, and no evidence was offered to prove, that either respondent had ever abused or neglected any of their three older children.

Moreover, the ages and medical conditions of the three older children stand in sharp contrast to that of the youngest child. Unlike the latter, who requires special medical care for which respondents seemed to underappreciate the need, no such special care was required for the older children. Moreover, respondents had cared for those children from birth without incident, including any allegation, let alone proof, that they had abused or neglected the three older children at any time. While anticipatory neglect can militate in favor of termination, under the unusual circumstances of this case, the doctrine has little bearing. Again, no allegations of abuse or neglect have ever arisen in connection with the three oldest children, and the only allegations of negligence underlying

this case concern respondent-mother's continued substance abuse during her pregnancy with the youngest child, and respondent-father's failure to act promptly in response to that infant's rapid medical deterioration. The three older children ranged in age from five to twelve years at the time of termination, and, thus, did not share their infant sister's medical vulnerabilities or inability to articulate personal needs or discomforts. Moreover, concerns over the youngest child's cerebral palsy hardly militated in favor of terminating parental rights to the older children, who suffered from no such special need. See *In re Newman*, 189 Mich App 61, 71; 472 NW2d 38 (1991) ("We do not consider it appropriate to destroy a family's relationship with five children if the major problem appears to be the parents' inability to cope with one of them . . . .").

The trial court's concern for both respondents' demonstrated failure to get their substance-abuse problems under control was certainly justified. However, drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect.

Cases that come before this Court often dramatically illustrate that substance abuse can cause, or exacerbate, serious parenting deficiencies, but the instant case is a poor example. We do not mean to imply any approval of the protracted, and sometimes illegal, use of prescription medications so much in evidence in this case, even as we refrain from repeating the trial court's apparent mistake of simply assuming that overuse, or illegal acquisition, of such medications is itself ground for concluding child neglect or abuse will ever result from it.[7]

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[7] Indeed, an early signal that consumption of prescription medication would be overvalued in this case was when, at the initial dispositional

Termination of parental rights requires "both a failure and an inability to provide proper care and custody," which in turn requires more than "speculative opinions . . . regarding what *might* happen in the future." *In re Hulbert*, 186 Mich App 600, 605; 465 NW2d 36 (1990). In the case of the youngest child, we credit the trial court's concern that respondents' continued substance-abuse issues, considered along with their failure to attend medical appointments or benefit from services offered to provide guidance in dealing with cerebral palsy, heightens the risk that respondents might again fail to appreciate the special needs and vulnerabilities of their infant daughter. But because no such special needs or vulnerabilities exist in relation to the three older children, we conclude that the trial court erred by invoking anticipatory neglect to extend those concerns to them as well.

For these reasons, we conclude that the trial court clearly erred by finding that termination of respondents' parental rights to the three older children was warranted under MCL 712A.19b(3)(c)(*i*), (3)(g), or (3)(j).[8]

C. BEST INTERESTS

Once a statutory basis for termination has been

hearing, the caseworker expressed her understanding that both respondents had prescriptions for hydrocodone, and that tests revealed concentrations of that drug well within therapeutic levels, but nonetheless insisted that respondents terminate what the witness understood to be respondents' respective physician-directed courses of treatment in deference to her own general concerns about the hazards of that pharmaceutical.

[8] Although petitioner raised other concerns regarding respondents' parenting prospects, including housing and emotional stability, there is no suggestion that any such problems on respondents' parts have ever resulted in any abuse or neglect of the children, and nothing in evidence suggests that that would suddenly change after ten years of parenting. Accordingly, those concerns do not themselves, separately or collectively, justify termination of parental rights.

shown by clear and convincing evidence, the court must determine whether termination is in the child's best interests. MCL 712A.19b(5). Best interests are determined on the basis of the preponderance of the evidence. *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013).

Because we conclude that the trial court erred by concluding that any of the statutory bases for termination were proved in connection with the three older children, we need not review the court's best-interest determinations as applied to them. However, because our decision should result in the return of the three oldest children to respondents, and thus significantly change the family dynamics from what the trial court envisioned when originally deciding this case, we remand this case to the trial court to determine anew whether termination of respondents' parental rights to the youngest child is in the latter's best interests. The court should consider all facts and circumstances that have occurred up to the date of its new decision.

III. CONCLUSION

The court erred as a matter of law by concluding the medical neglect involved in this case constituted failure to prevent physical harm for purposes of MCL 712A.19b(3)(b)(*ii*).

The trial court did not clearly err by concluding that termination of respondents' parental rights to their youngest child was warranted under MCL 712A.19b(3)(c)(*i*), (3)(g), and (3)(j). However, the court clearly erred by extending that result to the older three children on the basis of anticipatory neglect.

We affirm the decision below as it concerns the trial court's findings of three statutory bases for termination

in connection with respondents' youngest child, and remand for redetermination of that child's best interests. We reverse in all other respects.

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

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

RATAJ v CITY OF ROMULUS

Docket No. 315669. Submitted September 10, 2014, at Detroit. Decided September 23, 2014, at 9:25 a.m.

Michael A. Rataj filed an action in the Wayne Circuit Court against the city of Romulus and the Romulus Police Department (RPD). The action arose under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., and was related to a police officer's alleged assault of an unnamed individual who had been arrested and handcuffed. Plaintiff sought the disclosure of all records pertaining to the assault, including an unredacted copy of the official incident report, any other internal reports, and any videorecordings. The RPD had originally granted plaintiff's FOIA request in part and denied it in part, providing a copy of the incident report with the names, addresses, dates of birth, and telephone numbers of all persons redacted. The RPD further confirmed that a video of the incident existed, but stated that it was not being released at the request of the arrestee because of safety concerns. In the FOIA action, defendants moved for summary disposition, arguing that the records plaintiff sought were exempt from disclosure as a matter of law because they (1) contained information of a personal nature and disclosure would constitute a clearly unwarranted invasion of privacy under MCL 15.243(1)(a), (2) were law enforcement investigation records and disclosure would constitute an unwarranted invasion of privacy under MCL 15.243(1)(b)(*iii*), (3) related to law enforcement departmental discipline and personnel matters under MCL 15.243(1)(s)(*ix*). Alternatively, defendants argued that the court should hold an evidentiary hearing or review the requested records in camera before ordering any disclosure. Plaintiff requested that the court enter a judgment in his favor pursuant to MCR 2.116(I)(2). The court, Robert J. Colombo, Jr., J., ruled that the requested information was exempt from disclosure pursuant to MCL 15.243(1)(a). The court also concluded that the interest in disclosure was outweighed by the interest in protecting the individual's privacy and rejected the argument that disclosure of the information would serve the public interest by shedding light on the operations of the RPD. Accordingly, the court granted summary disposition in favor of defendants with regard to plaintiff's request for the arrestee's identity, the unredacted incident

report, and the videorecording. Regarding plaintiff's request for any RPD reports concerning internal investigations or the discipline of the officer, the court ruled that plaintiff had not sufficiently described those records within the meaning of MCL 15.233(1) and that even if the records existed and plaintiff had described them sufficiently, the records would be exempt from disclosure under MCL 15.243(1)(s)(*ix*). Accordingly, the court also granted summary disposition for defendants with respect to plaintiff's request for those records. The court further concluded that it was unnecessary to conduct an in camera review of the requested information. Plaintiff appealed.

The Court of Appeals *held*:

1. FOIA reflects the state's policy favoring public access to governmental information, recognizing the need of citizens to be informed as they participate in democratic governance and the need for public officials to be held accountable for the manner in which they perform their duties. FOIA is a prodisclosure statute, and its disclosure provisions must be interpreted broadly to ensure public access. While FOIA contains several exemptions from the duty to disclose in MCL 15.243, they must be construed narrowly, and the burden of proof rests with the party asserting an exemption. Under FOIA, a public body must disclose all public records that are not specifically exempt under the act.

2. The videorecording was subject to disclosure under FOIA, and the circuit court erred by concluding otherwise. MCL 15.232(e) defines a public record as a writing that is prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. A videorecording is a writing as defined under MCL 15.232(h), and the video in question was in the RPD's possession. MCL 15.243(1)(a) provides that a public body may exempt from disclosure information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. This exemption requires a two-pronged analysis. Under the first prong, information is of a personal nature if it is intimate, embarrassing, private, or confidential. It was alleged by the parties that the videorecording showed the arrestee spitting on the officer and using a racial slur. This information could be considered embarrassing and therefore of a personal nature. For the second prong, the question is whether public disclosure of the information contained in the videorecording would constitute a clearly unwarranted invasion of an individual's privacy. Answering this question requires the court to balance the public interest in disclosure against the interest the Legislature intended the ex-

emption to protect. The only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government. Accordingly, it was necessary to ask whether the requested information would shed light on the governmental agency's conduct or further the core purposes of FOIA. In all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's expectation of privacy. Notwithstanding the personal and embarrassing information that was depicted on the videorecording, the video would shed light on the operations of the RPD and, in particular, its treatment of those arrested and detained by its officers. While the circuit court was concerned about plaintiff's motives for seeking disclosure of the videorecording, initial and future uses of information requested under FOIA are irrelevant when determining whether the information falls within an exemption, as is the identity of the person seeking the information. Moreover, because the videorecording was plainly subject to disclosure, it would have been unnecessary for the circuit court to review the video in camera.

3. The circuit court erred by granting defendants summary disposition with respect to redaction of the names of the arrestee and the officer because they were also subject to disclosure under FOIA. Absent special circumstances not present in this case, an individual's name is not information of a personal nature within the meaning of MCL 15.243(1)(a), and there was no need to consider the second prong of the privacy-exemption analysis.

4. The other personal information in the incident report pertaining to the arrestee and the officer (home addresses, dates of birth, and telephone numbers) was exempt from disclosure under FOIA. For purposes of the second prong of the privacy-exemption analysis, the information would have revealed little or nothing about a governmental agency's conduct, nor would it have furthered the stated public policy underlying FOIA. Because the other personal information was exempt from disclosure under MCL 15.243(1)(a), it was properly redacted from the incident report.

5. Any RPD internal investigation reports and personnel records pertaining to the assault incident were also exempt from disclosure under FOIA. Under MCL 15.243(1)(s)(*ix*), internal investigation reports and personnel files of a law enforcement agency are exempt from disclosure unless the public interest in disclosure outweighs the public interest in nondisclosure in the

particular instance. While the circuit court erred by relying on an unsigned, unnotarized affidavit to conclude that the interest in nondisclosure outweighed the public interest in disclosure of any internal investigation reports and personnel files, its ultimate conclusion was nonetheless correct.

6. Because defendants wrongfully denied plaintiff's FOIA request insofar as it sought disclosure of the videorecording and the names of the arrestee and the officer involved in the assault, plaintiff's FOIA action and appeal were necessary to compel disclosure of the information requested. Having prevailed in part in his action, plaintiff was entitled under MCL 15.240(6) to an appropriate portion of his attorney fees, costs, and disbursements, and the circuit court was directed on remand to determine the fees, costs, and disbursements incurred by plaintiff, including attorney fees and costs necessitated by the appeal, and award him an appropriate portion of them. The circuit court was also directed to determine whether plaintiff was entitled to punitive damages pursuant to MCL 15.240(7).

Affirmed in part, reversed in part, and remanded.

1. PUBLIC RECORDS — FREEDOM OF INFORMATION ACT — VIDEORECORDINGS.

A videorecording is a public record subject to disclosure under the Freedom of Information Act, MCL 15.231 *et seq*.

2. PUBLIC RECORDS — FREEDOM OF INFORMATION ACT — EXEMPTIONS FROM DISCLOSURE — UNWARRANTED INVASIONS OF PRIVACY — MOTIVES FOR SEEKING DISCLOSURE.

MCL 15.243(1)(a) provides that a public body may exempt from disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy; the exemption requires a two-pronged analysis; under the first prong, information is of a personal nature if it is intimate, embarrassing, private, or confidential; for the second prong, the question is whether public disclosure of the information contained in the videorecording would constitute a clearly unwarranted invasion of an individual's privacy; answering this question requires the court to balance the public interest in disclosure against the interest the Legislature intended the exemption to protect; the only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government by shedding light on them; in

all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's expectation of privacy; a plaintiff's motives for seeking disclosure of the information requested under FOIA, including the initial and any future uses of the information, are irrelevant when determining whether the information falls within an exemption, as is the identity of the person seeking the information.

3. PUBLIC RECORDS — FREEDOM OF INFORMATION ACT — EXEMPTIONS FROM DISCLOSURE — UNWARRANTED INVASIONS OF PRIVACY — PERSONAL INFORMATION — NAMES, ADDRESSES, BIRTHDATES, AND PHONE NUMBERS.

Absent special circumstances, an individual's name is not information of a personal nature within the meaning of MCL 15.243(1)(a) for purposes of disclosure under the Freedom of Information Act, MCL 15.231 *et seq*.; other information such as home addresses, dates of birth, and telephone numbers are exempt from disclosure under MCL 15.243(1)(a) if the information would reveal little or nothing about a governmental agency's conduct and would not further the public policy underlying the act.

4. ATTORNEY FEES — FREEDOM OF INFORMATION ACT — COMPELLING DISCLOSURE — APPEALS.

If an appeal is necessary to compel the disclosure of information requested under the Freedom of Information Act, MCL 15.231 *et seq*., a plaintiff who prevailed in whole or in part in the action is entitled under MCL 15.240(6) to an appropriate portion of his or her attorney fees, costs, and disbursements necessitated by the appeal; the plaintiff may also be entitled to punitive damages under MCL 15.240(7).

Joel B. Sklar for plaintiff.

Plunkett Cooney (by *Mary Massaron Ross*, *Hilary A. Ballentine*, and *Audrey J. Forbush*) for defendants.

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

JANSEN, J. In this action brought pursuant to Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff appeals by right the circuit court's grant of summary disposition in favor of defendants. We

affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I

Plaintiff Michael A. Rataj (plaintiff), a Detroit-area attorney, learned that Romulus Police Officer Warren Jones (Jones) had assaulted an unnamed citizen at the Romulus Police Department (RPD) in the early morning hours of August 1, 2012. Although it is unclear how plaintiff initially discovered this information, RPD employee Kevin Ladach (Ladach) has confirmed that the assault took place and was captured on video.[1] According to plaintiff, Jones physically assaulted the citizen while the citizen's hands were handcuffed behind his back. Although the record does not disclose the specific reasons for the citizen's arrest, it appears that the citizen later provoked Jones while in custody by spitting on Jones and using an unidentified racial epithet.

On September 21, 2012, plaintiff sent a FOIA request to the RPD. Plaintiff sought the disclosure of all records pertaining to the assault, including an unredacted copy of the official incident report, any other internal reports, and any videorecordings. RPD Captain Derran E. Shelby (Shelby) responded on October 4, 2012, stating that plaintiff's FOIA request had been "granted in part and denied in part." Shelby provided a copy of the incident report pertaining to the events of August 1, 2012, with the names, addresses, dates of birth, and telephone numbers of all persons redacted. Shelby

[1] See *Ladach v City of Romulus*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 10, 2014 (Docket No. 13-CV-010771). At the time of the incident at issue in this case, Ladach was a detective sergeant at the RPD and was in charge of supervising the property and evidence room. Ladach has since been demoted and relieved of his duties in the detective bureau.

informed plaintiff that Lieutenant James Cox was the shift commander on duty at that time and that Sergeant Damian Hull was also on duty. Shelby confirmed that the RPD possessed video of the lobby area, booking area, and lock-up area recorded in the early morning hours of August 1, 2012. However, he stated that "at the request of the prisoner for his/her safety concerns, the video is not being released." In addition, Shelby wrote that "[t]he name of the arrestee has been redacted from the incident report at his/her request." Shelby notified plaintiff that he could appeal the decision in writing to Barry Seifman (Seifman), an attorney designated by the city of Romulus to handle FOIA appeals.

Plaintiff sent a written appeal to Seifman on November 14, 2012. Seifman responded on November 19, 2012, suggesting that the records sought by plaintiff were exempt from disclosure under FOIA because they (1) "would constitute a clearly unwarranted invasion of an individual's[2] privacy," (2) were related to "departmental discipline," and (3) consisted of "police personnel records." Seifman did send plaintiff a copy of a typewritten letter, allegedly signed by the citizen who was assaulted, which provided:

> September 28, 2012
>
> To the City of Romulus,
>
> [Redacted] requesting that any police reports, patrol car audio/video, police station audio/video, etc., obtained by the city as a result of my arrest on August 1, 2012, that the city of Romulus may have in their [sic] possession surrounding an incident where an officer struck me for spitting on him and using racial slurs, NOT be released to anyone. It is my belief that by releasing any of these items to anyone from

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[2] It is unclear whether Seifman was referring to Jones (the individual who allegedly committed the assault), the unnamed citizen (the individual who was assaulted), or both.

> the public will not only impact my current employment status, but also my personal safety as well.
>
> Sincerely,
>
> [Redacted]

Seifman informed plaintiff that although the citizen's name had been redacted, the letter "may help you understand the concerns of the person involved in the incident." Seifman did not explain why the letter was dated September 28, 2012, nearly two months after the incident had taken place.

On January 11, 2013, plaintiff commenced the instant FOIA action against defendants in the Wayne Circuit Court, seeking disclosure of the records identified in his earlier FOIA request, including an unredacted copy of the incident report and the videorecording of the assault. Plaintiff also requested costs and reasonable attorney fees pursuant to MCL 15.240(6).

In lieu of filing an answer, defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the records sought by plaintiff were exempt from disclosure as a matter of law because they (1) contained information of a personal nature and disclosure would constitute a clearly unwarranted invasion of privacy under MCL 15.243(1)(a); (2) were law enforcement investigation records and disclosure would constitute an unwarranted invasion of privacy under MCL 15.243(1)(b)(*iii*); and (3) related to law enforcement departmental discipline and personnel matters under MCL 15.243(1)(s)(*ix*). Alternatively, defendants argued that the circuit court should hold an evidentiary hearing or review the requested records in camera before ordering any disclosure.

Plaintiff responded to defendants' motion for summary disposition and requested that the circuit court enter judgment in his favor pursuant to MCR 2.116(I)(2). Plain-

tiff maintained that the requested records, including the videorecording, were all subject to disclosure under FOIA. Plaintiff argued that the privacy exemption of MCL 15.243(1)(a), the law enforcement investigation exemption of MCL 15.243(1)(b)(*iii*), the law enforcement personnel records exemption of MCL 15.243(1)(s)(*ix*), and the public safety exemption of MCL 15.243(1)(y) were all inapplicable on the facts of this case. Attached to his response, plaintiff submitted documentary evidence related to an ongoing investigation of the RPD by the Federal Bureau of Investigation, Michigan State Police, and Wayne County Prosecuting Attorney's Office. Plaintiff pointed out that several RPD officers had been charged with corruption and criminal misconduct in office. He suggested that the RPD had a history of covering up police misconduct and that disclosure of the requested videorecording would serve the public interest by shedding light on the internal operations of the RPD.

Plaintiff also attached a copy of the complaint filed in *Ladach v City of Romulus*,[3] a Whistleblowers' Protection Act lawsuit filed by Ladach in the United States District Court for the Eastern District of Michigan. In the complaint, Ladach explained that he had been a detective sergeant at the RPD, in charge of supervising the property and evidence room. This position had required him to gather and compile materials for certain FOIA requests. Ladach alleged that he had learned of an assault against a citizen during the midnight shift of August 1, 2012, which was captured on video. Upon learning of the assault, Ladach located the videorecording and made a copy of it on his departmental computer.

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[3] *Ladach v City of Romulus*, United States District Court for the Eastern District of Michigan, Docket No. 13-CV-010771.

When Ladach later received a FOIA request on September 24, 2012 (presumably the same request submitted by plaintiff on September 21, 2012), he compiled the requested information, including the videorecording, and presented the materials to RPD Chief Robert Dickerson (Dickerson) for his review and approval. According to Ladach, Dickerson and Shelby questioned him regarding the video, stating that they thought it had been destroyed. Dickerson instructed Ladach to destroy the video and delete it from his computer. Ladach subsequently contacted the Attorney General's office concerning the incident and the videorecording. He was later relieved of his duties in the detective bureau and evidence room and demoted to road patrol.

The circuit court held oral argument on March 22, 2013. The court repeatedly questioned counsel concerning plaintiff's motivations for seeking disclosure of the citizen's identity and videorecording. The court remarked that plaintiff's attorney was also involved in the *Ladach* case and suggested that the instant FOIA action was "really about you getting discovery to support your Ladach lawsuit." In response, plaintiff's attorney noted that the *Ladach* lawsuit had not been filed until after plaintiff's FOIA request was sent to the RPD. The circuit court then asked whether plaintiff was seeking disclosure of the citizen's identity and videorecording in order "to go out and solicit this citizen to file a 1983[4] action or an assault and battery claim." Plaintiff's attorney responded that this was not plaintiff's intention; he argued that the requested information was not exempt from disclosure under FOIA and that disclosure would be in the public interest.

The circuit court observed that the citizen involved in the incident did not want the incident report or

[4] 42 USC 1983.

videorecording disclosed. According to the court, "[I]t would not be surprising that a citizen would not want to disclose that [he] had been . . . arrested, charged, or convicted." The court further admonished plaintiff's counsel, "I don't think you're pursuing the public interest at all. I think you're pursuing discovery in your federal case." Defense counsel argued that the videorecording and any police reports concerning the incident of August 1, 2012, were exempt from disclosure under FOIA because disclosure would invade the citizen's right to privacy.

The circuit court ruled that the requested information was exempt from disclosure pursuant to MCL 15.243(1)(a). With respect to the first prong of the analysis under MCL 15.243(1)(a), the court concluded that

> [t]he information sought regarding the identity of the citizen in the police report as well as the video information is of a personal nature. The fact that the citizen was involved in an incident [for] which the police may have arrested and even charged is [an] intimate, embarrassing, private and confidential detail[] regarding the citizen's life.

Relying on *Mich Federation of Teachers & School Related Personnel v Univ of Mich*, 481 Mich 657, 680; 753 NW2d 28 (2008), the court held that the requested information remained private and personal, notwithstanding that the citizen's identity ultimately would have been discovered if he had been charged and tried in open court. With respect to the second prong of the analysis under MCL 15.243(1)(a), the circuit court concluded that the interest in disclosure was outweighed by the interest in protecting the citizen's privacy. The court "reject[ed]" plaintiff's argument that disclosure of the information would serve the public interest by shedding light on the operations of the RPD.

The court remarked that it would grant summary disposition for defendants under MCR 2.116(C)(8) with regard to plaintiff's request for the citizen's identity, unredacted incident report, and videorecording.

Regarding plaintiff's request for any RPD reports concerning internal investigations or the discipline of Jones, the circuit court ruled that plaintiff had not "sufficiently" described those records within the meaning of MCL 15.233(1). The court also ruled that, even if the records existed and had been sufficiently described by plaintiff, the records would be exempt from disclosure under MCL 15.243(1)(s)(*ix*) and *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff*, 463 Mich 353, 365-367; 616 NW2d 677 (2000). The court explained that it would grant summary disposition for defendants under MCR 2.116(C)(10) with respect to plaintiff's request for any internal investigation reports and personnel records. Observing that there was "absolutely no evidence to support any of the assertions made in the complaint and in the brief," the circuit court concluded that it was unnecessary to conduct an in camera review of the requested information.

On March 28, 2013, the circuit court entered an order denying plaintiff's request for summary disposition under MCR 2.116(I)(2) and granting summary disposition in favor of defendants for the reasons stated on the record.

II

We review de novo the circuit court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought 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." *Spiek*, 456 Mich at 337. "The motion must be granted if no factual development could justify the plaintiff's claim for relief." *Id*. A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Spiek*, 456 Mich at 337. "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). On the other hand, summary disposition is proper under MCR 2.116(I)(2) "if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

As with all statutes, the proper interpretation and application of FOIA is a question of law that we review de novo. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006); *Breighner v Mich High School Athletic Ass'n, Inc*, 255 Mich App 567, 570; 662 NW2d 413 (2003). This includes the question whether a particular document or recording constitutes a "public record" within the meaning of FOIA. See *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 639-640; 502 NW2d 368 (1993). In general, whether a public record is exempt from disclosure under FOIA is a mixed question of fact and law. *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 166; 645 NW2d 71 (2002). However, when the facts are undisputed and reasonable minds could not differ,

whether a public record is exempt under FOIA is a pure question of law for the court. See *Larry S Baker, PC v Westland*, 245 Mich App 90, 93; 627 NW2d 27 (2001); see also *Marcelle v Taubman*, 224 Mich App 215, 217; 568 NW2d 393 (1997) (noting that "[w]here facts are undisputed, applying a statute to the facts is an issue of law for the court").

III

In enacting FOIA, the Michigan Legislature declared:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. [MCL 15.231(2).]

"FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999). Our Supreme Court has repeatedly described FOIA as a "prodisclosure statute," *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000); *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991), and this Court has held that FOIA's disclosure provisions must be interpreted broadly to ensure public access, *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010). While it is true that FOIA contains several exceptions to

the duty to disclose, MCL 15.243, "these exemptions must be construed narrowly, and the burden of proof rests with the party asserting an exemption," *Manning*, 234 Mich App at 248; see also *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997). "Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011); see also MCL 15.233(1).

IV

We first conclude that the videorecording of the assault of August 1, 2012, is a public record subject to disclosure under FOIA.

As a preliminary matter, it is beyond dispute that a videorecording of the assault of August 1, 2012, does in fact exist.[5] Therefore, the threshold inquiry is whether the videorecording constitutes a "public record" within the meaning of FOIA. MCL 15.232(e) defines "[p]ublic record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." In turn, MCL 15.232(h) defines "[w]riting" as "handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content." Without question, a videorecording is a "writing" under MCL 15.232(h).

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[5] It is true that the citizen who was assaulted was never charged or prosecuted for any crime. But this is not relevant to our analysis.

Although it is not clear whether the videorecording was made in an interrogation room, the booking area, the lock-up area, or the lobby, we are satisfied that the video was "prepared . . . in the possession of, or retained by [the RPD] in the performance of an official function" within the meaning of MCL 15.232(e). This Court has previously held that booking photographs constitute public records under MCL 15.232(e). *Patterson*, 199 Mich App at 639; *Detroit Free Press, Inc v Oakland Co Sheriff*, 164 Mich App 656, 660-666; 418 NW2d 124 (1987). There are several obvious similarities between booking photographs and the videorecording at issue in this case. Moreover, in *Prins v Mich State Police*, 291 Mich App 586, 588; 805 NW2d 619 (2011), this Court essentially assumed, without deciding, that a police video of a traffic stop was a public record under FOIA. We conclude that the videorecording at issue in the present case is a "public record" within the meaning of MCL 15.232(e).

We also conclude that the videorecording is subject to disclosure. The circuit court determined that the videorecording was exempt from disclosure under the privacy exemption of MCL 15.243(1)(a), which provides that a public body may exempt from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." This exemption has two prongs. See *Mich Federation of Teachers*, 481 Mich at 672.

Under the first prong of the privacy exemption, information is "of a personal nature" if it is "intimate," "embarrassing," "private," or "confidential." *Id*. at 676. It has been alleged by the parties that the videorecording shows the citizen spitting on the officer and using a racial slur. This information could well be considered embarrassing and therefore of a personal nature. *Id*.

Under the second prong, then, the question is whether public disclosure of the information contained in the videorecording "would constitute a clearly unwarranted invasion of an individual's privacy." MCL 15.243(1)(a). To answer this question, the court must

> "balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect[.] . . . [T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." [*Practical Political Consulting*, 287 Mich App at 462, quoting *Mich Federation of Teachers*, 481 Mich at 673 (alterations in original).]

Under this prong of the analysis, it is necessary to ask whether the requested information would shed light on the governmental agency's conduct or further the core purposes of FOIA. *Mich Federation of Teachers*, 481 Mich at 681-682. "In all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's, or a group of individuals', expectation of privacy." *Practical Political Consulting*, 287 Mich App at 464.

Notwithstanding the personal and embarrassing information that is apparently depicted on the videorecording, we conclude that the video would shed light on the operations of the RPD and, in particular, its treatment of those arrested and detained by its officers. These are matters of legitimate public concern. See *Henry v Detroit*, 234 Mich App 405, 413 n 1; 594 NW2d 107 (1999). "[W]e cannot hold our [police] officials accountable if we do not have the information upon which to evaluate their actions." *Practical Political Consulting*, 287 Mich App at 464.

Furthermore, this Court has previously assumed that a police video depicting an arrestee is a public record subject to disclosure under FOIA. In *Prins*, 291 Mich App 587-588, the plaintiff was driving a vehicle in Ionia County when she was pulled over by a state trooper; the plaintiff's passenger was issued a ticket for failing to wear a seat belt. The plaintiff subsequently filed a FOIA request seeking disclosure of the video of the traffic stop, which had been recorded by a camera inside the police car. *Id*. at 588. The state police denied the plaintiff's request, however, explaining that any video made no longer existed. *Id*. Several months later, when the plaintiff's passenger appeared in district court to contest his seat-belt citation, the prosecutor produced the video of the traffic stop. *Id*. The *Prins* Court essentially assumed for purposes of its analysis that the state police had violated FOIA by failing to disclose the video in response to the plaintiff's FOIA request.

We acknowledge that the circuit court was concerned about plaintiff's motives for seeking disclosure of the videorecording. As explained previously, the court asked plaintiff's counsel whether his client was using the FOIA request as a means of obtaining discovery for the *Ladach* lawsuit and whether plaintiff was seeking disclosure of the citizen's identity and videorecording in order "to go out and solicit this citizen to file a [42 USC] 1983 action or an assault and battery claim." But as this Court has made clear, "initial as well as future uses of information requested under FOIA are irrelevant in determining whether the information falls within exemption, as is the identity of the person seeking the information." *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006). It is simply irrelevant whether plaintiff was seeking disclosure of the video for purposes of discovery in a different lawsuit. *Id*.; see also *Central Mich Univ Supervisory-*

Tech Ass'n v Central Mich Univ Bd of Trustees, 223 Mich App 727, 730; 567 NW2d 696 (1997).

Given that FOIA's privacy exemption must be narrowly construed, *Bradley*, 455 Mich at 293, and that disclosure of the videorecording would serve the core purposes of FOIA, see MCL 15.231(2); *Mager v Dep't of State Police*, 460 Mich 134, 145; 595 NW2d 142 (1999), we conclude that the videorecording is not exempt from disclosure under MCL 15.243(1)(a). The videorecording was plainly subject to disclosure, and it was therefore unnecessary for the circuit court to perform an in camera review of the video. We reverse the circuit court's erroneous determination that the videorecording was not subject to disclosure under FOIA.

V

Plaintiff also requested a copy of the unredacted incident report pertaining to the assault of August 1, 2012, presumably seeking disclosure of the identity of the citizen and officer involved in the assault. We conclude that the names of the citizen and officer, which were redacted from the incident report, were subject to disclosure under FOIA.

Like the videorecording itself, the names of the citizen and officer involved in the assault were withheld under the privacy exemption of MCL 15.243(1)(a). In the absence of special circumstances that are not present here, an individual's name is not "[i]nformation of a personal nature" within the meaning of MCL 15.243(1)(a). See, e.g., *Tobin v Civil Serv Comm*, 416 Mich 661, 671; 331 NW2d 184 (1982); *Practical Political Consulting*, 287 Mich App at 455; *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 282; 713 NW2d 28 (2005). Because the names of the citizen and officer are not information of a personal nature, the names are subject to disclosure and

there is no need to consider the second prong of the privacy exemption. See *Detroit Free Press*, 250 Mich App at 167-168 (stating that "[i]nformation not of a personal nature is subject to disclosure without considering the second prong of the privacy exemption"). We reverse the circuit court insofar as it declined to order disclosure of the names of the citizen and officer.[6]

VI

In contrast, we conclude that the other personal information redacted from the incident report (e.g., home addresses, dates of birth, and telephone numbers) was exempt from disclosure under FOIA. Home addresses, dates of birth, and telephone numbers typically constitute information of a personal nature within the meaning of the privacy exemption. See *Mich Federation of Teachers*, 481 Mich at 680. And for purposes of the second prong of the privacy exemption, our Supreme Court has held that the disclosure of such information "would reveal ' "little or nothing" ' about a governmental agency's conduct, nor would it further the stated public policy undergirding the Michigan FOIA." *Id*. at 682 (citations omitted). This other personal information pertaining to the citizen and officer was exempt from disclosure under MCL 15.243(1)(a) and was therefore properly redacted from the incident report.

VII

We similarly conclude that any RPD internal investigation reports[7] and personnel records pertaining to

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[6] As with the videorecording, plaintiff's motives for seeking disclosure of the names of the citizen and officer involved in the assault were irrelevant. *Taylor*, 272 Mich App at 205.

[7] We disagree with the circuit court's determination that plaintiff's request for internal investigation reports lacked sufficient specificity to

the incident of August 1, 2012, were exempt from disclosure under FOIA.

Internal investigation reports and personnel files of a law enforcement agency are exempt from disclosure "[u]nless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance . . . ." MCL 15.243(1)(s)(*ix*); see also *Kent Co Deputy Sheriffs*, 463 Mich at 365-367.

The circuit court relied on the unsigned, unnotarized "affidavit" of Dickerson to conclude that the public interest in disclosure of any internal investigation reports and personnel files was outweighed by the interest in nondisclosure. Specifically, the circuit court determined that it was essential to keep any internal investigation reports confidential in order to foster "frank and open discussion without fear of reprisal or retaliation." The court observed that if such reports were disclosed under FOIA, the RPD's ability to conduct internal investigations with the cooperation of its officers "would be chilled" or "destroyed." Although the circuit court technically erred to the extent that it relied on an unsigned, unnotarized "affidavit,"[8] we fully agree with its ultimate conclusion. Indeed, our Supreme Court adopted nearly identical reasoning in *Kent Co Deputy Sheriffs*, 463 Mich at 365-367, relying on the affidavit of the Kent County Undersheriff and concluding that the public interest in disclosure of various internal investigation records was outweighed by the

comply with MCL 15.233(1). Plaintiff's request described the requested records sufficiently to allow the RPD to identify and locate them. See *Coblentz v Novi*, 475 Mich 558, 572-573; 719 NW2d 73 (2006); *Thomas v New Baltimore*, 254 Mich App 196, 203-204; 657 NW2d 530 (2002).

[8] "[A]n unsworn, unsigned affidavit may not be considered by the trial court on a motion for summary disposition." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 120; 839 NW2d 223 (2013). Indeed, an unsigned, unnotarized "affidavit" is no affidavit at all. *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 711-712; 620 NW2d 319 (2000).

public interest in keeping the records confidential. We conclude that any RPD internal investigation records pertaining to the incident of August 1, 2012, were exempt from disclosure under MCL 15.243(1)(s)(*ix*). *Kent Co Deputy Sheriffs*, 463 Mich at 365-367. Likewise, we conclude that the public interest in disclosure of the officer's personnel file did not outweigh the public interest in nondisclosure. The circuit court properly determined that the requested internal investigation reports and personnel records were exempt from disclosure under MCL 15.243(1)(s)(*ix*).

VIII

As we have explained, defendants wrongfully denied plaintiff's FOIA request insofar as it sought disclosure of the videorecording and names of the citizen and officer involved in the assault of August 1, 2012. The present action—and particularly this appeal—was necessary to compel disclosure of this requested information. See *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002). We conclude that plaintiff, having prevailed in part in this action, is entitled to an appropriate portion of his attorney fees, costs, and disbursements pursuant to MCL 15.240(6). On remand, the circuit court shall determine the reasonable attorney fees, costs, and disbursements incurred by plaintiff in this case, including those attorney fees and costs necessitated by this appeal, and shall award plaintiff an appropriate portion thereof in accordance with MCL 15.240(6). The circuit court shall also determine whether plaintiff is entitled to punitive damages pursuant to MCL 15.240(7).

IX

We reverse the circuit court's grant of summary disposition in favor of defendants to the extent that the

court declined to order disclosure of the videorecording and unredacted names of the citizen and officer. The circuit court erred as a matter of law by ruling that these specific items were exempt from disclosure under FOIA.

We remand for entry of partial judgment in favor of plaintiff with respect to the requested videorecording and names, as well as for other proceedings. On remand, the circuit court shall (1) order disclosure of the videorecording and unredacted names of the citizen and officer involved in the assault, (2) award plaintiff an appropriate portion of his attorney fees, costs, and disbursements under MCL 15.240(6), and (3) determine whether plaintiff is entitled to punitive damages under MCL 15.240(7).

In all other respects, we affirm the circuit court's order granting summary disposition in favor of defendants and denying plaintiff's request for summary disposition under MCR 2.116(I)(2).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, no party having prevailed in full.

OWENS, P.J., and O'CONNELL, J., concurred with JANSEN, J.