MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

January 30, 2014, through April 15, 2014

CORBIN R. DAVIS
REPORTER OF DECISIONS

VOLUME 304
FIRST EDITION

THOMSON REUTERS™

2014

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

COURT OF APPEALS

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

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE

SUPREME COURT

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

Commissioners

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

TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
LYNN K. RICHARDSON	GARY L. ROGERS
NELSON S. LEAVITT	RICHARD B. LESLIE
DEBRA A. GUTIERREZ-McGUIRE	KATHLEEN M. DAWSON
ANNE-MARIE HYNOUS VOICE	RUTH E. ZIMMERMAN[1]
DON W. ATKINS	SAMUEL R. SMITH
JÜRGEN O. SKOPPEK	ANNE E. ALBERS

State Court Administrator

JOHN A. HOHMAN, Jr.

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

[1] To June 1, 2014.

TABLE OF CASES REPORTED

PAGE

COURT OF APPEALS CASES

HARRISON v MUNSON HEALTHCARE, INC

Docket Nos. 304512 and 304539. Submitted January 8, 2014, at Lansing. Decided January 30, 2014, at 9:00 a.m. Leave to appeal sought.

Jeanne Harrison brought an action in the Grand Traverse Circuit Court against Munson Healthcare, Inc., William P. Potthoff, M.D., and others, seeking damages for injuries sustained when an electrocautery device burned her forearm during thyroid surgery performed by Potthoff at Munson Medical Center. Munson insisted throughout discovery that no one who had been in the operating room remembered the incident. During their depositions, the operating room personnel stated that the device was always returned to its protective holster when not in active use. Munson contended that, given this habit and practice and the absence of any memories of the event, only an accidental dislodgment of the device from its holster could explain the burn. During trial, testimony revealed that an "incident report" had been created within 90 minutes of the burn that stated that a holster for the device had been available but had not been used. The court, Philip E. Rodgers, Jr., J., ordered Munson to produce certain files and notes for in camera review. Following its review, the court declared a mistrial, noting its concerns about ethical considerations arising from defendants' presentation of a defense inconsistent with the incident report. The court then conducted an evidentiary hearing regarding defendants' claim that the documents reviewed in the in camera hearing were peer-review documents exempt from disclosure. The court thereafter issued an opinion ruling that the documents were privileged. The court also held that counsel for Munson, Thomas R. Hall, had violated MRPC 3.1 and 3.3 by offering a defense that was inconsistent with known but undisclosed facts. The court additionally held that Hall and Bonnie Schreiber, Munson's risk manager, had violated MCR 2.114(D)(2) by filing documents that were not well grounded in fact. The court assessed Munson and Hall $53,958.69 in sanctions, jointly and severally. The court then denied defendants' motion for reconsideration and Harrison's motion for additional sanctions. Munson appealed and Harrison cross-appealed. (Docket No. 304512). Hall appealed. (Docket No. 304539). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Whether a particular document qualifies as privileged under MCL 333.21515 depends on the circumstances surrounding its creation.

2. The peer-review-privilege statutes exempt from disclosure the records, data, and knowledge collected for or by individuals or committees assigned a professional review function. Mere submission of information to a peer-review committee does not satisfy the collection requirement. MCL 333.20175(8) and MCL 333.21515 shield from disclosure materials accumulated for study by individuals or committees assigned a professional review function. Objective facts gathered contemporaneously with an event do not fall within the definition of "collect."

3. Given the evidence that Munson's quality committee does not collect or review accident reports, that incident reports are stored within the risk-management department and are not provided to peer-review committees for study, and that no peer-review file was ever created concerning Harrison's burn, it can be concluded that the factual information recorded on the first page of the incident report was not immune from disclosure as material collected pursuant to MCL 333.21515. The trial court erred by determining that that portion of the report, which contained a nurse's handwritten operating room observations, was privileged. The remainder of the incident report reflects a deliberative review process. The trial court correctly concluded that that portion of the incident report qualified as confidential.

4. The trial court did not clearly err by finding that a surgical participant laid the device on the surgical drape (accidentally, negligently, or deliberately) and that that person, or another person in the room, negligently failed to holster it.

5. Munson's conduct in creating an accident defense scenario despite its possession of direct evidence contrary to that position was a violation of MCL 600.2591(3)(a)(*ii*), which prohibits a party from advancing a claim or defense when the party has no reasonable basis to believe that the facts underlying that party's legal position are in fact true. The trial court did not abuse its discretion by finding that Munson invoked MRE 406 in bad faith by introducing habit-and-practice evidence to prove conformity of conduct despite that the evidence known only to Munson soundly contradicted that defense. The trial court's determination that defendants' conduct contravened MCR 2.114 fell within the range of reasonable and principled outcomes. The imposition of sanctions was not an abuse of discretion.

6. The trial court's determinations that Hall violated MCR 2.114 and MRPC 3.1 are affirmed. Hall's acquiescence in presenting certain testimony despite his awareness that the incident report substantially contradicted many of the statements in the testimony, suffices to establish an ethical violation under MRPC 3.3(a)(3).

7. The trial court erred by failing to render separate sanctions awards. Given the limited time Hall had access to the incident report, his culpability is far less than that of Munson. There is no merit to Harrison's claim for additional sanctions.

8. The award of sanctions is affirmed and the case is remanded for individualized assessments against Hall and Munson. On remand, Munson may elect to take full responsibility for the sanctions award. If Munson chooses not to do so, the trial court must conduct a hearing to clarify Hall's personal liability for the amounts awarded. Hall may not be sanctioned for costs or fees that arose before the date he was provided the incident report.

Affirmed and remanded.

1. HOSPITALS — PEER-REVIEW COMMITTEES — DISCLOSURE OF COMMITTEES' RECORDS, DATA, AND KNOWLEDGE.

Hospitals are required by MCL 333.21513(d) to establish peer-review committees whose purposes are to reduce morbidity and mortality and to ensure quality care; to encourage candid, thorough peer-review assessments of hospital practices, the Legislature has shielded peer-review activities from intrusive public involvement and from litigation; the records, data, and knowledge collected for or by individuals or committees assigned a review function are confidential and are to be used only for the purposes provided in Article 17 of the Public Health Code, are not public records, and are not available for court subpoena (MCL 333.21515).

2. HOSPITALS — PEER-REVIEW COMMITTEES — DISCLOSURE OF DOCUMENTS.

Whether a particular document qualifies as privileged from disclosure under MCL 333.21515 depends on the circumstances surrounding its creation; factual information objectively reporting contemporaneous observations or findings are not privileged while records, data, and knowledge gathered to permit an effective review of professional practices may be privileged.

3. HOSPITALS — PEER-REVIEW COMMITTEES — DISCLOSURE OF INFORMATION COLLECTED FOR REVIEW.

The records, data, and knowledge collected for or by individuals or committees assigned a peer-review function described in Article 17

> of the Public Health Code are confidential and may be used only for the purposes provided in Article 17, are not public records, and are not available for court subpoena; in determining whether any of the information requested is protected by the statutory privilege, the trial court should bear in mind that the mere submission of information to a peer-review committee does not satisfy the collection requirement so as to bring the information within the protection of the statute (MCL 333.21515).

Thomas C. Miller for plaintiff.

Fraser Trebilcock Davis & Dunlap, PC (by *Graham K. Crabtree*), for Munson Healthcare, Inc.

Hall Matson, PLC (by *Marcy R. Matson*), for Thomas R. Hall.

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

GLEICHER, J. Plaintiff, Jeanne Harrison, sustained a quarter-sized forearm burn during thyroid surgery performed by defendant Dr. William Potthoff at Munson Medical Center, owned by defendant Munson Healthcare, Inc. Postoperatively, Harrison met with a Munson representative to learn the cause of her burn. The representative told her that an electrocautery device called a "Bovie" had created the wound but offered no additional details. Dissatisfied with that answer and unhappy about the burn's aftereffects, Harrison filed suit.

Munson insisted throughout discovery that no one in the operating room remembered the incident, that the burn's mechanism "may not be ascertainable and may not ever be known," and that the witnesses lacked "any way of knowing precisely when or how the burn occurred." During their depositions, the operating room personnel avowed that they always returned the Bovie to its protective holster when it was not in active use. Munson contended that given this habit and practice

and the absence of any memories of the event, only an accidental dislodgement of the Bovie from its holster could explain the burn.

At the trial, Munson's operating room manager revealed that it would have been her practice to interview "every single staff member in [the operating] room" following an untoward event such as Harrison's burn. Subsequent inquiry revealed that within 90 minutes of the burn, a nurse penned an "incident report" stating: "During procedure, bovie was laid on drape, in a fold. Dr. Potthoff was leaning against the patient where the bovie was." The operating room manager's investigation yielded a conclusion that the Bovie's holster "was on field for this case, however bovie was not placed in it." The trial court perceived that this information directly contradicted the defense's contentions that no one knew how the event had occurred and that the Bovie had inadvertently fallen on the patient and declared a mistrial.

At an ensuing evidentiary hearing the trial court explored whether the incident report was subject to the statutory peer-review privilege and whether Munson and its counsel, Thomas R. Hall, had diminished the integrity of the proceeding by pursuing a defense at odds with the facts known to Munson. Ultimately, the trial court found the incident report privileged from disclosure but nevertheless imposed a joint and several sanction of $53,958.69 on Munson and Hall. We affirm the sanction award but remand for an individual assessment of the sanctions owed.[1]

[1] Numerous documents and transcripts were sealed by the trial court and remain sealed on appeal. Because defendants have relied on, quoted, and attached selective portions of these materials to their public briefs, we have cited in this opinion the portions of the sealed materials utilized by defendants.

I. BACKGROUND FACTS AND PROCEEDINGS

A. PRETRIAL PROCEEDINGS

On April 24, 2007, Dr. Potthoff surgically removed Jeanne Harrison's cancerous thyroid gland. Richard Burgett, a certified surgical assistant employed by Munson, assisted Dr. Potthoff. The operative note states that when the operation was complete and the drapes removed, "[t]here was found to be a burn wound on the left forearm, evidently from the Bovie."[2] The note continued: "There was a burn on the drape during the case that was noticed and this was sterilely covered with sterile towel and the Bovie changed. At this point in time it became evident that the burn carried into the skin on the patient." No other notations in Harrison's medical record shed light on the burn's cause.

Soon after she recovered from the thyroid operation, Harrison sought more information from Munson about the genesis of her injury. On June 5, 2007, Harrison received a letter signed by Barbara A. Peterson, Munson's operating room manager. The letter stated, in relevant part:

> This case has been confidentially reviewed and the following initiatives have been reinforced: The mandatory and active use of cautery protective devices anytime cautery is used. In addition, we have mandated the use of an alarm that is audible every time the device is activated. These precautions will decrease the likeihood of a burn event reoccuring. We will continue to measure these practices to ensure 100% compliance.

Harrison then met with Bonnie Schreiber, Munson's risk manager, to further discuss the burn. Still dissatisfied, Harrison retained counsel.

---

[2] A Bovie is a pencil-shaped instrument used to cauterize bleeding tissue or to cut through tissue. A push button on the device triggers the flow of current, which heats the device's electrical tip.

In November 2008, attorney Thomas C. Miller filed a complaint on Harrison's behalf in the Grand Traverse Circuit Court. The complaint sounded in negligence, rather than in medical malpractice, and named as defendants Munson Healthcare, Inc., and Dr. Potthoff. Dr. Potthoff was not employed by Munson, and the parties agreed that he did not act as Munson's agent at the time of the surgery. Nevertheless, Munson and Dr. Potthoff agreed to a joint defense handled by Hall. Hall sought summary disposition of Harrison's negligence claim, averring that it sounded in malpractice. Judge Philip E. Rodgers, Jr., granted the motion.[3]

Harrison proceeded to comply with the statutory requirements governing medical malpractice actions by mailing Munson and Dr. Potthoff a notice of intent to sue pursuant to MCL 600.2912b. During the 182-day "waiting time" required by the statute, Hall provided Miller the names of the 11 people who had been in the operating room during Harrison's surgery, identifying Burgett as the surgical assistant. Miller then filed a lawsuit against Burgett and Munson, again alleging negligence rather than malpractice.[4] Burgett, represented by Hall, responded by filing an affidavit of noninvolvement pursuant to MCL 600.2912c, averring that he did not "use, hold, holster, or otherwise handle the Bovie device" during the surgery. The affidavit further provided:

---

[3] Before the action was dismissed, Miller sent Munson a request for production of documents pursuant to MCR 2.310, requesting among other things "All incident reports and witness statements covering the incident that occurred during surgery on April 24, 2007, which resulted in Mrs. Harrison sustaining a burn on her left arm from an activated electrocautery device." Munson did not respond to this request and Miller failed to resend it during the subsequent proceedings.

[4] Because Burgett is an unlicensed health professional, Harrison argued that the notice of intent to file suit and affidavit of merit requirements of MCL 600.2912b and MCL 600.2912d(1) did not apply to him.

> 5. Prior to the April 24, 2007 surgery, I have had occasion to assist Dr. Potthoff in numerous surgeries, estimated at several hundred. This would likewise include literally dozens of surgeries involving removal of the thyroid gland and/or surrounding tissue.
>
> [6]. Throughout those occasions upon which I have assisted Dr. Potthoff during surgery involving thyroid removal, it has never been my habit and/or custom to use, hold, holster, or otherwise handle the electrocautery (Bovie) device, at any time before, during or after surgery.

Judge Rodgers granted Burgett and Munson summary disposition, ruling that the case sounded in medical malpractice rather than simple negligence.

Harrison then filed this medical malpractice action, which also included a res ipsa loquitur claim. With her complaint, Harrison submitted affidavits of merit signed by a general surgeon and a nurse. The parties embarked on a lengthy and contentious course of discovery focused on establishing how the Bovie had ended up on the drape covering Harrison's arm and who—Dr. Potthoff or a Munson employee—was responsible for its presence there.

Harrison utilized interrogatories and requests for admission, supplemented with depositions, to develop her proofs. Early in the process, Harrison sought an admission that the "individuals who were responsible for the electrocautery device" were Munson employees acting in the course of their employment. If Munson denied this request for admission, Harrison demanded that Munson "please specifically identify the individual or individuals by name and position, who were responsible for the device burning Mrs. Harrison's arm." Munson responded:

> Defendant objects to this request, in that it is vague, over broad and calls for a legal conclusion. Moreover, to the

> extent that this request refers in any manner to Dr. Potthoff, it has never been established that he was acting as an agent of Munson Healthcare (either real or ostensible) at the time of these events. In further answer, discovery is in its early stages and Plaintiff's counsel will be afforded the right to depose all individuals present in the operative suite at the time of surgery, who may have knowledge concerning the means by which the injury occurred or may have occurred. Finally, Defendant relies upon the medical records from Mrs. Harrison's April 24, 2007 outpatient surgery at Munson.

In response to Harrison's inquiries regarding responsibility for the Bovie at the time of the burn, defendants repeatedly directed Harrison to the medical record and denied that anyone in the operating room possessed any memory of the circumstances surrounding the burn. According to an affidavit filed early in the litigation by circulating nurse Cinthia Gilliand, "the injuries allegedly sustained by Jeanne Harrison, in whole or in part, were caused by acts and occurrences outside the control of the surgical team[.]" Gilliand concomitantly averred that she possessed no memory of the surgery.

Based on the absence of any participant's memory about the cause of the burn, Munson and Potthoff advanced an accident defense. They contended that because Dr. Potthoff and the operating personnel always reholstered the Bovie after using it, the Bovie's cord likely became entangled in a suction line, which then pulled the Bovie from its holster. Defendants theorized that the unnoticed Bovie accidentally fired when someone leaned against it. In answer to one of Harrison's interrogatories, Hall described the defense as follows:

> Defendants submit that a more fair description and/or plausible explanation of "how the burn occurred" is as follows: At some unknown point during surgery, the Bovie

> device evidently became unholstered while Dr. Potthoff was moving in and about the patient and attending to her. This may in fact have resulted in the Bovie cord becoming tangled upon itself, or perhaps upon other equipment at the bedside and even upon the clothing of Dr. Potthoff. (This was explained, in part by Dr. Potthoff at deposition).
>
> In any event, the Bovie apparently came to rest above the drape in the area of the patient's left arm, unbeknownst to the surgeon (Dr. Potthoff) and the remaining staff. From there, it appears most likely that the Bovie was inadvertently activated by Dr. Potthoff, as he leaned in toward the patient.

At his deposition, Dr. Potthoff denied any memory of the circumstances surrounding the burn, but opined that by virtue of the regular habits and practices of the surgical team, "we did everything possible to avoid such an injury." He insisted that because those in the operating room invariably reholstered the Bovie after each use, the burn qualified as accidental rather than a breach of the standard of care. Dr. Potthoff elaborated:

> The problem with the Bovie is it's attached to a cord which can get entangled, can get rubbed on, can get moved as people move around the table, as instruments get moved, as the suction, which is intimately connected to the Bovie in most cases, gets moved. The Bovie cord can get tangled up in all those things and get pulled out of the holster.[5]

Miller deposed most of the operating room witnesses and learned nothing new until the last two participants gave their testimonies. David Scott Babcock, a surgical technologist, and Ann Tembruell, a student technologist working under Babcock, remembered Harrison's surgery. Both recalled hearing an alarm signaling that

---

[5] The Bovie holster was attached to the operating room table near Harrison's chest area; no one could recall with certainty whether the holster was mounted on the patient's left or right side.

the Bovie was in use and simultaneously observing Dr. Potthoff without the Bovie in his hand. Babcock recounted that everyone immediately looked for the Bovie. Within seconds, someone found it on the drape overlying Harrison's arm. According to Babcock and Tembruell, Dr. Potthoff had activated the Bovie by leaning against it. Tembruell recalled stating aloud: "Dr. Potthoff, you're leaning against the Bovie. The Bovie has fallen," and that Dr. Potthoff "stepped back immediately."

B. THE TRIAL

In his opening statement at the trial, Hall told the jury that Munson did not know how the burn happened and postulated that the likely mechanism was an "inadvertent unholstering of th[e] Bovie when the surgeon is in there doing his work." Dr. Potthoff declared during his testimony that when he dictated the operative report "I did not know how it occurred . . . I still don't know how it occurred." He admitted, however, that during his 30 years as a surgeon, this was the only "inadvertent[]" Bovie burn he could recall. Similarly, none of the other operating room participants recalled any other Bovie burn incidents.

According to Dr. Potthoff, the standard of care required that he and the other operating room personnel place the Bovie in its holster after use "[a]bsolutely every time." Dr. Potthoff refused, however, to take full responsibility for holstering the Bovie; he testified that Burgett always handled the Bovie during surgeries and had lied in his affidavit of noninvolvement by claiming otherwise. Nevertheless, Dr. Potthoff stressed, he "absolutely" did not believe that Burgett was "in any way responsible" for Harrison's burn.

Several other operating room witnesses testified that they had no memory of the surgery and denied having been interviewed by anyone about what had happened. Babcock and Tembruell testified consistently with their depositions, recounting the discovery of the Bovie after the alarm sounded. The parties presented nurse Gilliand's testimony by reading from a deposition taken 10 days earlier. In the following colloquy Gilliand addressed her memory of the surgery and her practice regarding chart notes:

> *Q.* Now, have you ever been in a situation where you recall a specific incident were the Bovie burned a hole through the surgical drape? Has that ever happened in a procedure you've been involved in?
>
> *A.* I'm told in this one, but I don't remember.
>
> *Q.* All right. But—and I understand that you don't have a memory. That's why I'm saying do you ever remember in any time in your career, the 11 or 12 years that you've been working as a circulating nurse, where you've been part of a procedure where the Bovie did burn a hole in the drape?
>
> *A.* No.
>
> *Q. If that had happened while you were in the operating room is that something you would've written in the nurse's notes?*
>
> *A. Yes.*
>
> *Q. If after the sterile field was broken down following the closure, and it was determined at that point that Mrs. Harrison's arm had been burned by the Bovie, would that also have been something you would have normally recorded in that box?*
>
> *A. Usually, yes.*
>
> *Q.* And you have no memory of this happening in this case, true?
>
> *A.* Correct.

Q. Has there ever been a procedure where you've been involved where the Bovie has inadvertently burned a portion of the patient's body?

[*A*]. *No.*

* * *

Q. And you've indicated that if something like that happened you would've made a note in the back, right-hand corner of the form, in the nurse's notes section, right?

[*A*]. If that's something that would've happened, it's like the needle count being off, I would have documented it.

* * *

Q. Do you know Barbara Peterson?

[*A*]. She used to be the OR manager, yes.

Q. In the six weeks after this procedure, do you recall having been contacted by Ms. Peterson about what took place during this procedure?

A. No. I do not remember anything like that. [Emphasis added.]

Despite professing no memory of the surgery, Gilliand insisted that she had accurately attested in her affidavit "that the entire surgical team, including myself, took all necessary and proper measures to check and otherwise use the Bovie device."

Harrison called Barbara Peterson, Munson's operating room manager, to testify concerning the letter she had signed and sent to Harrison. Munson claimed that Peterson's testimony was potentially privileged as peer review; accordingly, Judge Rodgers questioned Peterson outside the jury's presence. During Judge Rodgers's questioning, Peterson revealed that it would have been her practice "to talk to every single staff member in that room" before drafting the letter and expressed

confidence that she did so. In response to the trial court's question whether an incident report would have been prepared, Peterson was uncertain but stated that it would have been an appropriate action.

Noting the discrepancy between Peterson's claim that she would have interviewed those present during the surgery and the participants' denials that they had been interviewed, Judge Rodgers ordered Munson to produce for in camera review the risk manager's file and any notes that Peterson created. The next day, Hall provided an incident report authored by nurse Gilliand, who had denied under oath any memory of the event or of participating in a postoperative discussion about it.[6]

C. THE IN CAMERA HEARING

The testimony in camera established that at 1:51 p.m. on the day of the surgery, Gilliand handwrote most of the first page of a multipage incident report. In a box labeled "WHAT happened?" Gilliand responded: "During procedure bovie was laid on drape, in a fold." Gilliand's note continued, "Dr. Potthoff was leaning against the [patient] where the bovie was." The event occurred "around" 12:20 p.m.

At the bottom of the report's second page, in a note dated 15 days later, Peterson handwrote: "Reviewed [at] Wed[nesday] inservice. Reviewed use of cautery safety devices. Use of these devices was made a 'Red Rule' resulting in disciplinary action if safety devices not used. *Bovie holder was on field for this case, however bovie was not placed in it*." (Emphasis added.) A summary attached to the incident report concluded

[6] The parties have used interchangeably the terms "incident report" and "occurrence report."

that "Contributing Factor #1" to the injury was: "Failure to follow procedure/policy."

After reviewing the incident report in chambers, Judge Rodgers declared a mistrial. He ruled that an evidentiary hearing would be required to determine whether the incident report qualified as a peer-review-protected document and expressed that Munson had demonstrated "[a] shocking lack of candor" regarding the cause of Harrison's burn. Judge Rodgers continued:

> There is a concern the Court has to some degree of risk management claims, management has been dressed up as a peer review here. There are cases that have been provided to the Court by counsel for Munson that would suggest in some cases incident reports could be protected, that begs the question of whether you can have an incident report, know what occurred, not produce the report and then pretend like you don't know what occurred. That suggests to me to be sophistry. It may be that your internal work product isn't produced, but it doesn't, I believe, absent authority to the contrary allow someone whose [sic] conducted an internal investigation, taken information from witnesses, to then say we don't know. I just, I'm struggling with how that could possibly be true.
>
> Quite frankly, as I've gone through this I'm concerned at this particular time with the lack of candor from Munson. And, I am feeling a degree of the frustruation that Ms. Harrison must have with regard to how this case is unfolding. And, also, some degree of empathy for Dr. Potthoff, who appears to be standing off to the side of this entire maelstrom without anybody involving him. I don't see his fingerprints on this whatsoever, I want to be crystal clear about that.
>
> This appears to be a mountain that has been made out of a mole hill.

Judge Rodgers then expressed concern about "ethical considerations" arising from the presentation of a defense inconsistent with the "peer review materials." He

queried: "If there is no specific memory about what occurred, can one present an analysis of what might have occurred that's inconsistent with perhaps the peer review, can that even be done ethically[?]" Judge Rodgers concluded:

> So, at this particular time it appears to me that there has been, at the very least, a gross impropriety in the discovery process here. The Court believes that is a cause to miss-try [sic] the case.
>
> The Court believes an evidentiary hearing needs to be held with respect to these documents. . . .
>
> . . . Is this legitimate peer review, is this claims management dressed up as peer review. What can you know, and if you protect the documents, still not disclose. How can you defend a case, what are the ethical limitations with regard to what's in the peer review documents. There is [sic] some very serious medical, legal, ethical issues encompassed in what is fortunately for Ms. Harrison a scar on her arm and not a loss of a limb or operation of a wrong eye.

D. THE EVIDENTIARY HEARING

Judge Rodgers introduced the evidentiary hearing by explaining that he intended "[t]o make a determination as to whether all, none, or part of the documents submitted to the Court are actually peer review documents." He continued: "And then, at least from this Court's point of view, perhaps most importantly, if in fact all or some of these documents are peer review, to discuss the ethical issues associated with presenting a defense which would appear to be inconsistent with those documents." Before the hearing testimony commenced, the parties acknowledged that Munson had admitted liability for the burn "in open court."[7]

[7] The parties have not provided this Court with a transcript of that admission. Munson subsequently settled Harrison's burn claim.

Paul Shirilla, Munson's vice president of legal affairs and general counsel, described at length the peer-review process utilized at Munson and the relationship of the incident report to that process. According to Shirilla, oversight for the peer-review process emanates from the board of trustees, which appointed the quality committee to review information submitted by other review committees. The quality committee does not review individual incident reports, but rather receives "a collection of trends . . . that . . . emanate from these other committees" and reviews "data and knowledge related to the quality of care delivered at the hospital." Incident reports, Shirilla claimed, are part of the peer-review process even though they are retained only in the risk-management office. Shirilla admitted, "[t]his is probably the first occurrence report that I've reviewed," and further acknowledged, "I don't believe a [peer review] committee reviewed this occurrence report."

Bonnie Schreiber, director of Munson's risk-management department, testified that she gave Hall a copy of the incident report several months before the trial. Schreiber admitted that when she and Hall composed answers to Harrison's discovery requests and drafted the affidavits signed by Munson personnel, she was personally aware of the incident report's contents. She further admitted that after speaking with Tembruell and learning of Tembruell's recollection of the surgical events, she took no action to amend or supplement earlier discovery responses indicating that no one at Munson recalled the events surrounding the burn. Like Shirilla, Schreiber disclaimed any knowledge of a "peer review file" regarding the burn incident.

During an in camera session with Judge Rodgers, Schreiber insisted that despite Gilliand's contemporaneous note that the Bovie "was laid on drape, in a fold,"

no one knew who had last handled it. While conceding that "[e]very person at that table had a responsibility to keep that patient safe," Schreiber expressed that what happened was an "accident" and maintained that the inadvertent-unholstering theory was not inconsistent with the incident report.

Judge Rodgers's examination of Gilliand, however, cast some doubt on the accidental-unholstering theory:

> *The Court*: So if it says the Bovie was laid on the drape, that's because you saw the Bovie laid on the drape?
>
> *The Witness*: To be honest with you, I don't know that I actually saw it laid on the drape. That may have been just a poor way of stating that. It may have—that's one of those things I try to be very articulate in my wording when it comes to things like this. And trying to get . . . my point across without showing blame at any one thing. . . .
>
> *The Court*: I'm not interested in blame.
>
> *The Witness*: I understand.
>
> *The Court*: Factually what happened.
>
> *The Witness*: I understand that. But I'm saying that I'm not really sure that I can see it laid on the drape. I am quite aways from the field.
>
> *The Court*: *Let me ask you this question. If it hadn't been laid on the drape, if it—it what—you had seen it becoming accidentally unholstered, would you have said Bovie accidentally unholstered?*
>
> *The Witness*: *If I had seen that, yes.* [Emphasis added.]

Peterson testified that she conducted one-on-one interviews with the people in the operating room before formulating her conclusion and recommendations. She expressed confidence that she had interviewed Gilliand and Babcock and told Judge Rodgers that nothing she had learned since the day she signed her report altered her conclusions.

One month after the evidentiary hearing, Judge Rodgers issued a lengthy written opinion, ruling that the incident report and related documents were privileged. Judge Rodgers further determined that Hall had violated Rule 3.1 and 3.3 of the Michigan Rules of Professional Conduct, by offering a defense that was inconsistent with known but undisclosed facts, and that Schreiber and Hall had violated MCR 2.114(D)(2), which requires that documents filed with the court be "well grounded in fact[.]" Based on these violations, Judge Rodgers ruled, sanctions would be assessed.

Judge Rodgers commenced his analysis by summarizing his initial impressions of the incident report:

> First and most importantly, the incident report reached a factual conclusion as to how the Bovie had come to penetrate the drape. Second, the Defendants claimed a peer review privilege and it was evident that the issues associated with peer review could not be resolved during the course of the jury trial. Third, if the facts associated with the described incident report were provided to the Plaintiff, the jury, and the Court, the Court would not allow expert testimony based on habit and practice regarding how the Bovie may have become unholstered which theories were inconsistent with the factual findings of the contemporaneous internal investigation.

Judge Rodgers proceeded to review the evidence provided during the evidentiary hearing. He made the following pertinent factual findings:

> When the Hospital was asked to explain how the Bovie came to burn a hole in the drape, the Hospital's consistent response was "unknown" or "may not ever be known" and explanations were then based on habit and custom. . . . Two members of the surgical team recalled the Bovie alarm being activated, that it was not in the Defendant Physician's hand, and that as he stepped away from the patient it was discovered between him and the Patient's body.

> No individual has a present memory of how the Bovie came to be on the drape, unholstered and in a position to burn the patient. Since the standard of care requires the Bovie to be holstered, it was critical in this case to know whether it was improperly placed on the drape out of its holster and not promptly reholstered by a member of the surgical team, or whether it became accidentally unholstered in a way that was within the standard of care.
>
> On this point, the Defendant Hospital stated that the event was "sudden, accidental and unpreventable" . . . . and "more than likely resulted from an inadvertent dislodging of the Bovie from its holster." According to the Hospital, "As all Defendants have maintained throughout, what happened to this patient was entirely inadvertent, and could not reasonably have been detected and/or prevented before it occurred." . . .
>
> The conclusion of the internal investigation was diametrically opposed to the Defendant Hospital's statements. In fact, the Bovie had not become accidentally unholstered: "Bovie was laid on the drape," and the "Bovie holder was on field for this case, however, Bovie was not placed in it." . . . These facts were not charted. Whether or not laying the Bovie on the drape was determined by the Defendant Hospital to be a standard of care violation, a cause for discipline or grounds for the implementation of subsequent remedial measures are not facts sought by the Plaintiff nor would they be discoverable. Clearly, such internal conclusions drawn as part of the peer review process are protected from discovery for sound policy reasons.

Nevertheless, Judge Rodgers reasoned, the policy reasons are "not so broad as to allow the Defendant Hospital to ignore those facts and pretend they do not exist." Judge Rodgers continued, "The finding that the Bovie was laid on the drape and not placed in the holster is grossly inconsistent with an argument that the Bovie was properly holstered and then accidentally unholstered."

The facts noted by Gilliand and found by Peterson, Judge Rodgers elucidated, should have been recorded in Harrison's medical record. But if defendants elected not to document those facts in the patient's chart, Judge Rodgers drew upon MRPC 3.3(a)(1) and (3) to conclude that defendants nonetheless were "precluded ethically from offering an explanation that is inconsistent with those facts." The hospital's representations that the Bovie became inadvertently unholstered, Judge Rodgers found, constituted "affirmative misrepresentations and violations of the Michigan Rules of Professional Conduct." Judge Rodgers opined: "The Hospital's Risk Manager and defense counsel participated in a course of defense which, in this Court's opinion, is materially inconsistent with the findings of the contemporaneous investigation documented in the . . . incident report," thereby violating the previously cited rules of professional conduct.

Moreover, Judge Rodgers continued, defendants pursued a claim that expert testimony was required in this case despite awareness that "the unholstered Bovie was laid on the drape, a standard of care violation[.]" Had the actual known facts about the Bovie's placement been revealed, Judge Rodgers wrote, Munson likely would have admitted liability far sooner, without need for the "[s]ubstantial time and energy . . . wasted in the effort to learn how the Bovie came to penetrate the drape and burn the Plaintiff's arm." Judge Rodgers summarized: "The Court has not found a case that would allow the Defendant Hospital to fail to disclose the causation facts and present a defense inconsistent with them."

Judge Rodgers assessed Munson and Hall $53,958.69 in sanctions, jointly and severally. The sanctions represented travel and discovery expenses and attorney fees

arising from Miller's trial preparation. Munson brought a motion for reconsideration, contending that neither the hospital nor its counsel had any duty to review the incident report before trial and that Judge Rodgers had erroneously concluded that the incident report was inconsistent with the hospital's defense. In support of its motion, Munson submitted a new affidavit signed by Gilliand, attesting that she "would not have been sufficiently close to the operative field to see or hear the Bovie intraoperatively" and did not know whether the Bovie had been "intentionally" laid on the drape. Peterson, too, signed an affidavit averring that her conclusions were not based on "specific knowledge" or "facts" from any source to indicate that the Bovie device had been "intentionally placed on the drape by any individual(s) involved in the surgery."

In a written opinion denying reconsideration, Judge Rodgers addressed as follows the two newly filed affidavits:

> Finally, the submission of additional affidavits from two witnesses who testified at the evidentiary hearing is highly irregular. No witness has any present recollection of what occurred at the time of the surgery nor does Ms. Peterson have any present recollection of her investigation other than that she conducted one and it is reflected in her Incident Report. Given that all parties were represented by counsel at the evidentiary hearing, the submission of post-hearing affidavits not subject to cross examination regarding what these witnesses "intended" is inappropriate, self-serving and, in view of the testimony the Court received, of no substantive value.

Harrison brought a supplemental motion seeking additional sanctions representing costs and fees dating from the initiation of the litigation. Judge Rodgers also denied this motion.

Munson now appeals as of right, challenging the award of sanctions. Harrison cross-appeals as of right, arguing that she should have been granted additional sanctions. Hall also appeals as of right, asserting that he should not have been sanctioned. We consolidated these appeals.[8] As discussed in greater detail in the balance of this opinion, we affirm Judge Rodgers's decision to assess sanctions against Munson and Hall, as well as Judge Rodgers's refusal to assess additional sanctions. We further affirm the sanction amount. However, we remand to the trial court to divide the sanctions award into individualized penalties according to fault.

II. ANALYSIS

A. PEER-REVIEW PRIVILEGE

We begin by addressing the parties' claims regarding the peer-review privilege. Munson contends in its brief that because the incident report and related documents were privileged, neither Munson's risk manager nor Hall had a duty to review them before presenting a defense. Munson further asserts that "upon the trial court's proper determination that the Incident Report and other documents at issue were protected by the peer review privilege, further review and consideration of their content outside of the peer review process should have been foreclosed, and the inquiry brought to an end." Harrison counters that the documents were discoverable because Munson's medical peer-review system did not contemplate their confidentiality.

Munson's privilege claim rests on MCL 333.21515, which shelters peer-review "records, data, and knowl-

[8] We also granted the Michigan Society for Healthcare Risk Management's motion to file an amicus curiae brief. That brief was never filed in this Court.

edge" from court subpoena. We interpret and apply this statute de novo. See *People v Smith-Anthony*, 296 Mich App 413, 416; 821 NW2d 172 (2012).

> "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.' " [*Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002), overruled in part on other grounds *Stand Up For Democracy v Secretary of State*, 492 Mich 588 (2012), quoting *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (citations omitted).]

In addition to these statutory construction precepts, we take heed of the general rule that statutory privileges should be narrowly construed. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000) (marital privilege); *In re Brock*, 442 Mich 101, 119; 499 NW2d 752 (1993) (physician-patient privilege). "Their construction should be no greater than necessary to promote the interests sought to be protected in the first place." *People v Wood*, 447 Mich 80, 91-92; 523 NW2d 477 (1994) (CAVANAGH, C.J., concurring).

Michigan's Public Health Code, MCL 333.1101 *et seq*., directs that the "governing body" of a licensed hospital bears responsibility "for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital." MCL 333.21513(a). To fulfill this command, hospitals must ensure that all physicians and other hospital personnel "who are required to be licensed or registered are in fact

currently licensed or registered." MCL 333.21513(b). Hospitals may grant physicians only those hospital privileges "consistent with their individual training, experience, and other qualifications." MCL 333.21513(c). And to encourage hospitals to implement and adhere to high standards of patient care, the Legislature imposes on hospitals an obligation to

> assure that physicians and dentists admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. The review shall include the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital. [MCL 333.21513(d).]

This review function is commonly known as "peer review." "Hospitals are required [by MCL 333.21513(d)] to establish peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality care." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 41; 594 NW2d 455 (1999). "Peer review is 'essential to the continued improvement in the care and treatment of patients[.]' " *Feyz v Mercy Mem Hosp*, 475 Mich 663, 680; 719 NW2d 1 (2006), quoting *Dorris*, 460 Mich at 42 (additional quotation marks and citations omitted). To encourage candid, thorough peer-review assessments of hospital practices, the Legislature has shielded peer-review activities from "intrusive public involvement and from litigation." *Feyz*, 475 Mich at 680.

At issue here is the statutory provision removing from the scope of discovery "records, data, and knowledge" collected for or by peer-review entities. The relevant privilege statute provides in its entirety: "The records, data, and knowledge collected for or by indi-

viduals or committees assigned a review function described in this article [Article 17] are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena." MCL 333.21515.[9]

Whether a particular document qualifies as privileged under the peer-review statute depends on the circumstances surrounding its creation. Thus, when a litigant challenges a hospital's invocation of the peer-review privilege, an in camera evidentiary hearing is required. *Monty v Warren Hosp Corp*, 422 Mich 138, 144; 366 NW2d 198 (1985).[10] At the hearing, the documents at issue must be identified by date and author. *Id*. at 146. To assist in making a peer-review-privilege determination, a court may consult hospital bylaws and "internal regulations," and should consider whether "a particular committee was assigned a review function so that information it collected is protected," or "whether the committee's function is one of current patient care[.]" *Id*. at 147. "In determining whether any of the information requested is protected by the statutory privilege, the trial court should bear in mind that mere submission of information to a peer review committee does not satisfy the collection requirement so as to bring the information within the protection of the statute." *Id*. at 146-147.

---

[9] MCL 333.20175(8) similarly states:

> The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

[10] "An in camera proceeding is the appropriate vehicle to determine whether information requested in discovery proceedings is protected by a statutory privilege." *LeGendre v Monroe Co*, 234 Mich App 708, 742; 600 NW2d 78 (1999).

Judge Rodgers proceeded in accordance with *Monty* by reviewing the requested documents and related materials in camera and by convening an evidentiary hearing to test Munson's privilege claim. At oral argument, Munson's counsel conceded that Judge Rodgers's review of the documents was entirely proper. Accordingly, we reject Munson's arguments that Judge Rodgers's consideration of the documents exceeded that contemplated by *Monty* or that the peer-review privilege itself prohibited Judge Rodgers from reviewing the documents.

We next turn to the parties' arguments concerning whether the incident report was privileged. Judge Rodgers ruled that the "facts" contained in the incident report, "as opposed to the conclusions drawn in the report," should have been documented in Harrison's medical record. Nevertheless, Judge Rodgers found the incident report to be a "protected peer review document." We agree with Judge Rodgers in part. Gilliand's contemporaneous, handwritten operating-room observations were not subject to a peer-review privilege. In other words, the initial page of the incident report did not fall within the protection of MCL 333.21515. The balance of the report, however, reflected a review process and was confidential. As discussed in greater detail later in this opinion, peer-review protection from public disclosure does not shield Munson or Hall from the imposition of sanctions.

The peer-review-privilege statutes exempt from disclosure "[t]he records, data, and knowledge collected for or by individuals or committees assigned a professional review function[.]" MCL 333.20175(8). In construing this language, we remain mindful of *Monty*'s admonition that "mere submission of information to a peer review committee does not satisfy the collection re-

quirement . . . ." *Monty*, 422 Mich at 146. *Monty* further guides us to review the structure and function of the hospital's peer-review system, and identifies three cases from other jurisdictions that shed light on our interpretive task. We find the cases cited in *Monty* enlightening and utilize them as guideposts.

In *Bredice v Doctors Hosp, Inc*, 50 FRD 249 (D DC, 1970), the plaintiff sought " '[m]inutes and reports of any Board or Committee of Doctors Hospital or its staff' " concerning the death of the plaintiff's decedent. *Id*. at 249. The United States District Court for the District of Columbia relied on a common-law peer-review privilege to find that the minutes and reports were not subject to disclosure, reasoning that "[c]onfidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients." *Id*. at 250. Only upon a showing of "exceptional necessity," the court ruled, should such information be disclosed. *Id*. The court added:

> The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process. [*Id*.]

Davidson v Light, 79 FRD 137 (D Colo, 1978), another case cited in *Monty*, arose from the plaintiff's development of a gangrenous leg. The plaintiff requested production of a report prepared by the defendant hospital's "Infection Control Committee." *Id*. at 139. The United States District Court for the District of

Colorado ordered the report produced and distinguished *Bredice*, finding that unlike in that case, the infection-control records "apparently contain[] both factual data relating to the plaintiff's infection, and opinions or evaluations by the review committee of the care received by the plaintiff from the staff." *Id*. The court continued: "The report's mixed nature indicates that the review committee involved here, unlike that in *Bredice*, functions as a part of current patient care, investigating the source of infections and attempting to control their proliferation." *Id*. Further, the district court judge explained, the Colorado Supreme Court had held in *Bernardi v Community Hosp Ass'n*, 166 Colo 280; 443 P2d 708 (1968), that factual information contained in an incident report was discoverable "because it is concerned primarily with the problem of a single patient, relates to current patient care, and is generated because of a specific incident or occurrence rather than a general desire for discussion or improvement." *Davidson*, 79 FRD at 140.

Monty's third cited case, *Coburn v Seda*, 101 Wash 2d 270; 677 P2d 173 (1984), is particularly instructive. The plaintiff in *Coburn* propounded interrogatories to the defendant hospital seeking to learn whether a hospital review committee had considered the circumstances of a heart catheterization that led to the death of the plaintiff's decedent and whether " 'a written report' " had been prepared by the committee regarding the incident. *Id*. at 271-272. Applying Washington's peer-review-privilege statute, the Washington Supreme Court ruled that reports generated by the hospital's peer-review committees were protected from discovery. *Id*. at 275. Citing *Bredice* and *Davidson*, the court remanded to the trial court for a determination whether the statute applied to the particular committee

whose report was sought. *Id*. at 277-278. The Washington Supreme Court further instructed:

> The statute may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings. The statute does not grant an immunity to information otherwise available from original sources. For example, any information from original sources would not be shielded merely by its introduction at a review committee meeting. Further, the hospital must identify all persons who have knowledge of the underlying event which is the basis of the malpractice action regardless of whether those persons presented evidence to a hospital review committee. [*Id*. at 277.]

We derive from these three cases a distinction between factual information objectively reporting contemporaneous observations or findings and "records, data, and knowledge" gathered to permit an effective review of professional practices. Gilliand's notation reporting that the Bovie "was laid on drape, in a fold" falls in the former category and as such was not privileged from disclosure, despite its inclusion on a form labeled "Quality/Safety Monitoring." Employing *Davidson*, we find it critical that Gilliand's note concerned a single patient and was "generated because of a specific incident or occurrence rather than a general desire for discussion or improvement." *Davidson* 79 FRD at 140. And as *Coburn* counseled, this information is not to be "shielded merely by its introduction at a review committee meeting." *Coburn*, 101 Wash 2d at 277. These excerpts from the cases cited by our Supreme Court in *Monty* give context to the *Monty* Court's admonition that "mere submission of information to a peer review committee does not satisfy the collection requirement . . . ." *Monty*, 422 Mich at 146. Here, Gilliand's preparation of a firsthand, contemporaneous factual report about a patient that she elected to place on a

risk-management form rather than within the patient's medical record did not trigger the statutory privilege.

Centennial Healthcare Mgt Corp v Dep't of Consumer & Indus Servs, 254 Mich App 275; 657 NW2d 746 (2002), buttresses our holding. In *Centennial*, the defendant state agency requested incident and accident reports as part of an investigation of a nursing home. *Id*. at 276-277. State administrative rules required that the plaintiff maintain accident and incident reports and make them available for review by the defendant. *Id*. at 280. The plaintiff insisted that incident reports were privileged pursuant to MCL 333.20175(8) because they were used for peer review. *Id*. at 277. This Court discerned no conflict between the administrative rule and the statute. We explained:

> Subsection 20175(8) is made up of five parts: (1) a list describing the types of items that are potentially covered by the peer review privilege [records, data, and knowledge]; (2) the requirement that these items be "collected for or by individuals or committees assigned a peer review function"; (3) a list of the entities to which the privilege applies; (4) the pronouncement that items satisfying these three criteria are "confidential"; and (5) a limit on the uses to which these items can be put, which includes the command that those uses are to be found in article 17 of the Public Health Code, as well as the specific directives that these items "are not public records" and "are not subject to court subpoena." [*Centennial*, 254 Mich App at 286, quoting MCL 333.20175(8).]

The Court observed that "a peer review committee could be said to have collected anything that it directs its facility to compile." *Centennial*, 254 Mich App at 290. This definition of the term "collect," the Court explained, would require "simply too broad a reading of the statutory privilege." *Id*. Rather, "in keeping with the interests the privilege is protecting," a peer-review

committee "collects" material by accumulating it for study. *Id*. The Court continued:

> Certainly, in the abstract, a peer review committee cannot properly review performance in a facility without hard facts at its disposal. However, it is not the facts themselves that are at the heart of the peer review process. Rather, it is what is done with those facts that is essential to the internal review process, i.e., a candid assessment of what those facts indicate, and the best way to improve the situation represented by those facts. *Simply put, the logic of the principle of confidentiality in the peer review context does not require construing the limits of the privilege to cover any and all factual material that is assembled at the direction of a peer review committee.*
>
> In the context of the circumstances in the case at bar, it is true that [the nursing home's] peer review committee could not effectively do its work without collecting basic information about the various incidents and accidents that occur at a nursing home. However, it is not the existence of the facts of an incident or accident that must be kept confidential in order for the committee to effectuate its purpose; it is how the committee discusses, deliberates, evaluates, and judges those facts that the privilege is designed to protect. [*Id*. at 290-291 (emphasis added) (citation omitted).]

We find *Centennial*'s reasoning compelling. MCL 333.20175(8) and MCL 333.21515 shield from disclosure materials accumulated for study by individuals or committees "assigned a professional review function." Objective facts gathered contemporaneously with an event do not fall within that definition.

Other courts interpreting peer-review statutes have similarly determined that facts concerning a patient's care, and in particular facts incorporated within an incident report, are not entitled to confidentiality. For example, in *Columbia/HCA Healthcare Corp v Eighth Judicial Dist Court*, 113 Nev 521, 531; 936 P2d 844

(1997), the Nevada Supreme Court observed that "[o]ccurrence reports . . . are nothing more than factual narratives" which contain information usually unearthed in discovery. The Nebraska Supreme Court held in *State ex rel AMISUB, Inc v Buckley*, 260 Neb 596, 614; 618 NW2d 684 (2000), that "[r]eports which are merely factual accounts or fact compilations relating to the care of a specific patient are not privileged" under the Nebraska peer-review statutes. The Court reasoned:

> The [statutory] language . . . does not protect antecedent reports relating to the care of a specific patient which memorialize bare facts and which were written by or collected from percipient witnesses notwithstanding the fact that such documents may have been forwarded to a hospital-wide committee, nor does [the statute] protect an assembly of such facts outside the committees identified in [the statute]. [*Id*.]

The Arizona Court of Appeals concluded in *John C Lincoln Hosp & Health Ctr v Superior Court*, 159 Ariz 456, 459; 768 P2d 188 (1989), that because incident reports "are issued by hospital personnel in the regular course of providing medical care," they did not fall within Arizona's peer-review-privilege statute. The Court reasoned:

> These reports are intended for use whenever there is an unusual occurrence of any kind in the day-to-day administration of the hospital. Thus they are very broad in nature and cover situations as diverse as an electrical failure, a patient's loss of personal articles, and an incorrect type of anesthesia. Though Incident Reports sometimes precipitate peer review, they do not always do so, and they are not made solely for that purpose. [*Id*.]

And the Connecticut Supreme Court explained in *Babcock v Bridgeport Hosp*, 251 Conn 790, 838; 742 A2d 322 (1999), that based on the language of that state's statute, "the notations of a treating physician or nurse

are not protected, even if those notations are utilized in a study of morbidity or mortality undertaken for the purpose of improving the quality of care."

Here, Shirilla confirmed that Munson's quality committee does not "collect" or even review incident reports. He and Schreiber agreed that at Munson, incident reports are stored within the risk-management department and are not provided to peer-review committees for study. And Schreiber acknowledged that no "peer review file" was ever created concerning Harrison's burn. Given this evidence, we conclude that the factual information recorded on the first page of the incident report was not immune from disclosure as material collected pursuant to MCL 333.21515. To hold otherwise would grant risk managers the power to unilaterally insulate from discovery firsthand observations that the risk managers would prefer remain concealed. The peer-review statutes do not sweep so broadly.

We reach a different conclusion, however, regarding the incident report's remaining pages. In the balance of the document, Peterson or another Munson employee summarized the result of the investigation Peterson conducted in her role as a peer reviewer: that the burn occurred because someone failed to reholster the Bovie. The documentation following Gilliand's note reflects a deliberative review process. Judge Rodgers correctly concluded that this portion of the incident report qualified as confidential.

Against this legal backdrop, we turn to Munson's argument that because the incident report was a peer-review-privileged document, Schreiber and Hall had no duty to consider it while defending Harrison's malpractice claim. For the sake of this argument, we assume

that Schreiber appropriately believed that the entirety of the incident report was confidential pursuant to MCL 333.21515.

We are somewhat puzzled by Munson's duty argument, because the testimony established without dispute that Schreiber and Hall *did* read the incident report and knew its contents. In her testimony before Judge Rodgers, Schreiber admitted that she had been aware of Gilliand's note and Peterson's analysis throughout the litigation. Schreiber verified that Hall was given a copy of the incident report at least a month before the trial. Thus, Munson's duty argument has no application to the facts of this case. Nor do we accept as a general proposition, divorced from this case, that a risk manager may deliberately avoid reviewing or considering relevant *factual* information if doing so involves consulting potentially privileged documents. Certainly, the peer-review-privilege statutes were not intended to prevent a hospital from reviewing its own records. And we have located no law from any jurisdiction suggesting that a hospital may ethically present a medical malpractice defense directly conflicting with the hospital's knowledge of how an event occurred.

Consequently, we discern nothing in the language of the peer-review statutes that would have precluded Schreiber from reviewing the incident report. We express no opinion regarding whether Munson should have produced the first page of the incident report to Harrison during discovery. As hereafter discussed in greater detail, Judge Rodgers did not sanction Munson and Hall based on their failure to *produce* the report. Judge Rodgers imposed the sanctions because he determined that Munson and Hall presented a defense in fundamental conflict with the facts contained in the incident report. We next consider the propriety of the sanction rulings.

B. THE SANCTIONS

Judge Rodgers grounded his sanctions order on his finding that Munson and Hall put forward a defense that was inconsistent with "known but undisclosed facts." Judge Rodgers wrote: "The finding that the Bovie was laid on the drape and not placed in the holster is grossly inconsistent with an argument that the Bovie was properly holstered and then accidentally unholstered." Judge Rodgers invoked several court rules, a statute, and two rules of professional responsibility as support for his sanctions assessment.

Munson and Hall assert that Gilliand's note and Peterson's conclusions were ambiguous, vague, and entirely consistent with the "accident" defense. According to Munson and Hall, Judge Rodgers clearly erred by finding "that the Bovie was intentionally set down upon the drape instead of being placed in its holster[.]" Hall emphasizes: "The trial court opinion has a single underlying assumption: that the Bovie device was *deliberately* laid on the drape." Because that assumption should not have been made, Hall contends, this Court should reverse the sanction award.[11]

"Trial courts possess the inherent authority to sanction litigants and their counsel[.]" *Maldonado v Ford Motor* Co, 476 Mich 372, 388; 719 NW2d 809 (2006). We review for an abuse of discretion a court's exercise of that power. *Id*. A court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes. *Id*. Judge Rodgers sanctioned Munson and Hall pursuant to MCR 2.114(D) and (E), as well as

[11] The affidavits rejected by Judge Rodgers similarly attested that the affiants did not know whether the Bovie had been "intentionally" laid on the drape. Given that medical malpractice actions employ a negligence standard of care, whether the Bovie was "intentionally" placed on the drape is of no legal consequence.

MCL 600.2591(2), and sanctioned Hall separately pursuant to MRPC 3.1 and 3.3. "The interpretation and application of a court rule involves a question of law that this Court reviews de novo." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). We also review de novo a trial court's construction of the Michigan Rules of Professional Conduct. *Grievance Administrator v Fieger*, 476 Mich 231, 240; 719 NW2d 123 (2006). This Court reviews for clear error any factual findings underlying a trial court's decision. MCR 2.613(C). "A trial court's finding[] with regard to whether a claim or defense was frivolous, and whether sanctions may be imposed, will not be disturbed unless it is clearly erroneous." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 533; 773 NW2d 57 (2009). "A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made." *Johnson*, 281 Mich App at 387.

We initially address defendants' contention that Judge Rodgers clearly erred by finding that the Bovie was "intentionally" or "deliberately" placed on the drape. Defendants misapprehend Judge Rodgers's findings. At no point in his 12-page opinion did Judge Rodgers refer to intentional or deliberate conduct on the part of the operating room team. The words "intentional" or "intentionally" do not appear in Judge Rodgers's opinion. Contrary to defendants' argument, Judge Rodgers made no finding that the Bovie had been "intentionally" laid on the drape.

Rather, Judge Rodgers's factual findings assumed the accuracy of Gilliand's notation and Peterson's conclusion. In construing the words used by both witnesses, Judge Rodgers interpreted the writings according to their plain, ordinary, everyday meanings. Gilliand

reported: "during [the] procedure [the] bovie was laid on [the] drape, in a fold." In normal, everyday parlance, the term "was laid" is used to describe the putting or placing of an object in a certain location.[12] Defendants contend that Judge Rodgers should have interpreted Gilliand's words as meaning that the Bovie "was lying" on the drape. A reasonable construction of Peterson's note resolves this dispute. After interviewing the operating-room participants, Peterson decided that the "Bovie holder was on field for this case, however bovie *was not placed in it*." (Emphasis added.) Thus, Judge Rodgers interpreted both Gilliand's and Peterson's words in a logical and reasonable fashion.

Moreover, whether an operating-room participant *deliberately* laid the Bovie on the drape or did so *negligently* or *accidentally* lacks relevance given defendants' admission that the standard of care required reholstering the Bovie after each use. Assuming that the Bovie was accidentally laid on the drape does not excuse defendants from reholstering it, according to their own testimony that the standard of care required reholstering after each use. Moreover, defendants' argument that Judge Rodgers misinterpreted the incident report rings particularly hollow in light of the information that Munson willingly provided to Harrison before the litigation commenced: that the event had been "confidentially reviewed" and that as a result, the

[12] For instance: "Plaintiff and his mother-in-law both testified that the baby was laid upon an electric pad." *Wabeke v Bull*, 289 Mich 551, 555; 286 NW 825 (1939) (BUSHNELL, J., dissenting); "Hansen testified that defendant's coat was laid over the old man's body in the car and was blood-stained." *People v McKernan*, 236 Mich 226, 231; 210 NW 219 (1926); "Where the ends of the boxes were stationary, one end of the timber was laid down in the bottom of the car, and the other end projected over the end of the box in cases where the timber was longer than the box." *Dewey v Detroit, G H & M R Co*, 97 Mich 329, 335; 56 NW 756 (1893).

hospital had "reinforced . . . [t]he mandatory and active use of cautery protective devices anytime cautery is used." Had Munson's internal investigation revealed that the Bovie's transit to the drape was entirely inadvertent rather than the product of some human action, we question why the hospital would have shared with Harrison its intent to reinforce the "mandatory and active use" of Bovie holsters.

Finally, Gilliand's belated claim that she did not actually see someone "lay" the Bovie on the drape bears no relevance to Judge Rodgers's factual findings. Gilliand was the sole source of firsthand, contemporaneous factual information about the Bovie's appearance on the drape. As such, the evidence that she could have provided was unique. Had Gilliand been deposed by an attorney in possession of her note, she likely would have conceded the obvious: that reasonably interpreted, her words could be understood to mean that a surgery participant laid the Bovie on the drape. The trier of fact may draw reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). Gilliand's choice of words and Peterson's conclusions render reasonable a deduction that the Bovie was placed or put on the drape by someone who had held it and negligently failed to return it to its safe holding place. Thus, Judge Rodgers did not clearly err by finding that a surgical participant "laid" the Bovie on the drape (accidentally, negligently or deliberately) and that that person, or another individual in the room, negligently failed to holster it.[13]

---

[13] The clear error standard is deferential. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."

We now consider the legal bases for the sanctions imposed. MCR 2.114(E) requires sanctions if an attorney or party signs a document in violation of MCR 2.114(D), which provides:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Similarly, MCL 600.2591(1) provides:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

The statute defines "frivolous" to include that a party "had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." MCL 600.2591(3)(a)(*ii*).

MCR 2.114 "provides for an award of sanctions against both a party and his counsel for not making reasonable inquiry as to whether a pleading is well grounded in fact[.]" *Briarwood v Faber's Fabrics, Inc*,

---

MCR 2.613(C). Judge Rodgers had the benefit of questioning Gilliand and Peterson about their notes. That their words are potentially susceptible of another meaning does not render Judge Rodgers's factual findings clearly erroneous.

163 Mich App 784, 792; 415 NW2d 310 (1987). Sanctions may be assessed without regard to whether the pleader harbored an improper purpose. *Id*. at 792-793. The purpose for punishing with sanctions the introduction of frivolous claims "is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 723; 591 NW2d 676 (1998). In *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 406; 700 NW2d 432 (2005) (quotation marks and citation omitted), this Court cited with approval a federal court's observation that sanctions "are essentially deterrent in nature, imposed in an effort to discourage dilatory tactics and the maintenance of untenable positions."

Judge Rodgers determined that Schreiber, Munson's risk manager, knew throughout the litigation that a contemporaneous investigation had revealed that someone in the operating room failed to reholster the Bovie after its use. Schreiber was also aware of Dr. Potthoff's testimony that the standard of care required reholstering the Bovie "absolutely every time." This evidence, Judge Rodgers concluded, was susceptible to only one reasonable conclusion: Harrison's burn occurred because someone in the operating room negligently failed to reholster the Bovie after using it. Sanctions were warranted, Judge Rodgers ruled, because Munson concealed facts that would have pointed directly to its negligence and instead created a causation theory that was contradicted by evidence gathered by Munson itself.

Munson's conduct in creating an "accident" defense scenario despite its possession of direct evidence con-

trary to that position qualifies as a violation of MCL 600.2591(3)(a)(*ii*), which prohibits a party from advancing a claim or defense when the party has "no reasonable basis to believe that the facts underlying that party's legal position were in fact true." Munson presented no evidence in the trial court conflicting with Gilliand's account that the Bovie "was laid" on the drape. Nor did Munson supply evidence that Peterson had conducted a faulty investigation or had misinterpreted the data she considered. Rather, Munson interposed "habit and practice" evidence while fully aware that the habit had not been followed in Harrison's case. Judge Rodgers did not abuse his discretion by finding that Munson invoked MRE 406 in bad faith by introducing habit-and-practice evidence to prove conformity of conduct despite that the evidence known only to Munson soundly contradicted that defense.

In addition to these violations of MCL 600.2591(3)(a)(*ii*), Munson obstructed Harrison's search for the truth throughout discovery by: (1) repeatedly insisting that no one had any information about what had happened, despite that Tembruell and Babcock clearly remembered the procedure, (2) preparing an affidavit for Burgett's signature attesting that he had never handled a Bovie, despite Dr. Potthoff's testimony to the contrary, and (3) asserting in numerous filings that the burn was "caused by acts and occurrences outside the control of the surgical team," in contradiction of the facts contained in the incident report. The pleadings containing these attestations, Judge Rodgers ruled, were not well grounded in the facts known to Munson. The record evidence substantiates these findings. Accordingly, Judge Rodgers's determination that defendants' conduct contravened MCR 2.114 fell within the range of reasonable and principled outcomes, and his imposition of sanctions did not qualify as an abuse of discretion.

In affirming the sanctions order against Munson, we emphasize that statutory privileges were not intended by the Legislature as licenses to subvert the discovery process, or as shields for the presentation of false or misleading evidence. By protecting peer review from external scrutiny, Michigan's Public Health Code does not concomitantly erect a barrier to a patient's quest for objective facts concerning the patient's own surgical procedure. The discovery process is designed to allow the parties to fully explore the facts underlying a controversy as inexpensively and expeditiously as possible, and without gamesmanship. The peer-review statutes do not create an exception to this principle. Nor does any privilege, including that created for peer review, prevent a court from safeguarding the integrity of its administration of justice.

Judge Rodgers sanctioned Hall pursuant to MCR 2.114 as well as MRPC 3.3(a)(3), which prohibits an attorney from offering evidence that the attorney knows to be false, MRPC 3.3(a)(1), which disallows false statements of material fact made to a tribunal, and MRPC 3.1, which prohibits an attorney from defending a proceeding or controverting an issue "unless there is a basis for doing so that is not frivolous." Hall admitted receiving the incident report before the trial. He further admitted during the evidentiary hearing that the "facts" stated in the incident report were not the same as those in Harrison's medical record, and he conceded that perhaps they should have been. Hall nevertheless insisted that he stood "personally and professionally" by the "veracity" of the discovery answers he drafted.

We affirm Judge Rodgers's determination that Hall violated MCR 2.114 and MRPC 3.1 by pursing an "accident" defense after reading Gilliand's note and Peterson's attribution of the burn's cause to a failure to

reholster the Bovie. Once in possession of that information, Hall had an ethical obligation to withhold an "accident" defense. Indeed, an admission of liability was forthcoming after the information contained in the incident report came to light. Hall bore a concomitant ethical obligation to amend and supplement the answer he had provided to Harrison's request for admission early in the case. That request sought Munson's admission that the "individuals who were responsible for the electrocautery device" were Munson employees acting in the course of their employment. Instead of answering this request, Munson relied on a boilerplate objection and referred Harrison to the medical record. When Hall reviewed the incident report, he was under an affirmative duty to change Munson's answer to a simple admission. See also MCR 2.302(E)(1)(b)(ii) (setting forth a duty to amend a discovery answer when a party obtains information indicating that a former response, "though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment").

Moreover, Hall had received the incident report before Gilliand's trial deposition was taken, and knew that Gilliand had authored the note and participated in Peterson's follow-up investigation. Despite his knowledge of these facts, Hall did nothing to correct Gilliand's patently incorrect deposition testimony that: (1) if the event had happened while she was in the operating room, she would have written something about it in the patient's hospital record, (2) if she had seen a burn, she would have recorded that finding in the patient's record, (3) she had never been involved in a procedure in which a Bovie had inadvertently burned a patient, and (4) she did not recall being contacted by Peterson about what took place during the surgery. Hall's acquiescence in presenting Gilliand's testimony, despite

awareness that the incident report substantially contradicted many of Gilliand's statements, suffices to establish an ethical violation under MRPC 3.3(a)(3).

Nevertheless, we believe that Judge Rodgers erred by failing to render separate sanctions awards in this case. Given the limited time he had access to the incident report, Hall's culpability is far less than that of Munson. On remand, Munson may elect to take full responsibility for the sanctions award. Should Munson chose not to do so, the court must conduct a hearing in which Hall's personal liability for the amounts awarded is clarified. Hall may not be sanctioned for costs or fees that arose before the date that he was provided the incident report.

We have reviewed Harrison's claim for additional sanctions but find it without merit for the reasons stated by Judge Rodgers.

We affirm the sanctions award but remand for individualized assessments against Hall and Munson. We do not retain jurisdiction.

OWENS, P.J., and BORRELLO, J., concurred with GLEICHER, J.

OAKLAND-MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT
v RIC-MAN CONSTRUCTION, INC

Docket No. 314098. Submitted October 8, 2013, at Detroit. Decided January 30, 2014, at 9:10 a.m.

The Oakland-Macomb Interceptor Drain Drainage District (OMIDDD) brought an action for declarative and injunctive relief against Ric-Man Construction, Inc., and the American Arbitration Association (AAA) in the Oakland Circuit Court, seeking to enforce the terms of an arbitration agreement that the OMIDDD entered into with Ric-Man to resolve several multimillion-dollar claims arising from Ric-Man's contractual agreements with the OMIDDD to repair a portion of the Oakland-Macomb sanitary-sewer system. Specifically, plaintiff sought to enforce the provisions of the arbitration agreement that set forth a detailed procedure for choosing the members of the arbitration panel, which was to include two construction-industry professionals and one attorney with background in construction litigation, after the AAA appointed a member to the attorney position who did not meet the minimum acceptable level of qualifications. The court, Colleen A. O'Brien, J., denied plaintiff's motion for summary disposition and dismissed the case, ruling that there was no basis on which to grant plaintiff declaratory or injunctive relief. Plaintiff appealed.

The Court of Appeals *held*:

Under the Federal Arbitration Act (FAA), 9 USC 4 and 5, a court may grant a party's petition for relief before an arbitral award has been made if the arbitration agreement explicitly specifies detailed qualifications that an arbitrator must possess and the third-party administrator fails to appoint an arbitrator that meets these qualifications.

Reversed and remanded for the trial court to issue an order consistent with this opinion and to award plaintiff costs and attorney fees.

JANSEN, J., dissenting, concluded that the trial court reached the right result, albeit for the wrong reason, because the FAA does not allow courts to review decisions about the qualification of arbitrators before an award is made, regardless of the

requirements set forth in the arbitration agreement, absent fraud or other infirmity in the contracting process that would constitute legal or equitable grounds for revoking the agreement.

ARBITRATION — FEDERAL ARBITRATION ACT — PROVISIONS ESTABLISHING ARBITRATOR QUALIFICATIONS — PREARBITRATION ENFORCEMENT.

A court may grant a party's petition for relief before an arbitral award has been made if the arbitration agreement explicitly specifies detailed qualifications that an arbitrator must possess and the third-party administrator fails to appoint an arbitrator that meets these qualifications (9 USC 4 and 5).

Kotz Sangster Wysocki PC (by *Jeffrey M. Sangster* and *Barry J. Jensen*) for Oakland-Macomb Interceptor Drain Drainage District.

McAlpine PC (by *Mark McAlpine*, *Marcus R. Sanborn*, and *David M. Zack*) for Ric-Man Construction, Inc.

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

SAAD, P.J. Plaintiff Oakland-Macomb Interceptor Drain Drainage District ("Drainage District"), a public sector drainage district, seeks to enforce provisions of its agreement to arbitrate with defendant Ric-Man Construction. The American Arbitration Association (AAA) failed to appoint a lawyer-member of the arbitral panel that had the specific, specialized qualifications set forth in the parties' agreement.

I. NATURE OF THE CASE

Plaintiff's objection to the AAA's failure to comply with the contractual requirements of a specific, highly specialized arbitral agreement raises an issue of first impression for a Michigan court's application of the Federal Arbitration Act (FAA), 9 USC 1 *et seq*. That is, will our courts enforce the conditions of an arbitral

agreement before the arbitral award has been issued when (1) the underlying subject matter of the arbitration involves complex technical and legal issues, (2) the arbitration agreement requires that the arbitrators possess a highly specialized professional background, and (3) the arbitration agreement specifically outlines a precise method to select said arbitrators?

Other courts that have looked at this narrow, but important, issue have made the following distinction, which informs our analysis: Courts will not entertain suits to address preaward general objections to the impartiality or expertise of an arbitrator. But when suit is brought, as here, to enforce the key provisions of the agreement to arbitrate—i.e., when the criteria and method for choosing arbitrators are at the heart of the arbitration agreement—then courts will enforce these contractual mandates. To rule otherwise would essentially rewrite the parties' contract and rob the objecting party of this key contractual right to have a panel with the specialized qualifications necessary to make an informed arbitral ruling—which goes to the precise purpose and reason to arbitrate such technically and legally complex claims.

With this key distinction in mind and after a careful review of the comprehensive arbitration agreement,[1] we note that this is not the standard, garden-variety, simple arbitration case or arbitration agreement. To the contrary, every provision of this arbitration agreement reveals that this is a complex matter, both technically and legally. Indeed, the agreement was "tailor made" to arbitrate a complex, large, public-sector sewer construction project, and it was entered into only *after* the parties encountered multimillion-dollar disputes against each other, which they could not resolve. And

[1] The agreement is attached as an appendix.

the agreement provides for extensive discovery; contains unusual provisions for waivers, statute of limitations, res judicata, and recorded proceedings; and mandates detailed findings by the panel in anticipation of potential claims by and against vendors, consultants, and other interested third parties.

In addition, the arbitration agreement expressly modifies the already sophisticated complex construction rules of the AAA by mandating very specific qualifications for the three-member arbitral panel and outlining the precise manner in which the AAA must appoint these panel members. Again, the parties spelled out very particularized qualifications that the panel members must possess. Their specialized experience would make it more likely that the panel would understand the complexity of the technical and legal issues presented, and thus render an informed decision.

Any objective reading of this agreement to arbitrate makes this intention very clear. Neither the parties to the agreement nor the AAA—which agreed to act as the third-party entity to implement this arbitration agreement—could possibly misunderstand or miss the significance of having high-level, quality arbitrators to hear the matters at issue and render an informed arbitral ruling. Therefore, when the AAA blatantly and inexplicably ignored these key provisions, plaintiff had only one course of action to ensure an arbitral hearing with the type of panel envisioned: it brought suit to enforce the contract. Notwithstanding the plain language of the agreement, defendant took the position that these provisions did not clearly call for the qualifications claimed by plaintiff. It also claimed that plaintiff's prearbitration suit to enforce said provisions was premature and contrary to the FAA that, it says, disallows prearbitration litigation regarding the qualifications of an arbitrator.

We disagree with defendant on both points and with the trial court, which ruled for defendant. Instead, we hold that it is abundantly clear that the agreement to arbitrate made the specialized qualifications of the panel central and key to the entire agreement. We also hold that when, as here, a provision to arbitrate is central to the agreement, the FAA provides that it should be enforced by the courts before the arbitral hearing.

The shibboleth that this approach would encourage delays is an artful and convenient dodge. It is quite obvious here that plaintiff strongly desires arbitration and, in fact, insists on an arbitral hearing, but only if it is meaningful, as contemplated by the contract between the parties. We also regard defendant's contention that the AAA followed the agreement as, at best, disingenuous.

For the reasons set forth in this opinion, we reject defendant's arguments, reverse the trial court's findings, and remand to the trial court to issue an order to the AAA consistent with this opinion.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff is a special-purpose public corporation established under the Drain Code, MCL 280.1 *et seq*. It owns the Oakland-Macomb Interceptor (OMI), which is part of an extensive sanitary-sewer system that delivers wastewater from suburban areas to the Detroit Water and Sewerage Department for treatment. Defendant Ric-Man is a construction company that entered into two contracts with plaintiff to build infrastructure needed to perform repairs on the OMI. These construction contracts include a brief dispute-resolution clause, which allowed the parties to agree to submit the claim to another dispute resolution process. Because plaintiff

and defendant asserted serious multimillion-dollar claims against each other during the construction project, they implemented their contractual right to amend their initial contract with a much more detailed arbitration agreement. The new arbitration agreement submitted the dispute to binding arbitration, to be administered by the AAA, and it specified in § 1.3 that the arbitration panel had to consist of two construction-industry professionals and one attorney with a "*background in construction litigation*" (emphasis added). The agreement also outlined a detailed set of requirements for the AAA to follow in the event that it, and not the parties, selected an arbitrator. In the relevant sections, the agreement states:

> § 1.3.4 Any selected arbitrator will be a member of the AAA Construction Panel. The arbitration panel shall include one construction lawyer and two construction professionals agreed upon by the parties or selected in accordance with the criteria set out below. If any arbitrators are selected by AAA, selection criteria shall be applied in the following order with the next level of criteria applied *only if no candidates are available who meet the preceding criteria* [emphasis added]:
>
> § 1.3.4.1 Construction Lawyer (1 member and 1 alternate)
>
> A [m]ember of the Large Complex Construction Dispute ("LCCD") panel and at least *20 years of experience in construction law* with an emphasis in heavy construction. [Emphasis added.]
>
> At least 20 years of experience in construction law with an emphasis in heavy construction.
>
> A member of the LCCD panel and at least 10 years of experience with an emphasis in heavy [c]onstruction.
>
> At least 10 years of experience with an emphasis in heavy [c]onstruction.

A member of the LCCD panel and at least 20 years of experience in construction law with some experience in heavy construction.

At least 20 years of experience in construction law with some experience in heavy construction.

A member of the LCCD panel and at least 10 years of experience with some experience in heavy construction.

At least 10 years of experience with some experience in heavy construction.

Accordingly, the key provisions—and those provisions directly pertinent to this appeal—concern the composition and selection of the arbitral panel. If the parties could not agree on two construction professionals and one construction lawyer, then the AAA would choose a panel member that met the parties' stipulated qualifications. And, in order to ensure that the most qualified available lawyer was chosen, the arbitration agreement specifies the declining, but minimal order of qualifications in the event a lawyer with all the desired qualifications is unavailable. Taken together,[2] these provisions obviously attest to the importance and centrality of the qualifications of the arbitrators to the parties' agreement to arbitrate. The central point of these provisions is that the parties agreed that, if available, the lawyer-member of the three-member arbitral panel must (1) be an attorney with experience in construction litigation, (2) possess 20 years' experience in construction law with an emphasis in heavy construction, and (3) be a member of the Large Complex Construction Dispute panel.

These portions of the arbitration agreement were triggered in January 2012, when the Drainage District

[2] "We read contracts as a whole, giving harmonious effect, if possible, to each word and phrase." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003).

filed its demand with the AAA for arbitration against Ric-Man. Both parties selected the two construction-industry-professional arbitrators from a list supplied by the AAA. But they could not agree on the construction-litigator arbitrator, thus leaving that position to be filled by the AAA in accordance with the procedures, methodology, and selection criteria specified in the arbitration agreement.

In August 2012, the AAA notified the Drainage District and Ric-Man that it had chosen Michael Hayslip as the construction-litigator member of the panel. Hayslip unquestionably did not meet the qualification requirements of the contract. Though Hayslip was admitted to the Ohio bar in 1994, and worked in the construction industry throughout his career,[3] he had no background in construction litigation—much less 20 years of experience with an emphasis in heavy construction, which is a key qualification required by the arbitration agreement—nor was he a member of the AAA's LCCD panel. The Drainage District immediately objected to the AAA's disregard of the arbitration agreement, but the AAA nonetheless reaffirmed its appointment of Hayslip.

Plaintiff subsequently filed suit against Ric-Man and the AAA in October 2012 to enforce its contractual right to have an attorney with the aforementioned qualifications on the panel. Plaintiff sought (1) a declaration that the AAA was required to appoint a lawyer with a background in construction litigation in compliance with the arbitrator-selection procedures specified in the

[3] After plaintiff brought suit, the AAA also chose Thomas Weiers as an alternate attorney-arbitrator. At the time of his appointment, Weiers had 25 years' experience as a construction-industry attorney, with knowledge of both heavy construction and construction litigation, and was a member of the AAA's LCCD panel.

arbitration agreement, (2) an injunction ordering the AAA to do the same, and (3) a judgment of summary disposition under MCR 2.116(C)(10), stating that Hayslip lacked the necessary experience required by the agreement and that any award issued by the current arbitration panel was void.

Plaintiff also alleged that the AAA failed to follow the arbitrator-selection process outlined in the agreement, pointing to Hayslip's relative lack of experience when compared to the alternate attorney-arbitrator, Weiers. Of course, as noted, in addition to his lack of experience in construction litigation, Hayslip's professional background did not meet the first two criteria the AAA was supposed to take into account when choosing arbitrators: (1) he was not a Large Complex Construction Dispute panel member with at least 20 years of experience in construction law, and (2) he did not have at least 20 years of experience in construction law with an emphasis in heavy construction. Whereas Hayslip did not satisfy either qualification, Weiers possessed both.

In response, Ric-Man stated that a court cannot second-guess an arbitration decision and that the AAA followed the specified arbitrator-selection process. It contended that the arbitration agreement did not actually require the attorney-arbitrator to have construction-litigation experience, and that plaintiff sued simply because it was unhappy with the selected group of arbitrators.

The trial court rejected plaintiff's arguments, and held, erroneously, that the AAA's selection of Hayslip complied with the plain language of the arbitration agreement. In so doing, it ruled that there was no language in the arbitration agreement requiring the AAA to appoint a construction lawyer with 10 to 20

years of construction-litigation experience. The trial court denied plaintiff's motion for summary disposition and dismissed the case.

Plaintiff filed an appeal in January 2013, claiming that the trial court erred when it denied the motion for summary disposition and dismissed the complaint. Specifically, plaintiff requests that our Court order the AAA to comply with the arbitration agreement.

III. STANDARD OF REVIEW

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

The interpretation of a contract presents a question of law that is reviewed de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "Arbitration agreements are generally interpreted in the same manner as ordinary contracts. They must be enforced according to their terms to effectuate

the intentions of the parties." *Bayati v Bayati*, 264 Mich App 595, 599; 691 NW2d 812 (2004) (citation omitted). See also *Equal Employment Opportunity Comm v Frank's Nursery & Crafts, Inc*, 177 F3d 448, 460 (CA 6, 1999) ("Because courts are to treat agreements to arbitrate as all other contracts, they must apply general principles of contract interpretation to the interpretation of an agreement covered by the FAA.").

IV. ANALYSIS

Because both the Drainage District and Ric-Man agree that this case involves materials shipped through interstate commerce and is thus is governed by the FAA,[4] we begin our analysis with the plain language of the applicable statute. Section 5 of the FAA, which governs the appointment of arbitrators, states: "*If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . .*" 9 USC 5 (emphasis added). Significantly, to implement the mandate of § 5, the use of the term "shall" indicates that compliance with the methods specified in the agreement is mandatory.[5] Further, to give life to this mandate, § 4 of the FAA permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to "petition any United States district court . . . for an

[4] See *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995) (stating that "[t]he [FAA] governs actions in both federal and state courts arising out of contracts involving interstate commerce"). "State courts are bound under the Supremacy Clause, US Const, art VI, § 2, to enforce the substantive provisions of the federal act." *Id*.

[5] "The word 'shall' is generally used to designate a mandatory provision . . . ." *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003).

order directing that such arbitration proceed in the manner provided for in such agreement." 9 USC 4.

Therefore, under §§ 4 and 5 of the FAA, courts have a statutory obligation to protect arbitral parties from abuse by the third-party agency conducting the arbitration. See *Morrison v Circuit City Stores, Inc*, 317 F3d 646, 678 (CA 6, 2003). If courts were to refuse prearbitration relief, arbitration agencies could ignore with impunity the specific terms of the arbitration agreement, thus effectively modifying the agreed-upon terms without each party's consent. See *id*. at 678-680; *Farrell v Subway Int'l, BV*, unpublished opinion of the United States District Court for the Southern District of New York, issued March 23, 2011 (Docket No. 11 Civ 08), pp 10-11 ("[F]ederal law directs that the Court enforce the selection of the arbitrator in accordance with the terms of the [parties'] Agreement . . . .") citing 9 USC 5; and *Jefferson-Pilot Life Ins Co v LeafRe Reinsurance Co*, unpublished opinion of the United States District Court for the Northern District of Illinois, issued November 20, 2000 (Docket No. 00 C 5257), p 4 ("The [FAA] clearly states that contractual provisions for the appointment of an arbitrator 'shall be followed.' "), quoting 9 USC 5. To prevent such a material alteration of the contract, in cases in which the "parties have agreed to arbitrate, but disagree as to the operation or implementation of that agreement," a court can remove an arbitrator before an award has been granted. *B/E Aerospace, Inc v Jet Aviation St Louis, Inc*, unpublished opinion of the United States District Court for the Southern District of New York, issued July 1, 2011 (Docket No. 11 Civ 4032), p 3 (citations and quotation marks omitted).

Accordingly, a party may petition a court for relief before an arbitral award has been made if (1) the

arbitration agreement explicitly specifies detailed qualifications the arbitrator must possess, and (2) the third-party arbitration administrator fails to appoint an arbitrator that meets these specified qualifications. Therefore, a court may issue an "order, pursuant to § 4 of the FAA, requiring that the arbitration proceedings conform to the terms of the arbitration agreement entered into by the parties." *Morrison*, 317 F3d at 678.

To hold otherwise under these facts would negate the purpose of arbitration: parties make arbitration agreements with the expectation that the third-party arbitral agency will honor important provisions of the agreements. If that agency disregards the explicit terms of the arbitration agreement—terms that were central to the initial contract between the parties—the disadvantaged party must have some access to judicial relief, and relief can be effective only before the arbitral hearing.

In such cases—as here, and contrary to defendant's argument and the trial court's ruling—it is not premature to give the disadvantaged party access to judicial relief before an arbitral award has been made.[6] Essen-

[6] Our ruling conflicts with a decision of the United States Court of Appeals for the Fifth Circuit, which held that parties generally may not challenge the appointment of an arbitrator before an arbitral award is issued. *Gulf Guaranty Life Ins Co v Conn Gen Life Ins Co*, 304 F3d 476, 489-490 (CA 5, 2002) (holding that "the FAA does not expressly provide for court authority to remove an arbitrator prior to the issuance of an arbitral award" and "does not expressly endorse court inquiry into the capacity of any arbitrator to serve prior to issuance of an arbitral award") (emphasis omitted). As the Fifth Circuit explained, this narrow interpretation of a court's authority in the preaward stages of an FAA dispute prevents "endless applications [to the courts] and infinite delay" and also stops overly litigious parties from bringing lawsuit after lawsuit to delay arbitration. *Id*. at 492 (citations and quotation marks omitted).

As noted, we do not find this analysis applicable to or persuasive under the specific circumstances of our case. See *Truel v City of Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010) (noting that "[d]eci-

tially, this is the only opportunity the objecting party has to demand an arbitration panel that conforms to the arbitration agreement. If the objecting party waits until the award has been made, it is very improbable that a court will offer relief. See *Bell v Seabury*, 243 Mich App 413, 421-422; 622 NW2d 347 (2000) (stating that "arbitral awards are given great deference and courts have stated unequivocally that they should not be lightly set aside"); and *Dawahare v Spencer*, 210 F3d 666, 669 (CA 6, 2000) (holding that "[a]n arbitration decision must fly in the face of established legal precedent for [a court] to find manifest disregard of the law") (citations and quotation marks omitted). Thus, to prevent the party from receiving prearbitration relief would undermine the very purpose of an arbitration agreement, which is to ensure swift extrajudicial resolution of a dispute under bargained-for terms. See *City of Bridgeport v Kasper Group, Inc*, 278 Conn 466, 485; 899 A2d 523 (Conn 2006) (stating that "the primary goal of arbitration . . . is to provide the efficient, economical and expeditious resolution of private disputes") (citation and quotation marks omitted). And, here, contrary to the trial court's ruling, the agreement to arbitrate made it very clear that the lawyer member of the panel must have specific and substantial experience in construction litigation—and yet the AAA chose a lawyer with no such experience.

---

sions from lower federal courts are not binding but may be considered persuasive"). As noted, requiring an objecting party to wait until an arbitral award has been issued before bringing a claim related to the composition of the arbitral panel, when said expertise is critical to a fully informed arbitral hearing, essentially robs the party of any opportunity to receive judicial relief. *Guaranty* also evinces an unwarranted lack of faith in the competence of our judiciary to distinguish between real and serious objections, as here, and frivolous developing tactics. We trust that in most cases, as here, the distinction is clear and obvious, and that courts should provide relief under the FAA.

Accordingly, the AAA obviously ignored the arbitration agreement when it made Hayslip the attorney arbitrator. The AAA could have easily corrected its failure to comply with the arbitration agreement when the Drainage District protested Hayslip's selection, but it did not. Evidently, there were attorneys available to serve as arbitrators who met all the conditions of plaintiff and defendant's contract, as demonstrated by the AAA's decision to make Weiers—a lawyer with a "background in construction litigation"—the alternate attorney-arbitrator.[7] The AAA's refusal to comply with the arbitration agreement's stated terms robbed the Drainage District of its bargained-for terms, and AAA's repudiation of its obligation cannot be sanctioned by this Court.

V. CONCLUSION

Pursuant to FAA §§ 4 and 5, plaintiff may enforce the precise language of the arbitration contract relating to the qualifications of the arbitrators and the method of choosing the arbitrators. Accordingly, we reverse and remand to the trial court to issue an order to the AAA requiring it to appoint an arbitral panel member who meets the criteria called for in the arbitration agreement, so that any subsequent arbitration will "proceed in the manner provided for in such agreement." 9 USC 4; see also *Morrison*, 317 F3d at 678. We also award plaintiff its costs and attorney fees to be assessed by the

[7] As noted, Weiers was appointed as an alternate attorney-arbitrator *after* this litigation began. Our analysis might have been different if, on appointing Hayslip, the AAA had told plaintiff and defendant Ric-Man that it was unable to find any arbitrators that satisfied the contract terms. The AAA did not do so, however, and Ric-Man does not make this allegation on appeal—in fact, Ric-Man continues to maintain that Hayslip was qualified to serve as an arbitrator under the terms of the arbitration agreement, which he clearly is not.

trial court upon remand, which shall include the costs and attorney fees at both the trial and appellate level.

Reversed and remanded. We do not retain jurisdiction.

SAWYER, J., concurred with SAAD, P.J.

JANSEN, J. (*dissenting*). Because I conclude that the circuit court reached the correct result in this case, albeit for the wrong reason, I must respectfully dissent.

The circuit court dismissed plaintiff's complaint for declaratory and injunctive relief, concluding that defendant American Arbitration Association (AAA) had fully complied with the plain language of the arbitration agreement when it selected Michael Hayslip as the lawyer-member of the arbitral panel. The circuit court ruled that plaintiff was "reading into the arbitration [agreement] a requirement that does not exist."

The circuit court reached the correct result by dismissing plaintiff's complaint, even though it did so for the wrong reason. For purposes of this appeal, it actually makes no difference whether the arbitration agreement required AAA to appoint a lawyer-member with a particular number of years of construction litigation experience. Irrespective of the exact requirements set forth in the arbitration agreement at issue in this case, it is well settled that "[a]ppellants cannot obtain judicial review of . . . decisions about the qualifications of the arbitrators . . . prior to the making of an award." *Cox v Piper, Jaffray & Hopwood, Inc*, 848 F2d 842, 843-844 (CA 8, 1988). The Federal Arbitration Act (FAA), 9 USC 1 *et seq*., "does not provide for pre-award removal of an arbitrator."[1] *Aviall, Inc v Ryder System,*

[1] It is undisputed that the FAA applies in this case.

Inc, 110 F3d 892, 895 (CA 2, 1997). Indeed, " 'it is well established that a . . . court cannot entertain an attack upon the qualifications . . . of arbitrators until after the conclusion of the arbitration and the rendition of an award.' " *Id*., quoting *Michaels v Mariforum Shipping, SA*, 624 F2d 411, 414 n 4 (CA 2, 1980). "The [FAA] does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service." *Florasynth, Inc v Pickholz*, 750 F2d 171, 174 (CA 2, 1984); see also *Gulf Guaranty Life Ins Co v Connecticut Gen Life Ins Co*, 304 F3d 476, 490-491 (CA 5, 2002).

Of course, a court would have the authority to remove a particular arbitrator prior to issuance of the arbitral award if the dispute concerning the arbitrator's qualifications implicated "grounds . . . at law or in equity for the revocation of [the] contract." 9 USC 2; see also *Aviall*, 110 F3d at 895. However, it is appropriate for the court to make such a preaward removal "only when there is a claim, for example, that there was 'fraud in the inducement' or some other 'infirmity in the contracting process' regarding the parties' establishing arbitral qualifications, which ground would invalidate the agreement to arbitrate." *Gulf Guaranty*, 304 F3d at 491, quoting *Aviall*, 110 F3d at 896. Similarly, preaward removal may be permissible under § 2 of the FAA when "the arbitrator's relationship to one party was undisclosed, or unanticipated and unintended, thereby invalidating the contract." *Aviall*, 110 F3d at 896.

In the present case, there is no claim that AAA's selection of Hayslip as the lawyer-member of the arbitral panel involved fraud or any other fundamental infirmity in the contracting process that would com-

pletely invalidate the arbitration agreement. See 9 USC 2; see also *Gulf Guaranty*, 304 F3d at 491. Nor is there any claim that Hayslip had an inappropriate relationship with either party. See *Aviall*, 110 F3d at 896. It may well be that Hayslip did not meet the specific requirements for appointment set forth in the arbitration agreement. But plaintiff was required to wait until after issuance of the arbitral award and raise this matter in a proceeding to vacate. See 9 USC 10; see also *Gulf Guaranty*, 304 F3d at 490-491; *Florasynth*, 750 F2d at 174.

Because the dispute over Hayslip's qualifications to serve as the lawyer-member did not constitute a sufficient ground to warrant revocation of the entire arbitration agreement, the circuit court was without authority to reach the issue at this stage of the proceedings. See 9 USC 2; see also *Gulf Guaranty*, 304 F3d at 491 (noting that "a court may not entertain disputes over the qualifications of an arbitrator to serve merely because a party claims that enforcement of the contract by its terms is at issue, unless such claim raises concerns rising to the level that the very validity of the agreement be at issue"). The dispute regarding Hayslip's qualifications to serve, although framed by plaintiff as a request to enforce the arbitration agreement according to its terms, "is not the type of challenge that the [circuit] court was authorized to adjudicate pursuant to the FAA prior to issuance of an arbitral award." *Id*. at 492.[2]

---

[2] As the majority opinion correctly observes, "[d]ecisions from lower federal courts are not binding but may be considered persuasive." *Truel v City of Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010). At the same time, however, the Supremacy Clause precludes this Court from applying any state law or policy that is inconsistent with the FAA. See *Abela v Gen Motors Corp*, 257 Mich App 513, 524-525; 669 NW2d 271 (2003), aff'd 469 Mich 603 (2004). Both our Supreme Court and this

In my opinion, the circuit court reached the correct result, albeit for the wrong reason, when it dismissed plaintiff's complaint. "It is well settled that we will not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason." *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 226; 813 NW2d 752 (2011). I would affirm the circuit court's dismissal of plaintiff's complaint.

Court have looked to the decisions of lower federal courts when interpreting and applying the FAA. See, e.g., *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004); *Scanlon v P&J Enterprises, Inc*, 182 Mich App 347, 351; 451 NW2d 616 (1990).

APPENDIX

AMENDMENT TO CONTRACT GENERAL CONDITION 16.01

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT

IN CONSIDERATION of the mutual promises contained in this Alternative Dispute Resolution Agreement ("Agreement"), Oakland-Macomb Interceptor Drain Drainage District ("OMIDDD") and Ric-Man Construction, Inc. ("Ric-Man") agree to amend Contract 1 and Contract 2 as identified below by adding their agreement for alternate dispute resolution procedures pursuant to Section 16.01 of the General conditions as follows, effective this 12th day of April, 2011:

I. RECITALS

On or about January 19, 2010 OMIDDD and Ric-Man entered into a contract for the construction of sewer access and control structures designated as Installation of Flow Control Measures Edison Corridor Interceptor, Macomb County Michigan designated as Contract 1 ("Contract 1").

On or about January 19, 2010, OMIDDD and Ric-Man entered into a contract for the Installation of Flow Control Measures Oakland Arm Interceptor Macomb County Michigan designated as Contract 2 ("Contract 2"). As used herein, "Projects" is defined as the work performed or required to be performed under Contract 1 and Contract 2.

During construction of the Projects , Ric-Man has raised various claims for additional time and compensation for performing the work and asserted extra work, including by example, claims allegedly arising under the Spearin Doctrine and for alleged differing site conditions. OMIDDD has also raised claims against Ric-Man for credits, reimbursement and other damages allegedly arising from Ric-Man's work on the Projects. Contract 1 and Contract 2 provide that the parties may resolve claims or disputes through any form of alternative dispute resolution agreed upon by the parties.

OMIDDD and Ric-Man now seek to amend Contract 1 and Contract 2 by adding their agreement for alternate dispute resolution procedures pursuant to Section 16.01 of the General conditions for the resolution of any and all claims, disputes, or controversies regarding the Projects through binding arbitration as follows:

II. AGREEMENT FOR ALTERNATIVE DISPUTE RESOLUTION

§ 1.1 ARBITRATION AGREEMENT.

§ 1.1.1 This Agreement defines the exclusive terms for binding arbitration for any claims arising out of or related to the Projects as provided upon agreement of the parties in Section 16.01 of the General Conditions of Contract 1 and Contract 2.

§1.1.2 Any claim or dispute, arising out of or related to the Projects, between OMIDDD and Ric Man shall be subject to binding arbitration administered by the American Arbitration Association ("AAA") in accordance with its Construction Industry Arbitration Rules which include Large, Complex Construction Dispute Rules in effect on the date of this Agreement, as modified by the terms of this agreement.

APPENDIX

§ 1.2 DEMAND FOR ARBITRATION. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the AAA. The party filing a demand for arbitration must assert in the demand all accrued claims then known to that party on which arbitration is permitted to be demanded. Each claim shall be discretely and specifically set out in the arbitration demand. Any accrued claim which is known to a party, or which should be known based on the available factual information, is waived if not asserted in the arbitration demand. A demand for arbitration may be made at any time following execution of this Agreement by all parties, however no discovery or arbitration hearings shall proceed unless the requesting party has provided a complete and detailed description of each discrete claim that will be asserted by that party and agrees that no further claims will be asserted in relation to the Projects. All discovery and arbitration hearings shall be postponed until the preceding condition is satisfied. The Arbitration Panel may allow the addition of a claim that is not included in the description of claims identified above only if the panel finds that the claim was neither known nor reasonably should have been known based on the available factual information. A party may not amend their arbitration demand merely on the grounds that the party elected to file their claim before the project was completed, or on the grounds that they had not completed their claim analysis (i.e. a party is at risk of waiving their additional claims if they submit their statement that no further claims will be made, prior to completion of the project, and/or prior to completion of their analysis of potential claims).

In no event shall a demand for arbitration be made after the date when the institution of legal or equitable proceedings based on the claim(s) would be barred by the applicable statute of limitations or applicable contractual limitations period. For statute of limitations, or contractual limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim(s). An arbitration demand shall only address claims arising from or related to the Projects. If demands for arbitration are filed on both Contract 1 and Contract 2, the demands will be asserted in a single demand for arbitration before a single arbitration panel. For purposes of statute of limitations, each claim from each Contract shall be considered separately and the time for bringing a claim based on one Contract will not be extended by time limits applicable to claims for the other Contract.

Unless otherwise agreed by the parties in writing, the arbitration demand shall include only claims and disputes between OMIDDD and Ric-Man.

§ 1.3 SELECTION OF ARBITRATORS. Any arbitration conducted pursuant to this agreement shall be decided by a panel of three arbitrators. This panel shall consist of two construction industry professionals and one attorney with a background in construction litigation. All arbitration hearings shall be conducted at the AAA office in Southfield Michigan, unless the parties agree to an alternate location in Southeastern Michigan.

Once a demand for arbitration is filed, the parties shall jointly ask the AAA to distribute a list of at least 25 approved construction arbitrators. The parties shall request that AAA provide a list of 25 potential construction arbitrators who best meet the criteria set forth in section 1.3.4 below and who are closest geographically to the Southfield office of AAA. Priority shall be given to proximity first and to the remaining criteria second without regard to priority of the remaining criteria. The 100 mile limitation set out in § 1.3.3 below shall not apply to this initial selection. Within thirty (30) days of the date of receipt of the list of arbitrators, the parties shall

APPENDIX

mutually agree upon a panel of three arbitrators who are mutually acceptable and two additional arbitrators designated as alternates (one construction lawyer and one industry professional) in the event that one of the selected arbitrators becomes unavailable. If the parties are unable to agree on the necessary number of arbitrators from the original list, then the parties shall jointly ask the AAA for a further list of 25 additional approved construction arbitrators who best meet the criteria set forth below and who are the next closest geographically to the Southfield office of AAA. Priority shall be given to proximity first and to the remaining criteria second without regard to priority of the remaining criteria. The 100 mile limitation set out in Section 1.3.3 below shall not apply to this selection. If the parties fail to select a panel of three arbitrators and two alternate arbitrators within thirty days of the date of service of the second list of potential arbitrators, then the remaining positions will be filled by arbitrators selected through the normal process of the AAA, Construction Industry Rules, subject to the following parameters:

§ 1.3.1 **(Applicable only if the parties fail to agree on arbitrator(s)).** No arbitrator shall be selected who was already rejected by one of the parties. A list of arbitrators that were rejected in prior discussions will be provided by each party within ten (10) days of a request by the AAA.

§ 1.3.2 **(Applicable only if the parties fail to agree on arbitrator(s))** In addition to any other grounds on which a prospective arbitrator would be disqualified under the AAA Rules to protect against arbitrator bias or conflicts of interest, no arbitrator shall be selected who has any connection, relationship to or interest in any of the parties, any consultant, attorney, employee, subcontractor, or witness of the parties. The parties shall provide a list of all such persons or entities within ten (10) days of a request by the AAA.

§ 1.3.3 **(Applicable only if the parties fail to agree on arbitrator(s)).** No arbitrator will be selected by the AAA who resides within 100 miles of the offices of either party, including field offices as well as the Florida office or any other subsidiary office of Ric-Man. The parties will provide a list of all such addresses within ten (10) days of a request from the AAA.

§ 1.3.4 Any selected arbitrator will be a member of the AAA Construction Panel. The arbitration panel shall include one construction lawyer and two construction professionals agreed upon by the parties or selected in accordance with the criteria set out below. If any arbitrators are selected by AAA, selection criteria shall be applied in the following order with the next level of criteria applied only if no candidates are available who meet the preceding criteria:

1.3.4.1 Construction Lawyer (1 member and 1 alternate)

A Member of the Large Complex Construction Dispute ("LCCD") panel and at least 20 years of experience in construction law with an emphasis in heavy construction.

At least 20 years of experience in construction law with an emphasis in heavy construction.

A member of the LCCD panel and at least 10 years of experience with an emphasis in heavy Construction.

At least 10 years of experience with an emphasis in heavy Construction.

APPENDIX

A member of the LCCD panel and at least 20 years of experience in construction law with some experience in heavy construction.

At least 20 years of experience in construction law with some experience in heavy construction.

A member of the LCCD panel and at least 10 years of experience with some experience in heavy construction.

At least 10 years of experience with some experience in heavy construction.

1.3.4.2 Construction Industry Professionals (2 members and 1 alternate).

A member of the LCCD panel and an advanced Civil Engineering Degree with at least 20 years of geotechnical experience emphasizing soils, soil loadings, dewatering, and structural steel design and loading.

An advanced Civil Engineering Degree with at least 20 years of geotechnical experience emphasizing soils, soil loadings, dewatering, and structural steel design and loading.

A member of the LCCD panel and an advanced Civil Engineering Degree with at least 10 years of geotechnical experience emphasizing soils, soil loadings, dewatering, and structural steel design and loading.

An advanced Civil Engineering Degree with at least 10 years of geotechnical experience emphasizing soils, soil loadings, dewatering, and structural steel design and loading.

A member of the LCCD panel and a Civil Engineering degree with at least 20 years of geotechnical experience emphasizing soils, soil loading, dewatering, and structural steel design and/or loading.

A Civil Engineering degree with at least 20 years of geotechnical experience emphasizing soils, soil loading, dewatering, and structural steel design and/or loading.

A member of the LCCD panel and a Civil Engineering degree with at least 10 years of geotechnical experience emphasizing soils, soil loading, dewatering, and structural steel design and/or loading.

A Civil Engineering degree with at least 10 years of geotechnical experience emphasizing soils, soil loading, dewatering, and structural steel design and/or loading.

APPENDIX

A member of the LCCD panel and any Engineering degree with at least 20 years of geotechnical experience emphasizing soils, soil loading, dewatering, and structural steel design and/or loading.

Any Engineering degree with at least 20 years of geotechnical experience emphasizing soils, soil loading, dewatering, and structural steel design and/or loading.

A member of the LCCD panel and any Engineering degree with at least 10 years of geotechnical experience emphasizing soils, soil loading, dewatering, and structural steel design and/or loading.

Any Engineering degree with at least 10 years of geotechnical experience emphasizing soils, soil loading, dewatering, and structural steel design and/or loading.

A member of the LCCD panel and at least 20 years of geological or geotechnical experience in construction management or design emphasizing soils, soil loadings, dewatering, and structural steel design and/or loading.

At least 20 years of geological or geotechnical experience in construction management or design emphasizing soils, soil loadings, dewatering, and structural steel design and/or loading.

A member of the LCCD panel and at least 10 years of geological or geotechnical experience in construction management or design emphasizing soils, soil loadings, dewatering, and structural steel design and/or loading.

At least 10 years of geological or geotechnical experience in construction management or design emphasizing soils, soil loadings, dewatering, and structural steel design and/or loading.

§ 1.4 DISCOVERY. All discovery permitted by the Michigan State Rules of Court shall also be permitted in the arbitration process under this Agreement, subject to each party's right to seek a protective order if discovery becomes harassing or abusive. The AAA Construction Industry Rules' limitation on discovery shall not apply. The arbitration panel is hereby authorized to decide any and all discovery disputes and issue appropriate sanctions where warranted. The arbitration panel may resolve discovery disputes through any procedure deemed prudent by the arbitrators, including through a conference call or a formal motion and hearing.

Notwithstanding the foregoing, the arbitration panel may limit discovery where the panel finds that the discovery sought serves no purpose other than to increase the expense of the arbitration or to harass the other party.

§ 1.5 VACANCIES AND REPLACEMENT OF ARBITRATORS

In the event that an arbitrator on the panel becomes unable to continue to serve as an arbitrator while arbitration is pending, the arbitration hearings shall be temporarily suspended

APPENDIX

until the alternate/replacement arbitrator is prepared to proceed with the hearings. The alternate arbitrator(s) shall review the transcripts and evidence from hearings previously conducted in the matter and shall then replace the absent arbitrator on the panel. If additional arbitrators become unable to continue to serve as arbitrators on the panel, then the parties shall agree upon a replacement arbitrator within ten days of the date that the hearings are suspended or if the parties are unable to agree, the AAA shall select a replacement arbitrator, subject to the parameters set out above. The makeup of the arbitration panel (one construction lawyer and two industry professionals) shall be maintained.

§ 1.6 FORM AND FINALITY OF AWARD. The arbitration award shall be a standard award. However, the parties also desire a determination of the general basis of the award, and distribution of amounts awarded and offset or deducted based on the general issues, to allow an assessment of the potential culpability of or recovery by third parties including subcontractors, consultants, or suppliers. Therefore the parties request that the panel provide a breakdown of the amount of any final award that identifies the basis for the amount and sets out the general issues that constitute the basis for each dollar amount added to or deducted from the amount of the award. Such determination shall not be considered for purposes of appeal or review of the award. In the event of such a review on appeal, the special determination shall not be admissible nor considered by the reviewing entity. The arbitration proceedings shall be recorded by a certified court reporter selected by agreement of the parties and, if they are unable to agree, then by the AAA. The parties shall share the cost of the reporter equally. The award rendered by the arbitration panel shall be final, binding, and judgment may be entered upon it in accordance with applicable law in any court having competent jurisdiction thereof.

EXECUTION, REPRESENTATIONS AND WARRANTIES.

§ 2.1 This Agreement shall bind the parties hereto and their heirs, assigns, subsidiaries, parent companies, creditors, representatives, or beneficiaries.

§ 2.2 The individuals executing this Agreement hereby warrant they have authority to sign this Agreement on behalf of their respective entity and to bind that entity to the terms of this Agreement.

§ 2.3 This Agreement shall amend, and to the extent of any conflict, supersede the terms and conditions of Contract 1 and Contract 2 defined above.

APPENDIX

§ 2.4 The parties, by and through their authorized representatives hereby agree to the terms of this agreement.

OAKLAND-MACOMB INTERCEPTOR DRAINAGE DISTRICT

By

Its Secretary

Date: 4-14-2011

RIC-MAN CONSTRUCTION, INC.

By: STEPHEN MANCINI

Its: PRESIDENT

Dated: 4-12-11

Approved as to form and content:

KOTZ, SANGSTER, WYSOCKI AND BERG, P.C.

By: Jeffrey M. Sangster (P30791)
Attorneys for OMIDDD
400 Renaissance Center, Suite 3400
Detroit, MI 48243
(313) 259-8300
jsangster@kotzsangster.com

BROOKS WILKINS SHARKEY & TURCO, PLLC

By:
Michael R. Turco (P48705)
Attorneys for Ric Man
401 S. Old Woodward Avenue, Suite 460
Birmingham, Michigan 48009
(248) 971-1800
turco@bwst-law.com

PEOPLE v TUTTLE

Docket No. 312364. Submitted October 8, 2013, at Detroit. Decided January 30, 2014, at 9:15 a.m. Leave to appeal granted, 496 Mich ___.

Robert Tuttle was charged in the Oakland Circuit Court with 3 counts of delivering marijuana, 1 count of manufacturing marijuana, 1 count of possessing marijuana with the intent to deliver it, and two counts of possession of a firearm during the commission of a felony. Defendant moved to dismiss the charges on the bases that he was entitled to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424, and dismissal pursuant to the affirmative defense set forth in § 8 of the MMMA, MCL 333.26428. The court, Michael D. Warren, Jr., J., held that defendant was not entitled to immunity under § 4 and denied defendant's requests for dismissal under § 8 or to present a § 8 defense at trial. Defendant was a registered primary caregiver for two medical marijuana patients to whom he was connected through the state's MMMA registration process. Defendant was also a medical marijuana patient with a valid registry identification card. On three occasions, defendant sold marijuana to a confidential informant for the Oakland County Sheriff's Office. The informant had supplied defendant with various documents demonstrating that he was a qualifying patient under the MMMA, but defendant never became connected to the informant as a caregiver through the state's registration process before selling him marijuana. At defendant's home, the police seized 33 marijuana plants, 38 grams of dried marijuana, and several firearms. The Court of Appeals denied defendant's application for leave to appeal, and defendant sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 493 Mich 950 (2013).

The Court of Appeals *held*:

1. Under MCL 333.26424(a), a qualifying patient who holds a registry identification card is entitled to immunity from prosecution. To be entitled to immunity, the patient may not possess more than 2.5 ounces of usable marijuana and 12 marijuana plants. MCL 333.26424(b) contains a parallel provision that applies to

registered primary caregivers. Section 4 immunity, however, does not extend to patient-to-patient transfers of marijuana. Nor does it extend to a caregiver who transfers marijuana for any purpose other than to alleviate the condition or symptoms of a specific patient with whom the caregiver is connected through the state's registration process. Under MCL 333.26424(d), qualifying patients and caregivers are presumed to be engaged in the medical use of marijuana in accordance with the MMMA if they possess a registry identification card and an amount of marijuana that does not exceed the amount allowed under the act. The presumption may be rebutted if the prosecution provides evidence that conduct related to marijuana was not for the purpose of alleviating a qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition in accordance with the act. In this case, defendant conceded that he was not entitled to § 4 immunity for the sales of marijuana to the confidential informant, but claimed that the remaining charges should be dismissed under § 4 because he was entitled to the presumption in § 4(d). However, the evidence that defendant sold marijuana to a patient with whom he was not connected through the state's registration process meant that defendant was not acting in accordance with the act, rebutting the presumption with regard to all of defendant's conduct involving marijuana. The trial court correctly held that defendant was not entitled to immunity under § 4.

2. Under MCL 333.26428(a), a defendant may assert the medical purpose for using marijuana as a defense in any prosecution involving marijuana. For the defense to be successful, the defendant must prove (1) the existence of a bona fide physician-patient relationship, (2) that the patient and the patient's caregiver, if any, were collectively in possession of a quantity of marijuana that was not more than reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's condition, and (3) the patient and the caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or marijuana paraphernalia to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's condition. Possession of a registry identification card, without more, does nothing to address the medical requirements of § 8 and is not sufficient to demonstrate compliance with the MMMA. It offers no proof of the existence of an ongoing relationship between a patient and a physician as mandated by § 8(a)(1). It does not prove that the caregiver is aware of how much marijuana the patient has been prescribed or for how

long the patient is supposed to use the drug as mandated by § 8(a)(2). It does not establish that the marijuana provided by the caregiver is actually being used by the patient for medical reasons as mandated by § 8(a)(3). In this case, the trial court incorrectly ruled that defendant had satisfied MCL 333.26428(a)(3), citing the testimony of the two patients to whom defendant was connected through the state's registration process. But any analysis of § 8(a)(3) needs to incorporate every patient possibly using the marijuana at issue, including, in this case, defendant and the confidential informant, and defendant failed to testify that he used the marijuana found in his home to treat a serious or debilitating medical condition or its symptoms. Nonetheless, the court correctly ruled that defendant had otherwise failed to meet his burden under § 8(a) and that he was, therefore, not entitled to have the case dismissed under that section, nor was he permitted to assert the § 8 defense at trial.

Trial court's ruling regarding MCL 333.26428(a)(3) reversed, but trial court's order denying defendant's motion to dismiss the case and precluding defendant from asserting a § 8 defense at trial affirmed.

JANSEN, J., concurred in the result only.

1. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — PRESUMPTIONS — MEDICAL USE OF MARIHUANA — REBUTTAL.

Under MCL 333.26424(d) of the Michigan Medical Marihuana Act, qualifying patients and caregivers are presumed to be engaged in the medical use of marijuana in accordance with the act if they possess a registry identification card and an amount of marijuana that does not exceed the amount allowed under the act; the presumption may be rebutted if the prosecution provides evidence that conduct related to marijuana was not for the purpose of alleviating a qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition in accordance with the act; an admission by a defendant that the defendant acted outside the parameters of the act in one regard rebuts the presumption with regard to all conduct involving marijuana.

2. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — AFFIRMATIVE DEFENSES — MEDICAL USE.

Under MCL 333.26428(a), a defendant may assert the medical purpose for using marijuana as a defense in any prosecution involving marijuana; for the defense to be successful, the defendant must prove (1) the existence of a bona fide physician-patient relationship, (2) that the patient and the patient's caregiver, if any, were collectively in

> possession of a quantity of marijuana that was not more than reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's condition, and (3) the patient and the caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or marijuana paraphernalia to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's condition; any analysis of whether the patient and the caregiver, if any, were engaged in the actual medical use of marijuana needs to incorporate every patient possibly using the marijuana at issue.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Tanya L. Nava*, Assistant Prosecuting Attorney, for the people.

Daniel J. M. Schouman, PLC (by *Daniel J. M. Schouman*), for defendant.

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

SAAD, P.J. Defendant appeals the trial court's order that (1) held that he was not entitled to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA),[1] (2) denied defendant's request for dismissal under § 8 of the MMMA, and (3) denied his request to present the § 8 defense at trial. For the reasons set forth in this opinion, we affirm in part and reverse in part.

I. NATURE OF THE CASE

Defendant was arrested for selling marijuana to a confidential informant of the Oakland County Sheriff's

[1] The MMMA uses the variant "marihuana." Throughout this opinion, we use the more common spelling "marijuana" unless quoting from the MMMA or cases that use the variant spelling.

Office. He was subsequently charged with the sale and production of marijuana and possession of a firearm during the commission of a felony (felony-firearm). Defendant holds a valid registry identification card under the MMMA, MCL 333.26421 *et seq*. He claims that possession of the card, without more, entitles him to (1) immunity from prosecution under § 4 of the MMMA, MCL 333.26424, for the charges not relating to the sale of marijuana, and (2) an affirmative defense under § 8 of the MMMA, MCL 333.26428, for all the charges. In addition, defendant argues that the testimony of his medical marijuana patients allows him to assert the § 8 affirmative defense. The trial court rejected both arguments and held that defendant was not entitled to immunity under § 4 and that he had not presented the requisite evidence to make an affirmative defense under § 8.

We uphold the trial court, and expand our analysis to include defendant's arguments regarding (1) his possession of a registry identification card, and (2) the testimony of his medical marijuana patients. To adopt defendant's MMMA interpretation would subvert the purposes of the statute. It provides a limited "exception to the Public Health Code's prohibition on the use of controlled substances . . . ." *People v Bylsma*, 493 Mich 17, 27; 825 NW2d 543 (2012). This exception is intended to allow Michiganders "suffering from serious or debilitating medical conditions or symptoms" the use of marijuana to help treat and alleviate their symptoms. *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012). We therefore reject defendant's arguments and hold that the trial court did not abuse its discretion when it (1) ruled that defendant was not entitled to immunity from criminal prosecution under § 4, (2) denied defendant's request for dismissal under § 8, and (3) held that defendant could not present the § 8 defense at trial.

II. FACTS AND PROCEDURAL HISTORY

On three occasions in January 2012, defendant sold marijuana to a confidential informant of the Oakland County Sheriff's Office. Defendant originally met the informant on a website that connects medical marijuana patients with marijuana growers.[2] Before the sales, defendant met with the confidential informant in Waterford and asked him for various documents to demonstrate that he was a "qualifying patient"[3] under the MMMA. Defendant did not ask the confidential informant (nor did the confidential informant provide) information on how much marijuana he required to treat his debilitating medical condition, or how long this treatment should continue.

The Oakland County Sheriff's Office arrested defendant shortly after the third sale. The office also obtained a warrant to search defendant's home. At the house, a detective recovered 33 marijuana plants and 38 grams of dried marijuana from a locked garage and shed. The police also discovered a cache of firearms (including an AK-47) in a gun safe in defendant's basement.

The state subsequently charged defendant with numerous counts related to marijuana manufacture and delivery and possession of a firearm during the commis-

[2] Defendant himself is a medical marijuana patient with a state-issued registry identification card. He also is a registered "caregiver" for two other qualifying patients. MCL 333.26423(h) defines "primary caregiver" and "caregiver" as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime . . . ."

[3] MCL 333.26423(i) defines "qualifying patient" and "patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition."

sion of a felony.[4] After defendant was bound over to the circuit court, he moved to dismiss the charges based on possession of marijuana in his home and the related felony-firearm charges under § 4 of the MMMA, which grants immunity from prosecution. The defendant asserted that § 4 allowed him to possess up to 7.5 ounces of dried marijuana and 36 marijuana plants. Defendant also argued that the remaining charges should be dismissed under the affirmative defense provision in § 8 of the MMMA because he possessed only an amount of marijuana "reasonably necessary" to treat him and his patients. Defendant also requested an evidentiary hearing under § 8.

The prosecution responded to defendant's motion, and conceded that defendant complied with the "quantity and storage parameters" of § 4. But the prosecution asserted that defendant's conduct rebutted the presumption that he was engaged in the "medical use of marihuana" under § 4(d) of the MMMA. Defendant sold marijuana to a patient, the confidential informant, and was connected to that patient in a method outside the state's registration process, contravening § 4(b)(1), which mandates that caregivers be connected with patients through "the department's registration process." MCL 333.26424(b)(1). The prosecution also noted that the marijuana sold to the confidential informant came from the same stockpile used to supply defendant's legitimate medical marijuana patients. Finally, the prosecution noted that defendant's sale to the confidential informant violated the regulations in § 4(a) for medical marijuana patients because this Court has

[4] Counts I-III relate to the sale of marijuana to the confidential informant—one charge for each of the sale dates. Counts IV and V concern possession of the 38 grams of loose marijuana and a related felony-firearm charge. Counts VI and VII relate to the growing of 33 marijuana plants and a related felony-firearm charge.

ruled that patient-to-patient sales of marijuana do not fall under the MMMA.[5] The prosecution acceded to defendant's request for an evidentiary hearing.

The trial court agreed with the prosecution and denied defendant's motion to dismiss under § 4 before the evidentiary hearing. It held that the prosecution had rebutted the presumption of compliance with the MMMA referred to in § 4(d).

At the evidentiary hearing, a detective and the confidential informant offered testimony. Defendant's two registered patients testified as well. After it heard this evidence, the trial court denied defendant's request for dismissal under § 8. It also held that defendant was precluded from presenting the § 8 affirmative defense at trial because he had failed to provide evidence of every element required under that section. Specifically, the court noted that the physician statements provided by defendant did not actually state that the respective physicians completed a full assessment of each patient's medical history and current medical condition. It was also troubled by the number of plants found in defendant's home, stating that "33 plants certainly could be viewed to be significantly beyond the required quantity" to treat his patient's conditions. However, the trial court did find evidence that defendant was actually engaged in the possession and cultivation of marijuana for medical purposes, citing the testimony of defendant's two certified patients.

---

[5] *Michigan v McQueen*, 293 Mich App 644, 675; 811 NW2d 513 (2011). This case was subsequently affirmed on other grounds by our Supreme Court. *Michigan v McQueen*, 493 Mich 135; 828 NW2d 644 (2013). However, the Supreme Court agreed that MMMA § 4 did not provide immunity for patient-to-patient sales. *McQueen*, 493 Mich at 156. We will return to the Supreme Court's interpretation of § 4 later in this opinion.

In September 2012, defendant sought leave to appeal in this Court, which denied leave.[6] Defendant then sought leave to appeal in the Michigan Supreme Court, which entered an order remanding the case to this Court for consideration as on leave granted.[7] Defendant appeals the ruling of the trial court, arguing that Counts IV through VII of the charges against him (the possession and felony-firearm charges) should be dismissed under the § 4 immunity provisions. He also argues that he is entitled to dismissal of all charges under the § 8 affirmative defense. In the alternative, he argues that he should be permitted to raise the § 8 affirmative defense at trial.

III. STANDARD OF REVIEW

A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *Bylsma*, 493 Mich at 26. "A trial court's findings of fact may not be set aside unless they are clearly erroneous." *Id*. A finding is clearly erroneous " 'if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.' " *Id*., quoting *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Questions of statutory interpretation, including interpretation of the MMMA, are reviewed de novo. *Kolanek*, 491 Mich at 393.

IV. ANALYSIS

A. SECTION 4 IMMUNITY

Only some of the multiple subsections of § 4 are relevant to this case: §§ 4(a), 4(b), and 4(d). Under § 4(a), qualifying patients who hold registry identifica-

[6] *People v Tuttle*, unpublished order of the Court of Appeals, entered October 11, 2012 (Docket No. 312364).

[7] *People v Tuttle*, 493 Mich 950 (2013).

tion cards[8] receive immunity from criminal prosecution. MCL 333.26424(a); *Kolanek*, 491 Mich at 394-395. To be entitled to immunity, a qualifying patient cannot possess more than 2.5 ounces of usable marijuana and 12 marijuana plants. MCL 333.26424(a). Section 4(b) contains a parallel immunity provision that applies to registered primary caregivers. *Bylsma*, 493 Mich at 28. Our Supreme Court recently clarified that the immunity provisions in § 4 do not extend to

> a registered qualifying patient who transfers marijuana to another registered qualifying patient for the transferee's use because the transferor is not engaging in conduct related to marijuana for the purpose of relieving *the transferor's own* condition or symptoms. Similarly, § 4 immunity does not extend to a registered primary caregiver who transfers marijuana for any purpose other than to alleviate the condition or symptoms of a specific patient *with whom the caregiver is connected through the* [*Michigan Department of Community Health's*] *registration process*. [*McQueen*, 493 Mich at 156.]

Under § 4(d), qualifying patients and primary caregivers are presumed to be "engaged in the medical use of marihuana in accordance with [the MMMA]" if they are in possession of (1) "a registry identification card" and (2) "an amount of marihuana that does not exceed the amount allowed under this act." MCL 333.26424(d). This presumption is rebuttable—if the prosecution provides "evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act" it will not apply. MCL 333.26424(d)(2).

---

[8] MCL 333.26423(j) defines "registry identification card" as "a document issued by the department that identifies a person as a registered qualifying patient or registered primary caregiver."

Here, defendant's transfer of marijuana to the confidential informant is clearly not protected under § 4. See *McQueen*, 493 Mich at 156. He transferred marijuana to the confidential informant, who, though a registered qualifying patient, was not connected to defendant through the state's registration process.

Defendant concedes that he is not entitled to § 4 immunity for the sales of marijuana to the confidential informant. Yet he asserts that the other charges—namely, the ones related to marijuana possession and the accompanying felony-firearm counts—should be dismissed under § 4. He bases this claim on the following evidence: (1) his and his patients' possession of valid registry identification cards, and (2) his possession of 33 marijuana plants and 1.34 ounces of dried marijuana—an amount less than permitted to him under § 4(b).[9] As such, defendant claims he is entitled to the presumption under § 4(d) that he is "engaged in the medical use of marihuana in accordance with" the MMMA. MCL 333.26424(d).

Defendant is correct that he is entitled to the presumption in § 4(d): he was in possession of the requisite identification cards and possessed an "amount of marihuana that [did] not exceed the amount allowed under [the MMMA]." MCL 333.26424(d)(2). But what § 4(d) gives may also be lost under § 4(d)(2), because the prosecution may rebut the presumption. It has done so here. Defendant has engaged in "conduct related to marihuana [that] was not for the purpose of alleviating the qualifying patient's debilitating medical condition

[9] Under § 4(b)(2), defendant could possess up to 36 plants and, subject to certain volume limitations, remain in compliance with the MMMA. The statute allows him to possess 12 plants for himself, plus 12 plants for each patient for whom he is a caregiver (3 x 12 = 36). In addition, § 4(b)(1) allows defendant to possess up to 7.5 ounces of usable marijuana: 2.5 ounces for himself, and 5 ounces combined for his two patients.

or symptoms associated with the debilitating medical condition, *in accordance with this act*." MCL 333.26424(d)(2) (emphasis added). By his own admission, defendant sold marijuana to an individual outside the parameters of the MMMA. And as a consequence, he does not have the privilege to claim immunity under § 4. This action rebuts the presumption with regard to *all* his conduct involving marijuana—even conduct involving his two other qualifying patients.

Defendant attempts to obscure this clear statutory outcome by asserting that there is no evidence that the specific marijuana found by the police in his home—i.e., the 33 plants and 1.34 ounces of useable marijuana—was used for the illegal sale to the confidential informant. He also suggests that one illicit marijuana sale shouldn't "taint" the ostensibly "clean" marijuana used to supply his legitimate, MMMA-compliant patients.

This argument lacks any grounding in the statute itself. Defendant ignores that it is his *conduct* that is at issue—conduct that is tainted by his violation of the MMMA. Defendant's reasoning also contravenes the MMMA's stated aims: to provide a particular exception to the general illegality of marijuana use,[10] so that the drug can be used by "individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use 'is carried out in accordance with the provisions of [the MMMA].' " *Kolanek*, 491 Mich at 394 (alteration in original), quoting MCL 333.26427(a). And, as noted, defendant's claim ignores common sense. The fact that he sold marijuana to the confidential informant is obvious evidence that defendant did not conduct his marijuana-related activities in compli-

[10] See *Bylsma*, 493 Mich at 27 (which held that the MMMA provides an "exception to the Public Health Code's prohibition on the use of controlled substances").

ance with the MMMA. The plain meaning of § 4 does not allow defendant to decouple his illicit actions involving marijuana from his other marijuana-related activities—even if those other activities are within the parameters of the statute. The evidence of defendant's illicit actions rebuts the presumption of MMMA-compliant conduct.

Accordingly, defendant is not entitled to the immunity provisions of § 4. The trial court was correct to so hold, and we affirm.

B. SECTION 8(A) DEFENSE

Under § 8(a) of the MMMA, a defendant may assert the medical purpose for using marijuana as a defense in any prosecution involving marijuana.[11] The defense has three elements, all of which must be satisfied for the defense to be successful. MCL 333.26428(a).[12] This burden originates in the medical reasons that inform the statute.

---

[11] Defendant's claims regarding § 8 of the MMMA are almost identical to the claims of the defendant in *People v Hartwick*, 303 Mich App 247; 842 NW2d 545 (2013), which was submitted to this same panel on the same date as this case. Accordingly, our analysis of § 8 in the two cases is largely the same.

[12] The Michigan Supreme Court recently outlined very specific steps and procedural outcomes for defendants who assert the § 8(a) affirmative defense. If the defendant establishes the three § 8(a) elements during a pretrial evidentiary hearing, and there are no material questions of fact, the defendant is entitled to dismissal of the charges. *Kolanek*, 491 Mich at 412. If the defendant establishes evidence of each element, but there are still material questions of fact, then the § 8(a) affirmative defense must be submitted to a jury. *Id*. Finally, if no reasonable juror could conclude that the defendant has satisfied the elements of the § 8(a) affirmative defense, then the defense fails as a matter of law and the defendant is precluded from asserting it at trial. *Id*. at 412.

In this case, the trial court held that no reasonable juror could conclude that defendant had satisfied all the elements of the § 8(a) affirmative defense. Accordingly, it ruled that the defense failed as a matter of law and that defendant was precluded from asserting it at trial.

Before we address each subsection of § 8, it is important to consider the mandate of the section as a whole. Because the MMMA is a limited statutory exception to the general state prohibition of marijuana, the MMMA promulgates a comprehensive statutory scheme that must be followed if caregivers and patients wish to comply with the law. Section 8 outlines a possible defense that a defendant can raise when charged with any state crime involving marijuana. In so doing, the section weaves together the obligations of each individual involved in the prescription, use, and production of marijuana for medical purposes. Under the act, doctors must have an ongoing relationship with their patients, in which the doctor regularly reviews the patient's condition and revises any marijuana prescription accordingly.[13] Further, patients must provide certain basic information regarding their marijuana use to their caregivers. And caregivers, to be protected under the MMMA, must ask for this basic information—specifically, information that details, as any pharmaceutical prescription would, how much marijuana the patient is supposed to use, and how long that use is

[13] The importance of a legitimate, ongoing relationship between the marijuana-prescribing doctor and the marijuana-using patient is stressed throughout the MMMA. Section 4(f), which provides a qualified immunity for physicians, mandates that the immunity only applies to physicians that prescribe marijuana "in the course of a bona fide physician-patient relationship . . . ." MCL 333.26424(f). Section 4(f) further implies that this relationship must be ongoing by stressing that "nothing shall prevent a professional licensing board from sanctioning a physician for . . . otherwise violating the standard of care for evaluating medical conditions." This standard of care presumably includes follow-up visits with the patient. And § 6—as noted, the section that governs the issuance of registry cards—also implies the expectation of an ongoing physician-patient relationship. It states that if a "patient's certifying physician notifies the department in writing that the patient has ceased to suffer from a debilitating medical condition, the card shall become null and void upon notification by the department to the patient." MCL 333.26426(f).

supposed to continue. Though patients and caregivers are ordinary citizens, not trained medical professionals, the MMMA's essential mandate is that marijuana be used for medical purposes. Accordingly, for their own protection from criminal prosecution, patients and caregivers must comply with this medical purpose—patients by supplying the necessary documentation to their caregivers, and caregivers by only supplying patients who provide the statutorily mandated information.

Possession of a registry card, without more, does nothing to address these § 8 medical requirements. It offers no proof of the existence of an ongoing relationship between patient and physician, as mandated by § 8(a)(1). Nor does it prove the caregiver is aware of how much marijuana the patient is prescribed or for how long the patient is supposed to use the drug, as mandated by § 8(a)(2). And it does not ensure the marijuana sold by the caregiver is actually being used by the patient for medical reasons, as mandated by § 8(a)(3).

In sum, possession of a registry card is not sufficient to demonstrate compliance with the MMMA, and clearly does not satisfy the requirements for asserting the § 8 defense in a prosecution for a crime involving marijuana.

1. SECTION 8(a)(1): THE BONA FIDE PHYSICIAN-PATIENT RELATIONSHIP

To satisfy § 8(a)(1), a defendant must present evidence that

> [a] physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient rela-

> tionship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition[.] [MCL 333.26428(a)(1).]

Defendant claims that the documents he presented at the evidentiary hearing—his medical marijuana patient and caregiver cards, his patients' registry identifications, and the various documentation supporting both—are sufficient evidence to satisfy the requirement of a physician statement and a bona fide physician-patient relationship. In addition, defendant asserts that the testimony of his two patients is further evidence of the existence of the bona fide physician-patient relationship required by the statute. We address each claim in turn.

a. REGISTRY IDENTIFICATION CARDS

Defendant's argument regarding the registry identification cards has some basis in § 6 of the MMMA. Section 6 governs the procedures patients and the Department of Licensing and Regulatory Affairs (the department) must follow for the department to issue patient and caregiver cards. Specifically, § 6(a) mandates that the department

> shall issue registry identification cards to qualifying patients who submit the following, in accordance with the department's rules:
>
> (1) A written certification;
>
> (2) Application or renewal fee;
>
> (3) Name, address, and date of birth of the qualifying patient, except that if the applicant is homeless, no address is required;
>
> (4) Name, address, and telephone number of the qualifying patient's physician;

(5) Name, address, and date of birth of the qualifying patient's primary caregiver, if any;

(6) Proof of Michigan residency. [MCL 333.26426(a).[14]]

In its definitional section, the MMMA defines a "written certification" as a document signed by a physician that states the following:

(1) The patient's debilitating medical condition.

(2) The physician has completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation.

(3) In the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition. [MCL 333.26423(m).]

The MMMA mandates that the department cannot issue a registry identification card to a patient or caregiver applicant unless it verifies the information submitted in the patient or caregiver's written certification. As such, possession of a registry identification card, if valid, satisfies some of the requirements of § 8(a)(1). Further, if the department actually followed its statutory obligations and conducted an investigation, the card would serve as evidence that a physician did the following: (1) completed a full assessment of the patient's medical history, (2) conducted an in-person medical evaluation, (3) observed a debilitating medical condition, and (4) concluded that the patient is likely to

[14] Under the earlier version of the MMMA that applies to this case, the final element, MCL 333.26426(a)(6), read as follows: "If the qualifying patient designates a primary caregiver, as designation as to whether the qualifying patient or primary caregiver will be allowed under state law to possess marihuana plants for the qualifying patient's medical use." 2008 IL 1. Neither this earlier language nor the amended language concerning residency bears on the outcome of this case.

benefit from the medical use of marijuana. However, the physician's written certification is not evidence of the existence of the bona fide physician-patient relationship, which is required for the § 8(a) affirmative defense.

The initial, voter-initiative version of the MMMA did not define "bona fide physician-patient relationship." See *People v Redden*, 290 Mich App 65, 86; 799 NW2d 184 (2010). The Legislature has since amended the MMMA to define that phrase. See 2012 PA 512. But this amendment took effect April 1, 2013. The new definition is therefore not applicable to cases, like this one, that arose before that date. See *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992) ("The general rule of statutory construction in Michigan is that a new or amended statute applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect. This rule applies equally to criminal statutes.") (citation omitted). If the MMMA had originated in the Legislature, the amendment could be considered evidence of what the Legislature intended "bona fide physician-patient relationship" to mean at the date of the MMMA's enactment.[15] But the MMMA is the result of a voter initiative, passed by the people of Michigan. As such, we must "ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself." *Kolanek*, 491 Mich at 397. The Court is thus

[15] The Legislature clearly has the power to subsequently amend statutes that enact voter initiatives. Const 1963, art 2, § 9; *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 64; 340 NW2d 817 (1983). It is unclear, however, if such a subsequent legislative amendment can serve as evidence of the peoples' intent at the time they passed the initiative. In this case, we follow the preamendment holdings of our Supreme Court, which instruct us to look to the plain meaning of the MMMA's terms to discern the peoples' intent.

required to construe the MMMA's language with the words' "ordinary and plain meaning as would have been understood by the electorate." *Id*.

Earlier cases have defined "bona fide" in the preamendment context. This Court used a dictionary to discern the plain-meaning definition of the term in *Redden*. *Redden* stated that "*Random House Webster's College Dictionary* (1997) defines 'bona fide' as '1. made, done, etc., in good faith; without deception or fraud. 2. authentic; genuine; real.' " *Redden*, 290 Mich App at 86. Our Supreme Court also quoted with approval a joint statement issued by the Michigan Board of Medicine and the Michigan Board of Osteopathic Medicine and Surgery, which advised that the phrase "bona fide physician-patient relationship" envisioned " 'a pre-existing and ongoing relationship with the patient as a treating physician.' " *Kolanek*, 491 Mich at 396 n 30 (citation omitted).

These definitions do not support defendant's effort to substitute the procedural requirements in § 6 for the legal requirements in § 8. The steps outlined in § 6 for obtaining a patient or caregiver's card cannot demonstrate the existence of a physician-patient relationship that is "pre-existing" and involves "ongoing" contact. Accordingly, mere possession of a patient identification card, a caregiver's card, or both does not satisfy the requirements of § 8(a)(1). That the statute requires this outcome is in keeping with its medical purpose and protects the patients it is designed to serve. By requiring a bona fide physician-patient relationship in order to establish the affirmative defense under § 8, the MMMA prevents doctors who merely write prescriptions—such as the one featured in *Redden*[16]—

[16] The *Redden* physician practiced medicine in six states, spent 30 minutes with each of the *Redden* defendants, and seemingly examined

from seeing a patient once, issuing a medical marijuana prescription, and never checking on whether that prescription actually treated the patient or served a palliative purpose.

b. THE PATIENT TESTIMONY

Our analysis of the phrase "bona fide physician-patient relationship" cannot end here, as defendant also asserts that the testimony of his two patients satisfies this requirement of § 8(a)(1). This assertion is incorrect. Again, defendant attempts to elide the fact that he illegally sold marijuana to the confidential informant. He does so by pointing to his supposedly legal activities involving marijuana with his two qualifying patients. Defendant did not provide evidence of the confidential informant's bona fide patient-physician relationship with his physician.[17] Nor did defendant provide evidence of a bona fide relationship between defendant and his own physician. Defendant did present a number of documents at the evidentiary hearing, which primarily related to the defendant's caregiver status for his two patients. He also presented a physician's certifica-

---

the patients with the express purpose of helping them qualify to receive marijuana for medical purposes. See *Redden*, 290 Mich App at 70-71.

[17] In fact, the confidential informant testified at the evidentiary hearing that he received the certification for his registry identification card by speaking with a doctor—or someone who claimed to be a doctor—over the phone. He spoke with the individual for less than 10 minutes. The confidential informant could not remember the name of the certifying doctor, and testified that he had never seen the doctor before, nor had he seen the doctor since. Whatever sort of relationship existed between the confidential informant and the certifying physician, it was certainly not a bona fide physician-patient relationship as required by the MMMA. In short, the confidential informant possessed a state-issued registry identification card—and yet did not have the bona fide relationship with his physician required for the § 8 affirmative defense. There is no plainer illustration of why mere possession of a registry identification card does not satisfy defendant's evidentiary burden under § 8(a)(1).

tion for his own use of marijuana for medical purposes. Neither that certification, nor any other evidence submitted by defendant, indicates (1) how often defendant saw his doctor, (2) what kinds of evaluations the doctor performed, or (3) when he began seeing his doctor.

In addition, the testimony of his two qualifying patients does not demonstrate the existence of a bona fide relationship between the patients and their physicians. One of the patients testified that he saw his certifying physician one time, for an hour. The other saw his certifying physician twice. This evidence does not demonstrate a " 'pre-existing and ongoing relationship' " between patient and physician. See *Kolanek*, 491 Mich at 396 n 30 (citation omitted).

Accordingly, we hold that mere possession of a patient identification card, a caregiver's card, or both does not satisfy § 8(a)(1). Further, we hold that the testimony of defendant's patients did not demonstrate a bona fide physician-patient relationship. Therefore, the trial court was correct to rule that defendant did not present valid evidence with respect to the first element of the § 8 affirmative defense.

2. SECTION 8(a)(2): NO MORE MARIJUANA THAN "REASONABLY NECESSARY"

To satisfy § 8(a)(2), a defendant must present evidence that

> [t]he patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition. [MCL 333.26428(a)(2).]

Accordingly, this element contains two components: (1) possession and (2) knowledge of what amount of marijuana is "reasonably necessary" for the patient's treatment.

Defendant notes that the amount of marijuana seized from his home is less than that permitted to him by § 4(b). Though he admits that this fact alone is not enough to satisfy the "reasonably necessary" standard of § 8(a)(2), he suggests that it be given "substantial weight" in our determination.

Defendant's approach misconstrues the law and ignores common sense. Our Supreme Court has strongly suggested that §§ 4 and 8, and the mandates found in each, are to be kept separate. See *Kolanek*, 491 Mich at 397-399. They are different sections and address different standards.[18] *Id*. This Court has also noted that mixing of the standards set forth in §§ 4 and 8 does violence to rules of statutory interpretation: "Indeed, if the intent of the statute were to have the amount in § 4 apply to § 8, the § 4 amount would have been reinserted into § 8(a)(2), instead of the language concerning an amount 'reasonably necessary to ensure . . . uninterrupted availability . . . .' " *Redden*, 290 Mich App at 87, quoting MCL 333.26428(a)(2). Further, importing the quantity limitations from § 4(b) into § 8(a)(2) ignores the treatment-oriented nature of the MMMA and the specific medical requirements of § 8(a). Those requirements are intended for a patient or caregiver who is intimately aware of how much marijuana is required to treat his or her condition, which he or she learns from a doctor with whom the patient or caregiver has an ongoing relationship.

At the evidentiary hearing, defendant's patients testified regarding the amount of marijuana defendant

[18] See also *Bylsma*, 493 Mich at 28.

provided. However, they did not give testimony that defendant knew how much marijuana was necessary to treat their debilitating medical conditions. Defendant himself also failed to provide any evidence of how much marijuana he used, or how often he used it to treat his severe or debilitating medical condition. Finally, defendant obviously had more marijuana than reasonably necessary to treat him and his patients. He possessed enough to sell to the confidential informant—on three different occasions.

Defendant thus failed to satisfy the second element of the § 8 affirmative defense. Accordingly, the trial court properly held that there was no question of fact with regard to this issue.

3. SECTION 8(a)(3): ACTUAL MEDICAL USE OF MARIJUANA

To satisfy § 8(a)(3), a defendant must present evidence that

> [t]he patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition. [MCL 333.26428(a)(3).]

The trial court held that defendant established this element, and pointed to the testimony of defendant's patients as its reason for so holding. The two patients testified that they suffer from chronic pain, which is alleviated through the medical use of marijuana. The trial court found this testimony demonstrated that the marijuana at issue in the case was actually used to alleviate "the [patients'] serious or debilitating medical condition" as required by § 8(a)(3).

The trial court's holding with respect to this element is flawed. Any analysis of § 8(a)(3) needs to incorporate every patient possibly using the marijuana at issue. Here, that group includes four individuals: defendant, his two patients, and the confidential informant. The trial court received testimony on this matter—testimony that it found convincing—from two of these individuals. It also heard from the confidential witness, who stated that he suffered from chronic pain, which he used marijuana to treat. But the trial court did not cite his testimony as a factor in its § 8(a)(3) determination.

In addition, the trial court received no testimony from defendant himself, who is a qualifying patient and caregiver. Defendant did not provide evidence that he personally used the marijuana found in his home to alleviate a "serious or debilitating medical condition," as required by § 8(a)(3). We again note that mere possession of a registry card is insufficient evidence for the purposes of § 8(a)(3). Possession of a registry card indicates that the holder has gone through the required steps set forth in § 6 to obtain a registry card. It does not indicate that any marijuana possessed or manufactured by an individual is *actually* being used to treat or alleviate a debilitating medical condition or its symptoms. In other words, prior state issuance of a registry card does not guarantee that the holder's subsequent behavior will comply with the MMMA. We reverse the trial court's ruling that defendant satisfied the elements of § 8(a)(3).

V. CONCLUSION

Because the prosecution presented evidence to rebut the medical-use presumption under § 4(d), defendant is not entitled to immunity under § 4. Further, because defendant did not present evidence satisfying all three

elements of the § 8 affirmative defense, he is not entitled to have the case dismissed under that section, nor is he permitted to assert that defense at trial. In so holding, we note that the trial court improperly held that defendant satisfied one element of the affirmative defense, § 8(a)(3). Nonetheless, the trial court properly rejected defendant's § 4 and § 8 claims.[19] We therefore reverse the trial court's ruling as to § 8(a)(3), but affirm its order denying defendant's motion to dismiss the case and precluding defendant from asserting a § 8 defense at trial.

SAWYER, J., concurred with SAAD, P.J.

JANSEN, J. (*concurring in the result*). I concur in the result only.

---

[19] "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).

HELTON v BEAMAN

Docket No. 314857. Submitted November 8, 2013, at Detroit. Decided February 4, 2014, at 9:00 a.m. Leave to appeal sought.

Matthew Helton brought an action under the Revocation of Paternity Act, MCL 722.1433 *et seq*., in the Oakland Circuit Court against Lisa M. and Douglas Beaman, seeking to revoke their acknowledgment of parentage of a nine-year-old child whom they had raised from birth. Defendants had been in a relationship for more than 10 years, but separated in the fall of 2002 for a few weeks. During that time, Lisa had a sexual relationship with Helton. Lisa and Douglas then reunited, but did not marry. Lisa gave birth to the child in June 2003. While at the hospital, both defendants signed the affidavit of parentage that established Douglas as the child's father. Defendants allowed Helton to see the child periodically. At Helton's request, defendants agreed to DNA paternity testing in 2003. Helton failed to pay the laboratory for three years, however, so the parties did not receive the DNA results until 2006. The tests established that Helton was the child's biological father. Four years later, when the child was seven years old, Helton sued defendants, seeking an order of filiation and parenting time. While Helton's suit was pending, defendants married and the court subsequently dismissed Helton's suit by stipulation. Helton brought this suit under the newly enacted Revocation of Paternity Act when the child was nine years old. Following a bench trial, the court, Elizabeth M. Pezzetti, J., found that Helton had no parental relationship with the child and, citing MCL 722.1443(4), concluded that it was not in the child's best interests to grant Helton the relief he requested. Helton appealed.

In separate opinions, the Court of Appeals *held*:

The decision of the trial court was affirmed on other grounds.

O'CONNELL, J., observed in the lead opinion that a plaintiff filing an action for revocation of an acknowledgment of parentage must submit an affidavit under MCL 722.1437(2) attesting to at least one of the five factors listed in that statute. While the trial court did not directly rule on the sufficiency of Helton's affidavit, Helton's assertion of a mistake of fact was a sufficient basis to proceed with the revocation action given that the DNA evidence supported his claim

that defendants had mistakenly believed Douglas was the biological father. The Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., confers the status of natural and legal father on a man who executes an acknowledgment of parentage. Once the acknowledgment of parentage is complete, the child has the identical status, rights, and duties of a child born in lawful wedlock, effective from birth. A valid acknowledgment of parentage by one man precludes a court from entering an order of filiation for a different man. Because a child can have only one legal father, the trial court could not grant an order of filiation in favor of Helton unless it first revoked defendants' acknowledgment of parentage. *In re Moiles*, 303 Mich App 59 (2013),* held that a court is not required to make a best-interest determination under MCL 722.1443(4) when revoking an acknowledgment. Because the panel was bound by *Moiles*, Judge O'CONNELL would have held that the trial court mistakenly applied those best-interest factors when it denied Helton's request to revoke the acknowledgment. The error did not require reversal, however, because the Revocation of Paternity Act gives courts the discretion to consider other factors when determining whether to revoke an acknowledgment of parentage, and in the absence of the Legislature's identifying the relevant factors or the legal standard, it was appropriate to use the best-interest factors found in MCL 722.23, part of the Child Custody Act. Two of those factors favored maintaining the custodial environment the child has enjoyed thus far, and Judge O'CONNELL concluded that the trial court had properly denied Helton's requests.

K. F. KELLY, J., concurring, agreed that the trial court properly denied Helton's request to set aside the acknowledgment of parentage but also believed that *Moiles* was wrongly decided because it erroneously held that an acknowledgment of parentage is not a paternity determination and accordingly incorrectly concluded that the best-interest factors of MCL 722.1443(4) do not apply to a case involving the revocation of an acknowledgment. An order revoking an acknowledgment of the parentage of a child born out of wedlock is an order setting aside a paternity determination and, therefore, must be subject to a best-interest analysis under MCL 722.1443(4). Because a trial court may appropriately consider the relevant best-interest factors under the Revocation of Paternity Act when deciding whether to revoke an acknowledgment of parentage, Judge KELLY concurred in the lead opinion's decision to affirm but believed that there was no need to resort to the Child Custody Act for guidance. Concluding that the relevant

---

* *Moiles* was reversed in part and vacated in part after the release of this opinion. See *In re Moiles*, 495 Mich 944 (2014)—REPORTER.

factors listed in MCL 722.1443(4) should be considered in any action brought under the Revocation of Paternity Act, regardless of how paternity was established, Judge KELLY would further have convened a conflict panel under MCR 7.215(J) to resolve the issue. Additionally, contrary to the position of the dissent, the resolution of this case has constitutional implications because the child could be deprived of her fundamental right to maintain a relationship with Beaman, who is her legal father. Finally, Judge KELLY would have concluded that the equitable defense of laches applied in this case and that Helton should have been precluded from bringing this action nine years after the child's birth.

SAWYER, P.J., dissenting, concluded that *Moiles* was correctly decided and would have reversed the trial court's decision and remanded the case for entry of an order revoking the acknowledgment of parentage. The Revocation of Paternity Act addresses three related, but separate situations: (1) setting aside an acknowledgment of paternity, (2) setting aside an order of filiation, and (3) a determination that a presumed father is not the child's father. MCL 722.1437 is the section of the act that concerns setting aside an acknowledgment. Under MCL 722.1437(3), the burden lies with the plaintiff to establish by clear and convincing evidence that the acknowledged father is not the father of the child. Nothing in MCL 722.1437 directs the trial court to consider the best interests of the child when determining whether the plaintiff met that burden of proof. *Moiles* held that a best-interest analysis of the child only applies when the court is faced with setting aside a determination of paternity or a determination that a child is born out of wedlock, not to the decision to set aside an acknowledgment. Because there was no decision by a court here, there was no determination of paternity, only an acknowledgment of it.

Affirmed.

Gentry Nalley PLLC (by *Kevin S. Gentry*) for plaintiff.

Arnold L. Weiner for defendants.

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

O'CONNELL, J. In this action brought under the Revocation of Paternity Act, MCL 722.1431 *et seq.*, plaintiff seeks to revoke defendants' acknowledgment of parentage of a nine-year-old child whom defendants have raised from birth. After a bench trial, the circuit court denied

plaintiff's request and also denied plaintiff's requests for an order of filiation and parenting time. Plaintiff now appeals by right.

We conclude that the circuit court reached the correct result, albeit for incorrect reasons. "This Court ordinarily affirms a trial court's decision if it reached the right result, even for the wrong reasons." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). We affirm on grounds other than those relied on by the circuit court.

I. FACTS AND PROCEDURAL HISTORY

Defendants, Lisa and Douglas Beaman, have been in a relationship for more than 10 years. In the fall of 2002, they separated for a few weeks. During those weeks, Lisa had a brief sexual relationship with plaintiff, Matthew Helton. Lisa and Douglas then reunited, but did not marry. In June 2003, Lisa gave birth to the child who is the subject of this action. Douglas accompanied Lisa to the hospital for the child's birth. While at the hospital, both defendants signed an affidavit of parentage that established Douglas as the child's father.[1] The child's birth certificate identifies both defendants as the child's parents.

---

[1] This Court could not locate the affidavit of parentage in the electronic record. For purposes of this opinion, the Court has assumed that the affidavit was duly signed and notarized and was properly executed and filed in keeping with the requirements §§ 3 and 5 of the Acknowledgment of Parentage Act, MCL 722.1003 and 722.1005. To be consistent with the terms used in the Acknowledgment of Parentage Act and the Michigan Department of Community Health forms, we refer to the document that defendants signed in the hospital as the "affidavit of parentage" and to the legal record on file with the Michigan Office of the State Registrar as the "acknowledgment of parentage" See Department of Community Health, Affidavit of Parentage <http://www.michigan.gov/documents/Parentage_10872_7.pdf> (accessed November 19, 2013) [http://perma.cc/3YMG-BPMK]; MCL 722.1003 and 722.1005.

Defendants began raising the child as part of their family, along with three other children. When the child was an infant, defendants allowed Helton to see the child periodically. When the child was approximately two months old, Helton asked to have DNA paternity testing conducted for the child. Defendants agreed to allow the testing, which was performed in 2003. Defendants opted to halt Helton's interaction with the child until he obtained the DNA results.

Although Helton planned to pay for the DNA testing, he failed to make full payment to the DNA laboratory for three years. Because of Helton's delay in payment, the parties did not receive the DNA results until 2006. The results established that Helton is the child's biological father. After receiving the DNA results, Helton visited the child a few times. Helton's visits then ceased. There was conflicting testimony at trial about whether Helton voluntarily stopped visiting the child or defendants decided against allowing further visits.

Four years after receiving the DNA results, when the child was seven years old, Helton brought suit against defendants seeking an order of filiation and parenting time with the child. By this time, the child had not visited with Helton for several years. While Helton's suit was pending, defendants married. The circuit court subsequently dismissed Helton's suit by stipulation.[2]

When the child was nine years old, Helton brought suit against defendants under §§ 7 and 13 of the newly enacted Revocation of Paternity Act, MCL 722.1437 and 722.1443. Helton submitted the DNA results to the circuit court and moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). The circuit court found that although the DNA results

[2] Because of Helton's delay in challenging paternity, I agree with Judge KELLY that the equitable defense of laches applies in this case.

proved that Helton was the child's biological father, the DNA results standing alone were insufficient to establish by clear and convincing evidence that defendants' acknowledgment of parentage should be set aside.

The circuit court later held a bench trial and then issued an opinion and order. In the opinion, the court stated that it had weighed the credibility of the parties and that it found Lisa's testimony more credible than Helton's testimony with regard to Helton's failure to continue a relationship with the child. The court specifically found that Helton had no parental relationship with the child. The court concluded that the evidence established that "it is not in [the child's] best interest to grant the relief requested by Plaintiff." Citing MCL 722.1443(4), the court denied Helton's request to revoke the acknowledgment of parentage. The court also denied Helton's requests for an order of filiation and parenting time.

II. STANDARD OF REVIEW

In an action to set aside an acknowledgment of parentage, the circuit court must make factual findings concerning the sufficiency of the plaintiff's supporting affidavit. See MCL 722.1437(3); see also *In re Moiles*, 303 Mich App 59, 66-67; 840 NW2d 790 (2013), lv pending.* If the plaintiff's affidavit is sufficient, the circuit court must then determine whether to revoke the acknowledgment of parentage. See MCL 722.1437(3) and 722.1443(5).

We review for clear error the circuit court's factual findings on the sufficiency of the plaintiff's affidavit; we also review for clear error the circuit court's determi-

* *Moiles* was reversed in part and vacated in part after the release of this opinion. See *In re Moiles*, 495 Mich 944 (2014)—REPORTER.

nation on the revocation of the acknowledgment of parentage. See *Moiles*, 303 Mich App at 66.[3] To the extent that the circuit court made conclusions of law, those conclusions are reviewed de novo. *Id*.

III. ANALYSIS OF THE CIRCUIT COURT'S ORDER

A. SUFFICIENCY OF HELTON'S AFFIDAVIT[4]

A plaintiff filing an action for revocation of an acknowledgment of parentage must submit an affidavit attesting to the basis for the revocation action. MCL 722.1437(2). The plaintiff must state facts that constitute at least one of the five factors listed in Subsection (2) of MCL 722.1437:

> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment. [MCL 722.1437(2).]

In turn, Subsection (3) of the same section requires the circuit court to make a determination of the sufficiency of the plaintiff's affidavit before ruling on the revocation request:

---

[3] The *Moiles* case did not directly present the issue of the standard of review for a circuit court's determination on revocation. *Moiles*, 303 Mich App at 65-66. However, it appears from the *Moiles* decision that the clear-error standard applies to the determination. *Id*. at 66.

[4] The parties on appeal do not address the sufficiency of Helton's affidavit. We address the affidavit because a determination of the sufficiency of the affidavit is a requisite step in the analysis prescribed by MCL 722.1437. See *Moiles*, 303 Mich App at 67.

> *If the court in an action for revocation under this section finds that an affidavit under subsection (2) is sufficient*, the court shall order blood or tissue typing or DNA identification profiling as required under [MCL 722.1443(5)]. The person filing the action has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child. [MCL 722.1437(3) (emphasis added).]

In this case, Helton's affidavit listed three grounds for revocation: mistake of fact, misconduct, and fraud. Specifically, Helton attested that "[t]he DNA test report demonstrates that there was a mistake of fact, in that [Douglas] is not the Father." Helton further alleged that defendants engaged in misconduct or fraud by executing the acknowledgment of parentage. Helton attested that he had sexual relations with Lisa in September 2002 and that Lisa knew he might be the father of the child born in June 2003. Helton went on to attest that Lisa "induced" Douglas to execute an acknowledgment of parentage.

The circuit court did not directly rule on the sufficiency of Helton's affidavit.[5] After hearing the trial testimony, the circuit court implicitly rejected Helton's assertions of misconduct and fraud. The court found that when the child was born, both defendants believed that Douglas was the child's biological father. Although Helton disputed defendants' testimony regarding their belief that Douglas was the biological father, we defer to the circuit court's credibility determinations. MCR 2.613(C); *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). Given that defendants believed Douglas to be the child's biological father at the time they signed the affidavit of parentage, Helton's

[5] At the time the circuit court denied Helton's summary disposition motion, Helton had not yet submitted the affidavit. Helton submitted the affidavit in an amended complaint.

assertions of misconduct and fraud are insufficient to support his action for revocation.[6]

In contrast, Helton's assertion of mistake of fact is a sufficient basis to proceed with the revocation action. The DNA evidence supports Helton's attestation that he is the child's biological father, and the trial testimony indicates that defendants mistakenly believed that Douglas was the child's biological father. When a defendant's decision to sign an affidavit of parentage was based in part on a mistaken belief that he is the child's biological father, that mistaken belief constitutes a mistake of fact sufficient to proceed with a revocation action. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189-190; 740 NW2d 678 (2007) (interpreting MCL 722.1011(2), now repealed and replaced by MCL 722.1437(2)). Accordingly, Helton's affidavit in this case was sufficient to allow the circuit court to proceed to determine whether to revoke the acknowledgment of parentage.

B. STANDARDS FOR REVOCATION UNDER THE REVOCATION OF PATERNITY ACT

1. THE ACKNOWLEDGMENT OF PARENTAGE ACT

The Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., confers the status of natural and legal father upon a man who executes an affidavit of parentage. *Sinicropi v Mazurek*, 273 Mich App 149, 152; 729

[6] We need not consider whether Helton's assertions of misconduct and fraud would be sufficient if the evidence demonstrated that defendants knew or had reason to know that Douglas was not the biological father at the time they signed the affidavit. Compare *Moiles*, 303 Mich App at 72 (affidavit of parentage attests to belief that male signatory is "natural father") with *Moiles*, 303 Mich App at 79 (WHITBECK, P.J., dissenting in part) (affidavit of parentage does not include attestation that male signator is "biological father.").

NW2d 256 (2006). The affidavit of parentage provides notice to the male signatory that he has the responsibility to support the child. MCL 722.1007(f). In addition, a valid acknowledgment of parentage may serve as the basis for child support, custody, and parenting time. MCL 722.1004. Once the acknowledgment of parentage is complete, the child has "the identical status, rights, and duties of a child born in lawful wedlock effective from birth." *Id*.

A man who executes an acknowledgment of parentage is known for legal purposes as the "acknowledged father." MCL 722.1433(1). In contrast, a man who obtains an order of filiation is known for legal purposes as an "affiliated father." MCL 722.1433(2). The existence of a valid acknowledgment of parentage by one man precludes a court from entering an order of filiation for a different man. *Sinicropi*, 273 Mich App at 164-165. In other words, a child may have only one legal father. *Id*. at 164. As a result, the circuit court in this case could not grant an order of filiation in favor of Helton unless the court first revoked defendants' acknowledgment of parentage.

2. BEST-INTEREST FACTORS IN § 13(4) OF THE REVOCATION OF PATERNITY ACT

In *Moiles*, 303 Mich App at 76, this Court held that a circuit court is not required to make a best-interest determination under MCL 722.1443(4) when revoking an acknowledgment.[7] Because we are bound by *Moiles*, we conclude that the circuit court in this case mistakenly

[7] MCL 722.1443(4) reads:

> A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best

applied the best-interest factors in MCL 722.1443(4) when it denied Helton's request to revoke the acknowledgment of parentage.[8]

3. APPLICABLE STANDARDS UNDER THE REVOCATION OF PATERNITY ACT

Given that the circuit court in this case mistakenly applied the best-interest factors in the Revocation of Paternity Act, MCL 722.1443(4), we must determine whether the error requires reversal of the circuit court's decision. We first consider the controlling sections of the act.

---

interests of the child. The court shall state its reasons for refusing to enter an order on the record. The court may consider the following factors:

(a) Whether the presumed father is estopped from denying parentage because of his conduct.

(b) The length of time the presumed father was on notice that he might not be the child's father.

(c) The facts surrounding the presumed father's discovery that he might not be the child's father.

(d) The nature of the relationship between the child and the presumed or alleged father.

(e) The age of the child.

(f) The harm that may result to the child.

(g) Other factors that may affect the equities arising from the disruption of the father-child relationship.

(h) Any other factor that the court determines appropriate to consider.

[8] But for *Moiles*, I would agree with Judge KELLY that "[a]n order revoking an acknowledgment of parentage, is plainly an order 'setting aside a paternity determination' and, therefore, subject to a best-interest analysis under MCL 722.1443(4)." *Post* at 114-115. However, because the legal standards for child custody cases can be applied in this case, I see no immediate need to call for a conflict panel. An appeal in our Supreme Court will produce a more efficient resolution of these legal issues.

Nothing in the act indicates that DNA results, standing alone, are sufficient to require revocation of an acknowledgment of parentage. In § 7(3) of the act, the Legislature mandated that a circuit court order DNA testing if the court determines that the plaintiff's supporting affidavit fulfills one of the requisite factors for proceeding with a revocation action. MCL 722.1437(3). In the same subsection, the Legislature mandated that the plaintiff in a revocation action "has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child." *Id*. Section 7 then addresses the administrative process for revoking an acknowledgment of parentage and requires the clerk of court to forward a revocation order to the State Registrar of the Department of Community Health. MCL 722.1437(4).

Section 7 is silent with regard to the legal standard for a circuit court to apply when deciding whether to revoke an acknowledgment of parentage. "When a statute expressly mentions one thing, it implies the exclusion of other similar things." *Moiles*, 303 Mich App at 75. If the Legislature had intended to decree that a DNA test indicating that the plaintiff is the father will result in an automatic revocation of an acknowledgment of parentage, the Legislature could have made that decree specific in the statute.[9] Absent any indica-

[9] An automatic revocation of parentage upon receipt of DNA results indicating that the plaintiff is the father would be contrary to the history and purpose of Michigan's laws, which require consideration of children's best interests before ordering unwarranted and traumatic disruptions in children's lives. See, e.g., MCL 712A.19b(5); MCL 722.23. Our Legislature adhered to this history and purpose in the Revocation of Paternity Act. For example, § 13(12) of the act allows circuit courts to extend, under certain circumstances, the limitations period for filing an action. MCL 722.1443(12). Once a circuit court extends the time for filing an action, the statute imposes a burden on the party filing the request for the extension to prove "by clear and convincing evidence, that granting relief

tion that a revocation order is automatic when a plaintiff submits such DNA results, we decline to interpret the statute as establishing an unsupported legal standard.

Section 13(5) of the act confirms that the legal standards for revocation of an acknowledgment of parentage require consideration of factors other than DNA results. MCL 722.1443(5). That statute reads:

> The court shall order the parties to an action or motion under this act to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination under this act. Blood or tissue typing or DNA identification profiling shall be conducted in accordance with section 6 of the paternity act, 1956 PA 205, MCL 722.716. *The results of blood or tissue typing or DNA identification profiling are not binding on a court in making a determination under this act.* [*Id*. (emphasis added); see also *Moiles*, 303 Mich App at 67.]

The Legislature's decision that DNA results are not binding on a court making a revocation determination is consistent with the predecessor revocation statute. Before the enactment of the Revocation of Paternity Act in 2012, revocation claims were governed by § 11 of the Acknowledgment of Parentage Act, MCL 722.1011 (repealed by 2012 PA 161). When enacting the new Revocation of Paternity Act, the Legislature adopted much of the language of the predecessor statute with regard to claims for revocation of acknowledgment of parentage. Compare former MCL 722.1011 with MCL 722.1437.

---

under this act will not be against *the best interests of the child considering the equities of the case*." MCL 722.1443(13) (emphasis added).

To impose an automatic revocation would not only be contrary to the language in the Revocation of Paternity Act, but would allow the absurdity of revoking the parental status of an acknowledged father in favor of, for example, a long-absent biological father who has a history of crimes against children.

The Legislature did not, however, adopt the predecessor statute's legal standard for revocation, which stated as follows: "The party filing the claim for revocation has the burden of proving, by clear and convincing evidence, that the man is not the father and that, *considering the equities of the case, revocation of the acknowledgment is proper*." MCL 722.1011(3), as enacted by 1996 PA 305 (emphasis added).

When the Legislature repealed the predecessor equitable legal standard for revocation claims, it replaced the equitable standard with the statutory declaration that DNA results are not binding on a court making a determination under the new act. MCL 722.1443(5). That statutory declaration gives circuit courts discretion to consider other factors when determining whether to revoke an acknowledgment of parentage. Because the Legislature did not identify the relevant factors or the legal standard that governs the circuit court's discretion, we consider analogous caselaw to determine the applicable legal standard for assessing the circuit court's decision in this case.

The legal standards in cases involving a change in child custody are well established, and our Courts have applied those standards to resolve issues similar to the issue presented in this case. The change-in-custody standards are designed to preserve stability for the child and protect against unwarranted and disruptive changes in the child's life. See *In re AP*, 283 Mich App 574, 592; 770 NW2d 403 (2009). Given that the change-in-custody standards are suited to the particular facts in this case, we assess the circuit court's decision on the basis of those factors.

This Court explained the legal standards that control a change-in-custody decision in *AP*, 283 Mich App at 600-602:

[T]he party seeking a change of custody must first establish proper cause or change of circumstances by a preponderance of evidence. The movant must make this requisite showing before the trial court determines the burden of persuasion to be applied and conducts the evidentiary hearing.

In determining the applicable burden of persuasion, the court must first determine whom the custody dispute is between. If the dispute is between the parents, the presumption in favor of the established custodial environment applies. MCL 722.27(1)(c) embodies this presumption and provides:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

As a threshold matter to determining which party will carry the burden of rebutting the presumption by clear and convincing evidence, the court is required to look into the circumstances of the case and determine whether an established custodial environment exists. A child's 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." MCL 722.27(1)(c). In making this determination, a court must also consider the "age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship . . . ." *Id*. If an established custodial environment exists with one parent and not the other, then the noncustodial parent bears the burden of persuasion and must show by clear and convincing evidence that a change in the custodial environment is in the child's best interests. We note that in circumstances in which an established custodial environment exists with both parents, the party seeking to modify the custody arrangement bears the burden of rebutting the presumption in favor of the custodial environment established with the other parent. [Citations omitted.]

Certain aspects of these legal standards require modification for application in this case. First, the Revocation of Paternity Act indicates that a mistake of fact is a change in circumstance that warrants consideration of a claim for revocation. MCL 722.1437(2)(a). In this case, Helton has established a mistake of fact regarding the biological paternity of the child. As a result, we find for purposes of this case that a change in circumstance exists. Second, with regard to the applicable burden of persuasion, the Revocation of Paternity Act places Helton (as biological father) and Douglas (as acknowledged father) in equivalent litigation postures. See MCL 722.1437(3). Accordingly, it is appropriate to use the burden of persuasion applicable to disputes between parents, which results in a presumption in favor of maintaining the child's established custodial environment. See *AP*, 283 Mich App at 600-601.

In this case, the child has an established custodial environment with defendants. To alter the established custodial environment, Helton would have to present clear and convincing evidence that a change in the custodial environment is in the child's best interests

under MCL 722.23. In a typical case, we would remand for presentation of evidence on the child's best interests under that statute. In this case, however, the record is sufficient to determine that a change in the established custodial environment would not be in the child's best interest. The statutory best-interest factors to be considered in change of custody cases are

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

Given that defendants have raised the child from birth and that Helton has had little to no meaningful interaction with the child, the record favors defendants on Factor (a) (emotional ties between the parties and the child) and on Factor (d) (the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity). Even if the record were equivocal with regard to the remaining factors, these two best-interest factors plainly favor maintaining the custodial environment the child has enjoyed thus far in life. We therefore conclude that in this case, the circuit court properly denied Holton's action for revocation of parentage.

Affirmed.

K. F. KELLY, J. (*concurring*). I concur that the trial court properly denied plaintiff's request to set aside the acknowledgment of paternity in this case. However, I believe that *In re Moiles*, 303 Mich App 59; 840 NW2d 790 (2013),[1] was wrongly decided.* The *Moiles* Court concluded that "the Legislature expressly linked a 'determination of paternity' to the section 7 of the Paternity Act," MCL 722.717, and that "the Legislature's use of the phrase 'paternity determination' in MCL 722.1443(4) specifically refers to a 'determination of paternity' under MCL 722.717, and the resulting order of filiation." *Id*. at 75. I disagree. An order revoking an acknowledgment of

[1] Application for leave is currently pending.

* *Moiles* was reversed in part and vacated in part after the release of this opinion. See *In re Moiles*, 495 Mich 944 (2014)—REPORTER.

parentage is plainly an order "setting aside a paternity determination" and, therefore, subject to a best-interest analysis under MCL 722.1443(4). Contrary to the holding in *Moiles*, a trial court may appropriately consider the relevant best-interest factors listed in MCL 722.1443(4) under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., when deciding whether to revoke an acknowledgment of parentage. Accordingly, I concur in the lead opinion's conclusion to affirm.

I. THE ACKNOWLEDGMENT OF PARENTAGE ACT

The Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., provides a mechanism for establishing paternity of a child born out of wedlock:

> If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage. [MCL 722.1003(1).]

Further,

> [a]n acknowledgment signed under this act ***establishes paternity***, and the acknowledgment may be the basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act, Act No. 205 of the Public Acts of 1956, being sections 722.711 to 722.730 of the Michigan Compiled Laws. ***The child who is the subject of the acknowledgment shall bear the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth.*** [MCL 722.1004 (emphasis added).]

Notably, the affidavit of parentage that the mother and father signed in this case states that "we sign this

affidavit to ***establish the paternity*** for this child." Department of Community Health Form DCH-0682 (emphasis added).

"It is no wonder that the definition [of 'child born out of wedlock'] is the same in the Acknowledgment of Parentage Act and the Paternity Act because the acts *simply provide different means to the same end*. Under the Paternity Act [MCL 722.711 *et seq*.], a party can seek a judicial determination of paternity; under the Acknowledgment of Parentage Act, a man and a woman can essentially stipulate the man's *paternity*." *Aichele v Hodge*, 259 Mich App 146, 154-155; 673 NW2d 452 (2003) (emphasis added). " '[T]he Acknowledgment of Parentage Act . . . *establishes paternity*, establishes the rights of the child, and supplies a "basis for court ordered child support, custody, or parenting time without further adjudication under the [P]aternity [A]ct . . . ." ' " *Id*. at 153, quoting *Eldred v Ziny*, 246 Mich App 142, 148; 631 NW2d 748 (2001) (second and third alterations in original). Upon the execution of an acknowledgment of parentage, "*paternity* was established, and the child was in a position identical to one in which the child was born or conceived during a marriage." *Sinicropi v Mazurek*, 273 Mich App 149, 158; 729 NW2d 256 (2006). The rights of a biological father are not superior to the rights of a man who acknowledges parentage. *Id*. at 159 n 2.

I fail to see how an acknowledgment of parentage can be anything other than a determination of the paternity of a child born out of wedlock.

II. THE REVOCATION OF PATERNITY ACT

The RPA[2] provides that a trial court may take a

[2] That an acknowledgment of parentage establishes paternity is further supported by the title of this act itself: the Revocation of *Paternity* Act.

number of actions when presented with a properly filed complaint under the statute. It may

> (a) Revoke an acknowledgment of parentage.
>
> (b) Set aside an order of filiation or a paternity order.
>
> (c) Determine that a child was born out of wedlock.
>
> (d) Make a determination of paternity and enter an order of filiation as provided for under section 7 of the paternity act, 1956 PA 205, MCL 722.717. [MCL 722.1443(2).]

The act also sets forth various definitions of "father":

> (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. [MCL 722.1433(1) to (4).]

With the exception of "alleged father," the Legislature did not distinguish these categories of father because of some hierarchy or predominant right of one over the other. Rather, both an "acknowledged father" and "affiliated father" have established paternity in alternative ways. And a "presumed father" enjoys the presumption that a child born during his marriage to the mother is his. All three categories of father provide a basis for court-ordered child support, custody, or parenting time without further proceedings under the Paternity Act.

The Legislature then set forth the various methods by which each of these fathers' paternity may be revoked:

(1) Section 7, MCL 722.1437, governs an action to set aside an acknowledgment of parentage.

(2) Section 9, MCL 722.1439, governs an action to set aside an order of filiation.

(3) Section 11, MCL 722.1441, governs an action to determine that a presumed father is not a child's father.

Again, these various methods are not based on a hierarchy of fatherhood, but are based logically on the path taken to establish paternity. For purposes of this case, MCL 722.1437 provides, in relevant part:

> (1) The mother, the acknowledged father, an alleged father, or a prosecuting attorney may file an action for revocation of an acknowledgment of parentage. An action under this section shall be filed within 3 years after the child's birth or within 1 year after the date that the acknowledgment of parentage was signed, whichever is later. The requirement that an action be filed within 3 years after the child's birth or within 1 year after the date the acknowledgment is signed does not apply to an action filed on or before 1 year after the effective date of this act.
>
> (2) An action for revocation under this section shall be supported by an affidavit signed by the person filing the action that states facts that constitute 1 of the following:
>
> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment.

> (3) If the court in an action for revocation under this section finds that an affidavit under subsection (2) is sufficient, the court shall order blood or tissue typing or DNA identification profiling as required under [MCL 722.1443(5)]. The person filing the action has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child.

I agree with the lead opinion that the trial court's first step should have been a determination of the sufficiency of plaintiff's affidavit. Plaintiff brought suit to revoke defendants' acknowledgment of parentage on the basis of a mistake of fact. Douglas Beaman testified that, at the time he signed the affidavit of parentage, he believed that the child was his. "Regardless of whether [the man] intended to be the father when he signed the affidavit of parentage, and whether he intended to remain the legal father after he learned that he was not the child's biological father, the evidence established that [his] decision to acknowledge paternity in this case was based, at least in part, on a mistaken belief that he was, in fact, the biological father." *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 190; 740 NW2d 678 (2007).

Because plaintiff's affidavit in support of revocation was sufficient, the trial court was then required to order DNA testing. This had already been done, and the parties do not dispute that plaintiff is the child's biological father. However, MCL 722.1443(5) specifically provides that "[t]he results of blood or tissue typing or DNA identification profiling are not binding on a court in making a determination under this act."

The question becomes what discretion the trial court has to refuse to revoke the acknowledgment of parentage. In cases involving children, the focus is always on their best interests. For example, the Child Custody Act (CCA), MCL 722.21 *et seq*., provides that "[i]f a child custody dispute is between the parents, between agen-

cies, or between third persons, the best interests of the child control." MCL 722.25(1). "[T]he statutory 'best interests' factors [in MCL 722.23] control whenever a court enters an order affecting child custody." *Harvey v Harvey*, 470 Mich 186, 187 n 2; 680 NW2d 835 (2004); *id*. at 194 ("[P]arties cannot stipulate to circumvent the authority of the circuit court in determining the custody of children. In making its determination, the court must consider the best interests of the children."). Similarly, in the context of termination-of-parental-rights cases brought under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq*., "the history of Michigan's termination-of-parental-rights statute indicates that the focus at the best-interest stage has always been on the child, not the parent," and "to determine whether termination is in the child's best interests, the focus still remains on the child." *In re Moss*, 301 Mich App 76, 87-88; 836 NW2d 182 (2013). When considering whether to terminate parental rights "it is perfectly appropriate for [the] court to refer directly to pertinent best interests factors in the Child Custody Act . . . ." *In re JS Minors*, 231 Mich App 92, 102-103; 585 NW2d 326 (1998), overruled on other grounds by *In re Trejo Minors*, 462 Mich 341 (2000).[3]

The RPA allows a court to consider a child's best interests before entering a judgment revoking paternity. MCL 722.1443(4) provides:

> A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. The court

[3] This case is not unlike a termination-of-parental-rights case. After signing the acknowledgment of paternity, Douglas Beaman enjoyed the status of legal father. *Aichele*, 259 Mich App at 153. By revoking the acknowledgment, the trial court would effectively have terminated Beaman's parental rights.

shall state its reasons for refusing to enter an order on the record. The court may consider the following factors:[4]

* * *

(d) The nature of the relationship between the child and the presumed or alleged father.

(e) The age of the child.

(f) The harm that may result to the child.

(g) Other factors that may affect the equities arising from the disruption of the father-child relationship.

(h) Any other factor that the court determines appropriate to consider.

However, the Court in *Moiles* wrongly concluded that these best-interest factors were inapplicable to a case involving revocation of an acknowledgment of parentage. The Court explained its rationale:

Moiles contends that an acknowledgment of parentage *is* a paternity determination because it establishes a child's paternity. We disagree, and conclude that the trial court correctly determined that an acknowledgment of parentage is not a paternity determination as that term is used in the statute, and therefore, that MCL 722.1443(4) did not apply. An acknowledgment of parentage does establish the paternity of a child born out of wedlock and does establish the man as a child's natural and legal father. However, in MCL 722.1443(2)(d), the Legislature expressly linked a "determination of paternity" to § 7 of the Paternity Act [MCL 722.717]. We conclude that the Legislature's use of the phrase "paternity determination" in MCL 722.1443(4) specifically refers to a "determination of paternity" under MCL 722.717, and the resulting order of filiation.

When a statute expressly mentions one thing, it implies the exclusion of other similar things. In this case, while

[4] Factors (a) through (c) are inapplicable to this case because those factors deal only with "presumed fathers."

> MCL 722.1443 generally applies to any of the actions listed in subsection (2), including the revocation of an acknowledgment of parentage, subsection (4) specifically addresses only paternity determinations and determinations that a child is born out of wedlock. These are only two of the four types of actions that the trial court may take under the Revocation of Paternity Act. Had the Legislature wanted the trial court to make a determination of the child's best interests relative to revoking an acknowledgment of parentage, it could have included language to that effect. But it did not.
>
> Therefore, we conclude that MCL 722.1443(4) did not require the trial court to make a best-interest determination before revoking Moiles's acknowledgment of parentage. [*Moiles*, 303 Mich App at 75-76 (citations omitted).]

However, as I have previously indicated, an acknowledgment of parentage establishes paternity. Adhering to the principles of statutory construction, I would hold that "setting aside a paternity determination" includes the situation at bar in which an alleged father seeks to revoke an acknowledgment of parentage. *Moiles* precludes a consideration of the best-interest factors in MCL 722.1443(4) by holding that an acknowledgment of parentage is not a paternity determination. Because I strongly disagree with that misstatement of law, I believe that a conflict panel should be convened to resolve the issue. MCR 7.215(J).[5]

The *Moiles* holding that precludes consideration of the best-interest factors in MCL 722.1443(4) leads to the conundrum we have before us. If a trial court cannot consider those factors, but DNA evidence is not "binding on a court in making a determination" on whether to revoke an acknowledgment of parentage,

[5] The lead opinion appears to acknowledge that *Moiles* may be flawed. *Ante* at 107 n 8.

MCL 722.1443(5), then what can the court consider? What discretion may it exercise?

The lead opinion writes:

> When the Legislature repealed the predecessor equitable legal standard for revocation claims, it replaced the equitable standard with the statutory declaration that DNA results are not binding on a court making a determination under the new act. MCL 722.1443(5). That statutory declaration gives circuit courts discretion to consider other factors when determining whether to revoke an acknowledgment of parentage. Because the Legislature did not identify the relevant factors or the legal standard that governs the circuit court's discretion, we consider analogous caselaw to determine the applicable legal standard for assessing the circuit court's decision in this case. [*Ante* at 110.]

In an attempt to provide trial courts with some guidance, the lead opinion invokes the process under the CCA for a change in custody.

I agree with the lead opinion that MCL 722.1443(5), which provides that DNA test results are not binding on a trial court, indicates the Legislature's intent to provide trial courts discretion in these cases. However, I also strongly believe that the Legislature, by including the best-interest factors in MCL 722.1443(4), provided the necessary framework for trial courts to exercise that discretion. I therefore disagree with the lead opinion's conclusion that "the Legislature did not identify the relevant factors or the legal standard that governs the circuit court's discretion . . . ." *Ante* at 110. On the contrary, I believe that the Legislature has left no guess work under the RPA and that there is no need to resort to the CCA for guidance.

As the lead opinion observes, before the RPA was enacted, a section of the Acknowledgment of Parentage Act addressed the revocation of an acknowledgment:

> If the court finds that the affidavit is sufficient, the court *may* order blood or genetic tests at the expense of the claimant, or may take other action the court considers appropriate. The party filing the claim for revocation has the burden of proving, by clear and convincing evidence, that the man is not the father and that, *considering the equities of the case*, revocation of the acknowledgment is proper. [MCL 722.1011(3), as enacted by 1996 PA 305, repealed by 2012 PA 161 (emphasis added).]

Now the RPA controls such a determination and, rather than a vague reference to the "equities of the case," the RPA lays out specific interests for the trial court to consider in MCL 722.1443(4). I would specifically note that Factor (g) eliminates the vagueness of the previous statute by directing a trial court to specifically consider "[o]ther factors that may affect the equities arising from the disruption of the father-child relationship." MCL 722.1443(4)(g). I believe that the relevant factors listed in MCL 722.1443(4) are to be considered in any action brought under the RPA regardless of how paternity was established. Thus, while I agree with the lead opinion that a child's best interests must be considered, I believe that the best-interest factors set forth in the RPA, and not those found in the CCA, control.

I applaud the lead opinion's attempt to wade through this issue. It is clear that we agree that a child's best interests must inform a trial court's decision whether to revoke paternity. But *Moiles* precludes trial courts from considering the best-interest factors set forth in MCL 722.1443(4), leaving courts to guess what the proper framework should be. Under those circumstances, the lead opinion's reference to the CCA is not wholly illogical. However, *Moiles* is wrong and we should say as much. We ought to convene a conflict panel rather than defer to the flawed analysis in *Moiles*.

III. CONSTITUTIONAL CONSIDERATIONS

While the dissent takes comfort in the fact that this is *only* a revocation-of-paternity case and that a trial court would eventually apply the best-interest factors under the CCA if plaintiff pursued custody further, that position overlooks the fact that the child in this case will be deprived of her fundamental right to maintain a relationship with Beaman, who is her legal father.

" '[A] child's right to family integrity is concomitant to that of a parent[.]' " *O'Donnell v Brown*, 335 F Supp 2d 787, 810 (WD Mich, 2004), quoting *Wooley v Baton Rouge*, 211 F3d 913, 923 (CA 5, 2000). Parents not only have the right to the care and custody of their children, but children also enjoy "parallel rights to the integrity of their family." *In re Anjoski*, 283 Mich App 41, 56; 770 NW2d 1 (2009). Similarly, a child also has a due process liberty interest in his or her family life. *In re Clausen*, 442 Mich 648, 686; 502 NW2d 649 (1993).

In *Grimes v Van Hook-Williams*, 302 Mich App 521, 537; 839 NW2d 237 (2013), we noted that

> the United States Supreme Court has never determined whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. And even if children do have such a constitutional right, it is almost certainly the right to maintain a filial relationship with their *legal* parents. Under the law as it exists in Michigan today, [the alleged father] is simply not one of the child's legal parents. [Quotation marks and citations omitted.]

In executing the acknowledgment of parentage, Beaman established himself as the child's *legal* father. *Sinicropi*, 273 Mich App at 160. Therefore, the child's constitutional rights are necessarily implicated.

That is not to say that the right to a continued relationship with a legal parent is absolute. However, in directing that trial courts may *not* consider the best-interest factors set forth in MCL 722.1443(4), *Moiles* produced the unintended consequence of categorizing children by affording protection to children whose fathers' paternity is either presumed as a result of marriage or established under the Paternity Act and declining such protection to children whose fathers have established paternity through an acknowledgment of parentage. I believe that the best-interest factors in MCL 722.1443(4) apply in all actions brought under the RPA.

Moreover, the mere fact that a child's custody arrangement may not immediately change upon revocation of paternity does not lessen the *legal* consequence of setting aside paternity. If a trial court sets aside paternity and enters an order recognizing a child's biological father as the child's legal father, the biological father will be entitled to all the rights accorded thereto. It is not enough to view an action under the RPA as a mere prelude to a custody battle. If that were the case, then the best-interest factors in the CCA would ensure that the child would maintain permanence and stability. But there are immediate legal ramifications that result upon revoking paternity. What would happen, for example, if the mother were to die? Assuming Beaman's acknowledgment of parentage is set aside, he would now have to seek custody as a third party and there is no guarantee that he would succeed or even have standing. See MCL 722.26c; *Anjoski*, 283 Mich App 41. The child enjoys a legal relationship with Beaman, and that relationship should not be destroyed absent a finding that it is in the child's best interests, using the best-interest factors in MCL 722.1443(4).

IV. LACHES AS AN EQUITABLE DEFENSE

Finally, I believe that the equitable defense of laches applies in this case and that plaintiff should have been precluded from bringing this action nine years after the child's birth. As such, it provides an additional basis to affirm.

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

"If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches" and may simply "leave[] the parties where it finds them." *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). "This is so because equity will not lend aid to those who are not diligent in protecting their own rights." *Id*.

Plaintiff suspected that he was the child's father from the start of the mother's pregnancy. In fact, plaintiff testified that he, the mother, and Beaman all sat down during the pregnancy to discuss what would

happen in the event that plaintiff was the biological father. Nevertheless, plaintiff failed to file a notice of intent to claim paternity, as is allowed under MCL 710.33(1) ("Before the birth of a child born out of wedlock, a person claiming under oath to be the father of the child may file a verified notice of intent to claim paternity . . . ."). A DNA test was administered in 2003 within two months after the child's birth, but because plaintiff allegedly could not afford the fee, the results were not revealed until three years later in 2006. Plaintiff's first attempt to establish paternity was in 2010 when the child was seven years old. That action was dismissed because defendant and Beaman got married and, consequently, plaintiff was deprived of standing. Thus, from the time before the child was born until she was seven years old, plaintiff took absolutely no action to establish paternity. He sat on his rights, with the resultant prejudice being that the child lived in a familial and custodial environment with her mother and Beaman, *her legal father*, for nine years.

MCL 722.1437(1) provides that an individual bringing an action to revoke an acknowledgment of parentage must do so "within 3 years after the child's birth or within 1 year after the date that the acknowledgment of parentage was signed, whichever is later." However, the Legislature further provided that "[t]he requirement that an action be filed within 3 years after the child's birth or within 1 year after the date the acknowledgment is signed does not apply to an action filed on or before 1 year after the effective date of this act." While plaintiff's action under the RPA was timely, the fact that a party brings a claim within the limitations period does not necessarily defeat a laches defense. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 457; 761 NW2d 846 (2008) ("[L]aches may bar a legal claim even if the statutory period of limitations has not yet expired.").

I do not believe that in passing the RPA the Legislature intended to defeat the common-law defense of laches. In rejecting the idea that the doctrine of avoidable consequences was abrogated by the adoption of comparative negligence, this Court recently explained:

> "The common law remains in force until 'changed, amended or repealed.' " "There is no question that both [our Supreme] Court and the Legislature have the constitutional power to change the common law." However, "[w]e will not lightly presume that the Legislature has abrogated the common law. Nor will we extend a statute by implication to abrogate established rules of common law." Absent "a contrary expression by the Legislature, well-settled common-law principles are not to be abolished by implication . . . ." "Rather, the Legislature should speak in no uncertain terms when it exercises its authority to modify the common law." [*Braverman v Granger*, 303 Mich App 587, 596-597; 844 NW2d 485 (2014) (citations omitted) (alterations in original.]

Plaintiff had the ability to establish paternity during the pregnancy and also in the seven years following the child's birth before defendant married Beaman. I find the delay in doing so inexcusable and that the equitable defense of laches applies.

I agree that the matter should be affirmed, albeit for different reasons.

SAWYER, P.J. (*dissenting*). I respectfully dissent from both Judge O'CONNELL's view in the lead opinion that the trial court properly considered the best-interest factors and Judge KELLY's view in her concurrence that *In re Moiles*, 303 Mich App 59; 840 NW2d 790 (2013), lv pending,* was incorrectly decided. I believe that *Moiles* was correctly decided and would reverse the decision of

* *Moiles* was reversed in part and vacated in part after the release of this opinion. See *In re Moiles*, 495 Mich 944 (2014)—REPORTER.

the trial court and remand with instructions to enter an order revoking the acknowledgment of parentage.

The Revocation of Paternity Act, MCL 722.1431 *et seq.*, addresses three related, but separate, situations: setting aside an acknowledgment of paternity, setting aside an order of filiation, and the determination that a presumed father is not a child's father. Each of these situations is governed by a separate section of the act. MCL 722.1435. Because this case involves setting aside an acknowledgment of parentage, MCL 722.1435(1) directs us to § 7 of the act, MCL 722.1437.

MCL 722.1437(2) provides that an action for revocation of an acknowledgment of parentage may be pursued for a number of reasons, including a mistake of fact. Under Subsection (3), the burden lies with the petitioner to establish by clear and convincing evidence that the acknowledged father is not the father of the child. MCL 722.1437(3). Nothing in MCL 722.1437 directs the trial court to consider the best interests of the child in determining whether the petitioner has met that burden of proof. In the case at bar, not only do defendants stipulate that plaintiff is the biological father of the child, the trial court specifically found that plaintiff had met his burden to establish that fact by clear and convincing evidence. Rather, the trial court declined to enter an order setting aside the acknowledgment of parentage because it was not in the child's best interests.

Moiles presented a similar situation whereby a man who was not the child's biological child, Moiles, had signed an acknowledgment of parentage and, later, an action was filed to revoke that acknowledgment of parentage. Moiles had argued in the trial court, and then on appeal, that the trial court should have considered the best interests of the child before deciding

whether to revoke Moiles's acknowledgment of parentage despite the fact that he was not the biological father of the child. This Court rejected that argument, concluding that the best interests of the child only applies when the trial court is faced with setting aside a determination of paternity or a determination that a child is born out of wedlock, but not to the decision of whether to set aside an acknowledgment of parentage. I agree with the reasoning of the *Moiles* majority.

The reference to the consideration of the best interests of the child is found in MCL 722.1443(4), which reads in part as follows:

> A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interest of the child.

As the *Moiles* majority explained, this provision is inapplicable to the revocation of an acknowledgment of parentage:

> Moiles contends that an acknowledgment of parentage *is* a paternity determination because it establishes a child's paternity. We disagree, and conclude that the trial court correctly determined that an acknowledgment of parentage is not a paternity determination as that term is used in the statute, and therefore, that MCL 722.1443(4) did not apply. An acknowledgment of parentage does establish the paternity of a child born out of wedlock and does establish the man as a child's natural and legal father. However, in MCL 722.1443(2)(d), the Legislature expressly linked a "determination of paternity" to § 7 of the Paternity Act. We conclude that the Legislature's use of the phrase "paternity determination" in MCL 722.1443(4) specifically refers to a "determination of paternity" under MCL 722.717, and the resulting order of filiation.
>
> When a statute expressly mentions one thing, it implies the exclusion of other similar things. In this case, while

> MCL 722.1443 generally applies to any of the actions listed in subsection (2), including the revocation of an acknowledgment of parentage, subsection (4) specifically addresses only paternity determinations and determinations that a child is born out of wedlock. These are only two of the four types of actions that the trial court may take under the Revocation of Paternity Act. Had the Legislature wished the trial court to make a determination of the child's best interests relative to revoking an acknowledgment of parentage, it could have included language to that effect. But it did not. [*Moiles*, 303 Mich App at 75-76 (citations omitted).]

Indeed, the first definition of "determination" in *Black's Law Dictionary* (5th ed) is "[t]he decision of a court or administrative agency."

Both of my colleagues acknowledge that *Moiles* is controlling here. Judge KELLY disagrees with *Moiles* and would invoke a conflict panel to overrule it. She reaches this conclusion on the basis of the argument that, because an acknowledgment of parentage establishes paternity, it must be a determination of paternity. For the reasons discussed above, I do not agree. Because there was no decision by a court, there was no determination of paternity; rather, there was merely an acknowledgment of such. My colleague's reasoning overlooks the fact that paternity can be established by means other than a determination.

Turning to the lead opinion, which, while acknowledging that *Moiles* is controlling, reaches the conclusion that despite the decision in *Moiles*, the trial court can apply the best-interest factors, albeit for a different reason. The lead opinion simultaneously concludes that the trial court erred in applying the best-interest factors and that this case must be resolved by considering the best-interest factors. This essentially turns this case into a child custody dispute rather than a revocation of paternity dispute.

First, the lead opinion notes that, under MCL 722.1443(5), the results of DNA testing are not binding on the trial court. Then the learned judge's opinion takes a logical leap to the conclusion that this must somehow create discretion in the trial court to consider other factors in determining whether to revoke an acknowledgment of parentage. I disagree. I think the clearer and more obvious observation is that the Legislature merely did not want the trial court's factual determination to be limited by the DNA test results. That is, it allows for the possibility that the trial court, in making the factual determination regarding who is the biological father of the child, may be presented with a situation in which the DNA test results do not provide clear and convincing evidence that the acknowledged father is not the father of the child and, therefore, should not be deemed controlling.[1]

The shortcomings of the lead opinion are underscored by two additional factors. First, as the lead opinion itself points out, the now-repealed provision in the Acknowledgment of Parentage Act that dealt with revocation of an acknowledgment of parentage, former MCL 722.1011, included a provision that a party seeking to revoke an acknowledgment of parentage[2] "has

[1] For example, the trial court may have reason to believe that the test results are not accurate. Or perhaps the difference in the results between the two potential fathers is sufficiently small that the trial court is unwilling to merely determine paternity on the basis of whose results gave the slightly higher percentage. Or, for that matter, the results may suggest that neither man is the actual father, in which case the DNA results should not compel the court to rule in favor of the man who has the higher, though still small, likelihood of being the father.

[2] It is worth noting that under former MCL 722.1011(1), a man claiming to be the biological father of the child could not file the action to revoke the acknowledgment of parentage. It was to be filed by the mother, the man who signed the acknowledgment, or the prosecuting attorney.

the burden of proving, by clear and convincing evidence, that the man is not the father and that, *considering the equities of the case*, revocation of the acknowledgment is proper." MCL 722.1011(3), as enacted by 1996 PA 305, repealed by 2012 PA 161 (emphasis added). The lead opinion argues that the Legislature replaced this "equitable standard" with "the statutory declaration that DNA results are not binding on a court making a determination under the new act." *Ante* at 110. This is a tenuous argument at best. The provision of the new act that most closely relates to former MCL 722.1011(3) is MCL 722.1437(3), which establishes the clear-and-convincing-evidence burden (without the reference to the equities of the case), rather than MCL 722.1443(5), which establishes the principle that DNA results are not binding on the trial court. Moreover, the lead opinion ignores the principle of statutory construction that "when a statute is repealed and another statute is enacted that covers the same subject area, a change in wording is presumed to reflect a legislative intent to change the statute's meaning." *People v Henderson*, 282 Mich App 307, 328; 765 NW2d 619 (2009). Thus, the proper interpretation to be given to the Legislature's omission of the phrase "considering the equities of the case" from the new statute is that the Legislature no longer wished for the equities to be considered.

And this leads to the second problem with the lead opinion, which is that the statute does not, as the opinion acknowledges, "identify the relevant factors or the legal standard that governs the circuit court's discretion" in determining whether to revoke an acknowledgment of parentage. *Ante* at 110. Rather, the lead opinion goes on to supply that standard by looking to the child custody best-interest factors, with nothing in the Revocation of Paternity Act to supply a basis for those standards.

In sum, we are presented with two possible statutory interpretations. The first is fairly direct and simple: in the context of revoking an acknowledgment of parentage, the Legislature decided to remove consideration of the equities of the case and leave it to a factual determination of the trial court, placing a burden on the party seeking the revocation to establish by clear and convincing evidence that the acknowledged father is not, in fact, the actual father of the child, with the recognition that the trial court, in making its factual findings, is not compelled to accept the DNA results in every case.

The second interpretation is to follow the lead opinion's wanderings through the statute, ignoring that which the Legislature chose to delete and then finding its way into the Child Custody Act in order to supply a standard for the exercise of discretion when the Legislature has not chosen to grant discretion to the trial court. This interpretation has no support in the statute itself. Therefore, I choose the first.

But I should also recognize that the lead opinion's conclusion overlooks a very obvious point. After reviewing the best-interest factors, it notes that "these two best-interest factors plainly favor maintaining the custodial environment the child has enjoyed thus far in life." *Ante* at 114. Not only does the lead opinion err by turning this revocation-of-paternity case into a child custody case, it overlooks the fact that this is only a revocation-of-paternity case and not a child custody case. That is, merely because the acknowledgment of parentage is revoked and plaintiff becomes the child's legal father, that does not mean that there will be a change of custody. If, after establishing paternity, plaintiff chooses to pursue custody, the trial court will look to the custody act and the best-interest factors to determine whether a change in custody from the mother to plaintiff is warranted.

While it would be premature for me to address that question, I have no particular reason to disagree with my colleagues' analysis of that question and, assuming that their analysis is correct that the best-interest factors favor the mother, the trial court would presumably leave custody with the mother. All that will have changed is who is recognized as the child's legal father. And that presumably would reflect the intent of the Legislature in enacting the Revocation of Paternity Act in the first place: to allow biological fathers to establish their status as a child's legal father despite the fact that another man erroneously signed an acknowledgment of paternity.

Finally, as for resolving this case on the basis of laches, while defendants did plead laches as an affirmative defense, the trial court did not resolve this case on that ground. And more importantly, defendants did not raise laches in their brief on appeal. I am not inclined to raise it sua sponte.

For these reasons, I conclude that *Moiles* was correctly decided, and I would follow it and conclude that the trial court erred by considering the best-interest factors. Because this is an acknowledgment-of-parentage case and plaintiff has established by clear and convincing evidence, as the trial court and the parties agree, that he is the child's biological father, I would reverse the trial court and remand the matter for entry of an order revoking the existing acknowledgment of paternity and an order of filiation establishing plaintiff as the child's father.

GRAND/SAKWA OF NORTHFIELD, LLC v NORTHFIELD TOWNSHIP

Docket No. 305594. Submitted September 4, 2013, at Grand Rapids. Decided February 4, 2014, at 9:05 a.m.

Grand/Sakwa of Northfield, LLC, and Robert D., Marcia S., and Dennis W. Leland brought an action in the Washtenaw Circuit Court against Northfield Township, alleging an unconstitutional taking of property and violation of their due process and equal protection rights as a result of the zoning of property that Grand/Sakwa executed an agreement to purchase from the Lelands in January 2002. At the time plaintiffs executed the agreement, the property was zoned AR (Agriculture District). In June 2003, plaintiffs sought to rezone the property from AR to SR-1 (Single-Family Residential District One). The township board approved the rezoning in November 2003. Township residents then organized a successful referendum, held May 18, 2004, that overruled the board's decision, thereby leaving the property zoned AR. After plaintiffs brought their action, the board amended the zoning ordinances and rezoned the property from AR to LR (Low Density Residential District). The court, David S. Swartz, J., conducted a bench trial and eventually held that an unconstitutional taking had not occurred. Plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court did not err by ruling that the zoning classification applicable to plaintiffs' challenges was the LR classification in place when the court made its decision, not the AR classification in place when the lawsuit was filed.

2. The general rule is that the law to be applied is that which was in effect at the time of the trial court's decision. This rule is subject to two narrow exceptions: a court will not apply an amendment to a zoning ordinance when the amendment would destroy a vested property interest acquired before its enactment or when the amendment was enacted in bad faith and with unjustified delay. Neither exception applies under the facts of this case.

3. The Court of Appeals will not void a municipality's ordinance change simply because it served to strengthen its litigation position. The factual determination that must control the question whether the change was a result of bad faith is whether the

predominant motivation for the ordinance change was improvement of the municipality's litigation position. The evidence did not demonstrate that obtaining a litigation advantage was the predominate reason for the ordinance change by the township board. The trial court did not clearly err by applying the LR zoning as the law of the case.

4. The money plaintiffs spent in pursuit of a zoning change does not provide grounds to claim a taking.

5. The trial court did not err by ruling that plaintiffs were not denied due process or equal protection.

Affirmed.

1. ZONING — AMENDMENTS OF ZONING ORDINANCES — APPLICABLE ORDINANCES.

The general rule that the law to be applied by a trial court is the law that is in effect at the time of the court's decision is subject to two narrow exceptions; a court will not apply an amendment of a zoning ordinance, first, when the amendment would destroy a vested property interest acquired before the enactment of the amendment, and second, when the amendment was enacted in bad faith and with unjustified delay; the second exception applies when the predominant motivation for the ordinance change was the improvement of the litigation position of the municipality.

2. CONSTITUTIONAL LAW — TAKING PRIVATE PROPERTY.

The United States and Michigan Constitutions prohibit the government from taking private property for public use without just compensation; a taking may be caused by overly burdensome regulations, first, if the regulations do not advance a legitimate state interest and, second, if the regulations deny an owner economically viable use of his or her land; the second type of taking may be found two ways: first, there is a categorical taking if the regulation denies the owner all economically beneficial or productive use of the land, and second, a regulatory taking may be found on the basis of a balancing test that considers three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-backed expectations (US Const, Am V; Const 1963, art 10, § 2).

3. ZONING — EXPECTATION OF ZONING MODIFICATIONS.

A claimant who purchases land that is subject to zoning limitations with the intent to seek a modification of those limitations accepts the business risk that the limitations will remain in place or be only partially modified.

4. CONSTITUTIONAL LAW — ZONING — DUE PROCESS.

A plaintiff, to show a violation of substantive due process resulting from the zoning of the plaintiff's property, must prove that there is no reasonable governmental interest being advanced by the present zoning classification or that the zoning ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area under consideration.

Dykema Gossett PLLC (by *Lori McAllister* and *Aaron L. Vorce*) and *Conlin, McKenney & Philbrick, PC* (by *Joseph W. Phillips*), for plaintiffs.

Lucas & Baker (by *Frederick Lucas*) and *Law Offices of Paul E. Burns, PC* (by *Paul E. Burns* and *Bradford L. Maynes*) for defendant.

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

PER CURIAM. Plaintiffs appeal by right the trial court's ruling, after a bench trial, that defendant township's zoning regulations did not cause an unconstitutional taking. We affirm.

I. FACTS

Plaintiffs Robert, Marcia, and Dennis Leland own four parcels of land totaling approximately 220 acres (the property) in Northfield Township. Before the events that gave rise to the present dispute, the property had been zoned AR (Agriculture District), and had been farmed for over 100 years.

In January 2002, plaintiff Grand/Sakwa of Northfield, LLC (or its predecessor or agent), executed an agreement to purchase the property from the Lelands for $30,000 per acre and paid a nonrefundable deposit of $25,000. On June 30, 2003, plaintiffs applied to rezone

the property from AR to SR-1 (Single-Family Residential District One). SR-1 zoning allows up to four dwellings per acre with sewer service, or one dwelling per acre without sewer service. On November 18, 2003, the township board approved the rezoning, limited to 450 homes. Following that approval, township residents organized a successful referendum, held May 18, 2004, that overruled the board's decision, thereby leaving the property zoned AR. After the referendum, the Northfield Township Zoning Board of Appeals denied plaintiffs' requests for use or dimensional zoning variances.

Plaintiffs filed this lawsuit on October 22, 2004. They alleged that application of any zoning classification more restrictive than SR-1 constituted a regulatory taking. Shortly after the lawsuit was filed, a new township board took office. A majority of the new board's members were organizers or supporters of the referendum that overruled the board's 2003 rezoning of the property to SR-1. The new board fired its planner and took action to amend the zoning ordinances, rezoning the property from AR to LR (Low Density Residential District). The LR classification itself was amended to allow only one home per two acres, instead of the previously allowed one home per acre.

At the time of the bench trial, therefore, the property was zoned LR. Plaintiffs argued that whether or not a regulatory taking had occurred should be determined by evaluating the AR zoning that existed at the time the lawsuit was filed. The township argued that whether or not there was a taking should be determined on the basis of the LR zoning that existed at the time the trial court heard the proofs and rendered a decision. Therefore, before determining whether the zoning constituted a regulatory taking, the trial court had to determine which zoning ordinance was to be tested. The trial

court ruled that the relevant zoning ordinance was the one then in place, i.e., LR zoning. After the full trial, the court held in the township's favor on all of plaintiffs' claims, finding no constitutional violation. Plaintiffs appealed by right.

II. THE RELEVANT ZONING ORDINANCE

Plaintiffs first argue that the trial court erred by ruling that their challenge was to the LR zoning classification in place at the time the court made its decision rather than the AR classification in place when the lawsuit was filed.[1] We disagree.

Plaintiffs' view that the zoning classification in effect when their suit was filed should apply is contrary to the guiding caselaw. We have stated that "[t]he general rule is that the law to be applied is that which was in effect at the time of decision [by the trial court]. Thus, if a zoning ordinance has been amended [after suit was filed] . . . a court will give effect to the amendment[.]" *Klyman v City of Troy*, 40 Mich App 273, 277-278; 198 NW2d 822 (1972), citing *City of Lansing v Dawley*, 247 Mich 394; 225 NW 500 (1929).

This general rule is subject to two narrow exceptions. "A court will not apply an amendment to a zoning ordinance where (1) the amendment would destroy a vested property interest acquired before its enactment, or (2) the amendment was enacted in bad faith and with unjustified delay." *Lockwood v Southfield*, 93 Mich App 206, 211; 286 NW2d 87 (1979) (citation omitted).

The first exception does not apply here because there is no vested property interest at issue. At the time of the

[1] Following a bench trial, we review the trial court's findings of fact for clear error and review de novo its conclusions of law. *City of Flint v Chrisdom Props, Ltd*, 283 Mich App 494, 498; 770 NW2d 888 (2009).

sale, the property was zoned AR and remained so until the amendment rezoning it LR was adopted. Plaintiffs concede that the township board's 2003 decision to rezone the property SR-1 never took effect because it was superseded by the referendum. Thus, there was never any vested right to develop the property under any zoning classification other than AR.

The second exception applies if the trial court finds that the newer classification "was enacted for the purpose of manufacturing a defense to plaintiff's suit." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 161; 667 NW2d 93 (2003) (quotation marks and citation omitted). In *Klyman*, we defined the exception more narrowly, stating that a change in an ordinance shall be applied unless it "was . . . enacted *simply* to manufacture a defense." *Klyman*, 40 Mich App at 279 (emphasis added).

Plaintiffs have cited only one case of record, *Willingham v Dearborn*, 359 Mich 7; 101 NW2d 294 (1960), in support of their view on this issue. There, the plaintiff was denied a permit to construct a service garage on his property on the ground that the plans did not provide for a 160-foot setback. *Id*. at 8. However, no ordinance required such a setback. *Id*. Accordingly, the plaintiff filed suit to require the defendant city to issue a building permit. *Id*. While the suit was pending, the city adopted an ordinance requiring, for the first time, a 160-foot setback. *Id*. at 8-9. The trial court declined to consider the amended ordinance, finding that it " 'can place no other construction' " on the city's actions other than it serving as a basis to retroactively legitimize its denial of the sought-after building permit. *Id*. at 9. Our Supreme Court held that the trial court properly declined to apply the zoning ordinance adopted during litigation. *Id*. at 10.

The facts in *Willingham* bear no resemblance to those in the instant case. In that case, the city sought to adopt an ordinance tightening its zoning requirements to bar a use that was permitted when the plaintiff initially sought the building permit.[2] Here, the development sought by plaintiffs was never within the zoning classification, and the ordinance they seek to exclude from consideration is one that grants, rather than restricts, development rights.

In all the other cases addressing the issue, our courts have held that it is the postsuit ordinance that controls. *Franchise Realty Interstate Corp v Detroit*, 368 Mich 276, 279; 118 NW2d 258 (1962); *Landon Holdings*, 257 Mich App at 165; *MacDonald Advertising Co v McIntyre*, 211 Mich App 406, 410; 536 NW2d 249 (1995); *Lockwood*, 93 Mich App at 211; *Klyman*, 40 Mich App at 279.

We agree with plaintiff that the trial court wrongly characterized the relevant test as requiring application of the newer zoning ordinance unless its adoption was "done solely" to improve the municipality's litigation posture. However, we similarly reject the notion that if improving the municipality's litigation position plays any role in the decision to adopt the new ordinance, bad faith has been sufficiently established. None of the cases cited by the parties adopt such a standard, and there was evidence of mixed motives in several of the cases in which Michigan courts held that the newer ordinance applied. Accordingly, we will not void a municipality's action simply because it served to strengthen its litigation position. The factual determi-

[2] The *Willingham* Court also criticized the city for unduly delaying its change of classifications. *Id*. at 10. Plaintiffs here do not claim that the township unduly delayed action, complaining instead that the township acted too quickly.

nation that must control is whether the *predominant* motivation for the ordinance change was improvement of the municipality's litigation position. And, because this is a factual determination to be made by the trial court, we review it for clear error. MCR 2.613(C).[3]

In making their argument to the trial court, plaintiffs relied on several quotes from board meetings that demonstrated that the board was partially motivated by a desire to defend against the instant litigation. However, the trial court, after hearing the evidence, concluded that "the rezoning to LR was not done solely as an attempt to improve the Defendant's position at trial." The court further noted that the township's "GMP [Growth Management Plan] was amended to reflect that the LR zoning permits 'limited residential development while preserving significant areas of agriculture, open space, and natural features', and preserves 'a predominantly rural character,' while providing 'certain residential and public uses . . . compatible with the principal use . . . .' " It also noted that the rezoning to LR was undertaken "pursuant to recommendations from a newly hired land use planner." In other words, the board made a decision to allow residential development that maintained a rural character, rather than allow either more substantial development or none at all. The trial court also noted that the zoning board had previously granted plaintiffs' request to rezone the property SR-1. Plaintiffs suggest that we

[3] The township urges us to apply an abuse of discretion standard, citing *Landon Holdings*, 257 Mich App at 161, for the view that "a trial court's decision to admit or exclude evidence of ordinance amendments during litigation" is reviewed "for an abuse of discretion[.]" We decline to do so because the trial court was not asked to decide whether evidence of an ordinance change was admissible, but rather to make a factual finding that would determine which of the ordinances was to undergo constitutional review.

should ignore this fact, since the membership of the township board changed after the time the request was granted and the new board was hostile to development. However, the events can fairly be read as demonstrating recognition by both boards that development was in order, though they disagreed on the degree of that development. Plaintiffs suggest that the township was opposed to all development, as demonstrated by the referendum, and only adopted the LR zoning as a litigation strategy. However, plaintiffs concede that, after the old board adopted the SR-1 zoning, it was not possible to propose a referendum that would void the SR-1 zoning and institute LR zoning in its place. The only mechanism for the residents to challenge the SR-1 zoning in a referendum was to put it to an up or down vote, i.e., SR-1 or AR.

Given the deference we show to a trial court's superior ability to judge the credibility of witnesses, *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004), and that affording such deference leads us to the conclusion that the evidence did not demonstrate that obtaining a litigation advantage was the predominate reason for the ordinance change, we find that the trial court did not clearly err by applying LR zoning as the law of the case.

III. REGULATORY TAKING

Plaintiffs next argue that the LR zoning constitutes an unconstitutional governmental taking.[4] We disagree.

Both the United States and Michigan Constitutions prohibit the government from taking private property

[4] We review de novo constitutional questions. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 425; 761 NW2d 371 (2008).

for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2. A taking may be caused by overly burdensome regulations in two situations: if the regulation does not advance a legitimate state interest or if "the regulation denies an owner economically viable use of his land." *K & K Constr, Inc*, *v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998) (*K & K I*). The second type of taking may be found two ways. First, there is a "categorical taking" if a regulation denies the owner of "all economically beneficial or productive use of land." *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992). Second, a regulatory taking may be found on the basis of the traditional balancing test established in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

Plaintiffs do not claim a categorical taking, arguing only that the trial court should have found a taking under the *Penn Central* test. *Penn Central* calls for the court to consider three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-backed expectations. *Id*. at 124; *K & K I*, 456 Mich at 577.

A. CHARACTER OF THE GOVERNMENTAL ACTION

Penn Central provides that the central question in analyzing the character of the governmental action is whether that action constituted a physical invasion. *Penn Central*, 438 US at 124. Where it does, the factor weighs in favor of finding a taking. *Id*. Here, it is undisputed that the actions of the township board did not create a physical invasion of plaintiffs' property. Zoning regulations are not a physical invasion. *Id* at

125. Indeed, the *Penn Central* Court cited zoning ordinances as "the classic example" of governmental action affecting land interests and stated that such regulations are generally permissible. *Id*.

Penn Central further provides that the "government may execute laws or programs that adversely affect recognized economic values," and that a regulatory taking will not be found where a state tribunal reasonably concludes that the land-use limitation promotes the general welfare, even if it "destroy[s] or adversely affect[s] recognized real property interests." *Id*. at 124-125.[5] Accordingly, the trial court did not clearly err by finding that the first prong of the *Penn Central* test weighed in the township's favor.

B. ECONOMIC EFFECT OF THE LR ZONING

Plaintiffs maintain that the LR zoning created a loss of the value that they would have received had the

[5] Essentially ignoring the question of physical invasion, plaintiffs argue that this prong of the *Penn Central* test should weigh in their favor, relying on *Pulte Land Co LLC v Alpine Twp*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 2006 (Docket Nos. 259759 and 261199). Because *Pulte* is unpublished, it is not binding. MCR 7.215(C)(1). Moreover, in *Pulte*, while the zoning ordinance restricted the plaintiffs' land to agricultural uses, the master plan showed that the area was planned for medium-density residential development in the future. *Pulte*, unpub op at 2. Because the zoning ordinance and master plan were in conflict, this Court found that, in the long term, retaining the agricultural zoning of the plaintiffs' property would harm the public interest, rather than serve it. *Id*. at 5-6. On that basis, this Court held that the character of the governmental action favored the plaintiffs. *Id*. at p 6. By contrast, in the instant case, plaintiffs assert that the township's growth management plan called for the residential development of plaintiffs' property. However, plaintiffs fail to note that the plan, according to a report commissioned by plaintiffs, specified a density of one dwelling unit per five acres, i.e., the exact density permitted under AR zoning. The excerpts of the plan in the record do not demonstrate an intent to allow high-density residential development of plaintiffs' property.

property been zoned SR-1. The township does not dispute this allegation, because it is clear that property on which 450 homes can be built has greater value than the same property on which 80 homes can be built. However, the question, contrary to plaintiffs' suggestion, is not simply whether their preferred zoning results in an increase in the value of the land. If that were the case, virtually every zoning regulation could be successfully challenged as a regulatory taking. Plaintiffs correctly assert that a comparison of the values is relevant to the overall analysis, but it is by no means controlling.

In *Penn Central*, 438 US at 131, the Court agreed that the regulation in question diminished the value of the plaintiffs' property. However, it relied on the fact that the regulation "does not interfere in any way with the present uses of [the property]." *Id*. at 136. The same is true here. Indeed, the LR zoning classification allows a much more valuable use of the property than does AR zoning, the classification in effect when plaintiffs entered into the purchase agreement. Moreover, although the restriction imposed in *Penn Central* was quite significant in that it prevented the plaintiffs from building their planned structure, the Court held that this was insufficient to establish a taking because the plaintiffs were not "denied *all* use of even those preexisting [property] rights." *Id*. at 115-117, 137. In the instant case, the only preexisting rights of use of the property were those permissible under AR zoning. No rights existing under AR zoning are denied under the LR zoning; indeed, as noted, the LR zoning substantially expands plaintiffs' land use rights, allowing residential development to occur.

Plaintiffs also argue that the trial court made several errors in its decision to admit or exclude certain evi-

dence regarding the value of the property. We review these evidentiary challenges for an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). First, plaintiffs contend that the trial court should not have admitted evidence of a 1998 sale of 77 acres by the Lelands for $10,000 per acre. Plaintiffs argue that because that purchase was made by the Whitmore Lake School District, it was likely a unique event and should not be considered in determining value. Second, plaintiffs object to the consideration of a 1996 appraisal that valued 120 acres of the property at $3,500 per acre. Plaintiffs note that the appraisal was made under the previous AR zoning and was, therefore, inapplicable to a current valuation. Third, plaintiffs assert that the trial court should not have considered evidence that a local church was interested in purchasing 15 acres of the property for as much as $43,000 per acre. Plaintiffs argue that this church would not have developed the land for profit, that the sale would affect only a small portion of the property, and that the church's interest may have been a result of the anticipated residential development. We conclude, particularly given that this was a bench trial, that each of these challenges addresses the weight to be given to the evidence, not its admissibility.

Plaintiffs similarly assert that the trial court should have excluded the testimony of Robert Walworth, defendant's expert witness, who testified regarding the economic viability of the property under the LR and AR zoning classifications. Plaintiffs argue that the method employed by Walworth was improper and that he did not provide any useful information regarding the feasibility of development. Plaintiffs' expert, John Widmer, detailed what he perceived to be deficiencies in Walworth's calculations. The trial court heard this testimony and appropriately held that it went to the weight

of the evidence, rather than its admissibility. Walworth testified that he used estimated costs of development, some of which came from plaintiffs' evidence, added in a profit margin, and calculated the average price at which each lot would need to be sold in order to be economically viable. He explained certain differences between his analysis and that of Widmer, including that Widmer's analysis involved a prospective rate of return, whereas Walworth calculated a simple profit factor that did not discount future cash flows back to the present. Plaintiffs' objection appears to stem from the fact that Walworth and Widmer simply tried to calculate different things. In the context of a bench trial in which the experts underwent extensive cross-examination, we find no abuse of discretion in the trial court's admission of Walworth's testimony.

Plaintiffs next argue that the trial court erred by excluding testimony from lay witnesses regarding the value of the property under SR-1 zoning. The court held that this evidence was only relevant to damages and deferred the testimony pending a ruling on the cause of action. We agree with plaintiffs that the trial court should have taken the testimony, given that the balancing test "requires at least a comparison of the value removed with the value that remains." *K & K I*, 456 Mich at 588 (quotation marks and citations omitted). However, we cannot conclude that the court's ruling constituted an abuse of discretion, given that the township conceded that the property would have greater value if zoned SR-1 and that the court heard extensive testimony from plaintiffs' appraisal expert regarding the extent of the difference in value, including the admission of an economic feasibility report. It is well established that we defer to the trial court's credibility determinations. *Glen Lake*, 264 Mich App at 531. Moreover, the relevant caselaw provides that even a large

diminution of value does not, standing alone, constitute a taking. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 553; 705 NW2d 365 (2005) (*K & K II*) (noting that the United States Supreme Court has refused to find takings in cases involving 75% and even 87.5% diminutions of value). There was sufficient evidence, albeit evidence with which plaintiffs disagreed, to allow the trial court to properly conclude that the diminution in value was not so significant as to weigh the second prong of the *Penn Central* test in plaintiffs' favor.

C. INTERFERENCE WITH DISTINCT INVESTMENT-BACKED EXPECTATIONS

The role of investment-backed expectations was discussed at length in *K & K II*. In that case, we did not wholly foreclose a taking claim based on a regulation in effect at the time the land was purchased; however, we held that "[a] key factor is notice of the applicable regulatory regime[.]" *Id*. at 555. A claimant who purchases land that is subject to zoning limitations with the intent to seek a modification of those limitations accepts the business risk that the limitations will remain in place or be only partially modified. As Justice O'Connor noted in her concurrence in *Palazzolo v Rhode Island*, 533 US 606, 633; 121 S Ct 2448; 150 L Ed 2d 592 (2001), "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations." Notice of the regulation cannot absolutely bar a taking claim, but should be taken into account. When plaintiffs entered into the purchase agreement, they were aware that the property was zoned AR. Plaintiffs argue that they had a reasonable expectation that the zoning classification would change, but they do not refer us to any evidence in support of that proposition. Instead,

they rely on the fact that the previous board agreed to change the zoning to SR-1 in 2003. However, as plaintiffs conceded at oral argument, they understood that the zoning modification adopted by the board remained subject to a timely referendum challenge[6] and that, when a timely challenge is made, the new zoning classification would not take effect at all, unless approved by the voters. Thus, plaintiffs' implicit suggestion that the property was for some time subject to the SR-1 zoning and that the SR-1 classification was taken away from them, after they spent money on the project, fails because of the fundamental fact that the property was never actually zoned SR-1. Moreover, any funds expended by plaintiffs once the petition was filed cannot be said to have been expended with a reasonable expectation that the proposed development could be built, in light of the referendum challenge.

In sum, Grand/Sakwa chose to purchase AR-zoned property upon which, according to its own arguments and expert testimony, it could not build an economically viable development. It made efforts to get the zoning changed and failed. Contrary to plaintiffs' claim, we are unaware of any caselaw that provides that monies expended in pursuit of a zoning change are, themselves, grounds to claim a taking.

The trial court did not clearly err by holding that the third *Penn Central* factor favored the township. Accord-

---

[6] MCL 125.3402(2) provides that a petition to overrule the zoning ordinance may be submitted within 30 days of its publication. The petition must contain the signatures of "not less than 15% of the total vote cast within the zoning jurisdiction for all candidates for governor at the last" gubernatorial election. The statute provides that if such a petition is filed and determined to contain the requisite number of signatures, "the zoning ordinance adopted by the legislative body shall not take effect until . . . the ordinance is approved by a majority of the registered electors residing in the zoning jurisdiction[.]" MCL 125.3402(3)(c).

ingly, because each of the *Penn Central* factors weighed in the township's favor, we find that the trial court did not err by finding that the rezoning of the property to LR did not constitute an unconstitutional regulatory taking.

IV. DUE PROCESS AND EQUAL PROTECTION

Finally, plaintiffs argue that rezoning the property to LR violated their due process and equal protection rights because it rendered the property not economically viable.[7] We disagree.

To show a violation of substantive due process, "a plaintiff must prove (1) that there is no reasonable governmental interest being advanced by the present zoning classification, or (2) that the ordinance is unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration." *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992). Plaintiffs argue that AR and LR zoning render the property dead land. However, as already discussed, the trial court did not clearly err when it found that this was not the case. Accepting the trial court's finding on that point, plaintiffs cannot show that it was a due process violation for the township to zone the property LR.

Regarding the equal protection challenge, it is true that the rezoning to LR affected only plaintiffs' property. However, it is not the case that the rest of the AR-zoned land in the township was rezoned to SR-1, with only plaintiffs left behind. Rather, after the referendum, the township acted to give plaintiffs at least

[7] We review de novo constitutional questions. *Great Lakes Society*, 281 Mich App at 425.

some of the relief they sought without completely abandoning the traditionally rural character of the area. It was appropriate to rezone only plaintiffs' property when it was the only property for which a change in zoning was sought. Moreover, the amendment of the LR zoning classification itself affected all LR-zoned properties, not just plaintiffs' property.

The township's goals of controlling growth and maintaining open space were legitimate, the method chosen was not arbitrary or capricious, and plaintiffs' property was not improperly singled out under the circumstances. Moreover, following the referendum denial of the SR-1 zoning, the township acted to provide plaintiffs with a more economically viable zoning classification than AR.

Accordingly, we find that the trial court did not err by ruling for the township on plaintiffs' due process and equal protection claims.

Affirmed.

SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ., concurred.

In re APPLICATION OF MICHIGAN CONSOLIDATED GAS COMPANY

Docket Nos. 312296 and 312305. Submitted January 9, 2014, at Lansing. Decided February 6, 2014, at 9:00 a.m.

In Docket No. 312296, Michigan Consolidated Gas Company (MichCon) filed an application for a gas cost recovery reconciliation proceeding for the 12 months ending March 31, 2010, in the Public Service Commission (PSC) (Case No. U-15701-R). The aspect of the case at issue on appeal is the pricing method for the exchange gas that MichCon purchases from the MichCon Gathering Company (MGAT), which collects natural gas into a gathering facility before delivering it to MichCon at a meter station in Kalkaska County. "Exchange gas" refers to the imbalance between the volume of gas measured at the gathering facility and the volume of gas delivered to MichCon at the meter station. MichCon had historically priced its exchange gas purchases at the jurisdictional rate, which is the average cost of gas over the entire cost-recovery period. However, in a September 28, 2010 order in Case No. U-16146 (the rate-case companion of the reconciliation case underlying the appeal in Docket No. 312305), the PSC announced that exchange gas purchases would thereafter be priced at MichCon's city-gate index rates, meaning the published monthly index prices for gas purchases at MichCon's delivery point. The PSC specified that this change would operate prospectively. Testimony indicated that MichCon had not reported the MGAT imbalances as a purchase for the period at issue because MichCon was awaiting the PSC's order in Case No. U-15451-R, which was expected to include an approved pricing methodology for exchange gas. The PSC issued that order on October 14, 2010, and there reiterated its determination in the September 28, 2010 order in this case that exchange gas would thereafter be priced at city-gate index rates. The proposal for decision in the case at issue concluded that appellant had not purchased the exchange gas within the meaning of the PSC's orders in Case Nos. U-16146 and U-15451-R, but had instead deferred the purchase of those volumes pending the PSC's decisions in those cases, and thus that an adjustment to the prices included in the reconciliation of those volumes was appropriate. Accordingly, the PSC issued an order in Case No. U-15701-R

repricing appellant's purchases of exchange gas incurred between April 1, 2009, and March 31, 2010, at city-gate index prices, thus reducing appellant's gas supply cost recovery by $3.3 million. The PSC denied MichCon's motion for rehearing.

In Docket No. 312305, MichCon filed an application for a gas cost recovery reconciliation proceeding for the 12 months ending March 31, 2011 (Case No. U-16146-R). Testimony indicated that the exchange gas purchases for this period that took place before the PSC's September 28, 2010 order changing the pricing methodology were recorded at the jurisdictional rate, and that purchases made after this date were priced at the city-gate index rate. However, the PSC issued an order pricing all of appellant's purchases of exchange gas for the reconciliation period at city-gate index prices, resulting in a reduction of appellant's gas supply cost recovery by $1,142,595.

MichCon appealed in both cases, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. The PSC did not exceed its authority by using the reconciliation cases to adjust the pricing of the exchange gas purchases. MCL 460.6h provides for establishing, approving, and implementing gas cost recovery (GCR) factors, then provides for reviewing such implementation in progress to determine whether adjustments are in order. MCL 460.6h(12) directs the PSC to reconcile the revenues recorded pursuant to the gas cost recovery factor and the allowance for cost of gas included in the base rates established in the latest commission order for the gas utility with the amounts actually expensed and included in the cost of gas sold, and to do so on the basis of the reasonableness and prudence of expenses. The provision for reconciliation proceedings thus calls for refinement or enforcement of what was decided in the attendant plan proceedings. Accordingly, the command of MCL 460.6h(3) to minimize costs applied to both rate cases and reconciliation proceedings. To the extent that the adjustments the PSC made to the pricing of exchange gas in the reconciliation proceedings could be characterized as retroactive ratemaking, it was authorized by MCL 460.6h.

2. The PSC acted unreasonably or capriciously by setting forth a prospective-only requirement changing the pricing of exchange gas to the city-gate index method, then applying that change retroactively. In Case No. U-15701-R, although there was testimony indicating that MichCon intended to defer completing its purchase of delivered exchange gas pending an expected decision from the PSC, uncontroverted evidence indicated that appellant in fact completed the purchases of exchange gas at issue before the

PSC announced that pricing change. In Case No. U-16146-R, the PSC justified its determination to impose city-gate index pricing for the whole period covered in that reconciliation on the grounds that the September 28, 2010 order that called for city-gate index pricing for purchases occurring thereafter also stated that it applied to deliveries of gas that predated that order, but whose costs were not yet approved by the PSC. However, it was undisputed that the purchases in question occurred before September 28, 2010. Accordingly, the orders were vacated insofar as they retroactively repriced MichCon's purchases of exchange gas completed before September 28, 2010, and the case was remanded to the PSC for further proceedings consistent with this opinion.

Orders vacated with respect to repricing and remanded for further proceedings; cases affirmed in all other respects.

Bruce R. Maters, *Richard P. Middleton*, and *Fahey Schultz Burzych Rhodes PLC* (by *William K. Fahey and Stephen J. Rhodes*) for the Michigan Consolidated Gas Company.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Steven D. Hughey*, *Michael J. Orris*, and *Heather M. Durian*, Assistant Attorneys General, for the Michigan Public Service Commission.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Michael E. Moody*, Assistant Attorney General, for the Attorney General.

Public Law Resource Center PLLC (by *Don L. Keskey*) for the Michigan Community Action Agency Association.

Before: WHITBECK, C.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM. In these consolidated appeals, appellant Michigan Consolidated Gas Company appeals as of

right orders of the Michigan Public Service Commission (PSC) insofar as they repriced appellant's purchases of exchange gas for the period of April 1, 2009, through March 31, 2010, and April 1, 2010, through September 27, 2010, in accordance with a rate adopted prospectively for such purchases on September 28, 2010. We vacate the orders below in those regards and remand this case to the PSC for further proceedings. There being no other issues on appeal, we affirm the orders below in all other regards.

I. FACTS

These appeals arise from gas cost reconciliation proceedings conducted pursuant to MCL 460.6h(12), which provides for periodic contested cases in order to "reconcile the revenues recorded pursuant to the gas cost recovery factor and the allowance for cost of gas included in the base rates established in the latest commission order for the gas utility with the amounts actually expensed and included in the cost of gas sold" and for doing so on the basis of the "reasonableness and prudence of expenses for which customers were charged if the issue could not have been considered adequately at a previously conducted gas supply and cost review."

At issue is appellant's purchases of exchange gas from the MichCon Gathering Company (MGAT), which gathers natural gas in the northern portion of the lower peninsula into its Antrim Expansion Project (AEP), then delivers the gas to appellant at a meter station in Kalkaska County. According to the parties, a perfect balance never exists between the gas delivered to the AEP and that delivered to appellant, and the difference between those two measured volumes of gas is referred to as "exchange gas."

Appellant has historically priced its exchange gas purchases at the "jurisdictional rate," meaning the average cost of gas over the entire cost-recovery period. However, in a September 28, 2010 order in Case No. U-16146, which is the companion of the reconciliation cases on appeal in Docket No. 312305, the PSC announced that exchange gas purchases would thereafter be priced at appellant's "city-gate index" rates, meaning the published monthly index prices for gas purchases at appellant's delivery point. The PSC stated that this change would operate prospectively, and elaborated as follows:

> Mich Con shall prospectively price its MGAT purchases using its monthly city-gate index price rather than the jurisdictional rate. By "prospective," the Commission means all purchases occurring after the Commission issues its final order in this case. In the case where the gas was delivered before the Commission issues this order, but the costs are not approved until after the order, then Mich Con shall book the costs at the city-gate monthly index price.

In an order issued a few weeks later, in a case not part of the present appeal, the PSC again addressed the issue of prospective application of the city-gate index pricing for exchange gas, stating:

> [T]he Staff . . . recommended that the city-gate index price be applied as a ceiling on a going forward basis. The Staff believed it unfair to Mich Con to apply the city-gate index in this case as the company had not received notice that the Commission might apply another benchmark for the MGAT purchases other than the jurisdictional rate. The ALJ agreed that the city-gate rate is the more appropriate benchmark for MGAT purchase[s], but agreed with the Staff that it should be applied to MGAT purchases prospectively only. The ALJ did, however, recommend that the city-gate index rate apply to MGAT supply received but not booked with an associated cost in the forthcoming [gas cost recovery (GCR)] periods. The ALJ did find evidence that

> Mich Con was aware of the potential risk of disallowance for MGAT pricing. [*In re Application of Mich Con Gas Co*, order of the Public Service Commission, entered October 14, 2010 (Case No. U-15451-R), p 9.]

Accordingly, the PSC did not use the new pricing for the latter case, but decreed that "Michigan Consolidated Gas Company shall apply the city-gate index price to all future Mich Con Gathering Company supply purchases." *Id*. at 12.

A. CASE NO. U-15701-R: EXCHANGE GAS PRICING FOR APRIL 2009 TO MARCH 2010

A witness testifying on behalf of the Attorney General introduced an exhibit detailing events related to MGAT's deliveries of gas to appellant, asserting that although appellant's gas cost recovery plan for the 2009-2010 GCR period made no mention of MGAT, MGAT purchases did take place during that period. The witness testified that the purchase price recorded for gas received by appellant from MGAT during the 2009-2010 reconciliation period was the jurisdictional rate for that year, and that in each month of that period appellant recorded its receipt of the gas provided by MGAT as exchange gas received. Asked about changing the pricing method for this period from the jurisdictional rate to the city-gate index rate, the witness estimated that such a change would result in a reduction of appellant's recoverable costs for exchange gas purchases of $3.3 million.

A gas supply analyst for appellant answered in the negative when asked whether appellant did purchase imbalance volumes from MGAT from April 2009 through March 2010, and elaborated, "MGAT imbalances were recorded as exchange gas and appropriately included in the cost of gas as done for all exchange gas

accounting" and that "the volumes have not been booked as a purchase at this time." The witness explained that appellant was awaiting the PSC's order in Case No. U-15451-R, because that order was expected to include an approved pricing methodology for exchange gas, and appellant intended to adhere to the PSC's determination in that regard. The PSC issued that order on October 14, 2010, and there reiterated its determination in the September 28, 2010 order in this case that exchange gas would thereafter be priced at city-gate index rates. Similarly, another of appellant's supply analysts testified that "MGAT imbalance volumes for the April 2009-March 2010 period have not been purchased at this time." However, a third witness for appellant, in rebuttal testimony, stated that appellant's "treatment of the MGAT costs included in this reconciliation is consistent with the Commission's order[s]," having "priced its MGAT volumes at the Jurisdictional rate" on the ground that "[t]his purchase was made prior to the Commission's orders and would not have been a 'prospective' purchase at the time of these orders."

The administrative law judge, in the proposal for decision (PFD), opined that appellant "did not 'purchase' the volumes within the meaning of the Commission's orders in Case Nos. U-16146 and U-15451-R, but instead deferred the 'purchase' of those volumes pending the Commission's decisions in those cases," and thus that "an adjustment to the prices included in the reconciliation for those volumes is appropriate." The PFD recommended that the PSC adopt the proposal of the attorney general's witness to disallow $3.3 million in gas recovery costs.

On December 6, 2011, the PSC issued an order in Case No. U-15701-R, repricing appellant's purchases of

exchange gas incurred between April 1, 2009, and March 31, 2010, at city-gate index prices, thus reducing appellant's gas supply cost recovery by $3.3 million. The PSC denied appellant's motion for rehearing in an order issued on August 14, 2012.

B. CASE NO. U-16146-R: EXCHANGE GAS PRICING FOR APRIL 2010 TO MARCH 2011

Appellant's supply analyst testified that, between April 2010 and March 2011, the volume of gas measured at the outlet of the AEP was greater than the net inputs to the AEP; that the gains across were delivered to appellant, producing a surplus for the latter; and that appellant agreed to purchase the imbalance volumes from MGAT at the time they were delivered through the meter. The witness added that those purchases took place before September 28, 2010, and so were "properly" recorded at the jurisdictional rate. Another witness for appellant confirmed that "purchases made through September 27, 2010 were priced at the Jurisdictional Rate for the period during which they were delivered," but that "[a]ll purchases made after this date were priced at MichCon's City Gate Index in accordance with the Commission's Orders."

However, the attorney general's witness recommended that, to be consistent with its treatment of prices for 2009-2010, the PSC adopt city-gate index pricing for the entire 2010-2011 period, and thus reduce appellant's recovery of gas costs for that period by $1,140,000.

On August 14, 2012, the same date on which the PSC denied rehearing in Case No. U-15701-R, the PSC issued an order pricing all of appellant's purchases of exchange gas incurred between April 1, 2010, and March 31, 2011, at city-gate index prices, declining to

distinguish purchases made before September 28, 2010, from those made afterward. The result was a reduction of appellant's gas supply cost recovery by $1,142,595. The PSC took the opportunity to elaborate on its new pricing policy, stating:

> [T]he jurisdictional rate applies to gas where, by contract, a fixed quantity of gas must be delivered to a certain receipt point on a certain date. None of these attributes applies to MGAT deliveries; thus, it appears that the jurisdictional rate is an unreasonable proxy for pricing MGAT imbalances. This is especially true when the company has an obligation to minimize the cost of gas as provided in Section 3 of Act 304.[1] Nevertheless, the Commission agreed with the Staff's position in Case No. U-15451-R, that it would be unfair to re-price MGAT supply in that reconciliation because Mich Con was not on notice that the Commission would use the city-gate index as a proxy for MGAT pricing. At this point, however, Mich Con has been aware for almost two years that MGAT purchases are more appropriately priced at city-gate index.

C. APPELLATE PROCEEDINGS

In these consolidated appeals, appellant argues that the PSC erred by applying the city-gate index prices to any purchases of exchange gas incurred at the jurisdictional rate before September 28, 2010, the date from which the city-gate rates were to replace the jurisdictional rates. Appellant raises no challenges concerning witness credibility, the accuracy of any of the mathematics involved, or the overall propriety of using city-gate index pricing for exchange gas purchases. Instead, appellant raises a challenge on procedural grounds concerning the propriety of imposing such an

[1] "Act 304" refers to 1982 PA 304, now MCL 460.6h through m, which, among other things, authorized the use of gas cost recovery clauses or factors.

adjustment in a rate reconciliation case, and whether the change constituted impermissible retroactive ratemaking. Appellant also challenges what it characterizes as the PSC's retroactive application of city-gate index rates in these cases on the substantive ground that the PSC failed to adhere to its determination to apply the new pricing methodology only prospectively. Appellees argue that the PSC had a reasonable basis for concluding that the purchases in question took place after the effective date of the orders establishing city-gate index pricing, and also acted reasonably in using the reconciliation process to enforce that requirement.

II. STANDARDS OF REVIEW

All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. MCL 462.25. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). However, whether the PSC exceeded the scope of its authority is a question of law calling for review de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

Likewise, issues of statutory interpretation call for review de novo. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). A reviewing court should give an administrative agency's interpretation of statutes that it is obligated to execute respectful consideration, but not deference. *Id*. at 103, 108.

III. REPRICING IN A RECONCILIATION CASE

Appellant argues that the PSC exceeded its authority by using the reconciliation cases below to adjust the pricing of its exchange gas purchases. We disagree.

This issue concerns the interplay between rate cases and reconciliation cases. MCL 460.6h sets forth the process through which a gas utility may include gas cost recovery factors in calculating rates charged to customers, and through which the PSC may approve such factors initially, or adjust them to reconcile them with actual expenses incurred. Subsections (2) through (11) govern contested GCR plan cases to establish and implement such factors. Specifically, subsection (3) authorizes a gas utility to evaluate the "reasonableness and prudence of its decisions to obtain gas" and to explain its "legal and regulatory actions . . . to minimize the cost of gas purchased by the utility."

Subsection (12) provides for contested gas cost reconciliation proceedings to review GCR plans "not later than 3 months after the end of the 12-month period covered by a . . . plan," to "reconcile the revenues recorded" in connection with the GCR factors "and the allowance for cost of gas included in the base rates established in the latest commission order for the gas utility with the amounts actually expensed and included in the cost of gas sold," and authorizes the PSC to "consider any issue regarding the reasonableness and

prudence of expenses for which customers were charged if the issue could not have been considered adequately at a previously conducted gas supply and cost review."

Subsection (13) requires the PSC, in orders resulting from gas cost reconciliation cases, to "require a gas utility to refund to customers or credit to customers' bills any net amount determined to have been recovered over the period covered in excess of the amounts determined to have been actually expensed by the utility for gas sold, and to have been incurred through reasonable and prudent actions . . . ."

Subsection (14) in turn requires the PSC to "authorize a gas utility to recover from customers any net amount by which the amount determined to have been recovered over the period covered was less than the amount determined to have been actually expensed by the utility for gas sold, and to have been incurred through reasonable and prudent actions . . . ."

Appellant argues that the PSC erred by demanding a change in pricing exchange gas in reconciliation proceedings, on the grounds that the requirement in MCL 460.6h for minimizing costs occurs in the course of providing for GCR plan cases, not reconciliation ones, and that by imposing such adjustments in reconciliation proceedings the PSC has run afoul of the general rule against retroactive ratemaking. The PSC concedes that in the reconciliation cases below it did not determine appellant's MGAT purchases to be unreasonable or imprudent, but asserts that it retained authority beyond that initial approval to insist on pricing for those purchases consistent with its earlier orders.

The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Pub Serv Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). Among the constraints on administrative action is that decisions

may not be "[m]ade upon unlawful procedure resulting in material prejudice to a party." MCL 24.306(1)(c). Words and phrases in the PSC's enabling statutes must be read narrowly and in the context of the entire statutory scheme. See *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 155-159; 596 NW2d 126 (1999). However, "[t]o the extent possible, each provision of a statute should be given effect, and each should be read to harmonize with all others." *Mich Basic Prop Ins Ass'n v Ware*, 230 Mich App 44, 49; 583 NW2d 240 (1998).

MCL 460.6h first sets forth provisions for establishing, approving, and implementing GCR factors, then sets forth provisions for reviewing such implementation in progress to determine whether adjustments are in order. Again, MCL 460.6h(12) directs the PSC to "reconcile the revenues recorded pursuant to the gas cost recovery factor and the allowance for cost of gas included in the base rates established in the latest commission order for the gas utility with the amounts actually expensed and included in the cost of gas sold," and to do so on the basis of the "reasonableness and prudence of expenses[.]" The provision for reconciliation proceedings thus calls for refinement or enforcement of what was decided in the attendant plan proceedings. Accordingly, we construe the command of MCL 460.6h(3) to minimize costs as bearing on both kinds of proceeding.

In Case No. U-15701-R, its GCR-plan companion, Case No. U-15701, included no provision for exchange gas at all, and so when the reality of such purchases from MGAT came into being, reconciliation proceedings afforded the only opportunity to consider the question whether appellant was recording those purchases at the correct price. That enforcement action thus falls

squarely under the authority prescribed in subsection (12) for the PSC to "reconcile the revenues" on the basis of "reasonableness and prudence of expenses for which customers were charged *if the issue could not have been considered adequately at a previously conducted gas supply and cost review*" (emphasis added).

In Case No. U-16146-R, its rate-proceeding companion, Case No. U-16146, expressly envisioned MGAT purchases, and prospectively called for city-gate index pricing of exchange gas. In light of the discussion and resolution of questions concerning how to price exchange gas through the development of, and decision in, the GCR plan case that in turn engendered this reconciliation case, it would be elevating form over function to suggest that the PSC was powerless to remedy a perceived error in the matter in the reconciliation proceeding.

Nor does appellant's characterization of the result as retroactive ratemaking have merit. Retroactive ratemaking "involves a change either upward or downward in the rates charged by a utility for its service under a lawful order." *Detroit Edison Co v Pub Serv Comm*, 221 Mich App 370, 376; 562 NW2d 224 (1997). In the absence of specific statutory authorization, retroactive ratemaking in utility cases is prohibited. *Mich Bell Tel Co v Pub Serv Comm*, 315 Mich 533, 547, 554-555; 24 NW2d 200 (1946). However, "the PSC has discretion to determine what charges and expenses to allow as costs of operation. What reasonable accounting method to employ is a legislative decision to be made by the PSC." *Detroit Edison Co*, 221 Mich App at 375 (citation omitted).

In this case, if the adjustments the PSC made to the pricing of exchange gas in the reconciliation proceedings below may fairly be characterized as retroactive

ratemaking, such retroactive ratemaking is statutorily authorized. See *Mich Bell Tel Co*, 315 Mich at 547, 554-555. As previously discussed, MCL 460.6h sets forth reconciliation proceedings as a means of refining or enforcing the provisions of related GCR plan cases during or immediately following implementation of those plans. As appellees consistently and reasonably note, the statutory provisions for reconciliation cases envision some after-the-fact adjustments in approved costs by their very nature.

For these reasons, we reject appellant's procedural challenges.

IV. PROSPECTIVE APPLICATION

Appellant argues that the PSC set forth a new pricing methodology with strictly prospective application, but then engaged in creative interpretation of the evidence and of its orders to apply that methodology retroactively. We find merit to this argument.

In Case No. U-15701-R, the PSC justified applying the city-gate index pricing by pointing out that two of appellant's witnesses testified that exchange gas from MGAT had been received and recorded, but that as a matter of bookkeeping, actual completion of the purchases would be delayed until the PSC had issued orders resolving recent controversy over the best method of pricing. The PSC apparently credited those two witnesses entirely, and discredited as an unexplained contradiction the later testimony from a third witness that the gas in question had actually been purchased before the awaited orders were issued. The PSC apparently found it expedient to identify an evidentiary conflict and resolve it in favor of the witnesses who spoke of deferred purchasing. But, as appellant

points out, its witnesses were speaking at different times about different practices.

The witnesses who spoke of appellant's deferring purchases of exchange gas testified on June 29, 2010. The rebuttal witness who spoke of appellant's having in fact completed all such purchases initiated before the PSC's September 28, 2010 order announcing a prospective new pricing scheme by that date testified on March 15, 2011. The attorney general's witness confirmed that a change had taken place, offering the following summary:

> [The administrative law judge] issued his PFD in Case No. U-15451-R on July 1, 2010, just two days after MichCon had filed its U-15701-R testimony declaring its intention to price its MGAT purchases in accord with the Commission's U-15451-R order when it appeared. But MichCon did not wait for the Commission's order. Instead, on August 4, 2010, MichCon purchased the MGAT deliveries made during the U-15701-R GCR period (April 2009 through March 2010) at a price equal to the Jurisdictional Rate for that U-15701-R period. On the same date, MichCon also purchased the gas delivered by MGAT in April, May, and June 2010. The price for the latter purchase was $6.95 per Mcf, which was MichCon's estimate (as of the purchase date) of its Jurisdictional Rate for the 2010-2011 GCR period, which is the period being addressed in the present proceeding.
>
> The following day—August 5, 2010—[the] ALJ . . . issued her PFD in Case No. U-16146, MichCon's GCR plan proceeding for the 2010-2011 GCR period being reconciled here. Four days later, on August 9, MichCon purchased MGAT's July deliveries; and then MichCon purchased MGAT's August 2010 deliveries on September 24. Both of these MGAT purchases were priced at MichCon's then-current estimate of what its Jurisdictional Rate would be for the entire 2010-2011 GCR period, ending March 31, 2011. That estimate remained at $6.95 per Mcf for the

> purchase of MGAT's July and August deliveries, the same as the estimate used to price the deliveries for April, May, and June 2010.
>
> Also on August 9, 2010, the same day it purchased MGAT's July deliveries, MichCon amended its Base Contract with MGAT for the purchase of the MGAT deliveries. The amendment fixed the pricing of the MGAT purchases at MichCon's Jurisdictional Rate, contrary [to] the recommendations by both ALJs in their PFDs addressing the pricing issue. The amendment also made this pricing change retroactive to include all transactions executed after April 1, 2009.

This summary comports with an exhibit submitted by the Attorney General detailing the purchasing activity between appellant and MGAT at the relevant times. This undisputed chronology suggests that appellant originally intended to defer the completion of its exchange of gas purchases until the PSC issued orders indicating whether there would be a change to city-gate index pricing, but then actually *accelerated* the process in order to complete the transactions at issue before the anticipated change to retain the perceived advantage of the earlier pricing methodology.

Appellant characterizes its timing in incurring the exchange gas purchases as a management decision outside the PSC's regulatory purview. Appellant likens its actions in this regard to a taxpayer who "might complete a contemplated transaction before year-end due to a potential future change in the tax law." We see nothing pernicious about a utility's accelerating certain business activities in order to maximize the advantage to be had from doing so before an anticipated change in the regulatory environment. We must conclude that the record does not support the PSC's finding, because the earlier testimony reflected a mere plan to defer actual purchases of exchange gas, which plan ultimately

yielded to a change in appellant's actual business operations. It is undisputed that appellant actually completed the purchases before the orders affecting pricing methodology were issued.

In its order in Case No. U-16146-R, the PSC noted the Attorney General's argument below that appellant changed its relationship with MGAT in order to "frustrate" the pending recommendations for a change in pricing methodology. The PSC justified its determination to impose city-gate index pricing for the whole period covered in that reconciliation on the grounds that the September 28, 2010 order that called for city-gate index pricing for "all purchases occurring after the Commission issues its final order in this case" also stated that it applied to deliveries of gas that predated that order, but whose costs were not yet approved by that order. According to the PSC, appellant "has been aware for almost two years that MGAT purchases are more appropriately priced at city-gate index." On appeal, the PSC adopts the following reasoning set forth by the ALJ in the proposal for decision:

> Under the express terms of that [9/28/10] Order [in Case No. U-16146], the MGAT purchases between April 1 and September 27, 2010, at issue in this case occurred before September 28, 2010. However, those purchases will not be approved until the Order in this case is entered. Therefore, all MGAT purchases during the GCR Year, irrespective of when they occurred, must be priced at the city-gate index.

The PSC thus concedes that the purchases of the gas at issue had indeed "occurred" before the effective date of the order calling for a change in pricing methodology, then relies on the pendency of final cost approval for purposes of imposing the new pricing on those purchases that had otherwise already occurred. Appellant asserts that dating otherwise completed purchases to a

later approval date does not comport with the announced policy of prospective application. We agree that application of the policy to purchases that appellant made before September 28, 2010, did not comply with the PSC's statement that it would only prospectively apply the new policy.

For these reasons, we conclude that the PSC acted unreasonably, or capriciously, in setting forth a prospective-only requirement changing the pricing of exchange gas to the city-gate index method, then applying that change retroactively. In Case No. U-15701-R it achieved this by overreliance on testimony indicating that appellant intended to defer completing its purchase of delivered exchange gas pending an expected decision from the PSC, when uncontroverted testimony and exhibits indicated that appellant in fact completed the purchases of exchange gas at issue before the PSC announced that pricing change. In Case No. U-16146-R, the PSC enforced its ostensibly prospective-only rule retroactively by indulging the fiction that otherwise completed purchases of exchange gas were in fact not completed until approved through completion of the PSC's review process, despite conceding that the purchases had occurred before September 28, 2010.

Accordingly, we vacate the orders below insofar as they retroactively repriced appellant's purchases of exchange gas completed before September 28, 2010, and remand this case to the PSC for further proceedings consistent with this opinion.

Reversed in part and remanded. We do not retain jurisdiction.

WHITBECK, C.J., and FITZGERALD and O'CONNELL, JJ., concurred.

FRASER TREBILOCK DAVIS & DUNLAP, PC v BOYCE TRUST 2350

Docket Nos. 302835, 305149, and 307002. Submitted December 4, 2013, at Lansing. Decided February 6, 2014, at 9:05 a.m. Leave to appeal sought.

Fraser Trebilcock Davis & Dunlap, PC, brought an action in the Midland Circuit Court against Boyce Trust 2350, Boyce Trust 3649, and Boyce Trust 3650, seeking to collect unpaid attorney fees. Following a jury trial, the court, Jonathan E. Lauderbach, J., entered a judgment in favor of plaintiff in the amount of $73,501.90, inclusive of damages, taxable costs, and prejudgment interest. Defendants appealed. (Docket No. 302835). The trial court then granted plaintiff's motion for case-evaluation sanctions pursuant to MCR 2.403(O). Defendants brought two separate appeals from the attorney-fee orders. (Docket Nos. 305149 and 307002). The appeals were consolidated by the Court of Appeals.

The Court of Appeals *held*:

1. The trial court did not err by determining that defendants' special requested jury instruction was not necessary because the model jury instructions that were given adequately informed the jury on plaintiff's burden of proof. There was no instructional error.

2. The trial court did not abuse its discretion by refusing to permit certain rebuttal testimony proposed by defendants.

3. A law firm, such as plaintiff, represented by its own attorneys is not a pro se litigant for purposes of entitlement to attorney-fee sanctions under MCR 2.403(O). With regard to self-representation, an organization is not comparable to a pro se litigant because the organization is always represented by counsel, whether in house or pro bono, and thus, there is always an attorney-client relationship.

4. MCR 2.403(O)(6)(b) requires a trial court to award a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial court for services necessitated by the rejection of a case evaluation. The court rule does not require that the attorney fee be incurred, it requires only that the trial court determine a reasonable attorney-fee amount according to a pre-

scribed method, namely, by determining the hourly or daily rate for services necessitated by the rejection of the case evaluation. Accordingly, an award of case-evaluation sanctions must include an award of attorney fees to be determined by this method.

5. Actual costs arising from postjudgment proceedings that occur more than 28 days after the judgment may be awarded as case-evaluation sanctions if the proceedings are causally connected to the party's rejection of the case evaluation.

6. Plaintiff's legal work opposing defendants' motion for a new trial was necessitated by defendants' rejection of the case evaluation. The proceedings to obtain the award of case-evaluation sanctions were not necessitated by defendants' rejection of the case evaluation. The case-evaluation proceedings were complicated by defendants' assertion that plaintiff, a law firm represented by its own members, was not entitled to receive attorney fees and by defendants' objections to the amount of attorney fees sought by plaintiff. Because the legal issue of plaintiff's entitlement to attorney fees for services rendered by its own attorneys was a close one, not clearly settled by Michigan caselaw, and the trial court awarded plaintiff only approximately 30% of its requested attorney fees, under the circumstances of this case, there was an insufficient causal nexus between defendants' rejection of the case evaluation and the resources plaintiff expended claiming attorney fees. Therefore, the supplemental attorney-fee award of $22,703.95 ($21,253.60 plus interest of $1,450.35) for expenses sustained from March 4, 2011, to August 11, 2011, is not authorized by MCR 2.403(O). The orders of June 29, 2011, and November 7, 2011, must be reversed to the extent that they authorize case-evaluation sanctions for plaintiff's time devoted to pursuing case-evaluation sanctions.

7. The trial court did not abuse its discretion by determining that $300 was a reasonable hourly fee for attorney Perry, who represented plaintiff. The decision was within the range of principled outcomes.

8. The trial court's award of $80,434 in attorney fees was not outside the range of principled outcomes, notwithstanding that the verdict was only $70,000.

9. The judgment in Docket No. 302835 is affirmed. The award of case-evaluation sanctions in Docket Nos. 305149 and 307002 is affirmed in part and reversed in part to the extent that it encompasses services related to the pursuit of case-evaluation sanctions. The case is remanded to the trial court for the recalculation of case-evaluations sanctions.

Affirmed in part, reversed in part, and remanded.

MURPHY, C.J., concurring in part and dissenting in part, agreed with the majority with regard to the jury instruction and evidentiary issues but disagreed with the majority concerning whether plaintiff is entitled to an award of attorney fees as case-evaluation sanctions. An attorney is defined as an agent of another person, therefore, there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees. If a law firm itself becomes embroiled in litigation as a party litigant and proceeds using one or more of its own attorneys, the law firm has in theory employed itself to go forward. It is effectively proceeding *in propria persona* and the firm does not have an identity that is separate from its attorneys for purposes of establishing an attorney-client relationship. There is an absence of a true attorney-client relationship, as required to be entitled to an attorney fee. The trial court's decision to award attorney fees to plaintiff should be reversed, considering there was no attorney fee for purposes of MCR 2.403(O)(6)(b) in light of the missing element of an attorney-client relationship.

1. ACTIONS — CASE EVALUATIONS — CASE-EVALUATION SANCTIONS — LAW FIRMS — PRO SE LITIGANTS.

A law firm represented by its own attorneys is not a pro se litigant for purposes of entitlement to attorney-fee sanctions under MCR 2.403(O).

2. ACTIONS — CASE EVALUATIONS — CASE-EVALUATION SANCTIONS — ACTUAL COSTS — ATTORNEY FEES.

The party who rejects a case evaluation and subsequently fails to receive a more favorable verdict must pay the opposing party's actual costs, including a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation; there is no requirement that the attorney fee be actually incurred (MCR 2.403(O)(1) and (6)(b)).

3. ACTIONS — CASE EVALUATIONS — CASE-EVALUATION SANCTIONS — ACTUAL COSTS.

A request for case-evaluation sanctions must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment; actual costs arising from postjudgment proceedings that occur more than 28 days after the judgment may be awarded

as case-evaluation sanctions if the proceedings are causally connected to the party's rejection of the case evaluation (MCR 2.403 (O)(8)(i) and (ii)).

Fraser Trebilcock Davis & Dunlap, PC (by *Michael H. Perry*), for plaintiff.

W. Jay Brown PLC (by *W. Jay Brown*) for defendants.

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

FITZGERALD, J. Plaintiff law firm brought this action to collect unpaid attorney fees from defendants. After a jury trial, the trial court entered a judgment in favor of plaintiff in the amount of $73,501.90, inclusive of damages, taxable costs, and prejudgment interest. Defendants appeal as of right from that judgment in Docket No. 302835. The trial court subsequently granted plaintiff's motion for case-evaluation sanctions pursuant to MCR 2.403(O). Defendants appeal as of right from the attorney fees orders in Docket Nos. 305149 and 307002. We consolidated the appeals. We affirm in part, reverse in part, and remand.

DEFENDANTS' TRANSACTIONS TO PURCHASE HYDROELECTRIC DAMS

Plaintiff's claims for unpaid attorney fees arise from plaintiff's representation of defendants in transactions to purchase and redevelop four hydroelectric dams in the Midland County area. The dams were owned by Synex-Wolverine. Defendants' cotrustee, Lee Mueller, believed the dams could be redeveloped for a profitable operation producing electrical power for Consumer's Energy. The transactions involved defendants' purchasing the entities that operated the dams and also purchasing more than 200 related real estate parcels from

Synex-Wolverine. Synex-Wolverine's 51% shareholder, Scott Goodwin, would also own a 51% interest in the new business, Synex-Michigan, but Goodwin would not have an ownership interest in the real estate. Defendants had sufficient resources to pay for the real estate, but they required financing to purchase the equipment and other business assets. Defendants and their Chicago counsel sought financing from a bank, but defendants obtained a bridge loan from Goodwin's associate, Richard Milsner, to enable the transaction to close before defendants received permanent financing. Milsner advanced the loan on the condition that Goodwin retain a 51% interest in the newly formed business enterprise.

Defendants retained plaintiff to conduct the transactions, which involved complex tax-planning issues. The transactions were subject to an advantageous tax benefit under the Internal Revenue Code, but only if the transactions were completed within a 180-day period. The transactions closed on March 17 and 23, 2006, enabling defendants to realize the tax benefit. Mueller was satisfied with the transactions and plaintiff's work up to the time of the closing, but afterward Mueller came to believe that Goodwin breached his duties to defendants, effectively depriving defendants of the benefit of the bargain. Goodwin made bridge-loan payments directly to Milsner instead of complying with Mueller's instructions to route the payments to defendants. Mueller alleged at trial that Goodwin "locked out" defendants from the dam and thwarted defendants' receipt of payments. Defendants alleged that Goodwin wrongfully failed to disclose to defendants that he had a history of noncompliance with federal energy regulators. Defendants requested plaintiff's services in handling these legal disputes with Goodwin, but they were disappointed with the results. In December

2006, defendants ceased paying plaintiff's attorney fees, leaving an outstanding balance of approximately $74,358.94.

Plaintiff filed a complaint alleging that defendants had paid $161,098.22 in legal fees, but had failed to pay the outstanding balance of $74,358.94. Plaintiff brought claims of breach of contract, account stated, and quantum meruit, and sought damages of $87,632.40, consisting of the unpaid balance, $1,098.22 for costs, and $12,175.24 for a time-price differential. Defendants denied that plaintiff was entitled to the requested damages. In their affirmative defenses, defendants asserted that plaintiff committed the first material breach of contract, that defendants were dissatisfied with the quality of plaintiff's representation, and that plaintiff improperly billed defendants for more hours than were actually spent on the matter, charged defendants for services that were not reasonably necessary, and raised their rates in violation of an agreement to only raise rates with defendants' written approval. Defendants argued that plaintiff had the burden of proving "that each time entry was actually incurred, was accurately recorded in terms of its length, and represented services reasonably necessary for representation of the defendants."

TRIAL

At trial, plaintiff's former associate attorney, John Miller, testified regarding the time he spent on legal matters for defendants. Miller testified that he assisted plaintiff's principal, Edward Castellani, an attorney and certified public accountant, with legal research and other tasks related to business and tax transactions. Miller testified about his hourly rate and the process by which associates submitted their

billable hours to partners for review and approval before plaintiff billed clients. He denied overstating his billable hours. Castellani testified that he assigned research and writing tasks to Miller because Miller could perform the work at a lower billing rate. Castellani testified that Miller's work was satisfactory and that Miller's time records were accurate. Castellani explained that Douglas Austin, also one of plaintiff's shareholders, was involved in the project because of his expertise in real estate law.

Castellani believed that plaintiff's work for defendants was completed after the closing, but defendants contacted Castellani about continuing problems with Goodwin. Castellani described "phase two" of plaintiff's work for defendants as "a lot of negotiations, discussion, and legal maneuvering about how to get [Goodwin] out of the business." Additionally, defendants needed a source of financing to pay off the bridge loan advanced by Milsner before the closing.

Castellani testified regarding an e-mail that Mueller sent to Castellani in response to Castellani's e-mail to the trustees on September 27, 2006. Mueller stated that defendants paid $12,000 toward their account that month, but they would not make additional payments until Goodwin resumed payments to defendants. The e-mail did not contain anything critical of plaintiff's work. Castellani's response stated that defendants' payment of $12,000 left an $8,000 amount that was more than 90 days overdue. Castellani warned defendants that plaintiff would terminate their services when the account became 120 days past due. Castellani rejected defendants' plan to delay paying plaintiff until Goodwin made payments to defendants. Castellani testified that defendants made no payments after November 2006.

Plaintiff questioned Castellani about defense Exhibit 35, an e-mail that Mueller sent to Castellani the first week of December 2006. In the e-mail, Mueller explained that defendants had problems with their ownership of the hydroelectric facilities. Defendants requested that plaintiff cosign a loan in the amount of $3,400,000 to enable defendants to secure the financing needed to continue to operate the dams. In exchange, Mueller offered to pay plaintiff $60,000, plus $75,000 to "pre-fund a Michigan litigation" against Goodwin. On December 18, 2006, Castellani wrote defendants a letter stating that plaintiff was suspending performance of legal services for defendants until defendants made arrangements to pay the balance due. Castellani testified that Mueller responded with an e-mail stating "there are numerous schedules that are apparently not actually part of the purchase agreement." Mueller complained that he could not determine from the transactional record which assets were owned by which entities, other than a list of personal property owned by Synex-Wolverine.

Castellani stated that Mike Perry was the billing attorney who reviewed billings to ensure that they were for reasonably necessary services. Castellani agreed that plaintiff was contractually bound to only bill the client for time actually spent on services that were reasonably necessary. Castellani acknowledged that the contract listed his hourly rate as $230, but he believed that the hourly rate actually charged was $240. Castellani stated that he did not know the reason for the differential because Perry handled billing for the firm. Castellani stated that he billed for activities such as drafting documents, reviewing documents, reviewing laws and rules, conferring with other attorneys regarding the file, and interactions with the client. Castellani

admitted that all the work done by Miller was work that Castellani could have done himself.

On cross-examination, defendants' counsel reviewed testimony that there were two closings, one on March 17 and one on March 23, 2006. When asked whether Mueller was "then happy that it got closed," Castellani answered affirmatively. Defendants asked Castellani if plaintiff resolved defendants' problem relating to their loss of physical control of the dams. Castellani replied that it did not. Castellani stated that Mueller asked for plaintiff's assistance in obtaining permanent financing to resolve this problem. Defendants asked if "Mr. Mueller was unhappy with the failure to solve this problem?" Castellani replied, "I would say he was unhappy with the way his partner was interpreting those documents."

Defendants questioned Castellani extensively regarding items on plaintiff's invoices, suggesting that the tasks listed could not really have required as much time as shown in the billings. Defendants also questioned Castellani regarding the prebilling process in which senior attorneys reviewed associates' time reports and adjusted them before submitting the bills to clients. Castellani denied that Mueller complained that his billings contained too much detail or lacked enough detail.

Douglas Austin, one of plaintiff's shareholders, testified that his area of practice was real estate and that he usually represented developers. Austin stated that defendants received a bridge loan from Milsner to enable them to close before they obtained permanent financing. Austin did not attend the closing because the real estate issues were resolved by that time. Austin testified regarding plaintiff's Exhibit 36, an e-mail that Austin sent to Castellani after the closings. The e-mail stated, "Am extremely happy Lee [Mueller] called at 4:48 to say that the recordings had been completed, and

Eric had revised the commitments to show no requirements." It also stated, "Lee wanted me to express to you and John his gratitude for everything you have done. He is very pleased."

Lee Mueller testified that he had been a successor cotrustee of the trusts since 1998. Mueller recognized a business opportunity for the trusts in redeveloping the hydroelectric dams. Mueller and Goodwin discussed the possibility of teaming up to operate the hydroelectric dams. Defendants had sufficient cash to purchase the real estate, but not to purchase the business entities. Defendants' attorney in Chicago, Peter Recchia, agreed to look into a loan from LaSalle Bank.

Mueller stated that an escrow agent in Chicago paid plaintiff's bills to defendants. Mueller testified regarding his belief that plaintiff's attorneys inflated their bills by exaggerating the amount of time spent on various tasks. For example, Mueller objected to a charge of $120 for time spent exchanging e-mails about the bridge loan. Mueller testified that Miller was present at the closing on March 17, 2006. The closing took several hours and consisted mostly of participants signing documents. Mueller believed that Miller was a "spectator." Castellani did not tell Mueller that plaintiff would charge defendants for Miller's attendance. After Mueller received plaintiff's correspondence, notifying defendants of an outstanding balance of $97,000, he called Castellani to say he believed that defendants had already paid all of plaintiff's fees.

Mueller testified regarding the Milsner loan and the early indications that Goodwin intended to cheat defendants:

> When the mortgage documents were being delivered to or transmitted to Ed Castellani for review, they had language in them that was very, very troublesome.

> Mr. Milsner had expressed a view that in order to—that in order for him to feel secure about providing a 2.4 million dollar bridge loan to the Boyce Trusts, that he would want to be assured that these assets, these hydro assets, would be managed by somebody that he had confidence in. And because Mr. Goodwin was his partner, he wanted assurances that Mr. Goodwin would be the active manager rather than co-trustees of a trust that had never managed a hydro project before.
>
> In concept that—that didn't sound out of the ordinary. But in practice, I quickly realized that the intent of these documents was not to secure Mr. Milsner's temporary interest in his loan, but rather these documents were set up very cleverly to provide the ability to swindle the Boyce Trusts out of the entirety of our three million dollar investment.

Mueller confronted Goodwin and reminded him that Goodwin was not to own any interest in the real estate. Goodwin relented, and Castellani changed the documents accordingly. Mueller realized within 30 days that defendants were being swindled, when Goodwin declined to comply with Mueller's procedures for routing installment payments to Milsner. Mueller intended for Goodwin to submit payments to defendants, which would make payments to Milsner. Mueller knew that defendants were "in trouble" because Goodwin refused to make payments and made excuses for not paying.

Plaintiff's counsel remarked that Mueller had started providing testimony regarding plaintiff's services to defendants for the postclosing matters. Counsel stated:

> I'm not sure where this is going to go, but the quote, malpractice, wrongdoing kind of thing is out of the case. And if we're talking about reasonable necessity of service, that's one thing. But if we're going to talk about Fraser Trebilcock not doing or doing something else and whether—other than whether their services were rea-

> sonably necessary, I think we're going to be running afield far (sic) from what the case is all about.

Defendants' counsel responded that the evidence established that plaintiff billed "a significant amount of money" in the summer and fall of 2006 "without getting things done that Boyce Trusts had requested [plaintiff] to do." Plaintiff responded that the contract between the parties did not provide for contingent fees. The trial court asked defendants to specify whether Mueller would testify that the task was not accomplished or that the objective was not accomplished. By way of explaining the distinction, the trial court gave the example of plaintiff billing defendants for a telephone call that was not made, versus billing defendants for a phone call that was made, but did not achieve the result that defendants wanted. The court commented that, in the latter category, "we're getting into the subjective expectations of the client and . . . whether the lawyer was being effective." Defendants responded that plaintiff's witnesses testified about Mueller's failure to object to invoices. The trial court replied that plaintiff's failure to meet defendants' objectives was not relevant because the contract did not provide for a contingency fee. Defendants argued that plaintiff was "engaged in character assassination of Mr. Mueller," which would probably culminate in a closing argument that "Mueller got himself into a situation and then wasn't happy with what Fraser Trebilcock did and he didn't pay . . . ." Defendants asserted that plaintiff "introduced" these issues, so defendants "should have an opportunity to rebut these issues." The trial court replied that defendants were attempting to mislead the jury about whether the engagement letter empowered defendants to "condition payment not on whether services

were reasonably necessary, but whether [they were] satisfied with the outcome of the services that were provided."

Defendants' counsel acknowledged that the parties' contract did not condition defendants' obligation to pay on their satisfaction with plaintiff's work. But he argued that defendants' satisfaction was relevant to rebutting issues raised by plaintiff. The trial court commented that defendants had previously intended to pay all of plaintiff's legal fees when defendants received the funds they expected. The trial court stated that defendants' objections to the amount of the billings, and their inability to pay the invoices, did not support defendants' position that they were refusing payment because they believed plaintiff was padding the bills with unnecessary or unperformed services. The trial court allowed defendants' counsel to question Mueller regarding defendants' complaint that Goodwin excluded defendants from the dams.

Mueller testified that he discontinued plaintiff's services in November or December 2006. On cross-examination, Mueller stated that his failure to pay invoices from August 2006 until March 2007 represented his disapproval. Mueller stated that he expressed to Castellani his "disapproval of the rapacious nature" and "greedy and excessive billing practices" exercised by plaintiff. Mueller continued to pay bills at a lower rate because he did not want to stop payment and lose plaintiff's services. Mueller acknowledged that he told Castellani in correspondence dated September 20, 2006, that defendants intended to pay all of their obligations when funds became available. Mueller admitted that the September 20, 2006, e-mail indicated that defendants would sell securities to raise capital to fulfill their commitment to paying plaintiff.

JURY INSTRUCTION DISPUTE

Defendants proposed a special jury instruction indicating that plaintiff had the burden of proving by a preponderance of the evidence that the billings were for services that were reasonably necessary and that the billings accurately stated the time actually spent on each item. The trial court declined to give defendants' proposed instruction, stating, "I think that [M Civ JI] 142.50 accurately states the law that the Plaintiff has the burden to prove what the parties intended the contract to mean. Whether certain services were or were not reasonably necessary as contemplated by the contract is a factual question . . . for the jury to decide."

The jury found that defendants breached the fee agreement by failing to make payments to plaintiff and that defendants' breach resulted in $70,000 in damages for plaintiff. The trial court awarded plaintiff a judgment consisting of $70,000 in damages, $380 in taxable costs, interest in the amount of $2,697.21 from August 3, 2009, to August 3, 2010, and interest of $804.61 from August 3, 2010, to December 3, 2010, for a total judgment "in the amount of $73,501.90 [sic]."

POSTJUDGMENT PROCEEDINGS

Defendants moved for a new trial pursuant to MCR 2.611. Defendants asserted that they were deprived of a fair trial because the trial court failed to give their proposed jury instruction on the burden of proof and because the trial court did not allow defendants to present rebuttal testimony concerning defendants' "displeasure . . . with the amount billed." The trial court found that defendants had ample opportunity to rebut plaintiff's evidence. The court commented that defendants presented "an awful lot of testimony con-

cerning the line-by-line time entries from the itemized bills of the law firm." The court also commented that although the limitations period for filing a malpractice claim had expired, defendants had, but did not exercise, the option of asserting legal malpractice as an affirmative defense and identifying an expert witness in support of that defense. The court also determined that M Civ JI 142.01 was appropriate and accurate with respect to the burden of proof. The trial court denied defendants' motion for a new trial.

Plaintiff moved for an award of case-evaluation sanctions pursuant to MCR 2.403(O). Plaintiff submitted documentation indicating that the case-evaluation panel unanimously evaluated the case in the amount of $60,000 for plaintiff, which plaintiff accepted, and which defendants effectively rejected by failing to respond. Plaintiff submitted a "Draft for Work-in-Process" detailing its attorneys' work on the case since the case evaluation.

Defendants argued in response that plaintiff did not incur attorney fees, and was not eligible to receive attorney fees as case-evaluation sanctions, because MCR 2.403(O) does not authorize an award of attorney fees to a party that represents itself. Alternatively, defendants requested that the trial court conduct an evidentiary hearing to determine the reasonableness of the requested attorney fees after allowing the parties the opportunity to conduct discovery. Defendants argued that the requested attorney fees were excessive and out of line with the typical fee rates charged in the Midland area. Defendants filed a second pleading disputing plaintiff's calculation of attorney fees. Defendants argued that the reasonable rate for calculating plaintiff's attorney fees was the range of $195 to $200. Defendants based this argument on the median billing

rate for attorneys in Midland County of $200 and the median rate for creditor collections of $195.

At a hearing on February 4, 2011, the trial court commented that if a law firm uses its own attorneys to litigate an action against a former client for unpaid fees, the judgment it receives will be diminished by the cost of the lost opportunity of providing legal services to paying clients. The court commented that plaintiff used $81,000 worth of attorney work hours to collect a $70,000 debt; consequently, "[i]f they can't recoup the cost, or if the firm can't recoup the costs of pursuing the client that didn't pay the firm, they come out $11,000 upside down." The court asked defendants "what disincentive is there for the client to not stiff the lawyer?" Defendants responded by citing *Watkins v Manchester*, 220 Mich App 337; 559 NW2d 81 (1996), in which this Court followed caselaw that held that an attorney party who proceeded *in propria persona* in a lawsuit under the Freedom of Information Act was not permitted to recover attorney fees under MCR 2.403(O). The trial court determined that *Watkins* was distinguishable because it involved an individual attorney.

The trial court concluded that plaintiff was not a pro se litigant because it was a professional corporation represented through its agents. The court ruled that plaintiff was entitled to case-evaluation sanctions, including attorney fees, to be determined at an evidentiary hearing.

The court issued an order directing the parties to conduct discovery on the proper amount of fees in preparation for a hearing to be held on March 9, 2011. Subsequently, the parties stipulated to an order requiring the parties to take *de bene esse* depositions of the expert witnesses, Jack Pulley for plaintiff, and William Garchow for defendants, and file postdeposition briefs

within seven days from receipt of the deposition transcripts. Defendants argued that plaintiff's fees and costs incurred in pursuing case-evaluation sanctions were not recoverable. Defendants disparaged Pulley as incompetent and corrupt and urged the trial court to give no credence to his opinion on the hourly rate and amount of hours. Defendants praised their own expert, Garchow, and argued in favor of his range of reasonable fees from $180 to $250 an hour.

Plaintiff argued in favor of "$115,202 as a reasonable attorney fee, based on the blended hourly rate of $296 per hour for Fraser Trebilcock's attorneys' services from September 21, 2010, until March 3, 2011 necessitated by the Defendants' rejection of the case evaluation award." Additionally, plaintiff's brief filed before the stipulated order included arguments that its attorneys' respective billing rates were reasonable. Plaintiff cited Pulley's opinion that plaintiff's billing rates were reasonable. Plaintiff also cited data from the state bar that attorney fees in the Mt. Pleasant area ranged from $175 to $400 an hour, with plaintiff's attorneys' ranges from $175 to $320 falling within this bracket. Plaintiff defended Perry's hourly rate of $320, Nicole Proulx's hourly rate of $200, Austin's hourly rate of $260, and Ryan Kauffman's hourly rate of $195. Plaintiff argued that lead counsel's claim for 138.6 hours from September 21, 2010, until November 4, 2010, was reasonable in view of the tasks he was required to perform. Plaintiff argued that the factors in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), justified plaintiff's attorneys' fees.

The trial court began its analysis by determining the appropriate hourly rate for Perry's services. The court rejected plaintiff's request of $320 as a reasonable hourly rate, stating that MCR 2.403(O) "is not

intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client." The court also rejected defendants' argument that $200 was a reasonable rate. The court considered data from the 2010 State Bar of Michigan survey regarding the median, the 75th percentile, and the 95th percentile hourly rates for attorneys based on "legal classification," years in practice, firm size, field of practice, and primary location. Perry's legal classification was equity shareholder, he had 37 years of practice, his firm had 40 attorneys, his field of practice was environmental law, and his primary locations were Ingham and Midland Counties. The data indicated that the median hourly rate for attorneys in Michigan who share these categories with Perry ranged from $200 to $270, while the 75th percentile rate in these categories ranged from $235 to $350. The trial court concluded "that given Mr. Perry's skill, experience and reputation, the 75th percentile more accurately reflects the fee customarily charged for similar legal services, and finds as reasonable a rate of $300 per hour."

The trial court addressed defendants' argument that $200 was the reasonable rate because it was the median hourly billing rate in Midland County. The trial court stated that defendants' "near exclusive reliance" on one factor was inconsistent with our Supreme Court's decision in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). The court found that defendants' suggested rate failed to account for Perry's skill, experience, and reputation. The court stated that the reasonable fee did not reflect "what might be reasonable in Ingham County, but rather, what is reasonable in Midland County under the particular circumstances of this case." The court stated:

> It should also be noted that the median hourly billing rate for both Ingham and Midland County is $200, while the 75th percentile for each is roughly equivalent. The Court believes that the 75th percentile figure (whether in Ingham County or Midland County), coupled with an appropriate "upcharge" for Mr. Perry's considerable skill, experience and reputation, accurately reflects the fee customarily charged for similar legal services.

The court rejected defendants' argument that the reasonable rate should be determined according to the rates of local law firms that plaintiff might have retained to represent it in the action to collect unpaid attorney fees. The trial court determined that plaintiff reasonably decided to represent itself and that defendants should not have been surprised that plaintiff chose to represent itself because plaintiff's reliance on its own resources to litigate the action "was the economically rational thing to do." The court cited Perry's statement in his affidavit that plaintiff saved legal expenses that would have been incurred by outside attorneys familiarizing themselves with the facts of a case that plaintiff's attorneys already knew. The court noted that defendants did not object to the hourly rates of the other attorneys who provided services for plaintiff after the case evaluation, including Samantha Kopacz ($175), J.J. Burchman ($185), Nicole Proulx ($185), Ryan Kaufman ($185), Douglas Austin ($250), and Edward Castellani ($290).

The trial court noted that plaintiff sought compensation for 119.50 hours devoted to discovery and trial preparation, 96.8 hours of trial time, and 172.6 hours for posttrial issues. The trial court addressed defendants' challenges to an assessment of sanctions for posttrial matters. The court rejected defendants' argument that *Haliw v Sterling Hts*, 471 Mich 700; 691 NW2d 753 (2005), which precluded case-evaluation

sanctions for appellate proceedings, also precluded sanctions for posttrial proceedings in the trial court. The court commented that the basis for the *Haliw* Court's exclusion of appellate costs from case-evaluation sanctions was its recognition that MCR 2.403(O) is "trial-oriented." The trial court quoted the statement in *Haliw* that "a causal nexus plainly exists between rejection and trial fees and costs, the same cannot be said with respect to rejection and the decision to bring an appeal." The trial court reasoned that "there is a sufficient causal nexus between Defendants' rejection of the case evaluation and the fees and costs associated with continuing to defend against a motion for new trial." Regarding plaintiff's claim for attorney fees arising from preparing and filing the motion for case-evaluation sanctions, the trial court concluded that these services also were necessitated by defendants' rejection of the case evaluation and, therefore, were recoverable.

The trial court next considered the "reasonableness of the time spent by Plaintiff at all stages in the case." The trial court made these findings:

• Perry devoted 37.5 hours to pretrial motions. The trial court found this was reasonable.

• The trial court discounted three hours for Perry's travel time between Lansing and Midland for depositions, and six hours for Proulx's travel time for two days.

• The trial court discounted 1.4 hours that Perry spent on a dispositive motion that was never filed. The court also discounted 4.25 hours of a 7.1-hour entry in which Perry's work on the summary disposition motion was bundled with other services.

• The court discounted time that Austin spent attending the trial as plaintiff's corporate representative.

• Castellani claimed $4,270 for his two days' attendance at trial, determined by his hourly billing rate. The trial court allowed only $30, according to the daily $15 witness fee.

After making these adjustments, the trial court determined that plaintiff's total number of reasonable hours spent on proceedings after the case evaluation were 284.83, which, when multiplied by the respective attorneys' hourly rates, established a baseline monetary amount of $80,434. The court considered and rejected defendants' argument that this baseline figure should be adjusted downward because no attorney fees were incurred when plaintiff did not pay anything to the attorneys involved.

Plaintiff filed a taxed bill of costs for postjudgment proceedings on August 12, 2011, including Pulley's expert witness fee and the cost of transcribing both experts' depositions. Defendants argued in response that Pulley's fees were excessive and not supported by a detailed invoice.

The trial court's Final Order Awarding Reasonable Attorney Fees and Taxation of Costs in Favor of the Plaintiff was entered on November 7, 2011. The trial court referred to its October 18, 2011, opinion granting a reasonable supplemental attorney fee for fees plaintiff incurred from March 4, 2011, to August 11, 2011. The court adopted and incorporated its October 18, 2011, opinion. The court ordered:

> In addition to the reasonable attorney fee awarded to the Plaintiff on July 21, 2011 for the time period from September 21, 2010 to March 3, 2011, the Plaintiff is granted a reasonable supplemental attorney fee award for the fees which it incurred from March 4, 2011 to August 11, 2011 in the amount of $21,253.60, plus interest thereupon through October 31, 2011 in the amount of $1,450.35. The interest upon this Supplemental Attorney Fee Award shall accrue

> at a rate of $1.86 per day until December 31, 2011, at which point it shall continue to accrue until paid in full at the post-judgment interest rate established in accordance with MCL 600.6013(8).

The trial court also awarded plaintiff taxable costs for Pulley's expert witness fee ($3,000), costs of transcribing expert witnesses' testimony ($546), plus miscellaneous fees totaling $151, with interest accruing from August 3, 2009.

I. JURY INSTRUCTION

Defendants first argue that the trial court abused its discretion by declining to give defendants' requested instruction on plaintiff's burden of proof. This Court reviews de novo claims of instructional error, but the trial court's determination whether a standard jury instruction or special jury instruction is applicable and accurate is reviewed for an abuse of discretion. *Alfieri v Bertorelli*, 295 Mich App 189, 197; 813 NW2d 772 (2012). This Court considers jury instructions "as a whole to determine whether they adequately present the theories of the parties and the applicable law." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 626-627; 792 NW2d 344 (2010). "Instructional error warrants reversal when it affects the outcome of the trial." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 680; 819 NW2d 28 (2011).

The trial court instructed the jury on plaintiff's burden of proof as follows:

> Fraser Trebilcock Davis & Dunlap, P.C. has the burden of proof on the following:
>
> One, that there was a contract between it and Boyce Trusts 2350, 3649, and 3650.
>
> Two, that Boyce Trusts 2350, 3649, and 3650 breached the contract.

> And three, that Fraser Trebilcock Davis & Dunlap, P.C. suffered damages as a result of the breach.
>
> In this case, the parties do not dispute that there was a contract between them.
>
> If you find after considering all the evidence that Fraser Trebilcock Davis & Dunlap, P.C. has proved these elements, then your verdict should be for Fraser Trebilcock Davis & Dunlap, P.C.
>
> However, if Fraser Trebilcock Davis & Dunlap, P.C. fails to prove any one of these elements, your verdict should be for Boyce Trusts 2350, 3649, and 3650.
>
> * * *
>
> Fraser Trebilcock Davis & Dunlap, P.C. has the burden to prove what the parties intended the contract to mean. The contract is to be interpreted so as to give effect to the parties' intentions.

The court further instructed the jury that plaintiff had the burden of proving the parties' intentions regarding the correct interpretation of the contract. The court's instructions substantially recite M Civ JI 142.01 and 142.50. The court also instructed the jury that it "must determine the amount of money, if any, to award [plaintiff] as contract damages," and that plaintiff "must prove by a preponderance of the evidence the amount of any damages to be awarded."

Defendants argue that these model instructions failed to adequately instruct the jury that plaintiff was required to prove the legitimacy of each billed item. Defendants requested this special instruction, which the trial court declined to give:

> Plaintiff has claimed a right to recover for services it provided under the contract between the parties. As part of the contract, the Plaintiff agreed to provide and Defendant agreed to pay for services that were "reasonably necessary"

> for the Defendants' activities. Further, the Plaintiff agreed to bill on an hourly basis for the time spent on a matter. As the Plaintiff seeking compensation for providing services, the burden is on the Plaintiff to prove by a preponderance of the evidence that its billings are for services that are reasonably necessary and are for the time actually spent on the matter.

MCR 2.512(D)(4) provides that the trial court may give "additional instructions on applicable law not covered by the model instructions." If the court gives additional instructions, they must "be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative." *Id*.

Defendants argue that the standard instructions on burden of proof were not adequate because they did not explain that plaintiff was required to prove the legitimacy of each disputed item billed. Defendants cite *Livingston Shirt Corp v Great Lakes Garment Mfg Co*, 351 Mich 123; 88 NW2d 614 (1958). *Livingston Shirt* does not support defendants' argument that the trial court was required to specifically instruct the jury that plaintiff must prove the validity of each item billed. On the contrary, the decision indicates that once plaintiff satisfied its prima facie obligation to prove that it performed services in accordance with the contract, the burden shifted to defendants to prove that certain items billed were not proper. Defendants' reliance on *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55; 535 NW2d 529 (1995), which involved a no-fault automobile insurer's obligation to cover expenses for the insured's chiropractic treatment, is also misplaced. That case did not involve a claim for breach of contract, but rather a claim for recovery under the no-fault act, which specifically provides that no-fault benefits are payable only for "allowable expenses," which are limited to " 'all reason-

able charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.' " *Id*. at 93, quoting MCL 500.3107(1)(a).

Defendants extensively cross-examined plaintiff's witnesses regarding items stated in invoices, such as the time involved in answering a short e-mail and reviewing files. Defendants challenged items such as Miller's work on Christmas Day 2006. Defendants presented a detailed closing argument explaining their position that several of plaintiff's items were not credible. The trial court instructed the jury that plaintiff had the burden of proving all elements of its claim, including what the parties intended their contract to mean. The trial court did not err by determining that defendants' special requested instruction was not necessary because the model instructions adequately informed the jury on plaintiff's burden of proof. There was no instructional error.

II. EVIDENTIARY RULING

Defendants assert that the trial court erred by excluding Mueller's proposed testimony regarding defendants' dissatisfaction with plaintiff's legal services. They contend that plaintiff introduced the issue of client satisfaction into the trial and, therefore, that defendants were entitled to rebut this evidence. This Court reviews a trial court's decision to admit or exclude evidence, including rebuttal evidence, for an abuse of discretion. *Chmielewski v Xermac*, *Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

"The scope of rebuttal in civil cases is within the sound discretion of the trial court." *Taylor v Blue Cross & Blue Shield of Mich*, 205 Mich App 644, 655; 517 NW2d 864 (1994). The purpose of rebuttal evidence is

to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (quotation marks and citations omitted). Here, defendants sought to rebut testimony from plaintiff's witnesses that Mueller was satisfied with plaintiff's services until defendants' problems with Goodwin arose. Austin testified that he sent an e-mail to Castellani describing Mueller as "extremely happy" that the closing documents were revised in accordance with defendants' wishes. However, Castellani testified that Mueller was "unhappy with the way his partner was interpreting those documents," which meant, in context, that the controversy did not result in the desired outcome for Mueller. Mueller was permitted to testify regarding his belief that Goodwin swindled defendants. Thus, the testimony was not calculated to leave the impression that defendants were fully satisfied with plaintiff's services. Accordingly, the trial court did not abuse its discretion by refusing to permit the proposed rebuttal testimony.

III. CASE-EVALUATION SANCTIONS

Defendants objected to plaintiff's motion for case-evaluation sanctions on the ground that a law firm that represents itself is not entitled to receive an award of attorney fees under MCR 2.403(O). The interpretation and application of court rules presents a question of law subject to review de novo by this Court. *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

MCR 2.403(O) governs case-evaluation sanctions for parties who reject a case evaluation and fail to obtain a more favorable verdict at trial. The rule provides, in pertinent part:

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

* * *

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

The parties dispute whether plaintiff, a law firm represented by its own members, is eligible to obtain an award of attorney fees under MCR 2.403(O)(6)(b).

Defendants contend that this issue is controlled by this Court's decision in *Watkins*, 220 Mich App 337, in which this Court held that the defendant, an attorney who represented himself and also received services from his law firm's staff, was not entitled to an award of attorney fees under MCR 2.403(O)(6)(b). This Court's decision in *Watkins* was substantially based on this Court's earlier decision in *Laracey v Fin Institutions Bureau*, 163 Mich App 437, 441; 414 NW2d 909 (1987), and the United States Supreme Court's holding in *Kay v Ehrler*, 499 US 432; 111 S Ct 1435; 113 L Ed 2d 486 (1991). Therefore, a proper understanding of *Watkins* requires review of these two authorities.

In *Laracey*, 163 Mich App 437, this Court held that a plaintiff-attorney who represented himself in an action under the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*., was not entitled to attorney fees under the FOIA's attorney-fee provision, MCL 15.240(4) (1996 PA 553 moved the provision to MCL 15.240(6), effective March 31, 1997), because an attorney acting *in propria persona* is not an attorney within the meaning of that statutory provision. Reviewing federal cases brought under the attorney-fee provision of the federal FOIA, 5 USC 552, this Court noted that the purpose of the federal FOIA attorney-fee provision "was intended to encourage potential claimants to seek legal advice before commencing litigation," to afford claimants "the detached and objective perspective necessary to fulfill the federal act's aims." *Laracey*, 163 Mich App at 445. This Court declined to consider "whether a pro se litigant who is also an attorney possesses such perspective, for we are unpersuaded that an attorney proceeding pro se even has an 'attorney' for purposes of a fee award." *Id*. This Court stated a third rationale for denying attorney fees to a pro se FOIA litigant, namely that "the award of such fees to pro se

plaintiffs would create a 'cottage industry' for claimants using the act solely as a way to generate fees rather than to vindicate personal claims." *Id*. at 446.

In *Kay*, the petitioner, a licensed attorney, prevailed in an action against Kentucky election officials challenging state election statutes as unconstitutional. *Kay*, 499 US at 433-434. The petitioner requested attorney fees under 42 USC 1988, which gives a court discretion to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]" 42 USC 1988(b). The Court found that neither the text of the statute nor its legislative history provided a clear answer whether an attorney who proceeds pro se may recover attorney fees under the statute, stating:

> On the one hand, petitioner is an "attorney," and has obviously handled his professional responsibilities in this case in a competent manner. On the other hand, the word "attorney" assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988. Although this section was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights. [*Kay*, 499 US at 435-436.]

The Supreme Court concluded that the purpose of the attorney-fee provision was to ensure "the effective prosecution of meritorious claims," *id*. at 437, which would likely be compromised when a party attempts to represent itself. The Court noted that "[e]ven a skilled lawyer who represents himself is at a disadvantage in contested litigation" because he "is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile wit-

nesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom." *Id*. at 437. The Court concluded that § 1988 did not authorize an award of attorney fees to a pro se litigant because the "statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." *Id*. at 438.

In *Watkins*, 220 Mich App 337, the plaintiff sued the defendant attorney for breach of contract and the jury returned a verdict of no cause of action. The trial court awarded the defendant attorney fees as a mediation (case evaluation) sanction for the portion of the fee award that reflected the time the defendant and his staff spent working on the case. *Id*. at 341. On appeal, this Court found "the reasoning of the *Laracey* and *Kay* Courts to be persuasive[.]" *Id*. at 344. The Court commented that the purpose of MCR 2.403(O) is "to encourage settlement by plac[ing] the burden of litigation costs upon the party who insists upon trial by rejecting a proposed mediation award." *Id*. at 344 (alteration in original; citation and quotation marks omitted). The Court concluded:

> This purpose is best served when a party hires an objective attorney—rather than serving as both litigant and advocate—to provide a "filtering of meritless claims." *Kay*, *supra*. Moreover, we believe that to allow litigant-attorneys to recover compensation for time spent in their own behalf, while not extending such a rule to nonattorneys would most likely contribute to the widespread public perception that the courts exist primarily for the benefit of the legal profession. Pro se litigants who are not attorneys also may suffer lost income or lost business opportunities as the result of their time spent in litigation. [*Id*. at 344-345.]

This Court acknowledged two factors that weighed in favor of allowing the defendant's claim for attorney fees: (1) the defendant retained independent counsel and discontinued representing himself during the course of the proceedings, thus alleviating concerns about the value of independent representation, and (2) the defendant was defending a lawsuit rather than pursuing his own claim against a party. This Court concluded, however, that it "[did] not find these factors to be sufficient to justify creating an exception to the general rule disallowing such fees." *Id*. at 345. Accordingly, this Court vacated the portion of the attorney-fee award that compensated the defendant attorney for the time he or his staff spent defending against the claim. *Id*.

Plaintiff argues that *Watkins* is distinguishable and its rationale does not apply where the party is a law firm represented by its own attorneys. According to plaintiff, it did not appear as a pro se litigant because a law firm is a professional service corporation, as defined by MCL 450.1282 (formerly MCL 450.222, see 2012 PA 569, effective January 2, 2013), which is unable to practice law except through licensed attorneys who are its shareholders and employees. Plaintiff also cites MCL 450.681, which prohibits the practice of law by a corporation or voluntary association. Defendants deny that plaintiff's corporate status is a material distinction with respect to the precedential effect of *Watkins*. In response, defendants rely on MCR 2.117, which governs appearances in an action by parties and attorneys and states, in pertinent part:

> The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court ordered conference or trial. [MCR 2.117(B)(3)(b).]

No precedential Michigan caselaw exists addressing the effect of MCR 2.117 in the context of an attorney-fee award for a law firm party represented by its own attorneys. However, the trial court recognized that the hours that plaintiff's attorneys devoted to the action may have been of greater value to the firm than the judgment for plaintiff, and if sanctions were not awarded, defendants, which refused the opportunity to resolve the action through case evaluation, would be relieved of liability for sanctions merely because plaintiff made the reasonable and economical decision to represent itself. Denying attorney fees to a law firm party represented by its in-house agents would effectively negate the value of the case-evaluation process by lowering or eliminating the risk of rejecting the evaluation. Under these circumstances, further analysis is warranted.

In *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423; 733 NW2d 380 (2007), an attorney acting *in propria persona* brought a lawsuit against his former client for a violation of the Open Meetings Act (OMA), MCL 15.261 *et seq*. Our Supreme Court noted that the relevant provision of the OMA, MCL 15.271(4), provided that a party who successfully sues a public body for injunctive relief under the statute " 'shall recover court costs and *actual attorney fees* for the action.' " *Omdahl*, 478 Mich at 428 (emphasis added). The Court, *id*., analyzed the issue whether the plaintiff incurred "actual attorney fees" recoverable under the statute:

> The meaning of these three words is central to the resolution of this case. The word "actual" means " 'existing in act, fact, or reality; real.' " [*People v*] *Yamat*, [475 Mich 49] at 54 n 15 [714 NW2d 335 (2006)], quoting *Random House Webster's College Dictionary* (1997). "Attorney" is defined as a "lawyer" or an "attorney-at-law." *Random House Webster's College Dictionary* (2001). The definition

> of "lawyer" is "a person whose profession is *to represent clients* in a court of law or *to advise or act for them* in other legal matters." *Id*. (emphasis added). And the definition of "attorney-at-law" is "an officer of the court authorized to appear before it as a *representative of a party* to a legal controversy." *Id*. (emphasis added). Clearly, the word "attorney" connotes an agency relationship between two people. "Fee" is relevantly defined as "a sum charged or paid, as for professional services or for a privilege." *Id*.

The Court concluded that the statute required an agency relationship between a plaintiff and another person. *Id*. at 428-429. The Court also cited *Laracey*, 163 Mich App 437, and *Watkins*, 220 Mich App 337, in support of its decision. *Omdahl*, 478 Mich at 431. The Court's emphasis on an agency relationship as a prerequisite to obtaining an award of attorney fees arguably supports plaintiff's position in this case.

In *FMB-First Mich Bank v Bailey*, 232 Mich App 711; 591 NW2d 676 (1998), the trial court assessed sanctions under MCR 2.114(E) and (F) against the defendant, Donald Bailey, in favor of the third-party defendants, the law firm of Schenk, Boncher & Prasher, PC (SBP), and an individual attorney, James Koetje, who represented themselves.[1] *Id*. at 715-716. MCR 2.114 provides, in pertinent part:

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she had read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well

[1] This Court's opinion does not specify the relationship between SBP and Koetje, but the list of the attorneys representing the parties contained in the syllabus indicates that Koetje represented himself and his law firm, Bailey and Koetje, PC, and that SBP was represented by attorney Gregory Prasher, a member of the SBP firm. *Id*. at 713.

> grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
>
> (F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

MCR 2.625(A)(2) provides that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591(1) provides that if the court finds that "a civil action or defense to a civil action was frivolous," the court "shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney."

The defendant in *FMB-First Mich Bank*, 232 Mich App 711, argued on appeal that the trial court's award of attorney fees to the third-party defendants under MCR 2.114(E) and (F) was improper because the court rule did not permit pro se litigants to receive attorney fees under MCR 2.114. *Id*. at 719. This Court reviewed the decisions in *Kay*, 499 US 432, *Watkins*, 220 Mich

App 337, and *Laracey*, 163 Mich App 437, but concluded that these cases were distinguishable, stating:

> Although instructive, *Watkins* and *Kay* are not dispositive. The Courts in *Watkins* and *Kay* emphasized, respectively, that the mediation rule, and the attorney fee provision of the civil rights statute, were intended to encourage parties to seek legal counsel. We see no such purpose in MCR 2.114(E) or (F). Rather, the apparent objective of MCR 2.114(E) and (F) is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose. Clearly then, the question of sanctions to discourage frivolous litigation under MCR 2.114(E) and (F) is different from the questions and interests addressed in *Kay*, *supra*, and *Watkins*, *supra*. [*FMB-First Mich Bank*, 232 Mich App at 723.]

The Court in *FMB-First Mich Bank* discussed federal caselaw and caselaw from sister states analyzing a pro se litigant's eligibility for attorney fees as sanctions for a frivolous claim or defense. The Court agreed with the principle that "[t]here is no disharmony between the deterrent purpose of MCR 2.114 and attorney fees for pro se litigants," and commented that the deterrent effect of this rule on vexatious litigation might be diminished by precluding attorney fees for victims of such litigation who represent themselves. *FMB-First Mich Bank*, 232 Mich App at 725. The Court further considered whether the plain language of MCR 2.114 and MCL 600.2591 authorized attorney fees for pro se litigants, and concluded:

> MCR 2.114(E) provides that sanctions may include "the amount of the reasonable expenses *incurred* because of the filing of the document, including reasonable attorney fees." Similarly, MCL 600.2591(2); MSA 27A.2591(2) provides that "costs and fees awarded under this section shall include all reasonable costs *actually incurred* by the pre-

> vailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." To incur means "[t]o have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively." Black's Law Dictionary (rev 4th ed). An attorney is "an agent or substitute, or one who is appointed and authorized to act in the place or stead of another." *Id*. [*FMB-First Mich Bank*, 232 Mich App at 725-726.]

This Court concluded from these definitions that a person "who represents himself cannot be said to have had a liability cast on himself." *Id*. at 726. This Court also concluded that "a party acting in propria persona cannot truly be said to be an attorney for himself" because an attorney necessarily "is an agent or substitute who acts in the stead of another . . . ." *Id*. This Court applied these conclusions in its interpretation of MCR 2.114(E) and (F):

> MCR 2.114(E) says that if a document is signed in violation of the signature rule, "the court . . . shall impose upon the person who signed it . . . an *appropriate sanction, which may include* . . . the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." Therefore, MCR 2.114(E) does not restrict the sanction to expenses or costs incurred. Rather, it gives the trial court discretion to fashion another appropriate sanction. In contrast, MCL 600.2591; MSA 27A.2591, incorporated by reference in MCR 2.114(F), provides that the trial court "shall award to the prevailing party the costs and fees incurred," without giving the trial court discretion to fashion another appropriate sanction. [*FMB-First Mich Bank*, 232 Mich App at 726-727.]

This Court concluded that MCR 2.114(E) allows the trial court to award attorney fees in favor of a pro se litigant, but MCR 2.114(F) does not, and remanded the case to the trial court to recalculate sanctions awarded

to Koetje and SBP in accordance with its opinion. *FMB-First Mich Bank*, 232 Mich App at 727.

Plaintiff argues that the United States Supreme Court's decision in *Kay*, 499 US at 436 n 7, contains dicta that permits attorney fees where the party is an entity represented by in-house counsel. After commenting that the word "attorney" as used in 42 USC 1988 "assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988," *id*. at 435-436, the Court stated in footnote 7 of the opinion:

> Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. However, an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship. [*Kay*, 499 US at 436 n 7.]

Plaintiff cites federal cases that have relied on footnote 7 in *Kay* as authority for allowing attorney fees to a pro se attorney litigant.

Bond v Blum, 317 F3d 385 (CA 4, 2003), involved a copyright-infringement action arising from the defendants' use of the plaintiff's unpublished manuscript as evidence in a child-custody proceeding. In the custody dispute, the children's father, William Slavin, argued that the mother's home was an unfit environment for the children because the mother's new husband, William Bond, had written an autobiographical work admitting that he murdered his father and manipulated the juvenile criminal justice system to avoid serious consequences. *Id*. at 390-391. Bond brought an action for copyright infringement against Kenneth Blum (the

father of Bond's wife) and Blum's legal counsel for their allegedly unauthorized use of the manuscript. The trial court concluded that the copyright-infringement action was frivolous because use of the manuscript in the custody proceeding clearly came within the fair-use exception of the copyright act, 17 USC 107. *Bond*, 317 F3d at 396-397. The pertinent issue on appeal was whether the trial court erred by denying attorney fees to the two law-firm defendants pursuant to a provision of the copyright act, 17 USC 505. The trial court relied on *Kay*, 499 US 432, to deny attorney fees on the ground that an attorney representing himself or herself is ineligible for attorney fees. *Bond*, 317 F3d at 398. The United States Court of Appeals for the Fourth Circuit disagreed and remanded, holding that the principles in *Kay* "were applied to deny a prevailing party attorneys fees under fee-shifting statutes, [but] do not apply in circumstances where entities represent themselves through in-house or *pro bono* counsel." *Bond*, 317 F3d at 399. Citing *Kay*, 499 US 436 n 7, the court held that "[w]hen a member of an entity who is also an attorney represents the entity, he is in an attorney-client relationship with the entity and, even though interested in the affairs of the entity, he would not be so emotionally involved in the issues of the case so as to distort the rationality and competence that comes from independent representation." *Bond*, 317 F3d at 400. The Court stated:

> Though representation of a law firm by one of its members presents an increased risk of emotional involvement and loss of independence, the law firm still remains a business and professional entity distinct from its members, and the member representing the firm as an entity represents the firm's distinct interests in the agency relationship inherent in the attorney-client relationship. Although a given representation of a law firm by one or more of its

> members could suffer from a lack of independence, there is no indication in this case of a relationship that tended to distort independent judgment, as existed in *Doe* [*v Baltimore Co Bd of Ed*, 165 F3d 260 (CA 4, 1998)]. [*Bond*, 317 F3d at 400.]

In *Baker & Hostetler LLP v United States Dep't of Commerce*, 374 US App DC 172; 473 F3d 312 (2006), the United States Court of Appeals for the District of Columbia Circuit held that the plaintiff, a law firm representing Canadian lumber companies in an unfair-trade dispute, was eligible for an attorney fee when the firm represented itself in a federal FOIA action to obtain documents from the defendant Department of Commerce. *Id*. at 184, citing 5 USC 552(a)(4)(E). The court relied on both *Kay*, 499 US at 436 n 7, and the plain text of the statute. The court noted that the FOIA attorney fee provision applied to "all 'complainants' who have 'substantially prevailed,' " without making an exception for a claimant law firm that represents itself. *Id*. at 184-185. The Court stated:

> Footnote 7 suggests than an in-house counsel for a corporation is sufficiently independent to ensure effective prosecution of claims, thus justifying fees. An attorney who works for a law firm certainly is no less independent than an attorney who works for a corporation. Therefore, it would make little sense to slice and dice *Kay*'s conclusion regarding "organizations" and apply footnote 7 to *some* organizations but not others. [*Id*. at 185.]

Plaintiff urges this Court to follow the example of *Baker & Hostetler* and *Bond*, and adopt the dicta in *Kay*, 499 US at 436 n 7. *FMB-First Mich Bank* lends support to plaintiff's position. This Court's decision in *FMB-First Mich Bank* rested on two premises: first, that the purpose of awarding sanctions for vexatious litigation under MCR 2.114(E) and (F) is best served by penalizing violators without regard to whether their targets

were represented by counsel or represented themselves; and second, that a pro se litigant's eligibility for vexatious-litigation sanctions depends on the language of the particular statute or court rule. Case-evaluation sanctions are akin to sanctions for vexatious litigation under MCR 2.114. The ostensible purpose of case-evaluation sanctions is to encourage resolution of cases without a trial by shifting the cost of litigation to the party that rejects the evaluation and does not obtain a more favorable verdict at trial. See also *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006). This is more similar to MCR 2.114's objective of discouraging frivolous litigation than it is to the objective of attorney-fee provisions in civil rights and FOIA statutes to encourage litigants to retain independent counsel to help them more effectively assert their rights under the statutes. *FMB-First Mich Bank*, 232 Mich App at 723. Moreover, the value of objective and independent representation is less of a consideration in the case-evaluation context, in which the sanctions are a consequence of the payer's decisions. We do not perceive how the purpose of MCR 2.403(O) is furthered by excusing a rejecting party from the consequences of a rejection merely because the opposing party chose to represent itself. This is especially pertinent where, as here, the party law firm was represented by its own attorneys, who were already familiar with the underlying facts. Accordingly, we apply the dicta in *Kay*, 499 US at 436 n 7, and conclude that a law firm represented by its own attorneys is not a pro se litigant for purposes of entitlement to attorney-fee sanctions under MCR 2.403(O).

IV. INCURRED FEES

Defendants argue that plaintiff did not incur attorney fees and, therefore, was not eligible to receive an award of attorney fees as a case-evaluation sanction

under MCR 2.403(O). They contend that caselaw precluding an award of attorney fees in excess of attorney fees actually incurred supports their argument that plaintiff did not incur any attorney fees and, therefore, is not entitled to an award of attorney fees.

In *McAuley v Gen Motors Corp*, 457 Mich 513; 578 NW2d 282 (1998), the plaintiff sued the defendants under the former Handicappers' Civil Rights Act, MCL 37.1101 *et seq*. (now known as the Persons With Disabilities Civil Rights Act), and was awarded damages and attorney fees. *Id*. at 516-517. The plaintiff moved for case-evaluation sanctions under MCR 2.403(O), but the trial court denied the motion on the ground that the plaintiff had already been awarded attorney fees under the civil rights act and, therefore, was not entitled to "punitive" damages in the form of a double attorney-fee award. *Id*. at 517. Our Supreme Court held that attorney fees are compensatory, not punitive, in nature; therefore, "the amount of recovery for such damages is inherently limited by the amount of the loss; the party may not make a profit or obtain more than one recovery." *Id*. at 520. The Court acknowledged the possibility that a litigant could receive a double recovery of attorney fees under different court rules and statutes that each serve a different policy, but concluded that "this Court, in enacting MCR 2.403 did not intend double recovery under the circumstances of this case." *Id*. at 522-523.

The underlying premise of *McAuley* is that attorney fees are compensable in nature and that double recovery or excess recovery is impermissible in most circumstances. That principle is not particularly relevant to the issue whether a pro se litigant's time devoted to litigation is compensable as an attorney fee, even if the litigant did not incur a legal, monetary debt to itself.

As already discussed in Part III of this opinion, this Court in *FMB-First Mich Bank*, 232 Mich App 711, held that a party's status as an individual attorney representing himself or herself, or a law firm represented by its own attorney, does not preclude an award of attorney fees as a sanction for vexatious litigation if the applicable statute or court rule authorizes such an award. The Court began its analysis by examining the language of MCL 600.2591, and MCR 2.114(E) and (F). The Court stated:

> However, our analysis does not end here. MCR 2.114(E) says that if a document is signed in violation of the signature rule, "the court . . . shall impose upon the person who signed it . . . an *appropriate sanction, which may include* . . . the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." Therefore, MCR 2.114(E) does not restrict the sanction to expenses or costs incurred. Rather, it gives the trial court discretion to fashion another appropriate sanction. In contrast, MCL 600.2591; MSA 27A.2591, incorporated by reference in MCR 2.114(F), provides that the trial court "shall award to the prevailing party the costs and fees incurred," without giving the trial court discretion to fashion another appropriate sanction.
>
> Because any sanction awarded under MCR 2.114(F) is restricted to the costs and fees as described in MCL 600.2591(2); MSA 27A.2591(2), we hold that attorney fee sanctions are not available under MCR 2.114(F). In contrast, MCR 2.114(E) grants the trial court discretion to fashion an "appropriate sanction," which may include, but is not limited to, an order to pay the opposing party the reasonable expenses incurred (including attorney fees). Of course, the "appropriate sanction" may not include punitive damages under either subparagraph. MCR 2.114(E). [*FMB-First Mich Bank*, 232 Mich App at 726-727.]

MCR 2.403(O)(1) provides that the party who rejects a case evaluation and subsequently fails to receive a

more favorable verdict "must pay the opposing party's actual costs . . . ." MCR 2.403(O)(6)(b) provides that "actual costs" include "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." Unlike MCL 600.2591, which is incorporated by reference in MCR 2.114(F), MCR 2.403(O)(6)(b) does not restrict the trial court's authority to award a prevailing party only "the costs and fees incurred." Instead, MCR 2.403(O)(6)(b) requires the trial court to award "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b) does not require that the attorney fee be "incurred," it requires only that the trial court determine a "reasonable" attorney-fee amount according to a prescribed method, namely, by determining the "hourly or daily rate . . . for services necessitated by the rejection of the case evaluation." Accordingly, an award of case-evaluation sanctions must include an award of attorney fees to be determined by this method.

V. CASE-EVALUATION SANCTIONS FOR POSTJUDGMENT ACTIVITIES

Defendants argue that the trial court erred by awarding plaintiff case-evaluation sanctions for postjudgment activities and by awarding attorney fees for time spent in obtaining case-evaluation sanctions. This issue involves the interpretation and application of a court rule, which is reviewed de novo by this Court. *Kernen*, 252 Mich App at 692.

MCR 2.403(O)(8)(i) and (ii) provide that a request for case-evaluation sanctions "must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion" for a new trial or

to set aside the judgment. Defendants contend that this provision precludes recovery for any costs that arise from proceedings that take place after this 28-day limitations period.

Defendants rely on *Haliw*, 471 Mich 700, in which our Supreme Court held that appellate attorney fees and costs are not recoverable as case-evaluation sanctions. The Supreme Court held that "the failure of MCR 2.403(O) to expressly exclude appellate attorney fees and costs is [not] necessarily dispositive" because "the American rule permits recovery of fees and costs where *expressly authorized*." *Haliw*, 471 Mich at 707. The Court further observed that MCR 2.403(O) is "trial-oriented," because it focuses on expenses incurred between the time of the case evaluation and the verdict. *Haliw*, 471 Mich at 707-708. The Court explained in a footnote:

> [I]n support of our conclusion that MCR 2.403(O) is trial-oriented, we note that a request for case evaluation sanctions must be made within twenty-eight days after entry of the judgment, MCR 2.403(O)(8), generally a time before the bulk of appellate fees and costs have been incurred. In addition, MCR 2.403(O)(6)(b) allows recovery of attorney fees "necessitated by" the rejection of the case evaluation. While a causal nexus plainly exists between rejection and trial fees and costs, the same cannot be said with respect to rejection and the decision to bring an appeal. Rather, appellate attorney fees and costs are arguably "necessitated by" a perceived erroneous trial court ruling.
>
> We are cognizant of prior decisions of the Court of Appeals that have construed the phrase "necessitated by the rejection" as a mere temporal demarcation. See, e.g., *Michigan Basic Prop Ins Ass'n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 235; 486 NW2d 68 (1992). On the basis of the language of MCR 2.403(O), however, we believe the better-reasoned approach goes

> beyond a temporal demarcation and requires a causal nexus between rejection and incurred expenses. [*Haliw*, 471 Mich at 711 n 8.]

This Court held in *Troyanowski v Village of Kent City*, 175 Mich App 217; 437 NW2d 266 (1988), that the trial court properly awarded the defendant case-evaluation sanctions for attorney fees for services performed in postjudgment proceedings. This Court held that the rule authorizes attorney fees "for *all* services necessitated by the rejection of the mediation award." *Id*. at 226-227. In *Troyanowski*, the plaintiffs rejected the case evaluation and proceeded to trial, which resulted in a verdict of no cause of action. *Id*. at 219-220. The plaintiffs' motion for a new trial was denied. The trial court awarded case-evaluation sanctions that included compensation for attorney fees incurred by the defendants for the posttrial evidentiary hearing on the plaintiffs' motion for a new trial. *Id*. at 226-227. This Court held that MCR 2.403(O) permitted attorney fees "for *all* services necessitated by the rejection of the mediation award," which included the posttrial proceedings that were necessitated by the plaintiffs' decision to reject the case evaluation and proceed to trial. *Id*. at 227.

In *Young v Nandi*, 490 Mich 889 (2011), our Supreme Court issued a peremptory order reversing the portion of this Court's judgment holding that "the plaintiff is entitled to attorney fees and costs for posttrial work that occurred in the Oakland Circuit Court following the appellate process . . . ." The Supreme Court, citing *Haliw*, 471 Mich at 711 n 8, reinstated "the circuit court's ruling in this regard [because] [t]here is not a sufficient causal nexus between the postappeal proceedings and the defendants' rejection of the case evaluation." *Young*, 490 Mich at 890. The Court did not cite

the 28-day period referred to in MCR 2.403(O)(8), but rather determined that the plaintiff failed to demonstrate the requisite causal connection between the postappellate proceedings and the defendants' rejection of the case evaluation. We infer from these authorities that actual costs arising from postjudgment proceedings that occur more than 28 days after the judgment may be awarded as case-evaluation sanctions if the proceedings are causally connected to the party's rejection of the case evaluation.

Here, the trial court awarded plaintiff sanctions related both to its opposition to defendants' motion for a new trial and to its pursuit of case-evaluation sanctions. Regarding the former category, plaintiff's legal work opposing defendants' motion for a new trial was necessitated by defendants' rejection of the case evaluation. Defendants' motion for a new trial was a second attempt to obtain a favorable verdict after their first attempt resulted in a verdict higher than the case evaluation. This "second-bite-of-the-apple" would not have been necessary if defendants had accepted the case evaluation in the first instance.

However, the proceedings to obtain the award of case-evaluation sanctions were not necessitated by defendants' rejection of the case evaluation. The case-evaluation proceedings were complicated by defendants' assertion that plaintiff, a law firm represented by its own members, was not entitled to receive attorney fees and by defendants' objections to the amount of attorney fees sought by plaintiff. As previously discussed, the legal issue of plaintiff's entitlement to attorney fees for services rendered by its own attorneys was a close issue, not clearly settled by Michigan caselaw. Plaintiff requested $115,202 in attorney fees, but the trial court awarded only $80,434, reducing

plaintiff's claim by approximately 30%. Under these circumstances, we find that there is insufficient causal nexus between defendants' rejection of the case evaluation and the resources plaintiff expended claiming attorney fees. Accordingly, the supplemental attorney-fee award of $22,703.95 ($21,253.60 plus interest of $1,450.35) for expenses sustained from March 4, 2011, to August 11, 2011, is not authorized by MCR 2.403(O). Accordingly, we reverse in part the June 29, 2011, and November 7, 2011, orders to the extent they authorize case-evaluation sanctions for plaintiff's time devoted to pursuing case-evaluation sanctions.

VI. REASONABLE HOURLY ATTORNEY-FEE RATE

Defendants argue that the trial court erred by determining that $300 was a reasonable hourly rate for Perry's services in view of all the relevant factors. A trial court's decision in determining the amount of attorney fees awarded to a party is reviewed for an abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 239; 770 NW2d 47 (2009).

In *Wood*, 413 Mich 573, our Supreme Court, considering a claim for attorney fees under the no-fault act, held that an attorney-fee award must be reasonable and that reasonableness is determined according to the following factors set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Wood*, 413 Mich at 588, quoting *Crawley*, 48 Mich App at 737.]

The Court noted with approval the *Crawley* Court's statement "that there is no precise formula for computing the reasonableness of an attorney's fee . . . ." *Wood*, 413 Mich at 588. The Court also stated that a court awarding attorney fees "is not limited to those factors in making its determination," and that "the trial court need not detail its findings as to each specific factor considered." *Id*. The Court concluded that an award "will be upheld unless it appears upon appellate review that the trial court's finding on the 'reasonableness' issue was an abuse of discretion." *Id*.

In *Smith*, 481 Mich 519, two justices (TAYLOR, C.J., and YOUNG, J.), joined by two concurring justices (CORRIGAN, J., and MARKMAN, J.) clarified the statement in *Wood* that the trial court was not required to make detailed findings regarding each specific factor. The lead opinion by Chief Justice TAYLOR stated "that in order to aid appellate review, the court should briefly address on the record its view of each of the factors." *Smith*, 481 Mich at 529 n 14. The lead opinion also stated that the factors set forth in MRPC 1.5(a) are also relevant to determining a reasonable attorney fee and overlapped the *Wood* factors. *Smith*, 481 Mich at 529. MRPC 1.5(a) lists these eight factors:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> "(3) the fee customarily charged in the locality for similar legal services;
>
> "(4) the amount involved and the results obtained;
>
> "(5) the time limitations imposed by the client or by the circumstances;

"(6) the nature and length of the professional relationship with the client;

"(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

"(8) whether the fee is fixed or contingent." [*Smith v Khouri*, 481 Mich at 530, quoting MRPC 1.5(a).]

The lead opinion in *Smith* stated:

> We conclude that our current multifactor approach needs some fine-tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [*Smith*, 481 Mich at 530-531.]

Contrary to defendants' implied argument, these authorities do not cap an attorney's reasonable hourly fee at the highest amount supported by the locality. The trial court gave due consideration to the median, the 75th percentile, and the 95th percentile rates of attorneys with similar characteristics as Perry in the Midland area, the Lansing area, and in all of Michigan. However, the court decided that Perry's experience and skill justified a premium rate consistent with the 75th percentile of comparable attorneys in Michigan. The court did not abuse its discretion by making this deter-

mination; its decision is within the range of principled outcomes. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

Defendants also argue that the trial court improperly awarded plaintiff attorney fees in an amount higher than the jury's verdict for plaintiff. In *Smith*, the lead opinion stated:

> Factor 3 under *Wood*, 413 Mich at 588, and factor 4 under MRPC 1.5(a), is "the amount in question and the results achieved." Although this factor may be relevant in other situations, we conclude that it is not a relevant consideration in determining a reasonable attorney fee for case-evaluation sanctions. As stated, the purpose of MCR 2.403(O) is to encourage serious consideration of case-evaluation awards and penalize a party that "should have" accepted the case's evaluation. The rejecting party that does not achieve a more favorable result must pay reasonable attorney fees "for services necessitated by the rejection . . . ." MCR 2.403(O)(6). It would be inconsistent with MCR 2.403(O) to reduce the accepting party's reasonable attorney fees "for services necessitated by the rejection" on the basis of the amount in question or the results achieved. If we were to do so, the accepting party could have properly evaluated the case's value, yet be forced to incur additional fees, potentially in excess of the case's value. Reducing the accepting party's reasonable attorney fees necessitated by the rejection because they exceed or are disproportionate to the value the accepting party correctly assessed undermines the rule. MCR 2.403(O) penalizes the rejecting party who incorrectly valued the case, not the accepting party who correctly assessed the case's value at a much earlier and more efficient time. Reducing the accepting party's reasonable attorney fees on the basis of proportionality simply encourages the inefficiency the rule seeks to combat. [*Smith*, 481 Mich at 534 n 20 (opinion by TAYLOR, C.J.).]

Defendants contend that a majority of the justices in *Smith* held that the "results obtained" factor remains a significant factor in determining a reasonable attorney

fee under MCR 2.403(O). Justice CORRIGAN stated in her partial concurrence, partial dissent that the "results obtained" factor should not be eliminated as a factor in determining a reasonable attorney fee. *Smith*, 481 Mich at 538. Justice CORRIGAN stated that there is "no justification" for concluding that the term "reasonable attorney fee" in MCR 2.403(O) means anything different than it does in any other context; therefore, the results obtained is a relevant factor in determining whether an award is reasonable. *Id*. at 538-539. The three dissenting justices did not address the results-obtained factor. Accordingly, the results-obtained factor is either of little relevance to the determination of a reasonable attorney fee or only one of many factors to be considered. In the absence of any authority expressly prohibiting an attorney-fee award from being higher than the verdict amount for the prevailing party, we conclude that the trial court's award of $80,434 in attorney fees is not outside the range of principled outcomes, notwithstanding that the jury's verdict was only $70,000. *Taylor*, 277 Mich App at 99.

We affirm the judgment for plaintiff in Docket No. 302835. We affirm in part the award of case-evaluation sanctions in Docket Nos. 305149 and 307002, but reverse the award of case-evaluation sanctions to the extent that it encompasses services related to the pursuit of case-evaluation sanctions. The case is remanded for the recalculation of case-evaluation sanctions consistent with this opinion. We do not retain jurisdiction.

BORRELLO, J., concurred with FITZGERALD, J.

MURPHY, C.J. (*concurring in part and dissenting in part*). I am in accord with the majority with respect to the jury instruction and evidentiary issues; however, I respectfully disagree with the majority concerning

whether plaintiff is entitled to an award of attorney fees as case-evaluation sanctions. I would hold that there was no "attorney fee" to award plaintiff for purposes of MCR 2.403(O)(6)(b). Accordingly, I concur in part and dissent in part.

Under MCR 2.403(O)(6)(b), a case-evaluation award of actual costs includes "a reasonable *attorney fee* based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." (Emphasis added.) In *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423; 733 NW2d 380 (2007), the Michigan Supreme Court construed the Open Meetings Act (OMA), MCL 15.261 *et seq*., and in particular MCL 15.271(4), which provides for the recovery of "costs and actual attorney fees" in a successful action against a noncompliant public body. In *Omdahl*, the plaintiff was an attorney who proceeded *in propria persona*, and he won a judgment against the defendant for violating the OMA. However, the trial court denied the plaintiff's request for attorney fees. This Court reversed the trial court's ruling in a divided decision. *Id*. at 424-425. Our Supreme Court, in reversing the judgment of this Court, held "that because an attorney is defined as an agent of another person, there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees." *Id*. at 424.

The *Omdahl* Court, relying on dictionary definitions, reasoned that an "attorney" is a "lawyer" or an "attorney-at-law," and a lawyer is defined as being in the profession of representing clients in court or advising or acting for them in various legal matters, while, similarly, an attorney-at-law is defined as a court officer authorized to appear in court as a party's representative in a legal controversy. *Id*. at 428. The Court observed that "[t]he courts of this state as well as the

federal courts have, in deciding cases of this sort, focused on the concept that an attorney who represents himself or herself is not entitled to recover attorney fees because of the absence of an agency relationship." *Id*. at 428-429.

In challenging the dissent's position, the majority in *Omdahl* noted that "[t]he dissent claims that the definitions of 'attorney' do not explicitly require an agency relationship; however, the most reasonable interpretation of the term does require such a relationship, and the dissent does not cite a single instance in which 'attorney' is defined in any context other than an agency relationship." *Id*. at 428 n 1. The Court further stated:

> While the dissent criticizes the majority for relying on cases interpreting the statutory language "reasonable attorney fees," and claims that the difference between actual attorney fees and reasonable attorney fees is significant, we note that our focus in this case is on "attorney" not "actual." In this respect, the dissent's attempt to distinguish *Laracey* [*v Fin Institutions Bureau*, 163 Mich App 437; 414 NW2d 909 (1987),] fails. *Laracey* is relevant because both *Laracey* and the instant case involve attempts by an attorney appearing *in propria persona* to recover attorney fees. We find *Laracey* persuasive for the relevant portion of its holding, which states that "both a client and an attorney are necessary ingredients for an attorney fee award." *Laracey, supra* at 446. [*Omdahl*, 478 Mich at 430 n 4.]

" 'The fact that [a] plaintiff is admitted to practice law and available to be an attorney for others, does not mean that the plaintiff has an attorney, any more than any other principal who is qualified to be an agent, has an agent when he deals for himself.' " *Id*. at 430, quoting *Laracey*, 163 Mich at 445 n 10, quoting *Duncan v Poythress*, 777 F2d 1508, 1518 (CA 11, 1985) (Roney, J., dissenting).

The *Omdahl* Court also relied on *Watkins v Manchester*, 220 Mich App 337; 559 NW2d 81 (1996), which construed "the attorney fee provisions in the case evaluation rules[.]" *Omdahl*, 478 Mich at 431. Our Supreme Court found that while *Watkins* interpreted MCR 2.403(O), which had somewhat different language than the OMA statute given the reference to "reasonable" and not "actual" attorney fees, the panel nonetheless "focused on the availability of any attorney fees when the agency relationship was missing[.]" *Omdahl*, 478 Mich at 431.

The *Omdahl* Court also quoted with favor *Falcone v Internal Revenue Service*, 714 F2d 646, 648 (CA 6, 1983), agreeing with *Falcone* that " '[b]oth a client and an attorney are necessary ingredients for an award of fees[.]' " *Omdahl*, 478 Mich at 431. The *Omdahl* Court additionally relied on *Kay v Ehrler*, 499 US 432, 435-436; 111 S Ct 1435; 113 L Ed 2d 486 (1991), observing that *Kay* "noted that the use of the word 'attorney' assumed an agency relationship and found it likely that Congress intended to predicate an award under [42 USC 1988] on the existence of an attorney-client relationship." *Omdahl*, 478 Mich at 431. Our Supreme Court then concluded:

> Thus, with these definitions and the caselaw we have discussed in mind, it being clear that there was no agency relationship between two different people, there was no lawyer-client relationship as understood in the law. Therefore, there were no "actual attorney fees" for Omdahl to recover under MCL 15.271(4). [*Id*. at 432.]

I conclude that *Omdahl* dictates reversal of the trial court's award of attorney fees to plaintiff. As stated by plaintiff law firm, a professional services corporation like plaintiff provides professional legal services through its licensed attorneys. A law firm necessarily

acts through its attorneys and other personnel. The firm's attorneys are thus agents of the law firm, and this agency relationship exists because the attorneys are employed by the law firm, not because the law firm is a client of its attorneys. And "[u]nder fundamental agency law, a principal is bound by an agent's actions within the agent's actual or apparent authority." *James v Alberts*, 464 Mich 12,15; 626 NW2d 158 (2001). Stated otherwise, when an attorney acts within his or her actual or apparent authority, the firm employing the attorney has acted. "The appearance of an attorney is deemed to be the appearance of every member of the law firm." MCR 2.117(B)(3)(b). Accordingly, "a client's employment of one member of a law firm is deemed to be the employment of the firm itself." *Plunkett & Cooney, PC v Capitol Bancorp Ltd*, 212 Mich App 325, 329; 536 NW2d 886 (1995); see also *Mitchell v Dougherty*, 249 Mich App 668, 681; 644 NW2d 391 (2002). Therefore, when a law firm's attorney appears in litigation on behalf of a client, all of the firm's attorneys are deemed to have appeared, and the law firm itself is deemed to be employed by the client. Thus, if a law firm itself becomes embroiled in litigation as a party litigant, and if the firm proceeds in the litigation using one or more of its own attorneys, the law firm has in theory employed itself to go forward in the action. In such circumstances, the law firm is effectively proceeding *in propria persona*, and the firm does not have an identity that is separate from its attorney(s) for purposes of establishing an attorney-client relationship. When an attorney is already an agent of the law firm because of his or her employment status with the firm, the use of that attorney to handle litigation in which the firm is a party is no different than the employee or agent of any other company handling a matter in court; the

action is being pursued *in propria persona*. This necessarily means that there is an absence of a true attorney-client relationship, as required to be entitled to an "attorney" fee. *Omdahl*, 478 Mich at 432. Plaintiff and the attorneys who handled the litigation for plaintiff did not have a "lawyer-client relationship as understood in the law." *Id*. Plaintiff dealt for itself the only way possible, through its personnel. *Id*. at 430.

Plaintiff argues that a corporation such as plaintiff is a separate entity under the law, which distinguishes it from its attorneys; therefore, there were separate identities and the *Omdahl* requirement of an agency relationship was present. I agree that a corporation constitutes an artificial entity that is separate and distinct from the holders of the corporation's individual stock. *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950). However, this general principle does not mean that an incorporated law firm is separate and distinct from its attorneys *in the context of determining whether an attorney-client relationship exists*, given that a firm's attorney is an agent of the firm because of his or her employment status and considering that an appearance by a firm's attorney is an appearance by all of the attorneys in the firm, resulting in employment of the law firm by the client; the client and the law firm cannot be one and the same.

The majority suggests that *Omdahl* is distinguishable because the OMA referred to "actual" and not "reasonable" attorney fees, but *Omdahl* directly confronted and rejected that argument as raised in the dissenting opinion in *Omdahl*, noting that its focus was on the presence or absence of an attorney-client relationship, not the term "actual." *Omdahl*, 478 Mich at 430 n 4. Additionally, *Omdahl* favorably cited *Watkins*,

220 Mich App 337, employing its agency-relationship analysis, and *Watkins* concerned the very case-evaluation provision at issue here. *Omdahl*, 478 Mich at 431.

The majority's reliance on *FMB-First Mich Bank v Bailey*, 232 Mich App 711; 591 NW2d 676 (1998), is misplaced. First, it predates *Omdahl*, which governs. Regardless, *Bailey* is entirely consistent with *Omdahl*, and it actually provides strong support for my dissenting view. This Court ruled "that pro se parties are not eligible for attorney fee sanctions under MCR 2.114, and we vacate the order to the extent that it awards pro se litigants attorney fees." *Bailey*, 232 Mich App at 719. In *Bailey*, the litigation involved, in part, a party attorney, James Koetje, and a party law firm, Schenk, Boncher & Prasher, PC (S, B & P), and the defendant argued that the trial court erred by awarding attorney fees under MCR 2.114 to Koetje and S, B & P because they were pro se litigants. *Id*. at 714-715, 719. The Court observed:

> One who represents himself cannot be said to have had a liability cast on himself. A person cannot impose a liability for attorney fees on oneself. Thus, Koetje and S, B & P did not "incur" attorney fees, because they represented themselves. Similarly, the definition of "attorney" seems to preclude the possibility of incurring attorney fees unless someone is represented by a separate individual. Because an attorney is an agent or substitute who acts in the stead of another, a party acting in propria persona cannot truly be said to be an attorney for himself. It is thus impossible to incur attorney fees when one is not represented by an attorney, i.e., someone other than the actual party. [*Id*. at 726.]

The Court, however, found that sanctions could still be awarded under MCR 2.114(E), *id*. at 727, and noted the provisions of MCR 2.114(E) which provides:

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, *an appropriate sanction, which* **may** include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages. [Emphasis added.]

The Court reasoned that MCR 2.114(E) does not restrict the sanction to expenses or costs incurred, such as attorney fees; "[r]ather, it gives the trial court discretion to fashion another appropriate sanction." *Bailey*, 232 Mich App at 726-727. The *Bailey* panel ultimately concluded, "We vacate the sanction order to the extent that it awards attorney fees to pro se litigants. We remand for further consideration of sanctions in accordance with this opinion." *Id*. at 728.

Given that S, B & P was a pro se litigant, I can safely and confidently assume that one or more of its attorneys handled the litigation, as was the case here; therefore, *Bailey* provides on-point precedent supporting reversal of the trial court's ruling on the basis that there was no attorney-client relationship. I would reverse the trial court's decision to award attorney fees to plaintiff, considering that there was no "attorney fee" for purposes of MCR 2.403(O)(6)(b) in light of the missing element of an attorney-client relationship.

I respectfully concur in part and dissent in part.

PARKS v PARKS

Docket No. 317786. Submitted February 5, 2014, at Detroit. Decided February 11, 2014, at 9:00 a.m.

David R. Parks (plaintiff) divorced Tracy A. Parks (defendant) in the Macomb Circuit Court. They shared joint legal and physical custody of the child born during their marriage. Defendant subsequently filed a motion under the Revocation of Paternity Act, MCL 722.1431 *et seq*., requesting the court to terminate plaintiff's legal and physical custody of the child, determine that the child was born out of wedlock, and set aside the custody provision of the divorce judgment. Defendant had obtained a paternity test, which revealed that David Achinger (her current husband) rather than plaintiff was the child's biological father. She alleged that she, plaintiff, and Achinger had mutually and openly acknowledged the biological relationship between Achinger and the child. Plaintiff then moved for sole legal and physical custody of the child, denying that he had ever acknowledged the biological relationship between Achinger and the child, asserting that he was the father, and arguing that setting aside the divorce judgment would not be in the child's best interests. The court, Matthew S. Switalski, J., held a hearing on plaintiff's motion, but did not take testimony or receive evidence from either party. The court denied defendant's motion, concluding that she could not prove entitlement to relief under MCL 722.1441(1)(a) because she had failed to establish that plaintiff openly acknowledged the alleged biological relationship. The court further concluded that even if defendant could establish entitlement to relief under the act, setting aside the paternity determination would not be in the child's best interests, citing the factors listed in MCL 722.1443(4). The court also denied plaintiff's motion for a change in custody, finding that defendant's unilateral action of taking the child for genetic testing without plaintiff's knowledge did not constitute sufficient cause to request a change in the custody arrangement. Defendant appealed, arguing that the court erred by denying her motion without first conducting an evidentiary hearing to determine whether plaintiff, defendant, and Achinger had mutually and openly acknowledged the biological

relationship between Achinger and the child and whether the equitable factors listed in the act weighed in favor of setting aside the divorce judgment.

The Court of Appeals *held*:

1. The Revocation of Paternity Act allows the trial court to (1) revoke an acknowledgment of parentage, (2) set aside an order of filiation, (3) determine that a child was born out of wedlock, or (4) make a determination of paternity and enter an order of filiation. MCL 722.1433(4) defines "presumed father" as a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth. MCL 722.1441 governs an action to determine that a presumed father is not a child's father. MCL 722.1441(1)(a), the portion of the statute relevant in this case, provides that if a child has a presumed father, the court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if the child's mother timely filed an action identifying the alleged father and 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.

2. The trial court did not err by not conducting an evidentiary hearing to determine whether there was a mutual and open acknowledgment of the biological relationship between Achinger and the child. An evidentiary hearing is not always required under MCL 722.1441(1)(a). A trial court is not obligated to hold an evidentiary hearing under the statute absent a threshold showing that there are contested factual issues that must be resolved in order for the trial court to make an informed decision. Defendant failed to meet that threshold requirement. In particular, defendant's motion was devoid of any indication of how she intended to prove that plaintiff acknowledged the biological relationship between Achinger and the child and, in fact, plaintiff never did so.

3. Because defendant's motion failed to meet the minimum requirements under the act, it was not necessary to address the issue of whether the trial court erred by concluding that denying defendant's motion was in the child's best interests.

Affirmed.

PATERNITY — REVOCATION OF PATERNITY ACT — DETERMINATIONS OF ALLEGED FATHER AS CHILD'S BIOLOGICAL FATHER — EVIDENTIARY HEARINGS.

The Revocation of Paternity Act, MCL 722.1431 *et seq*., allows a trial court to (1) revoke an acknowledgment of parentage, (2) set aside an order of filiation, (3) determine that a child was born out of wedlock, or (4) make a determination of paternity and enter an

order of filiation; under MCL 722.1433(4), a presumed father is defined as the man 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 722.1441 governs an action to determine that a presumed father is not a child's father; MCL 722.1441(1)(a) provides that if a child has a presumed father, the court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if the child's mother files a timely action identifying the alleged father and 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; an evidentiary hearing is not always required under MCL 722.1441(1)(a), however; the trial court is not obligated to hold an evidentiary hearing absent a threshold showing that there are contested factual issues that must be resolved in order for the court to make an informed decision.

The Gucciardo Law Firm (by *Renée K. Gucciardo*) for David R. Parks.

Campbell, O'Brien & Mistele, PC (by *Robert J. Figa*), for Tracy A. Parks.

Before: JANSEN, P.J., and K. F. KELLY and SERVITTO, JJ.

K. F. KELLY, J. Defendant appeals as of right an order denying her motion brought under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., wherein defendant requested that the trial court terminate plaintiff's legal and physical custody of the minor child, declare that the child was born out of wedlock, set aside a prior divorce judgment, and enter an order of filiation decreeing that her current husband, David Achinger, is the child's father. Finding no errors requiring reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were married on June 12, 2004; the minor child was born while the parties were

still married. Plaintiff sought a divorce in March 2011. The parties eventually entered into a consent judgment of divorce on June 14, 2011, sharing joint legal and physical custody of the child.

On April 8, 2013, defendant filed a motion requesting the court to terminate plaintiff's legal and physical custody of the child, make a determination that the child was born out of wedlock, and set aside the custody provision of the divorce judgment. Defendant privately obtained a paternity test, which revealed that Achinger, and not plaintiff, was the child's biological father. Defendant alleged that she, plaintiff, and Achinger had at some point mutually and openly acknowledged the biological relationship between Achinger and the child. Except for the DNA test results, defendant attached no other exhibits or evidence to her motion.

In response to defendant's motion, plaintiff filed a motion for sole legal and physical custody of the child. Plaintiff denied that he ever acknowledged the biological relationship between Achinger and the child. In fact, plaintiff asserted that he had only recently discovered he was not the child's biological father and that defendant never identified Achinger as the child's father. Plaintiff attached to his motion an e-mail exchange between plaintiff and defendant dated March 13, 2013: in response to defendant's statement that she did not expect further financial help from plaintiff given that he was no longer the child's father, plaintiff replied, "I am [the minor child's] father." Plaintiff argued that defendant had failed to establish entitlement to relief under the RPA in the absence of a mutual and open acknowledgment of a biological relationship between Achinger and the child. Plaintiff also argued that setting aside the divorce judgment would not be in the child's best interests.

On May 6, 2013, the trial court held a hearing on plaintiff's motion, but did not receive testimony or evidence from either party. Defense counsel explained that defendant married Achinger in August 2012 and, as time passed, defendant noticed that the child increasingly resembled Achinger, leading her to obtain a DNA test in December 2012. Defense counsel argued that plaintiff openly acknowledged the biological relationship between the child and Achinger in three ways: (1) plaintiff spoke to his attorney about whether he was the child's father, (2) plaintiff indicated to defendant's sister that he had doubts about whether he was the child's father, and (3) plaintiff told his parents that Achinger was the child's father after learning of the paternity test. Plaintiff's counsel denied that plaintiff had mutually and openly acknowledged the biological relationship between the child and Achinger and asserted that, to the contrary, plaintiff had steadfastly held himself out as the child's father.

On July 31, 2013, the trial court issued a written opinion and order denying defendant's motion, stating:

> The Court is satisfied that Defendant cannot prove entitlement to relief under . . . MCL 722.1441(1)(a). In order to establish that she is entitled to relief, Defendant must show that she, the alleged father, and the presumed father [Plaintiff] "mutually and openly acknowledged a biological relationship between the alleged father and the child." Defendant has failed to establish Plaintiff has openly acknowledged the alleged biological relationship. In fact, Plaintiff has asserted that the minor child is his son, thereby refuting the "mutual" and "open" "acknowledgement" requirement. [Alteration in original.]

The court also held that, even if defendant could establish entitlement to relief under the RPA, setting aside the paternity determination would not be in the child's best interests, citing the factors listed in

MCL 722.1443(4). The trial court also denied plaintiff's motion for a change in custody, finding that defendant's unilateral action in taking the child for genetic testing without plaintiff's knowledge did not constitute sufficient proper cause to request a change in the custody arrangement.

Defendant now appeals as of right, arguing that the trial court erred by denying her motion under the RPA without first conducting an evidentiary hearing to determine whether plaintiff, defendant, and Achinger mutually and openly acknowledged the biological relationship between Achinger and the child and whether the equitable factors under the RPA weighed in favor of setting aside the parties' divorce judgment.

II. ANALYSIS

A. STANDARDS OF REVIEW

> The Revocation of Paternity Act does not provide a standard by which this Court should review the trial court's decision. Generally, this Court reviews for clear error the trial court's factual findings in proceedings involving the rights of children, and reviews de novo issues of statutory interpretation and application. The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake. [*In re Moiles*, 303 Mich App 59, 65-66; 840 NW2d 790 (2013) (citations omitted).]

"We review de novo issues of statutory interpretation." *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011). When interpreting a statute, a court must give effect the Legislature's intent. *Tellin v Forsyth Twp*, 291 Mich App 692, 700; 806 NW2d 359 (2011). We first look to the language of the statute itself in determining the Legislature's intent.

Id. at 700-701. "This Court gives the words of the statutes their plain and ordinary meaning and will look outside the statutory language only if it is ambiguous." *Id*. at 701. " '[W]here that 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.' " *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005) (citation omitted).

B. THE REVOCATION OF PATERNITY ACT

"The Revocation of Paternity Act was added by way of 2012 PA 159, and took effect on June 12, 2012. Among other things, the Revocation of Paternity Act 'governs actions to determine that a presumed father is not a child's father . . . .' " *Grimes v Van Hook-Williams*, 302 Mich App 521, 527; 839 NW2d 237 (2013), quoting *In re Daniels Estate*, 301 Mich App 450, 458–459; 837 NW2d 1 (2013). The RPA "allows the trial court to (1) revoke an acknowledgment of parentage, (2) set aside an order of filiation, (3) determine that a child was born out of wedlock, or (4) make a determination of paternity and enter an order of filiation." *Moiles*, 303 Mich App at 66; see MCL 722.1443(2). Relevant to this case, MCL 722.1441 is the statute that "governs an action to determine that a presumed father is not a child's father." MCL 722.1435(3). MCL 722.1433(4) defines a "presumed father" as "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." MCL 722.1441(1) provides, in relevant part:

> (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 either of the following applies:
>
> (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. [Emphasis added.]

MCL 722.1441(1)(a)(*ii*) thus requires that the presumed father, the alleged father, and the child's mother must at some time have mutually and openly acknowledged a biological relationship between the alleged father and the child.

C. APPLICATION OF THE LAW TO THE FACTS

Defendant argues that the trial court erred by failing to first conduct an evidentiary hearing to determine whether there was a mutual and open acknowledgment of the biological relationship between Achinger and the child. We disagree.

The RPA does not indicate whether an evidentiary hearing is necessary in order to establish whether the child was born out of wedlock. In fact, the term "hearing" is not found in the RPA. We hold that an evidentiary hearing is not always required under MCL 722.1441(1)(a). Rather, a trial court may conduct such a hearing at its discretion when there are contested factual issues and a hearing would assist the trial

court in making an informed decision on the issue. We consider MCR 3.210(C)(8) for comparison; it provides:

> In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

In the context of the Child Custody Act, MCL 722.21 *et seq*., a trial court is not required to conduct an evidentiary hearing when determining whether the moving party has proved that either proper cause or a change of circumstances exists absent a "threshold" showing. See *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Similarly, we conclude that a trial court is not obligated to hold an evidentiary hearing under MCL 722.1441(1)(a) absent a threshold showing that there are contested factual issues that must be resolved in order for the trial court to make an informed decision. Defendant has failed to meet that threshold requirement.

As previously stated, MCL 722.1441(1)(a)(*ii*) requires that the presumed father (plaintiff), the alleged father (Achinger), and the child's mother (defendant) must have, at some time, mutually and openly acknowledged the biological relationship between the alleged father and the child. Defendant's motion was devoid of any indication of how she intended to prove that plaintiff acknowledged such a relationship. Rather, she only attached the DNA test as an exhibit. At the hearing on defendant's motion, defense counsel argued:

> We believe that David Parks, the presumed father during the marriage, has acknowledged, has openly acknowledged that there is a relationship with the biological father. He

> had indicated previously that he had talked to his attorney previously, this is when my client told him that she had had a test done, that he had indicated previously that I had spoken to attorneys about whether I was the father -- that he was the father. But, he had previously told my client's sister he had doubts about whether he was the father. He certainly knew. In fact, the reason he filed for divorce, was because of the relationship between David Achinger during the marriage, and my client. That is why he filed for the divorce. So, we believe that based upon that, and he's also indicated when my client had told him that she wants [the child] to be living with his father, David Achinger, he had told her at some point, that yes, I have told my parents about this. So, we believe that he has openly acknowledged, and again, openly acknowledged is not denied in the statute anywhere.

Plaintiff's counsel denied that plaintiff mutually and openly acknowledged the biological relationship between the child and Achinger:

> None of these people [plaintiff, defendant, or Achinger] have ever had this mutual, open acknowledgment. [Plaintiff] finds out on March 3rd, [defendant] goes and does a test illegally back in December without even consulting the joint legal custodian that she is going to have a DNA test. She plots this whole thing out, she knew all along that there is a possibility of this whole thing, defrauds him. When she talked to him on March 3rd, his response was, I am [the child's] father. End of story. He has never, ever even looked at the DNA test, because he says, a DNA test means nothing, it's a piece of paper. This is my son. There is no open mutual acknowledgment.

Plaintiff also attached an e-mail communication to his response to defendant's motion, wherein he continued to maintain that he was the child's father.

Defendant's allegations do not even come close to meeting the "mutual and open acknowledgment" requirement under the RPA. First, defendant fails to

demonstrate how any of the alleged statements would be admissible, given that all three instances involve hearsay. Plaintiff's communications with his attorney are protected by the attorney-client privilege, and there is no indication that plaintiff has waived the privilege. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 420; 807 NW2d 77 (2011). Defendant offers no explanation of how plaintiff's alleged statements to his sister-in-law or his parents are admissible. And although defendant argues that there is no temporal requirement under the RPA and that an acknowledgment may be made at any time, it would be preposterous to suggest that plaintiff's statement to his parents advising them of what was happening was somehow an acknowledgment of the relationship between Achinger and the child.

Additionally, in none of plaintiff's alleged statements does plaintiff acknowledge Achinger as the child's biological father. Instead it would seem that plaintiff simply questioned his own paternity. Questioning paternity does not equate with acknowledging Achinger as the child's biological child. "Acknowledge" is defined as "**1.** to admit to be real or true; recognize the existence, truth, or fact of . . . . **2.** to show or express recognition or realization of . . . . **3.** to recognize the authority, validity, or claims of . . . ." *The Random House Dictionary of the English Language, Second Edition Unabridged*. At no time did plaintiff admit that Achinger was or recognize Achinger as the child's biological father.

Moreover, the record is silent regarding mutuality. "Mutual" is defined as "**1.** possessed, experienced, performed, etc., by each of two or more with respect to the other; reciprocal . . . . **2.** having the same relation each toward the other . . . . **3.** of or pertaining to each of two or more; held in common; shared . . . ." *Id*. The RPA, therefore, requires that all three individuals—the al-

leged father, the presumed father, and the mother—mutually acknowledge that the alleged father is the child's biological father. It was not enough that Achinger and the mother acknowledged the relationship. Plaintiff also had to acknowledge it, but refused to do so.

Thus, it is clear to us, as it was to the trial court, that defendant's allegations failed to meet the threshold requirement that would have potentially entitled her to an evidentiary hearing. There were no disputed facts before the court. Even if the trial court accepted as true all of plaintiff's alleged statements, the statements themselves failed to raise a question regarding whether there was a mutual acknowledgment of Achinger's biological relationship to the child.[1]

Affirmed.

JANSEN, P.J., and SERVITTO, J., concurred with K. F. KELLY, J.

---

[1] Because we conclude that defendant's motion failed to meet the minimum requirements under the RPA, we decline to address the issue of whether the trial court erred by concluding that the child's best interests were served by denying the motion. We also fail to see the need to address plaintiff's alternative arguments for affirmance.

PEOPLE v SMART

Docket No. 314980. Submitted August 6, 2013, at Detroit. Decided February 11, 2014, at 9:05 a.m. Leave to appeal sought.

Defendant was charged in the Genesee Circuit Court with one count of felony murder, two counts of armed robbery, one count of assault with intent to murder, and one count of carrying a firearm during the commission of a felony in connection with the robbery and death of Megan Kreuzer. Defendant supplied a gun to two other men who planned the robbery. Defendant also witnessed the robbery, during which one of the other men shot and killed Kreuzer. Defendant's involvement in Kreuzer's death was unknown until he was charged with an unrelated carjacking and advised his attorney in the carjacking case, Patricia Lazzio, that he had information concerning a homicide and hoped to work out a plea bargain. Lazzio spoke with an assistant prosecuting attorney; arranged for defendant to meet with the officer in charge of the homicide case, Mitch Brown; and elicited an agreement from the prosecutor that the information supplied by defendant would not be used against him. At the meeting, defendant admitted supplying the gun to the individuals who planned the robbery of Kreuzer and to witnessing the shooting. Defendant subsequently entered into a written plea agreement in the carjacking case, which in part required defendant to testify in proceedings related to Kreuzer's death. Before entering the plea in court, however, defendant began to have second thoughts about whether he had gotten the best possible deal and requested another meeting with Brown. Lazzio advised defendant that the deal would not improve and asked Brown to tell defendant the same thing. Brown sought guidance from the prosecutor, who advised Brown to meet with defendant to see if he could obtain more information about the homicide. On June 8, 2011, a second meeting was held between Brown, defendant, and Lazzio. Brown advised defendant that it was the prosecutor's office that decided what deals to offer and that he did not think the plea offer would get any better. Defendant continued to converse with Brown, revealing additional information about the robbery and homicide and further implicating himself in the homicide. The following day, defendant pleaded guilty in the carjacking case. On June 30, 2011, defendant failed to comply with

the terms of his plea agreement, refusing to testify at the preliminary examination of one of the men charged with Kreuzer's death. Defendant was thereafter charged in this case. Defendant moved under MRE 410 to suppress the statements he had made at the two meetings with Brown. The prosecution conceded that defendant's first statement to Brown was inadmissible, but argued that the second statement to Brown should be admitted. The court, Richard B. Yuille, J., suppressed both statements. The prosecution appealed by leave granted.

The Court of Appeals *held*:

Under MRE 410(4), any statement made in the course of plea discussions with an attorney for the prosecuting authority that does not result in a plea of guilty or that results in a plea of guilty that is later withdrawn, is not admissible against the defendant who made the plea or was a participant in the plea discussions. Under a prior version of the rule addressed in *People v Dunn*, 446 Mich 409 (1994), the Supreme Court held that the rule applied when the defendant had an actual subjective expectation to negotiate a plea at the time of the discussion and that expectation was reasonable given the totality of the objective circumstances. The amendment of MRE 410 added a required element that the statement subject to exclusion must have been made in the course of plea discussions with an attorney for the prosecuting authority. In this case, the prosecution failed to adequately brief the question whether there was an attorney for the prosecuting authority present at the June 8, 2011 meeting and whether that fact would have any bearing on the admissibility of the challenged statement under the rule. Accordingly, the issue was abandoned. The prosecution also foreclosed review of the issue because, by admitting that defendant's first statement was given in the course of plea discussions with the prosecuting authority even though no prosecutor was present when defendant made that statement, it had conceded that for purposes of MRE 410, a prosecuting attorney need not be physically present to hear the statements made. Further, the precise meaning and application of the phrase "with an attorney for the prosecuting authority" cannot be decided without proper briefing by the parties, which did not occur in this case. Instead, in reliance on *Dunn*, the prosecution argued that defendant did not have a reasonable expectation that he would be negotiating a plea on June 8, 2011. The trial court did not clearly err by holding to the contrary. In holding the meeting with the knowledge that defendant requested and would appear at the meeting in an attempt to negotiate a better plea deal, Brown, at the prosecutor's direction, gave defendant a reasonable belief that plea negotiations would take place at the June 8, 2011 meeting. Moreover, the parties actually

made additional minor changes to the plea agreement after the June 8, 2011 meeting. Thus, the totality of the objective circumstances support the trial court's finding that defendant's expectation that plea negotiations were ongoing was reasonable.

Affirmed.

Judge WILDER, dissenting, would have held that defendant's June 8, 2011 statement did not occur in the course of plea negotiations with an attorney for the prosecuting authority. In *People v Hannold*, 217 Mich App 382 (1996), the Court of Appeals held that when the facts establish that no prosecuting attorney was present at the time the defendant made his incriminating statements to the police, MRE 410(4) is simply inapplicable. The evidence adduced at the evidentiary hearing conducted by the trial court in this case, and submitted in the record on appeal, clearly demonstrated that there was no attorney for the prosecuting authority present at the June 8, 2011 meeting. Therefore, under the binding authority of *Hannold*, the trial court erred by finding that defendant made his June 8, 2011 statement in the course of plea negotiations. Because the facts necessary to resolve the unpreserved question of law, namely, the proper interpretation of MRE 410(4), were presented, this Court should have reviewed the question. Despite the holding in *Hannold*, however, under the unambiguous plain language of MRE 410(4), the fact that an attorney for the prosecuting authority is not physically present when the statement is made is not dispositive. In this case, plea negotiations between an attorney for the prosecuting authority and defendant had concluded when defendant made his June 8, 2011 statement as demonstrated by the signing of a written plea agreement before that date, the fact that Brown did not meet with defendant at the prosecution's direction but instead at defense counsel's request, and the fact that it was made clear to defendant before he gave his June 8, 2011 statement that the plea deal would not improve. Thus, defendant did not make the statement during the progress or process of plea negotiations. Further, when defendant gave his statement during the June 8, 2011 meeting, he had no right to be informed of his rights under *Miranda v Arizona*, 384 US 436 (1966), because he was not in custody for purposes of *Miranda*.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Vikki Bayeh Haley*, Assistant Prosecuting Attorney, for the people.

Daniel D. Bremer for defendant.

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

SERVITTO, P.J. The prosecution appeals by leave granted[1] the trial court's order suppressing statements made by defendant on March 15, 2011, and June 8, 2011. We affirm the order suppressing both statements.

"This Court reviews de novo the trial court's ultimate ruling on the defendant's motion to suppress." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008). If this Court's "inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo." *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). The trial court's findings of fact at a suppression hearing are reviewed for clear error. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009).

Defendant was charged with one count of felony murder, MCL 750.316(1)(b); two counts of armed robbery, MCL 750.529; one count of assault with intent to murder, MCL 750.83; and one count of carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in connection with the robbery and shooting death of Megan Kreuzer on May 31, 2010. Defendant supplied a gun to two other men who planned the robbery. Defendant also witnessed the robbery, during which one of the other men shot and killed Kreuzer.

Defendant's involvement was unknown until he was charged in another incident and advised his attorney in that case, Patricia Lazzio, that he had information concerning a homicide. Hoping to work out a favorable

[1] See *People v Smart*, unpublished order of the Court of Appeals, entered March 27, 2013 (Docket No. 314980).

plea bargain in the pending case against him, Lazzio spoke with Assistant Prosecuting Attorney Richmond Riggs of the Genesee County Prosecutor's Office and thereafter arranged a meeting with Sergeant Mitch Brown, the officer in charge of the homicide case, to discuss the instant matter. Lazzio, believing that defendant may have been a witness to the murder, elicited an agreement from Riggs that the information defendant provided at the meeting would not be used against him. At the March 15, 2011 meeting attended by Sergeant Brown, defendant, and Lazzio, defendant (to Lazzio's surprise) admitted to providing a weapon to the individuals who planned the robbery of Kreuzer and then witnessing the shooting. Thereafter, defendant entered into a written plea agreement in the case pending against him. Defendant subsequently desired to schedule another meeting with Sergeant Brown because defendant questioned whether his attorney had secured the best possible plea agreement. Sergeant Brown and Lazzio both believed the plea agreement would not change, and Lazzio asked Sergeant Brown to tell defendant that the plea agreement would not improve. Nevertheless, the prosecutor's office urged Sergeant Brown to meet with defendant again to see if he could obtain more information from defendant about the homicide.

As a result, a second interview between defendant, Lazzio, and Sergeant Brown took place on June 8, 2011. At that meeting, Sergeant Brown told defendant that he did not think that the plea agreement was going to get any better and that it was the prosecutor's office that decided what plea deals to offer. Defendant and Sergeant Brown still continued to converse and defendant ultimately revealed further information about the robbery and homicide that implicated him more than he had originally admitted. Defendant was thereafter charged in the instant case.

Before trial, defendant orally moved to suppress the statements he had made at both the March 15, 2011 and June 8, 2011 meetings pursuant to MRE 410. The trial court conducted an evidentiary hearing to take testimony from those who had participated in the interviews and, at the conclusion of the hearing, the trial court suppressed both statements.

The prosecution conceded (and still concedes) that defendant's March 15, 2011 statement was inadmissible under MRE 410(4), as a statement made during plea discussions, but argues that MRE 410(4) does not apply to defendant's June 8, 2011 statement. We disagree.

MRE 410 provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Citing *People v Dunn*, 446 Mich 409, 415-416; 521 NW2d 255 (1994), the prosecution first contends that defendant's expectation that the June 8, 2011 meeting would lead to a better plea agreement was unreasonable. In *Dunn*, our Supreme Court held that MRE 410 applies when (1) the defendant has " 'an actual subjective expectation to negotiate a plea at the time of the discussion,' " and (2) that expectation is reasonable " 'given the totality of the objective circumstances.' " *Dunn*, 446 Mich at 415, quoting *United States v Robertson*, 582 F2d 1356, 1366 (CA 5, 1978).

We note that the version of MRE 410 at issue in *Dunn* read as follows:

> Inadmissibility of Pleas, Offers of Pleas, and Related Statements.
>
> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement. [*Dunn*, 446 Mich at 414 n 14 (citation and quotation marks omitted). See also *People v Stevens*, 461 Mich 655, 661 n 4; 610 NW2d 881 (2000).]

Thus, the amendment of MRE 410 added a required element that the statement subject to exclusion must have been made in the course of plea discussions with an attorney for the prosecuting authority. In arguing that MRE 410 does not apply to the June 8, 2011 statement, the prosecution states that "[s]ince there was no attorney for the prosecuting authority present and since defendant had no reasonable basis to expect a second statement to result in further plea negotiations, the trial court erroneously applied MRE 410." (Emphasis omitted.) However, the prosecution focuses its argument *exclusively* on whether defendant's subjective expectation of obtaining further plea negotiations was reasonable, given Sergeant Brown's and defendant's own attorney's statements to him that no better plea agreement would be obtained. The prosecution does not elaborate on its claim that there was no attorney

present and did not even cite the prior language of MRE 410. "An appellant may not . . . give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). An appellant may also not merely announce a position and leave it to this Court to rationalize the basis for the claim, or elaborate the argument. *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton*, 256 Mich App at 339-340. We thus decline to address whether there was an attorney for the prosecuting attorney "present" during the June 8, 2011 meeting and whether that fact has any bearing on the admissibility of the challenged statement made during that meeting.

We specifically decline to address this issue not only because the prosecution abandoned it, but for additional reasons as well. First, although it has been established that no prosecuting attorney was physically present during the March 15, 2011 meeting between Sergeant Brown and defendant, the prosecution has nevertheless conceded that the March 15, 2011 statements were inadmissible under MRE 410. Clearly, then, the prosecution believes that the statements by defendant at the March 15, 2011 meeting were given "in the course of plea discussions with an attorney for the prosecuting authority" despite the absence of the physical presence of a prosecuting attorney during that meeting. For our purposes, and, we emphasize, *in this particular case*, then, the prosecution has conceded that a prosecuting attorney need not be physically present for statements to be deemed inadmissible under MRE 410. The prosecution has foreclosed review of this specific issue in this case by its concession.

Second, looking at MRE 410(4), the rule does not explicitly state that an attorney for the prosecuting authority must be physically present when the statement is made—and that is what the prosecution's single statement on this issue provides: that an attorney was not physically present. Rather, under MRE 410(4) statements are admissible only when made "in the course of plea discussions with an attorney for the prosecuting authority . . . ." "In the course of" means "in the process of, during the progress of." I *Oxford English Dictionary* (compact ed., 1971), p 1088. It is conceivable that a defendant may speak to persons other than an attorney for the prosecuting authority in the course of plea discussions. Indeed, a defendant may speak to persons, such as police officers, *at the direction* of an attorney for the prosecuting authority in the course of plea discussions, as it could be argued occurred here. Again, however, the precise meaning and application of this phrase (i.e., because pleas and plea offers can be withdrawn, whether plea negotiations are ever deemed concluded; whether a statement made to an agent of an attorney for the prosecuting authority is subject to suppression so long as it is made "in the course of" a defendant's plea negotiations; who may act as an agent for an attorney for the prosecuting authority, etc.) for purposes of suppression under MRE 410, was not addressed by the prosecution. More importantly, this issue is far too significant and multifaceted to be decided without proper briefing by both parties. While this Court *may* review issues not properly raised or addressed by a party "if a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case," *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d

373 (2007), to do so here would be to disregard the primary principle of our adversarial system by denying each party a full and fair opportunity to be heard. (Citations and quotation marks omitted.) We therefore leave the comprehensive interpretation of MRE 410(4) for an appropriate case that includes briefs, prepared by both parties, addressing the issue.

Returning to the parties' reliance on *Dunn* and the prosecution's argument that defendant had no reasonable expectation to believe that he would be negotiating a plea at the June 8, 2011 meeting, we would note that the version of MRE 410 in effect at the time *Dunn* was decided has no bearing on our Supreme Court's analysis of when MRE 410 applies. Keeping in mind that the amended version of MRE 410 now requires that the statement sought to be excluded have been made in the course of plea negotiations with an attorney for the prosecuting authority, it would stand to reason that the defendant must still have an actual subjective expectation to negotiate a plea at the time of the discussion and that such expectation be reasonable under the totality of the circumstances. See *Dunn*, 446 Mich at 415. Not every requested or held discussion concerning plea negotiations will necessarily result in a plea deal. And simply because a defendant seeks to engage in a plea negotiation does not mean that the person to whom he is speaking (a prosecuting attorney or another person) would or must view any discussion with the defendant as a plea negotiation. There is, therefore, no reason to stray from the guidelines imposed by *Dunn*, despite the amendment of MRE 410. As a result, our analysis establishes no new rule of law, nor does it modify an existing rule of law.

The prosecution claims that the trial court essentially made a finding of fact that defendant's belief that

plea negotiations would take place at the June 8, 2011 meeting was not reasonable. In support of this claim, the prosecution cites the Court's statement that "[t]here was very little discussion about whether a plea agreement was going to be altered and it was pretty apparent that it wasn't." We disagree with the prosecution and conclude that the trial court implicitly found that defendant's expectation was reasonable.

In its closing statement to the trial court, the prosecution clearly cited the two-prong test from *Dunn*, 446 Mich at 415, and argued that defendant's expectation was not reasonable. The trial court heard this argument and nonetheless granted defendant's motion to suppress. Furthermore, the trial court said it did not see a difference between the initiation of the March 15, 2011 meeting and the initiation of the June 8, 2011 meeting. Both were requested by defendant in his attempts to get a better plea agreement. We conclude that this finding was not clearly erroneous. See *Chowdhury*, 285 Mich App at 514. In *Dunn*, 446 Mich at 415-416, our Supreme Court found that the defendant's expectation was reasonable, stating:

> Shortly after his arrest, Dunn initiated communication with the detectives for the express purpose of negotiating a plea bargain with the prosecutor. The detectives encouraged him to talk so they could discuss the possibility of a plea with the prosecutor. With the information supplied by Dunn, the detectives went to the prosecutor and obtained a warrant for the second phone call.

Similarly, defendant initiated the June 8, 2011 meeting by telling his attorney that he thought he should get a better plea deal. In response, Lazzio arranged the meeting with Sergeant Brown. Lazzio did ask Sergeant Brown to tell defendant that the deal was not going to get better. But, importantly, Sergeant Brown did not

simply call defendant and tell him that the plea agreement was not going to improve or that he needed to talk to the prosecuting authority. Instead, Sergeant Brown spoke to the prosecuting authority and, with the prosecution's urging, scheduled another meeting with defendant as requested. The prosecuting authority was involved in the process of scheduling the June 8, 2011 meeting, just as it was with the March 15, 2011 meeting, and directed Sergeant Brown to see what information he could obtain from defendant about the homicide, just as it had with the March 15, 2011 meeting. This was not a situation in which the prosecution took a hands-off approach after the March 15, 2011 meeting was held. Furthermore, all parties were well aware that defendant was specifically requesting the second meeting to see if he could negotiate a better plea agreement. In holding the meeting with the knowledge that defendant requested and would appear at the meeting in an attempt to negotiate a better plea deal, Sergeant Brown, at the prosecution's direction, gave defendant a reasonable belief that plea negotiations would take place at the June 8, 2011 meeting—just as they had when defendant requested the March 15, 2011 meeting for purposes of negotiating a plea agreement.

At the meeting, Sergeant Brown did communicate to defendant that he did not believe the deal would get any better. Sergeant Brown also, however, told defendant that the decision was not his to make, but rather, a decision made by the prosecutor's office. In addition, Sergeant Brown told defendant that he would "give this information to the Prosecutor and they would be very interested in hearing what you just told me." This statement could also serve to bolster defendant's belief that a potentially more promising plea agreement could be forthcoming.

Like the police officers in *Dunn*, 446 Mich at 415-416, Sergeant Brown encouraged defendant to talk by asking him questions about Megan Kreuzer's homicide. In addition, Sergeant Brown implied that defendant could benefit from the additional information he was providing. By saying that the prosecution would be "very interested" in what defendant said, Sergeant Brown indicated that the prosecution might view defendant as a more valuable witness given the additional information, which could result in a better plea deal for him. Furthermore, from defendant's perspective, the June 8, 2011 meeting was very similar to the March 15, 2011 meeting, which led to defendant's initial plea agreement. Both were initiated by defendant. Both were attended by the same individuals—defendant, Lazzio, and Sergeant Brown. During both meetings, Sergeant Brown took notes, which defendant then reviewed and signed. Thus, it was reasonable for defendant to believe that his second meeting with Sergeant Brown would have a similar outcome as the first, and possibly benefit him in terms of a plea deal.

The "totality of the objective circumstances" further support the trial court's finding that defendant's expectation was reasonable. See *Dunn*, 446 Mich at 415. Defendant did not actually enter his plea on the record until June 9, 2011, the day after his June 8, 2011 meeting with Sergeant Brown. Before defendant entered his plea, defense attorney Lazzio told the judge in that case that there were two "tweaks" to the plea agreement. One of the "tweaks" was that defendant would not be charged in the Kreuzer case if he cooperated and testified truthfully and consistently with the statements he made to Sergeant Brown. The prosecutor agreed that was part of the agreement. Thus, Lazzio and the prosecutor made adjustments to the plea agreement even after defendant's June 8,

2011 meeting with Sergeant Brown, and defendant heard that "tweaks" were being made to the agreement such that he could have had a reasonable belief that the plea discussions were still ongoing at that time.

Because we conclude that defendant's June 8, 2011 statement was inadmissible under MRE 410(4), we need not consider whether the statement was also inadmissible because defendant was not advised of his *Miranda*[2] rights.

Affirmed.

CAVANAGH, J., concurred with SERVITTO, P.J.

WILDER, J. (*dissenting*). The prosecution appeals by leave granted[1] the trial court's order granting defendant's motion to suppress. The order suppresses statements made by defendant on March 15, 2011, and June 8, 2011. In its brief on appeal, the prosecution concedes as it did below that defendant's March 15, 2011 statement is inadmissible under MRE 410(4) as a statement made during plea discussions. However, the prosecution continues to assert that defendant's June 8, 2011 statement should not be suppressed under the dictates of MRE 410(4). The prosecution also argues that defendant did not have a right to *Miranda*[2] warnings when he gave his June 8, 2011 statement, and that the statement should also not be suppressed because of a failure to provide *Miranda* warnings. The majority concludes that the trial court properly suppressed defendant's

[2] *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[1] See *People v Smart*, unpublished order of the Court of Appeals, entered March 27, 2013 (Docket No. 314980).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

June 8, 2011 statement in conformance with MRE 410(4), and affirms the trial court's order on that basis.[3] I respectfully dissent.

I

In this case charging defendant with felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, defendant seeks to prevent the use as evidence against him of statements he made in an effort to obtain a plea agreement in a separate, unrelated case in which he was charged with carjacking, MCL 750.529a, armed robbery, MCL 750.529, felony-firearm, MCL 750.227b, and conspiracy to commit armed robbery, MCL 750.157a. Defendant successfully obtained an order suppressing his statements following an evidentiary hearing conducted by the trial court on April 11, 2012, and April 12, 2012. The evidence adduced at the hearing established the following.

On June 10, 2010, defendant was arrested in connection with a carjacking case and taken into custody. At the beginning of 2011, defendant informed his attorney that he was interested in providing information he knew about a homicide to the prosecution in exchange for a plea deal in his carjacking case. As a result of defendant's instructions, defendant's attorney contacted Richmond Riggs, the managing assistant prosecuting attorney in the Genesee County Prosecutor's Office. Defense counsel told Riggs that her client had witnessed a homicide and was interested in a plea deal

[3] The majority found it unnecessary to address defendant's claim that his *Miranda* rights were violated in light of its conclusion that the statements were properly suppressed under MRE 410(4).

in his carjacking case in exchange for giving the prosecutor the information he had about the homicide. Because defense counsel was concerned that defendant could be subject to additional criminal charges because he was purportedly dealing drugs when he witnessed the homicide, defense counsel sought assurances from Riggs that anything defendant said in the interview would not be used against him. Riggs agreed to this condition because he had no indication based on what defense counsel had told him that defendant was in any way involved in the homicide. However, Riggs testified that, pursuant to office policy, in advance of his statements, no blanket promise was made to defendant that he would not be charged with the homicide if it were later determined defendant was involved in some way.

Riggs contacted Sergeant Mitch Brown, the officer in charge of the May 31, 2010 homicide of Megan Kreuzer. After some conversations between defense counsel, Riggs, and Brown, it was confirmed that defendant was claiming to have witnessed Kreuzer's homicide. After verifying that defendant still wanted to talk, defense counsel contacted Riggs again and reconfirmed that anything defendant said in the interview would not be used against him. Riggs then instructed Brown to meet with defendant to see what he knew about the Kreuzer homicide and to get a statement if possible.

Brown first met with defendant and defense counsel on March 15, 2011. At this meeting, Brown did not advise defendant of his *Miranda* rights, but subsequently explained that he had told defendant that he was not a suspect in the homicide case and was not in custody for that offense because defense counsel had told Brown that defendant was just an eyewitness. Defendant gave his initial statement to Brown, and Brown told defendant that, in his view, defendant's

story did not make sense. To defense counsel's surprise, defendant then implicated himself in the murder by admitting that he had supplied the weapon used in the murder. Brown then told defendant that he could be charged with the homicide if he was involved, and that this charging decision was up to the prosecutor, and chastised him for not being honest with his attorney. Defendant admitted that he had not been completely truthful with defense counsel before the interview. Brown left the interrogation room so that defendant and defense counsel could talk privately. After speaking with defendant, defense counsel spoke privately with Brown, who informed defense counsel that one of the murder suspects, Jamario Mays, wanted to cooperate with police and provide information about the homicide. Brown speculated that defendant's statement might not be of much use to the prosecution if Mays was cooperative.

Brown and defense counsel returned to the interrogation room to continue the interview, and defense counsel indicated the interview should stop if defendant were to further implicate himself. Defendant then told Brown that he had received a phone call from Mays and Anthony Michael, who were looking for a gun. Defendant said he had told them he had a handgun and an AK-47 assault rifle, and that they had decided to buy the AK-47 from defendant. They made plans for defendant to bring the weapon over to Mays's house, and Mays, Michael, and Mays's sister were at the house when defendant arrived. Both Mays and Michael handled the rifle.

Defendant told Brown that after the sale, he left to go to a house on Dartmouth Street. At some point, he received a phone call from someone who wanted to buy crack cocaine, so he walked to a party store nearby to

sell the crack. Before he left or while he was walking, defendant received a call from Mays. They agreed that in exchange for the AK-47, Mays would give defendant a quarter pound of marijuana that defendant would sell for $400, of which he would keep $350 and give Mays $50. Defendant continued walking to sell the crack and ran into Mays and Michael, who told defendant that they were going to rob someone. Mays showed defendant a sawed-off shotgun in his shirt sleeve but said it was not loaded. Defendant asked why they needed a weapon from him if they already had a weapon, and then observed a car pull up and Mays walk up to the passenger side. Michael approached the driver's side. Someone said "give it up," and Michael pointed the AK-47 at the car's occupants. Then defendant heard pops and saw that shots were fired. The car sped away. Michael tried to give him the AK-47 back, but because defendant had seen a state police vehicle in the area, he refused to take it.

Consistently with his usual practice during an interview, Brown took notes on preliminary information about defendant's education and health status—to be certain defendant was sufficiently coherent to participate in the interview—and he took extensive notes about his conversation with defendant. Defendant reviewed the notes, made corrections to them, and signed them. Brown then faxed his notes to Riggs, who instructed Brown to speak with Mays to see if the stories were consistent. Brown testified that he was aware plea discussions were occurring at the time, but he never sat down with defense counsel and Riggs when they were discussing a plea agreement.

After his March 15, 2011 interview with Brown, defendant was offered a plea agreement in the carjacking case. Defendant agreed to plead guilty to unarmed

robbery and felony-firearm in exchange for the prosecution's agreement to drop all other charges. As part of the plea agreement, defendant also agreed to testify truthfully and consistently with the statement he made to Brown regarding the Kreuzer homicide. On May 12, 2011, the prosecution signed a written plea agreement conforming to the terms agreed to by defendant. Defendant and defense counsel signed it on May 23, 2011.[4]

After the plea agreement was signed but before defendant appeared in court to formally plead guilty and place the agreement on the record, at defendant's request, defense counsel contacted Brown directly for a second meeting with defendant. Defense counsel testified that defendant had become concerned about the two years he would have to serve on the felony-firearm count he had agreed to plead guilty to, and that he had expressed doubt about whether she had actually negotiated with the prosecution to get the best deal available. Both Brown and defense counsel understood from the prosecutor's office that the plea agreement would not be changed. Defense counsel told Brown that defendant thought he should have a better deal and she urged Brown to tell defendant that his plea deal was not going to get better. The prosecutor's office agreed that, as defense counsel had requested, Brown should meet with defendant. The prosecutor's office viewed the meeting only as an opportunity to get more information on the homicide, if possible. Brown met with defendant on June 8, 2011, and once again he did not advise defendant of his *Miranda* rights. As requested by defense counsel and consistently with his own understanding, Brown told defendant that, based on what he understood from the prosecutor's office, he did not think the plea deal was going to get better. Brown also told

[4] The written plea agreement was not included in the record on appeal.

defendant that the prosecutor's office, and not Brown, would decide what plea deals to offer, so defendant could "take it or leave it."

According to Brown, he and defendant then began talking about the night Kreuzer was killed, and defendant told him that he had not been totally honest about what had happened that night. Defendant then gave another statement in which he admitted that when he brought the gun over to Mays's home, Mays and Michael were talking about committing a robbery, so he knew that was their plan. Defendant did not go to the house on Dartmouth. He stayed at Mays's house and walked with Mays and Michael down the street to the meeting with Kreuzer. Defendant went because he did not think they would go through with the robbery and he wanted to see if they actually would. Brown asked defendant if he told Mays and Michael that he was going to take back the gun when he found out that they planned to commit a robbery. Defendant said he did not. Brown had defendant read over his notes and defendant signed them. These notes were not as extensive and did not include his usual information concerning defendant's ability to comprehend, because he had not anticipated conducting an interview when he went to meet with defendant. Brown reiterated to defendant that he had no discretion concerning plea negotiations, and that he would give this new information to the prosecutor.

Brown testified that he had interviewed Mays and Michael before his second meeting with defendant. From his interview with Mays, Brown knew before meeting with defendant that when Mays and Michael left Mays's house to go meet with Kreuzer and commit the robbery, defendant left Mays's house with them. The trial court asked Brown:

The Court: That didn't make [defendant] a suspect in your eyes?

[*Brown*]: Well, I gave the information to the Prosecutor's Office. And, like I said, I thought he could be charged in the crime. But we -- but he wasn't -- but he wasn't charged and he wasn't the person that pulled the trigger. The information we had was that it was Anthony Michael, and that was what he had indicated that he was willing to testify on.

* * *

The Court: From Day One that you met with him until the end, he wanted a better plea deal?

[*Brown*]: That's correct.

The Court: And even when he was on the stand and refused to testify because he didn't get a good plea deal?

[*Brown*]: According to him. That's correct.

Defendant testified that Brown had told him he would not be charged in connection with the homicide because they wanted the guy who did it, not him. Defendant was not sure if Brown said that during the first or second interview. Defendant thought that the only way he would be charged was if he lied or changed his story on the witness stand.

On June 9, 2011, defendant pleaded guilty to unarmed robbery and felony-firearm in the carjacking case. While the plea was given in general accord with the written plea agreement, in which all other charges were to be dismissed, defense counsel and the prosecutor also agreed on the record that defendant would not be charged in the Kreuzer homicide if he continued to cooperate and testified truthfully and consistently with the statements he had already made. Although nothing in the plea agreement expressly stated that defendant would not be charged with murder, the prosecutor and

defense counsel confirmed their understanding that this provision was one of the agreed-upon outcomes of the plea negotiations. In addition, because there was no sentence agreement contained in the plea agreement, the trial court also informed defendant when accepting his plea that the sentence imposed would be determined at the discretion of the court.

On June 30, 2011, despite being warned that he could be charged with homicide if he failed to comply with the plea agreement he had signed on May 23, 2011, defendant refused to testify against Michael during Michael's preliminary examination.

II

I believe there are two issues presented on appeal as it concerns the trial court's order suppressing defendant's June 8, 2011 statement: (1) whether the June 8, 2011 statement may be suppressed under MRE 410(4), and (2) whether defendant was entitled to *Miranda* warnings.

A

"This Court reviews de novo the trial court's ultimate ruling on the defendant's motion to suppress." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008). If this Court's "inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo." *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). The trial court's findings of fact at a suppression hearing are reviewed for clear error, *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009), and will only be disturbed if this Court is left with "a definite and firm conviction that a mistake was made." *Brown*, 279 Mich App at 127. But the

application of those facts to the relevant law is reviewed de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013); *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996).

In construing the rules of evidence, this Court applies "the legal principles that govern the construction and application of statutes. When the language of an evidentiary rule is unambiguous, we apply the plain meaning of the text without further judicial construction or interpretation." *Craig v Oakwood Hosp*, 471 Mich 67, 78; 684 NW2d 296 (2004) (citations and quotation marks omitted).

B

Rule 410 of the Michigan Rules of Evidence provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

In light of the facts developed in the suppression hearing, I would conclude that the June 8, 2011 statement did not occur in the course of plea negotiations with an attorney for the prosecuting authority.

1

In *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996), this Court held that when the facts establish that "no prosecuting attorney was present at

the time defendant made his incriminating statements to the police," MRE 410(4) as amended "is simply inapplicable."[5] The undisputed record in this case establishes that defendant made his statements only in the presence of his defense attorney and Sergeant Brown. Thus, were we to do nothing more than apply the binding holding in *Hannold* to the facts of this case without further analysis, at a minimum, we would be compelled to conclude that the trial court erred by suppressing defendant's statement under MRE 410 because no prosecuting attorney was present at the time of the statement.

2

However, as is highlighted by the prosecution's concession that defendant's March 15, 2011 statement is properly suppressed, *Hannold* as written is not easily applied to the facts of this case. In my view, *Hannold* errs by stating as a blanket rule of law that the physical presence of a prosecuting attorney is required in order for MRE 410(4) to be applicable.

a

The plain language of MRE 410(4), "[a]ny statement made in the course of plea discussions with an attorney for the prosecuting authority," is unambiguous. See *Craig*, 471 Mich at 78 (stating that when the language of an evidentiary rule is unambiguous courts must apply the plain meaning without further construction

[5] *Hannold*'s conclusion is consistent with our Supreme Court's holding in *People v Williams*, 475 Mich 245, 255-256; 716 NW2d 208 (2006), that "[a]lthough investigating police officers may and do cooperate with the prosecutor, they are not part of the prosecutor's office." Nor are they agents of the prosecutor such that knowledge by the police should be imputed to the prosecutor. *Id*. at 256.

or interpretation). The phrase "in the course of" means "in the process of, during the progress of." I *Oxford English Dictionary* (compact ed., 1971), p 1088. Given this unambiguous meaning, the phrase "in the course of" does *not* and cannot also solely mean "in the presence of." Therefore, under the plain language of the rule, only a statement made by a defendant in the progress or process of plea discussions with an attorney for the prosecuting authority would be excluded from admission into evidence. The fact that an attorney for the prosecuting authority is not present when the statement is made is not dispositive as to the question whether MRE 410(4) is applicable.

In my judgment, defendant's March 15, 2011 statement was made in the progress or process of plea discussions with an attorney for the prosecuting authority as conceded by the prosecution, and as argued by the prosecution, defendant's June 8, 2011 statement was not. Before defendant's March 15, 2011 statement, defense counsel and Riggs had extensive discussions about the conditions under which defendant would give his statement; defense counsel expressly sought from the prosecutor a reduction in charges in the carjacking case, and an agreement that defendant's statements to Brown about the homicide would not be used against him. Before defendant's June 8, 2011 statement, defense counsel's negotiations with Riggs resulted in a signed a plea agreement in the carjacking case. The signing of the plea agreement by defendant and the prosecutor necessarily evidences that plea negotiations in the carjacking case were completed. See *Meece v Commonwealth*, 348 SW3d 627, 650 (Ky, 2011) (stating that plea negotiations ended after the defendant signed the agreement and before he made any statement, so the statement was not made in the course of plea discussions).

Significantly, however, when defendant wished to seek a "better deal" than the one he had already agreed to, defense counsel did *not* call Riggs in an effort to reopen negotiations in the carjacking case. Rather, to initiate the opportunity to make a second statement, defense counsel instead called Brown, who had never been a party to the plea negotiations. The record shows that the prosecution, defense counsel, and Brown all understood that the prosecution had no intention to revise its written agreement with defendant. After being informed by Brown of defense counsel's request for Brown to meet again with defendant, Riggs agreed that Brown should talk to defendant a second time solely to obtain additional information about the Kreuzer homicide.[6] Neither Riggs nor defense counsel engaged in any discussions to the contrary, and the fact that the plea deal would not get any better was made clear to defendant by Brown at the outset of the second interview—before defendant made any statements. Thus, the uncontradicted evidence is that defendant's June 8, 2011 statement did not occur while in the progress or process of plea negotiations with the prosecuting authority.[7]

---

[6] I disagree with the majority's conclusion that the fact that Brown told defendant that the prosecution would be "very interested" in the content of the second interview indicates that plea discussions were in progress at that time. While Riggs agreed that Brown should attempt to obtain additional information about the Kreuzer homicide from defendant, no promises were made by Riggs or Brown to defendant for that information and defendant did not provide it conditionally.

[7] The June 9, 2011 "tweaks" referred to by the majority do not indicate that plea discussions were still in progress on June 8, 2011. Although defense counsel and the trial court used the word "tweaks" when referring to the promise that defendant would not be charged in the Kreuzer homicide and the fact that the sentence would be chosen by the trial court, not the prosecutor, the plea agreement did not change. As the record demonstrated, that defendant would not be charged in the Kreuzer homicide because of his cooperation was understood by counsel

In this regard, the facts of this case are similar to the facts in *Hutto v Ross*, 429 US 28, 28-30; 97 S Ct 202; 50 L Ed 2d 194 (1976). In that case, the defendant entered into a plea agreement with the prosecuting attorney by which the defendant would plead guilty to the charge of embezzlement in exchange for the prosecutor's recommendation that the defendant be given a 15-year sentence, with 10 years of the sentence to be suspended. Subsequently, the prosecutor asked the defendant to make a statement concerning the crime. Although defense counsel advised the defendant against making the statement, on the basis that the already negotiated plea agreement was enforceable regardless of the defendant's willingness to make the statement being requested, the defendant accommodated the prosecutor and made a statement confessing to the embezzlement. The defendant later decided to withdraw the plea, hired new counsel, and proceeded to trial. The prosecutor sought admission of the defendant's statement at trial, and following an evidentiary hearing outside of the presence of the jury, the trial court allowed admission of the statement. The defendant was convicted and sentenced to 21 years' imprisonment. On appeal, the United States Supreme Court held that because the defendant's statement was not made during the plea negotiation process, was not the result of an express or implied promise involving the plea or any coercion on the part of the prosecution, and was not involuntary, the statement was properly admitted at trial.

For these reasons, MRE 410(4) does not bar admission of defendant's June 8, 2011 statement to Brown.

---

to be a part of the plea agreement, even though this understanding was not memorialized in writing. Similarly, that the trial court would impose a sentence of its choice, "not the Prosecutor's choice," did not constitute a change in the agreement. The plea agreement never contained a sentencing provision.

b

Because the plain language of MRE 410(4) as amended is unambiguous and easily applied to the facts of a case in an objective fashion, I further contend that the majority errs, as did *Hannold*, as a matter of law in applying the two-tiered, "reasonable expectations" analysis enunciated in *People v Dunn*, 446 Mich 409, 415-416; 521 NW2d 255 (1994), to determine whether defendant's statements were properly suppressed.

The defendant in *Dunn* made his statements to the police before the substantial 1991 amendment of MRE 410. At that time, the rule provided:

> Inadmissibility of Pleas, Offers of Pleas, and Related Statements.
>
> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement. [*Dunn*, 446 Mich at 414 n 14, citing MRE 410, as adopted March 1, 1978.]

The reasonable expectations standard—whether a defendant had a "subjective expectation to negotiate a plea at the time of the discussion," and whether that expectation was reasonable given the totality of the objective circumstances—was not derived from the plain language of the earlier version of MRE 410. Rather, *Dunn* incorporated the two-tiered analysis construing the similar but not identical FRE 410, which

was adopted by the Fifth Circuit Court of Appeals in *United States v Robertson*, 582 F2d 1356, 1366 (CA 5, 1978). In contract law, our Supreme Court has rejected an interpretive approach in which "judges divine the parties' reasonable expectations" rather than interpret the plain language of the parties' agreement. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Similarly here, I would conclude that the plain language of MRE 410(4), and not defendant's expectations, should govern the outcome in this case. See *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 479; 838 NW2d 736, 745 (2013). Because the prosecuting authority had concluded its negotiations with defendant with the signing of a plea agreement, defendant's June 8, 2011 statement to Brown should not be construed as having occurred "in the course of plea discussions with an attorney for the prosecuting authority," regardless of what defendant claims his expectations were.

C

In its opinion, the majority states that it declines to consider whether and how the amendment of MRE 410 applies to the facts in this case, giving four reasons for that decision: (1) the prosecution's argument—that MRE 410 does not apply in this case because, there being no prosecuting attorney present during the June 8 statement, defendant could not have had a reasonable expectation that this meeting would result in further plea negotiations—is abandoned for the reason that the prosecution's briefing on this question was inadequate in that it failed to elaborate on the claim or cite the prior language of MRE 410; (2) because the prosecution inadequately briefed the issue, the majority will not address whether or not there was an attorney for the

prosecuting authority present during the June 8, 2011 meeting; (3) the prosecution has foreclosed review of the issue because, given its admission that the March 15, 2011 statement was given in the course of plea discussions with the prosecuting authority even though no prosecutor was present when defendant made the actual statement, it has conceded that for purposes of MRE 410, a prosecuting attorney need not be physically present to hear the statements made; and (4) the precise meaning and application of the phrase "with an attorney for the prosecuting authority" cannot be decided without proper briefing by the parties.[8]

I respectfully disagree with the majority's view that this issue should not be specifically addressed by this Court. When a controlling legal issue is squarely before the Court, "the parties' failure or refusal to offer correct solutions to the issue" places no limits on the "Court's ability to probe for and provide the correct solution." *Mack v Detroit*, 467 Mich 186, 206-207; 649 NW2d 47 (2002). Rather, addressing a controlling legal issue despite the failure of the parties to properly frame it is a well-understood judicial principle. *Id*. at 207. It is beyond dispute that when this Court's "inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo." *Dobek*, 274 Mich App at 93. See also *Cain*, 451 Mich at 503 n 38. Whether the trial court correctly suppressed defendant's June 8, 2011 statement to Brown cannot be properly decided without interpreting MRE 410(4). Thus, this Court's duty is to

[8] Despite its stated reticence to interpret MRE 410(4), the majority, nevertheless, goes on to conclude that "it would stand to reason that" the two-tiered, reasonable expectations analysis articulated in *Dunn* necessarily continues to apply under the amended, current version of MRE 410(4).

construe MRE 410(4) and apply it to the facts presented, regardless of the quality of the briefing and argument by the parties.

Moreover, although this Court does not generally address issues not raised by the parties on appeal, *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 560; 840 NW2d 375 (2013), citing *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 4 n 3; 704 NW2d 69 (2005), this Court may properly review "an unpreserved question of law where the facts necessary for its resolution have been presented," *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999). In this case, the record is clear that plea discussions with an attorney for the prosecuting authority were completed, as signified by the plea agreement signed by the prosecutor on May 12, 2011, and signed by defendant and defense counsel on May 23, 2011, well before defendant's June 8, 2011 interview with Brown. Whether defendant could reinitiate plea discussions with the prosecuting authority solely by communicating with Brown and not engaging in additional discussions with Riggs, and whether under these facts defendant's June 8, 2011 statement to Brown is admissible present questions of law that can and should be answered by analyzing the plain language of MRE 410(4) and applying it to the facts of this case.

D

In summary, because (1) the plea agreement between defendant and the prosecution was completed before the June 8, 2011 interview with Brown, (2) defense counsel made no effort to reengage the prosecution in additional discussions concerning defendant's plea agreement, (3) the evidence is clear that the prosecution agreed that Brown should conduct a second inter-

view with defendant only to see what additional information defendant would reveal about the homicide, and (4) defense counsel and Brown clearly conveyed to defendant that the prosecution would not offer any better plea deal in the carjacking case before he made his second statement, I would find on review de novo that the trial court erred when it found defendant's June 8, 2011 statement occurred "in the course of plea discussions with an attorney for the prosecuting authority," under MRE 410(4). See *Cain*, 451 Mich at 503 n 38.

III

The prosecution also contends that defendant had no right to *Miranda* warnings on June 8, 2011, so the statement should not be suppressed on the basis that he did not receive them. I agree.

A

Whether defendant was subjected to custodial interrogation, and thus entitled to *Miranda* warnings, is a mixed question of law and fact; this Court reviews the trial court's findings of fact for clear error but reviews questions of law de novo. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). A trial court's factual findings will only be disturbed if this Court is left with "a definite and firm conviction that a mistake was made." *Brown*, 279 Mich App at 127.

B

The Fifth Amendment's privilege against self-incrimination requires that a suspect be informed of certain rights before he or she is subject to a custodial interrogation. *Miranda*, 384 US at 444-445; *People v*

Vaughn, 291 Mich App 183, 188-189; 804 NW2d 764 (2010); see also US Const, Am V. These *Miranda* warnings include

> the right to remain silent, that anything he [the defendant] says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. [*Miranda*, 384 US at 479.]

The general test for determining if an individual is in custody is whether "in light of the objective circumstances of the interrogation, a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Howes v Fields*, 565 US ___, ___; 132 S Ct 1181, 1189; 182 L Ed 2d 17, 27 (2012) (citations and quotation marks omitted; alteration in original). However, an individual's imprisonment, by itself, is not enough to create a custodial environment. *Id.* at ___; 132 S Ct at 1190; 182 L Ed 2d at 28-29. When an individual is already in custody, he or she is not "yanked from familiar surroundings in the outside world and subjected to interrogation in a police station," which may make an individual feel coerced into answering questions. *Id.* at ___; 132 S Ct at 1190-1191; 182 L Ed 2d at 29. In addition, unlike an individual who is not in custody, a prisoner knows that he or she will remain confined after the questioning; the prisoner's cooperation in answering questions will not earn him or her a prompt release. *Id.* at ___; 132 S Ct at 1191; 182 L Ed 2d at 29. Finally, a prisoner who has been convicted and sentenced likely knows that the questioning officers do not have the authority to reduce his sentence. *Id.* at ___; 132 S Ct at 1191; 182 L Ed 2d at 29.

To determine whether a prisoner is in custody, a court should consider "the language that is used in summoning the prisoner to the interview and the

manner in which the interrogation is conducted." *Id.* at ___; 132 S Ct at 1192; 182 L Ed 2d at 30-31. In *Howes*, 565 US at ___; 132 S Ct at 1192-1194; 182 L Ed 2d at 31-32, the Supreme Court found that the prisoner was not in custody for purposes of *Miranda*, especially given that he was told he was free to end the questioning and return to his cell at any time.

In this case, defendant was not in custody for purposes of *Miranda* when he made the statement on June 8, 2011. Although defendant was in custody on the carjacking case on June 8, 2011, he initiated the second interview concerning Kreuzer's homicide through his attorney in an attempt to obtain a better plea deal, and was not summoned by Brown or the prosecutor. In addition, before defendant made any statements he was informed by Brown that a better plea agreement was not available, that he (Brown) had no authority to negotiate a new agreement, and that the terms of any agreement were within the discretion of the prosecution. Furthermore, defendant's attorney was present throughout the entire meeting.

IV

For all the foregoing reasons, I would reverse.

PEOPLE v LOCKRIDGE

Docket No. 310649. Submitted October 1, 2013, at Detroit. Decided February 13, 2014, at 9:00 a.m. Leave to appeal granted, 496 Mich ___.

An Oakland Circuit Court jury found Rahim O. Lockridge guilty of involuntary manslaughter, MCL 750.321. The recommended minimum sentence range under the sentencing guidelines was 43 to 86 months. The court, Nanci J. Grant, J., sentenced defendant to 8 to 15 years' imprisonment, reflecting a 10-month upward departure from the recommended range for the minimum sentence. The court articulated the following reasons for the departure: (1) defendant (who had children with the victim) violated court orders regarding contact with her, (2) the sentencing guidelines did not reflect the extent of defendant's prior altercations with the victim, (3) defendant killed the victim in the presence of their children and then left the residence while the children attempted to revive her, and (4) during and after the offense, defendant showed no concern for the children's physical or emotional well-being. Defendant appealed.

In separate opinions, the Court of Appeals *held*:

1. *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), held that any fact that increases the mandatory minimum sentence is an element that must be submitted to the jury or admitted by the defendant. *People v Herron*, 303 Mich App 392 (2013), subsequently rejected the argument that under *Alleyne*, the judicial fact-finding required by the Michigan sentencing guidelines to determine the minimum term of an indeterminate sentence violated the Sixth and Fourteenth Amendments. *Herron* was binding on subsequent panels under MCR 7.215(J)(1).

2. The trial court did not abuse its discretion by departing upward from the guidelines recommendation, and defendant is not entitled to resentencing.

3. A remand to the trial court is necessary for the ministerial task of correcting an error remaining in the presentence investigation report

Sentence affirmed and case remanded.

O'CONNELL, J., wrote the lead opinion and concluded that the trial court's reasons for the departure were objective and verifiable. Considering the exceptional nature of the crime, the reasons stated keenly and irresistibly grabbed the panel's attention in support of the upward departure. Moreover, while the prior record and offense variables accounted for defendant's past criminal record and the psychological injury to the victim's family, given the unique circumstances at hand, the trial court did not err by finding that those variables inadequately accounted for defendant's conduct. Judge O'CONNELL also concluded that he was bound to follow *Herron* and declined to address the argument based on it.

BECKERING, P.J., concurring, agreed that under *Herron* defendant was not entitled to resentencing but also concluded that *Herron* was wrongly decided. United States Supreme Court precedent dictated that the guidelines range within which a sentencing court in Michigan must fix a minimum term of imprisonment is itself a legally prescribed mandatory minimum. Further, the mandatory minimum permissible for purposes of *Alleyne* is the guidelines range determined solely on the basis of a defendant's criminal history and the facts reflected in the jury's verdict or admitted by the defendant. Michigan's sentencing scheme requires a trial court to engage in fact-finding by scoring the offense variables to determine the applicable guidelines range for a minimum sentence. Because of this, facts that are neither found by a jury nor admitted by a defendant increase the minimum term of imprisonment to which a defendant is exposed and, thus, the penalty. *Alleyne* prohibited this and therefore rendered Michigan's indeterminate sentencing scheme unconstitutional. Earlier Michigan decisions that held that the state's sentencing scheme was constitutionally sound were made without the benefit of the *Alleyne* Court's ruling that any fact that increases the mandatory minimum is an element that must be submitted to the jury. While Judge BECKERING agreed with Judge SHAPIRO that the upper end of the recommended minimum sentence range has no bearing on the maximum term of imprisonment to be imposed, she disagreed with his view that only the bottom of the minimum sentence range presents an *Alleyne* Sixth Amendment problem. Fact-finding to score the guidelines increases both the floor and the ceiling of the sentencing range, and an increase of the ceiling enhances the maximum minimum sentence a court can impose. This increases the penalty because both the floor and ceiling of sentence ranges define the legally prescribed penalty. To remedy the constitutional defect, Judge BECKERING

would have made the Michigan sentencing guidelines advisory, as the United States Supreme Court did for the federal sentencing guidelines.

SHAPIRO, J., concurring, agreed with the lead opinion that the trial court did not abuse its discretion by departing upward from the guidelines recommendation and further agreed with Judge BECKERING that the analysis in *Herron* did not comport with *Alleyne*, which explicitly barred judicial fact-finding that results in an increased mandatory minimum sentence, i.e., a sentencing floor, regardless of whether that mandatory minimum is defined within the statutory offense or by applicable statutory sentencing guidelines. Courts retain broad discretion to impose a minimum sentence within the limits fixed by law, but *Alleyne* made it clear that a trial court does not have the authority to set those limits with its own fact-finding. Judge SHAPIRO also agreed with Judge BECKERING that the upper end of the Michigan guidelines constitutes a maximum minimum sentence, but no case has established that category as being of Sixth Amendment import. It has no relevancy to the maximum term of imprisonment and, while it limits a court's ability to sentence above a certain minimum term, it does not trigger a constitutional issue. He therefore disagreed with Judge BECKERING that *Alleyne* rendered the entirety of the Michigan sentencing guidelines constitutionally infirm. Only the bottom of the minimum sentence range presents an *Alleyne* problem. The top of a given guidelines range does not set a mandatory minimum, and setting it through judicial fact-finding therefore presents no constitutional impropriety. Contrary to Judge BECKERING's view, only the lower end of the guidelines range need be advisory. Trial courts could continue to score the guidelines using findings made by a preponderance of the evidence standard, upper limits of the guidelines would remain mandatory, upward departures would be permitted only when there are substantial and compelling reasons for them, and downward departures from the lower end of a range would be subject to appellate review for reasonableness.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Danielle Walton*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for defendant.

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

O'CONNELL, J. Defendant appeals as of right his sentence of 8 to 15 years' imprisonment for his jury-based conviction of involuntary manslaughter, MCL 750.321. We affirm defendant's sentence, but remand the case to the trial court for the ministerial task of correcting the presentence investigation report (PSIR).

Defendant first argues that the trial court abused its discretion by imposing a 10-month upward departure from the sentencing guidelines. Defendant maintains that the guidelines adequately accounted for his conduct and that the trial court failed to articulate a substantial and compelling reason for the departure. We review for abuse of discretion the trial court's conclusion that there was a substantial and compelling reason to depart from the guidelines. *People v Hardy*, 494 Mich 430, 438 n 17; 835 NW2d 340 (2013). A trial court " 'may depart from the appropriate sentence range established under the sentencing guidelines set forth in MCL [777.1 *et seq.*] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.' " *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003), quoting MCL 769.34(3) (alteration in original). A substantial and compelling reason must be based on objective and verifiable factors. *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *Id.* at 43 n 6. "The reasons for departure must also be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Anderson*, 298 Mich App

178, 183; 825 NW2d 678 (2012) (quotation marks and citation omitted). Further, as intended by the Legislature, a substantial and compelling reason exists only in exceptional cases. *Babcock*, 469 Mich at 257. Lastly, the "departure must be proportionate to the defendant's conduct and criminal history. The trial court must justify the particular departure it made by explaining why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *People v Portellos*, 298 Mich App 431, 453; 827 NW2d 725 (2012) (quotation marks and citations omitted).

Defendant's 8-year minimum term of imprisonment is an upward departure from the recommended sentencing guidelines range of 43 to 86 months. The trial court articulated the following reasons for the departure: (1) that defendant had violated court orders regarding contact with the victim, (2) that the sentencing guidelines did not reflect the extent of defendant's prior altercations with the victim, (3) that defendant killed the victim in the presence of their children, and then left the residence while the children attempted to revive the victim, and (4) that during and after the offense, defendant showed no concern for the physical or emotional well-being of the children.

This Court has previously concluded that the psychological injury suffered by the victim's family members, the demonstration of escalating violence toward the victim, and the existence of a probation violation constitute objective and verifiable reasons to depart from the guidelines. See, e.g., *People v Corrin*, 489 Mich 855 (2011); *Horn*, 279 Mich App at 48; *People v Schaafsma*, 267 Mich App 184, 185-186; 704 NW2d 115 (2005). The trial court's reasons for the departure are objective and verifiable. Further, considering the exceptional nature

of the crime, the trial court's stated reasons keenly and irresistibly grab this Court's attention in support of the upward departure.

Defendant argues that his conduct has been adequately accounted for by the sentencing guidelines. In departing from the sentencing guidelines, a trial court may "not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range *unless* the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b) (emphasis added). While prior record and offense variables may account for defendant's past criminal record and the psychological injury to the victim's family, given the unique circumstances at hand, the escalation of the domestic-violence conduct toward the victim, the fact that the crime occurred in plain view of the children, and that defendant left his children alone with the trauma of attempting to revive their mother, the trial court did not err by finding that the prior record and offense variables inadequately accounted for defendant's conduct.

Defendant also argues that the trial court based its departure on improper factors, i.e., defendant's gender and a belief that defendant was guilty of the greater offense of second-degree murder. A trial court may not base a departure on a defendant's gender or make an independent finding regarding whether a defendant is guilty of another offense and justify the departure on that basis. MCL 769.34(3)(a); *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986), overruled in part on other grounds by *People v Hawthorne*, 474 Mich 174; 713 NW2d 724 (2006). While the trial court discussed

the jury's verdict, the trial court's comments did not suggest or reveal an intention to base the departure on a perceived belief that the jury was wrong. Moreover, a review of the record does not suggest that the trial court departed from the guidelines because of defendant's gender. Indeed, the trial judge shared her opinion regarding domestic violence cases but, again, those comments do not suggest or reveal an intention to depart on that basis. Accordingly, the trial court did not abuse its discretion by departing upward from the sentencing guidelines range.

In a supplemental brief, defendant argues that the trial court engaged in judicial fact-finding, which, according to defendant, violated the new rule in *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). This Court recently held that the decision in *Alleyne* does not implicate Michigan's sentencing scheme. See *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013). This Court is bound to follow *Herron*, and accordingly, I decline to address the argument in defendant's supplemental brief.

At sentencing, defendant challenged the accuracy of the information in the PSIR, and the trial court agreed to make four corrections to the report. The PSIR has been amended and all but one of the changes has been made. Specifically, the PSIR still contains the following sentence: "[K.L.] told the police that her father was choking her mother in the master bedroom upstairs." Therefore, this Court remands for the ministerial task of making the correction to the PSIR and orders the trial court to transmit a corrected copy of the report to the Department of Corrections. See *People v Martinez (After Remand)*, 210 Mich App 199, 203; 532 NW2d 863 (1995), overruling on other grounds recognized by *People v Edgett*, 220 Mich App 686, 692-694; 560 NW2d 360 (1996).

We affirm defendant's sentence, but remand for the ministerial task of correcting the PSIR. We do not retain jurisdiction.

BECKERING, P.J. (*concurring*). I concur with the result reached by my colleagues that defendant is not entitled to resentencing. I am required to reach this conclusion, in part, by this Court's recent decision in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013). In *Herron*, this Court rejected the defendant's argument that on the basis of *Alleyne v United States*, 570 US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), judicial fact-finding required by Michigan's sentencing guidelines to determine a minimum term of an indeterminate sentence violates the Sixth and Fourteenth Amendments of the United States Constitution. *Herron*, 303 Mich App at 399-405. *Herron* is binding on this Court and must be followed in this case. See MCR 7.215(J)(1).

I write separately because I disagree with this Court's holding in *Herron*. In *Alleyne*, 570 US at ___; 133 S Ct at 2155, the United States Supreme Court held that "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury." Precedent from the United States Supreme Court dictates that the guidelines range within which a trial court in Michigan is required to fix a minimum term of imprisonment is itself a legally prescribed mandatory minimum. Further, the mandatory minimum permissible for purposes of *Alleyne* is the guidelines range determined solely on the basis of a defendant's criminal history and the facts reflected in the jury's verdict or admitted by the defendant. Because Michigan's sentencing scheme requires trial courts to engage in fact-finding to determine the guidelines range within which the court must fix a minimum term of imprisonment, facts that are neither found by a jury nor admitted by a

defendant increase, by law, the minimum term of imprisonment to which a defendant is exposed and, thus, the penalty. *Alleyne* prohibits this and, therefore, renders Michigan's indeterminate sentencing scheme unconstitutional. See *Alleyne*, 570 US at ___; 133 S Ct at 2155, 2160-2162. As a remedy, I would make the sentencing guidelines in Michigan advisory as the United States Supreme Court did with the federal sentencing guidelines in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

I. *APPRENDI* v *NEW JERSEY* AND ITS PROGENY

A. *APPRENDI*

In *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court announced the now well-established rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The defendant in *Apprendi* pleaded guilty to, among other things, one count of second-degree possession of a firearm for an unlawful purpose, which by statute was punishable by imprisonment for "between five years and 10 years." *Id*. at 468 (quotation marks and citation omitted). However, the state of New Jersey's statutory "hate crime" law provided for an extended term of imprisonment of between 10 and 20 years for second-degree offenses if the trial court found by a preponderance of the evidence that the defendant "in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id*. at 468-469 (quotation marks and citation omitted). At an evidentiary hearing held after the defen-

dant's plea, the trial court found by a preponderance of the evidence that the defendant had acted with a purpose to intimidate as provided by the hate-crime statute; thus, the court applied the hate-crime enhancement to sentence the defendant to a 12-year term of imprisonment for the possession conviction. *Id*. at 471.

The United States Supreme Court held that New Jersey's practice of enhancing a defendant's sentence on the basis of judicial fact-finding under the hate-crime statute was unconstitutional. *Id*. at 491-492, 497. The Court explained that except for the fact of a prior conviction, it " 'is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' " *Id*. at 490, quoting *Jones v United States*, 526 US 227, 252-253; 119 S Ct 1215; 143 L Ed 2d 311 (1999) (Stevens, J., concurring). The Court opined that the fact of intimidation contained in the hate-crime statute was "the functional equivalent of an element of a greater offense" than the offense the defendant pleaded guilty to. See *Apprendi*, 530 US at 494 n 19. The Court emphasized that "merely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." *Id*. at 495 (quotation marks and citation omitted). The Court distinguished "sentencing factors" from "elements," explaining that sentencing factors are "a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Id*. at 494 n 19. The Court stressed that it is permissible "for

judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Id*. at 481.

B. *HARRIS*

In *Harris v United States*, 536 US 545, 555, 568; 122 S Ct 2406; 153 L Ed 2d 524 (2002), the Supreme Court distinguished facts increasing a defendant's mandatory minimum sentence from facts extending a sentence beyond the statutory maximum; the Court limited the application of *Apprendi* to factual findings that increase the statutory maximum sentence. The trial court in *Harris* found the defendant guilty of violating various federal drug and firearms laws after he sold illegal narcotics out of his pawnshop with an unconcealed semiautomatic pistol at his side. *Id*. at 550. One of the various statutes under which the defendant was convicted, 18 USC 924(c)(1)(A), provided as follows:

> "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> "(i) be sentenced to a term of imprisonment of not less than 5 years;
>
> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." [*Harris*, 536 US at 550-551, quoting 18 USC 924(c)(1)(A)(i) to (iii).]

Although the indictment did not mention brandishing or Subpart (ii), the trial court at the defendant's sentencing hearing found by a preponderance of the evi-

dence that the defendant had brandished a firearm, so the court sentenced the defendant to seven years' imprisonment. *Id*. at 551.

The Supreme Court upheld the defendant's sentence, concluding as follows: "[A]s a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense. The statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." *Id*. at 556. In upholding the defendant's sentence, the Court reaffirmed its prior decision in *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986), in which the Court "sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm." *Id*. at 550, 568.

C. *BLAKELY*

In *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the Supreme Court clarified the "statutory maximum" for *Apprendi* purposes, explaining that it is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" The defendant had pleaded guilty to second-degree kidnapping, a class B felony, involving domestic violence and use of a firearm. *Id*. at 298-299. Washington law provided for a maximum sentence of 120 months' imprisonment for a class B felony. *Id*. at 299. Significantly, Washington's Sentencing Reform Act further limited the range of the sentence for the defendant's conviction of second-degree kidnapping with a firearm, providing a "standard range" of 49 to 53 months' imprisonment. *Id*. However, the act also permitted a judge to "impose a

sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence' "; the act provided an illustrative list of aggravating factors, but an exceptional sentence could not be justified on the basis of a factor already considered when computing the standard range. *Id*. The trial court in *Blakely* sentenced the defendant to 90 months' imprisonment, 37 months more than the upper end of the standard range, after finding that the defendant had acted with "deliberate cruelty," which was a statutorily enumerated ground for departure. *Id*. at 300.

The Supreme Court held that the state of Washington's sentencing procedure violated the Sixth Amendment and that the defendant's sentence was invalid. *Id*. at 305. The Court rejected the state's argument that there was no *Apprendi* violation because the statutory maximum was 10 years for class B felonies, explaining that the "statutory maximum" for *Apprendi* purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id*. at 303. The Court emphasized that the trial court did not have the authority to impose the exceptional 90-month sentence because a finding of deliberate cruelty was neither made by a jury nor admitted by the defendant. See *id*. at 304. The law only allowed a maximum sentence of 53 months' imprisonment for the crime to which the defendant confessed. See *id*. at 303, 313.

D. *BOOKER*

In *Booker*, 543 US at 226, the Supreme Court, in two separate opinions, held that the Sixth Amendment as construed in *Apprendi* and *Blakely* applies to the federal sentencing guidelines and, to ensure the guidelines' compliance with the Sixth Amendment, invali-

dated two provisions of the federal Sentencing Reform Act of 1984 that effectively made the guidelines mandatory. Booker was charged with possession with intent to distribute at least 50 grams of crack cocaine. *Id*. at 227. After evidence was presented at trial that Booker possessed 92.5 grams of crack, a jury convicted him of violating 21 USC 841(a)(1), which provided for a minimum sentence of 10 years' imprisonment and a maximum sentence of life imprisonment. Solely on the basis of the facts found by the jury and Booker's criminal history, the federal sentencing guidelines provided a "base" sentence of "not less than 210 nor more than 262 months in prison." However, the trial court held a posttrial sentencing hearing and found by a preponderance of the evidence that Booker had both possessed an additional 566 grams of crack and obstructed justice. Mandatory application of the sentencing guidelines using these judicially found facts required the trial court to select a sentence between 360 months and life imprisonment; the court sentenced Booker to 30 years' (i.e., 360 months') imprisonment. *Id*. The United States Court of Appeals for the Seventh Circuit held that Booker's sentence violated the Sixth Amendment and remanded for the trial court to either sentence Booker within the sentencing range supported by the jury's findings or hold a separate sentencing hearing before a jury. *Id*. at 228.

The Supreme Court affirmed and remanded the case, instructing the trial court to impose a sentence in accordance with its opinion. *Id*. at 267. The Court reaffirmed its holding in *Apprendi* that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id*. at 244. The

Court held that *Apprendi* and its progeny applied to the federal sentencing guidelines, opining that there was not a distinction of constitutional significance between the federal sentencing guidelines and the state of Washington's procedures at issue in *Blakely*—both systems were mandatory and imposed binding requirements on sentencing courts.[1] *Id*. at 229, 233. The Court explained that "just as in *Blakely*, 'the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.' " *Id*. at 235, quoting *Blakely*, 542 US at 305. Specifically with respect to Booker's sentence, the Court opined:

> The jury convicted him of possessing at least 50 grams of crack in violation of 21 U.S.C. §841(b)(1)(A)(iii) based on evidence that he had 92.5 grams of crack in his duffel bag. Under these facts, the Guidelines specified an offense level of 32, which, given the defendant's criminal history category, authorized a sentence of 210-to-262 months. See USSG §2D1.1(c)(4). Booker's is a run-of-the-mill drug case, and does not present any factors that were inadequately considered by the Commission. The sentencing judge would therefore have been reversed had he not imposed a sentence within the level 32 Guidelines range.
>
> Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just

[1] Subsection (a) of the sentencing statute, 18 USC 3553, listed the sentencing guidelines as one factor to consider when imposing a sentence, but subsection (b) provided that "the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific limited cases." *Booker*, 543 US at 233-234, quoting 18 USC 3553(b).

> as in *Blakely*, the jury's verdict alone does not authorize the sentence. [*Id*. at 235 (quotation marks and citation omitted).]

The Court opined that if the federal sentencing guidelines could be read as advisory provisions recommending, rather than requiring, the selection of a particular sentence in response to a set of particular facts, use of the guidelines would not implicate the Sixth Amendment. *Id*. at 233. In such a case, a sentencing court would be exercising discretion to impose a sentence within a statutory range. See *id*. "[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id*. The Supreme Court explained that the availability of a departure from the guidelines range did not foreclose an *Apprendi* violation:

> The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. The Guidelines permit departures from the prescribed sentencing range in cases in which the judge "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. [*Id*. at 234 (citation omitted).]

As a remedy to ensure the guidelines' compliance with the Sixth Amendment, the Supreme Court severed and excised two provisions from the sentencing act: the provision requiring sentencing courts to impose a sentence within the applicable guidelines range (in the absence of circumstances justifying a departure), 18 USC 3553(b)(1), and the provision setting standards of review on appeal, 18 USC 3742(e). *Id*. at 245, 259, 265. The Court opined that without these two provisions, the remainder of the federal sentencing act satisfied constitutional requirements. *Id*. at 259. The Court stated that trial courts, "while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id*. at 264. In the future, appellate courts would review sentencing decisions for unreasonableness. *Id*. The Court opined that the advisory nature of the sentencing guidelines, "while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id*. at 264-265.

E. *ALLEYNE*

In *Alleyne*, 570 US at ___; 133 S Ct at 2155, the Supreme Court overruled *Harris* and held that "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury." Just as in *Harris*, *Alleyne* involved a defendant convicted of using or carrying a firearm in relation to a crime of violence, 18 USC 924(c)(1)(A), which provided for a mandatory minimum sentence of five years under Subpart (i) but a mandatory minimum sentence of seven years under Subpart (ii) if the firearm was brandished. Although the jury's verdict form did not indicate a

finding that the defendant had brandished a firearm, the trial court found by a preponderance of the evidence that the firearm was brandished. The court concluded that brandishing was a sentencing factor under *Harris* and sentenced the defendant to seven years' imprisonment. *Id*. at ___; 133 S Ct at 2155-2156.

The Supreme Court held that imposing a sentence on the basis of the court's finding of brandishing violated the defendant's Sixth Amendment rights. *Id*. at ___; 133 S Ct at 2163-2164. In so holding, the Court reaffirmed the rule of *Apprendi*: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Id*. at ___; 133 S Ct at 2155. The Court concluded that "[w]hile *Harris* limited *Apprendi* to facts increasing the statutory maximum, the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Id*. at ___; 133 S Ct at 2160. The Court explained the basis for this conclusion as follows:

> It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed. . . . And because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.
>
> It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty. . . . A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense.
>
> Moreover, it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment.

> Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's expected punishment has increased as a result of the narrowed range and the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. . . .
>
> * * *
>
> In adopting a contrary conclusion, *Harris* relied on the fact that the 7–year minimum sentence could have been imposed with or without a judicial finding of brandishing, because the jury's finding already authorized a sentence of five years to life. The dissent repeats this argument today. While undoubtedly true, this fact is beside the point.
>
> As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. [*Id*. at ___; 133 S Ct at 2160-2162 (quotation marks and citations omitted).]

The Court took care to distinguish judicial fact-finding that "both alters the legally prescribed range *and* does so in a way that aggravates the penalty" from "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' " *Id*. at ___ n 2; 133 S Ct at 2161 n 2, quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). The Court emphasized:

> Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e.g.*, *Dillon* v. *United States*, 560 U. S. [817, 828-829; 130 S Ct 2683; 177 L Ed 2d 271

> (2010)] ("[W]ithin established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi*, 530 U. S., at 481 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"). . . . "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Apprendi*, [530 US] at 519 (THOMAS, J., concurring). Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law. [*Alleyne*, 570 US at ___; 133 S Ct at 2163 (alterations in original except those related to citations).]

Applying these principles to the case before it, the Court concluded that the defendant's Sixth Amendment rights had been violated. *Id*. at ___; 133 S Ct at 2163-2164. The Court explained that "the sentencing range supported by the jury's verdict was five years' imprisonment to life." *Id*. at ___; 133 S Ct at 2163. The trial court's imposition of the seven-year mandatory minimum sentence on the basis of its finding of brandishing "increased the penalty to which the defendant was subjected"; thus, the fact of brandishing was an element that had to be found by the jury beyond a reasonable doubt. *Id*. at ___; 133 S Ct at 2163. The Court remanded the case for resentencing consistent with the jury's verdict. *Id*. at ___; 133 S Ct at 2164.

II. MICHIGAN'S SENTENCING SCHEME

"Michigan has an indeterminate sentencing scheme." *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007). "[I]n all but a few cases, a sentence

imposed in Michigan is an indeterminate sentence."[2] *People v Drohan*, 475 Mich 140, 161; 715 NW2d 778 (2006). In other words, a defendant is given a sentence with a minimum and a maximum. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). "The maximum sentence is not determined by the trial court, but rather is set by law." *Drohan*, 475 Mich at 161; see also MCL 769.8(1). "Michigan's sentencing laws clearly require that the maximum portion of every indeterminate sentence be no less than the 'maximum penalty provided by law . . . .' " *People v Harper*, 479 Mich 599, 621-622; 739 NW2d 523 (2007), quoting MCL 769.8(1). A trial court is prohibited from imposing a sentence that is greater than the statutory maximum.[3] *Drohan*, 475 Mich at 161. Michigan's sentencing guidelines create a range within which the sentencing court *must* set the *minimum* sentence. *McCuller*, 479 Mich at 683; see also MCL 769.8; MCL 769.34(2). The sentencing court determines the range by considering together "the defendant's record of prior convictions (the [prior record variable] score), the facts surrounding his crime (the [offense variable] score), and the legislatively designated offense class." *Harper*, 479 Mich at 616; see also MCL 777.21(1). "Generally, once the sentencing court calculates the defendant's

[2] Determinate sentences are required for first-degree murder, MCL 750.316 (life in prison without the possibility of parole), and carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b(1) (two years in prison for the first conviction, five years for the second conviction, and ten years for a third or subsequent conviction). See also *McCuller*, 479 Mich at 683 n 9.

[3] "[T]he statutory maximum sentence is subject to enhancement based on Michigan's habitual offender act, MCL 769.12." *Drohan*, 475 Mich at 161 n 13. "Thus, the statutory maximum sentence of a defendant who is convicted of being an habitual offender is as provided in the habitual offender statute, rather than the statute he or she was convicted of offending." *Id*.

guidelines range, it must . . . impose a minimum sentence within that range." *McCuller*, 479 Mich at 684-685, citing MCL 769.34(2).

A court may depart from the appropriate guidelines minimum sentence range if it has "a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A court is prohibited from departing on the basis of "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). "[T]he Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995) (analyzing similar language in the context of departures from minimum sentences for certain drug crimes). The guidelines provide that a "court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence." MCL 769.34(2)(b). "While the sentencing judge fixes the minimum portion of a defendant's indeterminate sentence, a defendant is still liable to serve his maximum sentence and may only be released before the maximum term has expired at the discretion of the parole board." *Harper*, 479 Mich at 613.

In several cases decided before the United States Supreme Court's decision in *Alleyne*, the Michigan Supreme Court addressed the effect of *Apprendi* and its progeny on Michigan's indeterminate sentencing system. First in *Claypool*, the Court stated in a footnote that the holding in *Blakely* does not affect Michigan's indeterminate sentencing system. *Claypool*, 470 Mich at 730 n 14. The *Claypool* Court explained that *Blakely*

involved a determinate sentencing system and that the *Blakely* Court made clear that its decision "did not affect indeterminate sentencing systems." *Id*.

Later, in *Drohan*, the Court reaffirmed its statement in *Claypool* that " 'the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment.' " *Drohan*, 475 Mich at 164, quoting *Claypool*, 470 Mich at 730 n 14. In holding that this state's indeterminate sentencing scheme does not violate the Sixth Amendment, the *Drohan* Court, relying on *Blakely*, explained that "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict . . . ." *Drohan*, 475 Mich at 159, citing *Blakely*, 542 US at 308-309. "Thus, the trial court's power to impose a sentence is always derived from the jury's verdict, because the 'maximum-minimum' sentence will always fall within the range authorized by the jury's verdict." *Drohan*, 475 Mich at 162. The Court emphasized that

> the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. . . . As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. [*Id*. at 164.]

Finally in *McCuller* and *Harper*, the Court reaffirmed its holding in *Drohan* that Michigan's indeterminate sentencing scheme is valid under *Blakely*. *McCuller*, 479 Mich at 683; *Harper*, 479 Mich at 615. In *McCuller*, the Court explained that

> [u]pon conviction, a defendant is legally entitled only to the statutory maximum sentence for the crime involved. A defendant has no legal right to expect any lesser *maximum*

> sentence. . . . Thus, a sentencing court does not violate *Blakely* principles by engaging in judicial fact-finding to score the [offense variables] to calculate the recommended *minimum* sentence range . . . . The sentencing court's factual findings do not elevate the defendant's maximum sentence, but merely determine the defendant's recommended minimum sentence range . . . . [*McCuller*, 479 Mich at 689-690.]

Additionally, the Supreme Court held that an intermediate sanction[4] is not a maximum sentence governed by *Blakely* for which the facts supporting a departure must be found by a jury beyond a reasonable doubt or admitted by the defendant. *Harper*, 479 Mich at 603. Rather, it is a conditional limit on incarceration and a "matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury verdict or the guilty plea, a circumstance that does not implicate *Blakely.*" *Id*. at 603-604; see also *McCuller*, 479 Mich at 677-678.

These decisions of our Supreme Court addressing the effect of *Apprendi* and its progeny on Michigan's indeterminate sentencing system predate *Alleyne*. As such, the Court's holdings that this state's sentencing scheme is constitutionally sound was made without the benefit of the *Alleyne* Court's ruling that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne*, 570 US at ___; 133 S Ct at 2155. Instead, the basis for the Court's decision was limited to *Harris*—now overruled by

[4] "If the upper limit of the minimum sentence range is 18 months or less, . . . the cell [of the sentencing grid] containing the range is an 'intermediate sanction cell.' " *Harper*, 479 Mich at 617. "A defendant falling within an intermediate sanction cell must be sentenced, absent a substantial and compelling reason for departure, to an intermediate sanction that does not include a prison term." *McCuller*, 479 Mich at 676 n 1, citing MCL 769.34(4)(a).

Alleyne—and *Blakely*, which together stood for the principle that a sentencing court does not run afoul of the Constitution by engaging in fact-finding to determine the minimum term of a defendant's indeterminate sentence unless the fact-finding increases the statutory maximum sentence to which the defendant had a legal right. *McCuller*, 479 Mich at 682 & n 8. Because *Alleyne* now requires a court to consider whether judicial fact-finding increases a legally prescribed minimum sentence, as opposed to looking solely to whether that fact-finding increases the legally prescribed maximum, to assess the validity of a sentencing scheme, a reassessment of the validity of Michigan's indeterminate sentencing system is necessary, despite our Supreme Court's previous decisions addressing the effect of *Apprendi* and its progeny on Michigan's scheme.

III. *HERRON* AND THE EFFECT OF *ALLEYNE* ON MICHIGAN'S SENTENCING SCHEME

Recently in *Herron*, a panel of this Court held that the judicial fact-finding required by Michigan's sentencing scheme for the determination of the minimum term of an indeterminate sentence range does not violate the Sixth and Fourteenth Amendments of the United States Constitution. *Herron*, 303 Mich App at 399-405. The *Herron* panel reached its conclusion primarily on three grounds, none of which justified the panel's holding.

First, the panel opined that "[t]he statutes defendant was convicted of violating do not provide for a *mandatory minimum* sentence on the basis of any judicial fact-finding." *Id*. at 403. Although true, the panel's identification of this fact that distinguishes *Herron* from *Alleyne* is constitutionally insignificant in light of *Blakely* and *Booker*. Both *Blakely* and *Booker* involved

statutes that imposed maximum sentences for the crimes for which the defendants were convicted: 120 months' imprisonment in *Blakely* and life imprisonment in *Booker*. But the Supreme Court in those cases did not view these as the statutory maximums for *Apprendi* purposes; instead, the Court focused on the maximum sentence that the law would allow in each case solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant. In both cases, the relevant statutory maximum was dictated by the application of statutory guidelines to determine a sentence range: a "standard range" of 49 to 53 months solely on the basis of the facts admitted by the defendant in *Blakely* and a "base" federal guidelines range of 210 to 262 months solely on the basis of the facts found by the jury and the defendant's criminal history in *Booker*. In *Blakely*, the Court held that it was unconstitutional to depart from the standard range and impose a sentence greater than 53 months, i.e., the maximum sentence permitted by law under *Apprendi* on the basis of judicial fact-finding. Similarly in *Booker*, the Court held that although required by the mandatory application of the federal sentencing guidelines, it was unconstitutional to use judicially found facts to score the guidelines and, thus, come to a sentence range not supported by the jury verdict alone. As in *Blakely* and *Booker*, Michigan's sentencing scheme provides for the mandatory application of statutory guidelines to determine a sentence range, within which a sentencing court is required to fix a sentence. As can be gleaned from *Blakely* and *Booker*, the essential constitutional inquiry is not whether a statute the defendant has been convicted of violating contains a maximum or minimum sentence but, rather, how statutorily required judicial fact-finding is being used in relation to the application of sentencing guidelines.

Second, the *Herron* panel emphasized that "judicial fact-finding in scoring the sentencing guidelines . . . does not establish a *mandatory minimum*[.]" *Herron*, 303 Mich App at 403-404. In light of *Blakely* and *Booker*, I must disagree. Again, the *Blakely* Court concluded that the statutory maximum permitted by law under *Apprendi* in the case before it was 53 months—the ceiling of the standard range of 49 to 53 months determined through the application of the sentencing guidelines solely on the basis of the facts admitted by the defendant. In *Booker*, the Court determined that the maximum sentence authorized by law for *Apprendi* purposes was the ceiling of the sentence range authorized by the federal sentencing guidelines solely on the basis of the facts found by the jury and Booker's criminal history: 262 months' imprisonment. As in *Blakely* and *Booker*, the sentencing guidelines in Michigan create a range within which the sentencing court must fix a sentence. The sentence that must be fixed is the minimum sentence. Thus, Michigan's sentencing guidelines establish a mandatory minimum sentence. The mandatory minimum is the guidelines range itself because the range is a sentencing range prescribed by law within which a sentencing court is required to fix a minimum sentence.

Admittedly, the nature of the floor and the ceiling of the guidelines range under Michigan's sentencing scheme differs from those at issue in *Blakely* and *Booker*. In *Blakely* and *Booker*, the floor of the guidelines range represented the legally prescribed minimum, and the ceiling represented the legally prescribed maximum. In contrast, the floor of the guidelines range in Michigan is the lowest minimum sentence a court can impose, and the ceiling is the maximum minimum sentence a court can impose. Yet this difference does not change the following facts: Michigan's guidelines range

is a sentencing range prescribed by law, the ceiling and floor of the range are legally prescribed limits to the minimum sentence that can be imposed, and a minimum sentence falling within the guidelines range is mandatory. Both the floor and the ceiling of the sentencing range define the legally prescribed minimum. Cf. *Alleyne*, 570 US at ___; 133 S Ct at 2160 ("Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty.").

Significantly, the availability of a departure does not extinguish the "mandatory" nature of the guidelines range. As previously discussed, the Court stated the following in *Booker*:

> The availability of a departure in specified circumstances does not avoid the constitutional issue . . . . [D]epartures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the [Sentencing] Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. [*Booker*, 543 US at 234.]

The same can be said of departures in Michigan. Departures in Michigan are not available in every case. Indeed, it is well established that the Legislature intended "substantial and compelling reasons" justifying a departure to exist only in "exceptional cases." *Fields*, 448 Mich at 68. Generally, a court must impose a minimum sentence within the guidelines range absent substantial and compelling reasons for a departure. *McCuller*, 479 Mich at 684-685.

Third, the *Herron* panel viewed judicial fact-finding under Michigan's sentencing guidelines as falling within the wide discretion afforded a sentencing court

identified as constitutionally permissible in *Apprendi* and its progeny. *Herron*, 303 Mich App at 405. I do not agree. To be sure, the United States Supreme Court has repeatedly emphasized that it is permissible for courts to exercise discretion to select a sentence *within a range authorized by law*. See, e.g., *Alleyne*, 570 US at ___; 133 S Ct at 2163 ("Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law."); *Apprendi*, 530 US at 481 (explaining that it is permissible "for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute."); *Booker*, 543 US at 233 ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."). In doing so, a sentencing court may consider various sentencing factors, which the Court in *Apprendi* defined as "a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Apprendi*, 530 US at 494 n 19. But this simply is not what a sentencing court is doing when it engages in fact-finding to determine the guidelines range for a minimum sentence.

Michigan's sentencing scheme *requires* a sentencing court to engage in fact-finding by scoring the offense variables to determine the applicable guidelines range for a minimum sentence. When a sentencing court in Michigan engages in that fact-finding, it is not finding facts in the exercise of its discretion to select a sentence within a range authorized by law. Rather, it is finding facts to determine a sentence range authorized by law.

" '[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things.' " *Alleyne*, 570 US at ___; 133 S Ct at 2163, quoting *Apprendi*, 530 US at 519 (Thomas, J., concurring). By engaging in the fact-finding required by Michigan's sentencing guidelines, a sentencing court is doing the former. Only after the applicable guidelines range for a minimum sentence has been established on the basis of judicially found facts does a sentencing court then exercise discretion, i.e., the discretion to select a minimum sentence within the guidelines range.

Accordingly, I disagree with the basis for the *Herron* panel's conclusion that the judicial fact-finding required by Michigan's sentencing scheme does not violate the Sixth and Fourteenth Amendments of the United States Constitution. I conclude that it does. Under *Apprendi* and its progeny, the mandatory minimum sentence in Michigan is the guidelines range itself, and the mandatory minimum permissible for purposes of *Alleyne* is the guidelines range as determined solely on the basis of a defendant's criminal history and the facts reflected in the jury's verdict or admitted by the defendant. See *Blakely*, 542 US at 298-300, 303-304, 313; *Booker*, 543 US at 226-227, 235. Yet Michigan's sentencing scheme requires trial courts to engage in fact-finding to determine the guidelines range within which they must fix a minimum term of imprisonment. As a result, facts not found by a jury or admitted by a defendant are used to increase the mandatory minimum sentence, which is a component of the penalty; *Alleyne* prohibits this and, therefore, renders Michigan's indeterminate sentencing scheme unconstitutional. See *Alleyne*, 570 US at ___; 133 S Ct at 2155, 2160-2163.

Given this conclusion, I must disagree with Judge SHAPIRO's view that "[i]n our sentencing system, . . . it is only the bottom of the range that presents an *Alleyne* Sixth Amendment problem." Contrary to Judge SHAPIRO's assertion in his concurrence, I do not conclude "that the top end of the applicable Michigan guidelines range constitutes a 'mandatory maximum.' " I wholeheartedly agree with Judge SHAPIRO that "the upper end of the Michigan guidelines has absolutely no bearing on the maximum term of imprisonment to be imposed, as that is set by statute. And, at the same time, it does not set a minimum term above which the court must sentence." The upper end of the Michigan guidelines range does, however, have a significant bearing on the minimum term of imprisonment to be imposed, which, contrary to Judge SHAPIRO, I find to have Sixth Amendment import. When a trial court in Michigan engages in fact-finding to score the guidelines, both the floor and the ceiling of the sentencing range increase. An increase of the ceiling enhances the maximum minimum sentence a court can impose. This undeniably increases the penalty; as the Supreme Court emphasized in *Alleyne*, "both the floor and ceiling of sentence ranges . . . define the legally prescribed penalty." *Id*. at ___; 133 S Ct at 2160.

This increase in penalty is best shown by illustration. Suppose a defendant's criminal history and facts found by a jury produced an appropriate Michigan guidelines range of 42 to 70 months' imprisonment. However, after engaging in statutorily required fact-finding, the appropriate guidelines range becomes 51 to 85 months' imprisonment, and the court imposes a minimum term of imprisonment of 85 months. Because of the judicial fact-finding, the maximum possible minimum sentence to which the defendant was exposed increased from 70 months to 85 months. See, generally, *Apprendi*, 530 US

at 490 (" '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' "). Indeed, the court imposed a minimum sentence that it could not have imposed without judicial fact-finding. The defendant's minimum sentence clearly became more severe—the penalty indisputably increased. But, most significantly, the 85-month minimum sentence was not authorized by the jury because it did not fall within the 42- to 70-month range that the jury authorized. As the Supreme Court so plainly yet emphatically put it in *Blakely*, and then again in *Booker*, "the jury's verdict alone does not authorize the sentence." *Blakely*, 542 US at 305; *Booker*, 543 US at 235. This is the Sixth Amendment import. Therefore, although Judge SHAPIRO correctly recognizes that the United States Supreme Court has not expressly extended its Sixth Amendment jurisprudence so as to bar judicial fact-finding that is statutorily required to determine a "maximum minimum" sentence, I believe such fact-finding is constitutionally invalid under the principles articulated in *Apprendi* and its progeny.

In *Booker*, 543 US at 246, the Supreme Court considered two potential remedies to the invalidity of the federal sentencing guidelines: (1) retain the sentencing scheme as written and engraft the Sixth Amendment jury-trial requirement into the scheme or (2) make the guidelines advisory. The Court chose the latter approach. *Id*. In rejecting the former as incompatible with the Sentencing Reform Act, the Court explained that shifting the fact-finding role for sentencing from a court to a jury would eliminate the use of a presentence report containing factual information uncovered after trial that is relevant to sentencing, it would result in a trial reflecting less completely the real conduct under-

lying the offense and, thus, weakening the vital link between an offender's real conduct and the sentence, and it would undermine the legislative goal of ensuring uniformity in sentencing. *Id*. at 250-254. Further, the Court emphasized that reading the jury requirement into the federal sentencing system would create a variety of complex issues, beginning with the allegations in the indictment and spilling into the trial itself, raising various concerns about the remedy's workability. *Id*. at 254-255.

These same concerns exist when considering what remedy should be adopted to ensure that Michigan's sentencing scheme passes constitutional muster. I would adopt an approach in line with *Booker* that makes the guidelines in Michigan advisory. Under such an approach, a sentencing court must still determine the appropriate guidelines range as provided in MCL 777.21 for purposes of fixing the minimum term of an indeterminate sentence as provided in MCL 769.8(1). The preparation and use of a presentence investigation report would remain to assist the court. See, generally, MCL 771.14. The court must then consider the appropriate guidelines range as an aid; however, it will no longer be required under MCL 769.34(2) to impose a minimum sentence within the appropriate guidelines range. Like the federal sentencing guidelines, the purpose of the Michigan sentencing guidelines is to promote uniformity and consistency in sentencing. *Booker*, 543 US at 250, 253; *People v Peltola*, 489 Mich 174, 189 n 30; 803 NW2d 140 (2011); see also MCL 769.34(2) and (3). Additional purposes include "elimination of certain inappropriate sentencing considerations" and "encouragement of the use of sanctions other than incarceration in the state prison system." *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003); see

also MCL 769.34(3) and (4). Making the guidelines advisory, although not what our Legislature intended, furthers these goals.

In sum, I believe that *Herron* was wrongly decided. Under *Apprendi* and its progeny, which now includes *Alleyne*, the judicial fact-finding required by Michigan's sentencing guidelines to determine a guidelines range within which a sentencing court must fix a minimum term of imprisonment violates the Sixth and Fourteenth Amendments of the United States Constitution. As a remedy, I would make the sentencing guidelines in Michigan advisory as the United States Supreme Court did with the federal sentencing guidelines in *Booker*. However, notwithstanding my disagreement with the decision in *Herron*, *Herron* is binding on this Court and must be followed in this case. See MCR 7.215(J)(1). Therefore, I must concur with the result reached by my colleagues that defendant is not entitled to resentencing.

SHAPIRO, J. (*concurring*). I concur with the lead opinion's conclusions that the trial court did not abuse its discretion by departing upward from defendant's sentencing guidelines range and that defendant's presentence investigation report (PSIR) must be corrected on remand. I write separately because, like Judge BECKERING, I believe that the analysis in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), does not comport with the constitutional mandate of *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). *Alleyne* explicitly bars judicial fact-finding that results in an increased mandatory minimum sentence, i.e., a sentencing "floor," and it does so whether that mandatory minimum is defined within the statutory offense or by applicable statutory sentencing guidelines.

In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), the United States Supreme Court held that the Sixth Amendment bars the use of judicial fact-finding that results in an increase in the maximum term of the sentence that may be imposed on a defendant. In other words, the "ceiling" applicable to a defendant's sentence may not be increased as a result of judicial fact-finding. However, as the Michigan Supreme Court noted in *People v Drohan*, 475 Mich 140, 161-162; 715 NW2d 778 (2006), and *People v McCuller*, 479 Mich 672, 677-678; 739 NW2d 563 (2007), under Michigan's sentencing system, the maximum term is fixed by statute and cannot be affected by judicial fact-finding. Accordingly, because the Michigan guidelines do not set maximum terms of incarceration, these cases held that the guidelines were not subject to a Sixth Amendment challenge. This was surely the case under the controlling federal caselaw. Indeed, the only United States Supreme Court decision that addressed the Sixth Amendment's application to mandatory minimum terms at that time was *Harris v United States*, 536 US 545, 568; 122 S Ct 2406; 153 L Ed 2d 524 (2002) (Kennedy, J.), in which the Court specifically held that the setting of a mandatory minimum through the use of judicial fact-finding "does not evade the requirements of the . . . Sixth Amendment[]."

This situation was, however, wholly altered by the Court's 2013 decision in *Alleyne*, which unequivocally held that that the Sixth Amendment is violated when judicial fact-finding is used to set a mandatory minimum. Indeed, *Alleyne* explicitly stated that "*Harris* is overruled" and went on to hold that "*any fact that increases the mandatory minimum* is an 'element' that must be submitted to the jury." *Alleyne*, 570 US at ___;

133 S Ct at 2155 (emphasis added). It is difficult to imagine language more definitive. *Alleyne* further concluded in absolute terms: "It is *impossible* to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id*. at ___; 133 S Ct 2160 (emphasis added).

Nevertheless, *Herron* concluded that the low end of a Michigan guidelines minimum sentence range is not "a mandatory minimum floor of a sentencing range." *Herron*, 303 Mich App at 403. This conclusion is difficult to understand since a trial court is statutorily barred from sentencing a defendant to a lesser term, a circumstance that is the *sine qua non* of a mandatory minimum sentence. *Herron*'s best attempt at an explanation is that, while judicial fact-finding may not set a sentencing floor, it may be used "to guide judicial discretion in selecting a punishment within limits fixed by law." *Id*. at 402, quoting *Alleyne*, 570 US at ___; 133 S Ct at 2161 n 2, quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949) (quotation marks omitted). It is obviously correct that the trial court retains broad discretion to impose a minimum sentence "within limits fixed by law," but *Alleyne* makes it absolutely clear that the trial court does not have the authority to *set* those limits on the basis of its own fact-finding.

Moreover, the definition of "mandatory" that must govern our analysis was set forth in *Booker*, 543 US at 234. There, the Supreme Court ruled that sentencing guidelines are mandatory when a sentencing court is required to apply them, even if departures may be made in limited circumstances.

Herron suggests that the only sentencing factors that fall within *Alleyne* are those that are also elements of the crime. However, whether a state labels a sentencing

factor as an element or a sentencing guideline is irrelevant. The United States Supreme Court has been absolutely clear on this issue:

> "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—*no matter how the State labels it*—must be found by a jury beyond a reasonable doubt." . . . "[T]he characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury[.]" [*Booker*, 543 US at 231, quoting *Ring v Arizona*, 536 US 584, 602, 605; 122 S Ct 2428; 153 L Ed 2d 556 (2002) (emphasis added).]

While I reject *Herron*, I do not agree with Judge BECKERING's conclusion in her concurrence that the top end of the applicable Michigan guidelines range constitutes a "mandatory maximum." First, this proposition was rejected by our Supreme Court in *Drohan*, 475 Mich at 161-162, and *McCuller*, 479 Mich at 677-678. Moreover, the upper end of the guidelines range in a particular case does not place a cap on the defendant's period of incarceration. Under our sentencing system, the highest term of incarceration that may be imposed is set exclusively by the statutory maximum for the crime. Judge BECKERING refers to the federal guidelines cases as holding that the guidelines "range" is constitutionally infirm. However, under the federal system the "range" in question is different than the one in Michigan. Under the federal determinate sentencing scheme, in which a defendant is given a single term rather than a minimum term and a maximum term, the low end of the guidelines range represents the least amount of time for which the defendant may be incarcerated. Thus, it has the same function and effect as the low end of the Michigan guidelines range. However, the upper end of the federal guidelines range represents the maximum term of imprisonment that the defendant

may be required to serve. That is not what the upper end of the Michigan guidelines represents. As discussed earlier and by the Michigan Supreme Court in *Drohan*, 475 Mich at 161-163, the upper end of the Michigan guidelines has absolutely no bearing on the maximum term of imprisonment to be imposed, as that is set by statute. And, at the same time, it does not set a minimum term above which the court must sentence.

Judge BECKERING correctly observes that the upper end of the Michigan guidelines constitutes a "maximum minimum," but there is no case that establishes that category as being of Sixth Amendment import. See *id*. at 162-163; *McCuller*, 479 Mich at 689-691. And the United States Supreme Court has never applied its Sixth Amendment analysis to a "maximum minimum," only to "maximums" and "minimums." The top end, or maximum minimum, of a Michigan sentencing guidelines range is a sui generis creature. It does not create a mandatory minimum because a trial court has full discretion to impose a sentence well below it, as long as that sentence is not below the floor of the guidelines range. Further, it has no relevancy to the maximum term of imprisonment. In sum, while it limits a court's ability to sentence above a certain minimum term, it does not trigger a constitutional issue. While the United States Supreme Court may at some point consider extending its Sixth Amendment jurisprudence to bar judicial fact-finding that places a cap on the minimum term that may be imposed, it has not done so to date.

I therefore disagree with Judge BECKERING's view that *Alleyne* renders the entirety of Michigan sentencing guidelines constitutionally infirm. *Alleyne* bars judicial fact-finding only to the degree that fact-finding is used to set a sentencing "floor," i.e., a mandatory minimum. In our sentencing system, it is only the

bottom of a given guidelines range that constitutes a floor, and so it is only the bottom of the range that presents an *Alleyne* Sixth Amendment problem. The top of a given guidelines range does not set a mandatory minimum, and thus setting it through judicial fact-finding presents no constitutional impropriety, at least under the present state of the law. Moreover, when ruling a portion of an act unconstitutional, courts are required, when possible, to invalidate only the portions of the act necessary to allow it to pass constitutional muster. MCL 8.5; *Blank v Dep't of Corrections*, 462 Mich 103, 122-123; 611 NW2d 530 (2000).

While judicial fact-finding may be constitutionally used to set an upper limit on a minimum term, it may not be constitutionally used to set a lower limit, as that limit constitutes a sentencing "floor" as defined in *Alleyne*. Like Judge BECKERING, I would follow the United States Supreme Court's approach to the remedy in such a setting, i.e., by holding that when there is a constitutional infirmity in the guidelines, their application shall be advisory rather than mandatory. However, contrary to Judge BECKERING's view, only the lower end of a guidelines range, or "minimum minimum," constitutes a sentencing floor under *Alleyne*, and, therefore, only the lower end of a range need be advisory only. Under this approach, trial courts would continue to score the guidelines on the basis of findings made under a preponderance-of-the-evidence standard. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Upper limits of the guidelines would remain mandatory, with upward departures permitted only when there are "substantial and compelling" reasons for them. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008); MCL 769.34(3). Downward departures from the lower end of a range would be subject to appellate review for reasonableness. This approach does not imply that the lower

end of the guidelines should be ignored. As the United States Supreme Court stated, even when not mandatory, trial courts "must consult th[e] Guidelines and taken them into account when sentencing." *Booker*, 543 US at 264.

Defendant was sentenced to a minimum term of 96 months, well above the mandatory minimum of 43 months set by the low end of the applicable guidelines range. The factual findings made by the trial court, therefore, did not prevent defendant from receiving a minimum sentence below that floor. Accordingly, the factual findings made by the trial court did not violate defendant's Sixth Amendment rights, and he is not entitled to resentencing.

PEOPLE v BROOKS

Docket No. 312639. Submitted February 5, 2014, at Detroit. Decided February 18, 2014, at 9:00 a.m. Leave to appeal sought.

Randall D. Brooks pleaded no contest to unarmed robbery, MCL 750.530, in the Monroe Circuit Court. The court, Michael W. Labeau, J., sentenced defendant to 8 to 40 years' imprisonment. When scoring the sentencing guidelines, the court assessed 15 points for offense variable (OV) 1, MCL 777.31, which concerns the aggravated use of a weapon. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

Under OV 1, 15 points must be assessed when a firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon. Alternatively, 5 points must be assessed if a weapon was only displayed or implied. "Threaten" means to be a source of danger to, or to indicate impending evil, mischief, or difficulty. "Display" means to show, exhibit, or make visible. Whether the display of a knife constitutes a threat is highly context specific. The fact that a weapon is apparently present, by sight or implication, in the abstract warrants the assessment of 5 points under MCL 777.31(1)(e). To warrant the assessment of 15 points under MCL 777.31(1)(c), there must be some reason for the victim to reasonably perceive that the weapon will be used against the victim. A threat exists when a knife is used for the purpose of suggesting to the victim a menace or source of danger. In this case, the trial court did not clearly err when it found that defendant threatened the victim with a knife even though defendant did not point the knife at the victim. There was evidence that defendant had a readily apparent knife that he attempted to pull out of his sock. In the context of the robbery, defendant's actions suggested that he was about to use the knife to inflict harm on the victim. The assessment of 15 points for OV 1 was appropriate.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE ONE — AGGRAVATED USE OF A WEAPON — KNIVES — THREATENED.

Under offense variable (OV) 1 of the sentencing guidelines, 15 points must be assessed when a firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon; "threaten" means to be a source of danger to, or to indicate impending evil, mischief, or difficulty; to warrant the assessment of 15 points under OV 1, there must be some reason for the victim to reasonably perceive that the weapon will be used against the victim; a threat exists when a knife is used for the purpose of suggesting to the victim a menace or source of danger; the defendant need not have pointed the knife at the victim to warrant the assessment of 15 points under OV 1 (MCL 777.31).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William P. Nichols*, Prosecuting Attorney, and *Michael C. Brown*, Assistant Prosecuting Attorney, for the people.

Wendy Barnwell for defendant.

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendant pleaded no contest to unarmed robbery, MCL 750.530, and was sentenced to 8 to 40 years' imprisonment. He appeals by leave granted, arguing that his sentencing guidelines score should be reduced. Specifically, he argues that he should have been assessed 5 points for Offense Variable (OV) 1 rather than 15 points, on the theory that he never threatened anyone with a knife, but rather merely displayed or implied the knife. We disagree and affirm.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is

left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). This Court reviews de novo whether the facts, as found by the sentencing court, are adequate to satisfy the scoring conditions prescribed by statute. *Hardy*, 494 Mich at 438. Accordingly, the lower court's factual finding that defendant attempted to pull a knife out of his sock is reviewed for clear error. The application of the statutory scoring conditions to that finding is reviewed de novo.

"Offense variable 1 is aggravated use of a weapon." MCL 777.31(1). See also *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). Pursuant to OV 1, 15 points must be assessed when "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c). Alternatively, pursuant to OV 1, 5 points must be assessed if "[a] weapon was displayed or implied." MCL 777.31(1)(e). Defendant does not contend that "[n]o aggravated use of a weapon occurred." MCL 777.31(1)(f). Indeed, there is no dispute that the victim—the cashier at the gas station where the robbery took place—had a reasonable apprehension of an immediate battery. Therefore, the issue before this Court is whether a knife was used to threaten the victim, or if the knife was merely displayed or implied without a threat.

Michigan Courts have not previously considered what actions constitute a threat under MCL 777.31(1)(c), versus a mere display of a weapon under MCL 777.31(1)(e). Consequently, this is an issue of first impression. Words not defined by statute are given their plain and ordinary meanings, and consulting a dictionary to ascertain those meanings is proper. *Koontz v*

Ameritech Servs, Inc, 466 Mich 304, 312; 645 NW2d 34 (2002). *Random House Webster's College Dictionary* (1997) defines "threaten" as "to be a menace or source of danger to" or "to indicate impending evil, mischief, or difficulty." "Display" is defined as "to show or exhibit; make visible." *Id*.

Clearly, whether displaying something would constitute a threat must be highly context specific. For example, a box cutter displayed while opening one's mail would not likely suggest a source of danger to an observer, because in that context it is unambiguously being used as a tool. Or a sales clerk in a store that sells knives showing a knife to a customer would not likely suggest a source of danger to a customer, because in that context it is merely an item of commerce. How the knife was used to threaten or how it was displayed must also be put in context here, a case involving a crime that *by definition* entails the defendant "us[ing] force or violence against any person who is present, or . . . assault[ing] or put[ting] the person in fear . . . ." MCL 750.530(1). The situational context in this case would suggest that the presence of the knife was not benign.

Significantly, MCL 777.31(1) explicitly distinguishes "threaten[ing]" from "display[ing]." Furthermore, MCL 777.31(1)(c) indicates that the threat is associated with, if not the proximate cause of, the victim reasonably apprehending an immediate battery. Finally, it is instructive that although MCL 777.31(1)(c) and (e) are both phrased in the passive voice, the former necessitates the victim's involvement in some way, whereas the latter does not. We conclude that the minimum distinction between the two circumstances is whether the defendant in any way suggests, by act or circumstance, that the weapon might actually be used against the victim.

In other words, the fact that some kind of weapon is apparently present, by sight or by implication, in the abstract warrants the assessment of 5 points under MCL 777.31(1)(e). To warrant the assessment of 15 points under MCL 777.31(1)(c), there must be some reason, however slight, for the victim to reasonably perceive that the weapon will actually be used, and moreover, will actually be used against the victim. A threat exists when a knife is used for the purpose of suggesting to the victim a "menace or source of danger . . . ." *Random House Webster's College Dictionary* (1997).

In this case, the factual record is not as clear as we might hope; in particular, there is some ambiguity whether defendant ever even removed the knife from his sock, let alone actually pointed it at or gestured with it toward anyone. Indeed, there is some dispute whether defendant made any overt acts that would suggest imminent removal of the knife from his sock. The presentence investigation report states that defendant "attempted to pull a knife out of his sock." The trial court's reading of the police report reflects that "the witness stated that they [sic] believed [defendant] attempted to pull a knife out of his sock." At the sentencing hearing, the prosecution stated that defendant "fiddled with a knife, which was seen by the victim," but also stated that defendant did not point it at anyone during the robbery. Defendant denied that a knife was ever displayed, and also argued that "[e]ven the victim had said that [the knife] was never exposed." Consequently, it is not undisputed whether the victim was, in fact, aware of the knife at all. The trial court did not explicitly state on the record that it found that defendant threatened anyone with the knife, but the trial court clearly did so by necessary implication; it further concluded that fear of the knife was the reason that the victim and another person who was present allowed defendant to leave the store with the beer and cigarettes.

We are not left with a definite and firm conviction that the trial court made a mistake in finding by a preponderance of the evidence that defendant threatened the victim with a knife. The evidence overwhelmingly indicates that defendant had a readily apparent knife and engaged in some kind of intentional, overt conduct involving that knife. The most reasonable interpretation of that action is that defendant had a present intention of removing the knife for use. In the context of a robbery, an assailant attempting to pull a knife out of his sock, or even merely reaching for the knife, would be interpreted by any reasonable person as an indication that the knife would actually be used to inflict harm upon them. In other words, defendant went beyond merely displaying a weapon by acting in a manner that suggested its imminent use. We conclude that defendant's actions were sufficient to constitute a threat under MCL 777.31(1)(c). Defendant's only counterargument is that there is no evidence that he pointed the knife at the victim; however, doing so is not necessary to constitute a threat.[1]

Accordingly, based on the factual finding of the trial court that defendant attempted to pull a knife from his sock, an assessment of 15 points for OV 1 was appropriate.

Affirmed.

MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ., concurred.

---

[1] The language of MCL 777.31(1)(c) relating to firearms indicates that 15 points should be assessed for OV 1 if the firearm is "pointed at or toward a victim," but that instructive language applies only to firearms, not other weapons.

BAILEY v SCHAAF (ON REMAND)

Docket No. 295801. Submitted August 28, 2013, at Lansing. Decided February 20, 2014, at 9:00 a.m. Leave to appeal sought.

Devon S. Bailey brought an action in the Genesee Circuit Court against Steven G. Schaaf; T.J. Realty, Inc., doing business as Hi-Tech Protection; an apartment complex, Evergreen Regency Townhomes, Ltd.; Radney Management & Investments; and others for injuries he suffered on August 4, 2006, while he was at the Evergreen complex. The complex was owned and operated by Radney. In 2003, Radney entered into a contract with Hi-Tech to provide Evergreen with security personnel to patrol the premises. Radney and Hi-Tech negotiated a new contract in the summer of 2006, with an effective date of August 28, 2006. Hi-Tech security guards William Baker and Chris Campbell were on duty and patrolling the complex on the night plaintiff was injured. A resident had informed Baker and Campbell that Schaaf was threatening people with a gun at an outdoor gathering. Plaintiff alleged that Baker and Campbell ignored the warning. Sometime later the guards heard two gun shots; Schaaf had shot plaintiff twice in the back, rendering plaintiff a paraplegic. Plaintiff alleged that Baker and Campbell were agents of Hi-Tech and that Hi-Tech was an agent of Radney and Evergreen. Plaintiff asserted multiple claims against all defendants under theories of premises liability, negligent hiring and supervising, ordinary negligence, vicarious liability, and breach of contract. The court, Joseph J. Farah, J., granted partial summary disposition in favor of all defendants but Schaaf, and plaintiff appealed. The Court of Appeals, BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., affirmed in part and reversed in part the circuit court's order. 293 Mich App 611 (2011). The Court of Appeals concluded in part that Evergreen and Radney owed plaintiff a duty to call the police in response to an ongoing emergency on the premises, extending the Supreme Court's decision in *MacDonald v PKT, Inc*, 464 Mich 322 (2001), to the landlord-tenant context. The Court of Appeals, however, rejected plaintiff's argument that he was a third-party beneficiary of the provision-of-security contract between Hi-Tech and Evergreen, and concluded that Hi-Tech did not owe plaintiff a duty that was separate and distinct from Hi-Tech's duties under the original

2003 contract between Hi-Tech and Evergreen that was in effect at the time of plaintiff's injuries. The Supreme Court granted an application for leave to appeal brought by all defendants except Schaaf. In the grant order, the Supreme Court asked the parties to address whether the Court of Appeals had erred when it extended the *MacDonald* holding to the landlord-tenant context. 491 Mich 924 (2012). Following oral argument, the Supreme Court affirmed in part the decision of the Court of Appeals, agreeing that landlords have a duty to reasonably expedite police involvement when put on notice of criminal acts occurring in common areas that pose a risk of imminent and foreseeable harm to an identifiable tenant or invitee. The Supreme Court vacated that portion of the Court of Appeals judgment that upheld the trial court's dismissal of plaintiff's negligence claims against Hi-Tech, and remanded the case for further consideration of that issue and for consideration of Evergreen and Radney's argument that the dismissal of the claims against the security guards relieved them of vicarious liability. 494 Mich 595 (2013).

On remand, the Court of Appeals *held*:

1. In order to recover against Hi-Tech, plaintiff had to establish that Hi-Tech owed him a duty of care. A duty to act for another person's benefit may arise by contractual agreement, by statute, or under the common law. But not every person benefited by a contractual agreement may sue to enforce the duties arising under it. Rather, only the parties to the agreement and those third parties that the contracting parties intended to benefit by the agreement may sue to enforce it. Persons acting pursuant to a contract may, however, be liable to third parties for negligently performing their contractual duties. For the plaintiff to recover, the claim must be premised on a duty that is separate and distinct from the underlying contractual obligation. In this case, although Hi-Tech had a contractual obligation to provide security guards who would presumably protect Evergreen's property, tenants, and guests, Hi-Tech had no legal duty to provide that protection because, under Michigan's common law, a person generally does not have a duty to protect or intervene to help others who might be in danger, and there was no special relationship between Hi-Tech and plaintiff that obligated Hi-Tech to act to protect plaintiff. Nor did plaintiff allege that Hi-Tech's employees breached their common-law duty to act with ordinary care by creating a new hazard or increasing the danger posed by an existing hazard. Because plaintiff failed to allege that Hi-Tech breached a duty that was separate and distinct from its obligations under its agreement

with Evergreen, the trial court did not err when it dismissed plaintiff's claims against Hi-Tech.

2. In civil cases, generally a litigant must preserve an issue for appellate review by raising it in the trial court. However, Michigan's appellate courts may, in exceptional circumstances, consider claims that were not properly preserved. In this case, the issue whether the dismissal of the claims against the security guards relieved Evergreen and Radney of vicarious liability under the decision in *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280 (2007), was not preserved. But under the circumstances of the case, it was appropriate for the Court of Appeals to consider the issue for the first time on appeal.

3. Vicarious liability is indirect responsibility imposed by operation of law. A principal may be vicariously liable to a third party for harms inflicted by his or her agent even though the principal did not participate by act or omission in the agent's tort. If the agent has not breached a duty owed to the third party, the principal cannot be held vicariously liable for the agent's acts or omissions. Similarly, a principal cannot be held vicariously liable for his or her agent's alleged tort if the trial court dismisses the claim against the agent and that dismissal constitutes an adjudication on the merits. However, in either case, the principal remains directly liable for the principal's own tortious conduct, including negligently hiring, training, or supervising an employee. In this case, in addition to alleging claims of vicarious liability against Evergreen and Radney, plaintiff also alleged traditional claims of direct liability against Evergreen and Radney, including negligence in hiring, supervising, and retaining Hi-Tech. Further, Evergreen and Radney, as landlords or premises possessors, had a duty to adequately respond to an ongoing emergency, and plaintiff's allegations were sufficient to state a claim that Evergreen and Radney breached that duty. Because plaintiff's remaining claims against Evergreen and Radney involved direct liability, the trial court's decision to dismiss the claims against security guards Baker and Campbell did not implicate *Al-Shimmari*'s holding that the principal cannot be held vicariously liable when a court dismisses on the merits the negligence claims against the agent.

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

MASTER AND SERVANT — VICARIOUS LIABILITY — DIRECT LIABILITY.

A principal may be vicariously liable to a third party for harms inflicted by his or her agent even though the principal did not participate by act or omission in the agent's tort; if the agent has

> not breached a duty owed to the third party, the principal cannot be held vicariously liable for the agent's acts or omissions; nor can the principal be held vicariously liable for his or her agent's alleged tort if the trial court dismisses the claim against the agent and that dismissal constitutes an adjudication on the merits; the principal, however, remains directly liable for the principal's own tortious conduct.

Donald M. Fulkerson and *David A. Robinson* for Devon Scott Bailey.

Gary P. Supanich PLLC (by *Gary P. Supanich*) for T.J. Realty, Inc., d/b/a Hi-Tech Protection, Evergreen Regency Townhomes, Ltd., and Radney Management & Investments.

ON REMAND

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

PER CURIAM. This case returns to us on remand from our Supreme Court to reconsider whether the trial court properly dismissed plaintiff Devon Scott Bailey's claims against defendants T.J. Realty, Inc., which did business under the name Hi-Tech Protection, Inc. (Hi-Tech), Evergreen Regency Townhomes, Ltd. (Evergreen), and Radney Management & Investments (Radney). *Bailey v Schaaf*, 494 Mich 595, 618-619; 835 NW2d 413 (2013). For the reasons more fully explained in this opinion, we again conclude that the trial court erred when it dismissed Bailey's claim against Evergreen and Radney for breach of their duty to involve the police after learning of an ongoing criminal emergency, but did not err when it dismissed Bailey's remaining claims. Accordingly, we again affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

In November 2007, Bailey sued various parties to recover damages for injuries he sustained after defendant Steven Gerome Schaaf shot him at an outdoor gathering on the grounds of an apartment complex. See *Bailey v Schaaf*, 293 Mich App 611, 616-617; 810 NW2d 641 (2011). In addition to his claim against Schaaf, Bailey eventually alleged claims against Evergreen, which owned the apartment complex; the complex's manager, Radney; the business that provided security for the complex, Hi-Tech; Hi-Tech's owner, Timothy Johnson; and the security guards that Hi-Tech assigned to the complex on the day of the shooting, William Baker and Christopher Campbell. *Id*. at 617. The trial court dismissed the claims against the individual defendants—Baker, Campbell and Johnson—after Bailey's lawyer declined to argue a basis for holding them individually liable. *Id*. at 618. The trial court later dismissed the claims against Evergreen, Radney, and Hi-Tech, but entered a default judgment against Schaaf. Bailey then appealed the trial court's decision to dismiss his claims against Evergreen, Radney, and Hi-Tech to this Court. *Id*. at 619-620.

In that first appeal, we addressed three issues: whether the trial court abused its discretion when it allowed Evergreen and Radney to amend their responses to Bailey's request for admissions, whether the trial court erred when it determined that Bailey was not a third-party beneficiary of the contract for security services between Evergreen and Hi-Tech, and whether the trial court erred when it dismissed Bailey's claims against Evergreen, Radney, and Hi-Tech under MCR 2.116(C)(8) after it determined that Bailey failed to identify a duty that any of these defendants owed to him. See *Bailey*, 293 Mich App at 614-615, 627. We

concluded that the trial court did not abuse its discretion when it permitted Evergreen and Radney to amend their responses to Bailey's request to admit and did not err when it determined that Bailey was not a third-party beneficiary under the contract between Evergreen and Hi-Tech. *Id*. at 620-626.

Turning to the duties that Evergreen and Radney may have owed to Bailey, this Court surveyed the authorities addressing a premises possessor's duty to his or her invitees and recognized that the common law does not normally impose a duty to protect invitees from criminal acts by third parties. *Id*. at 629-642. This Court, however, acknowledged that our Supreme Court had determined that merchants have a limited duty to respond to criminal acts: the merchant must expedite the involvement of the police "when a situation presently occurring on the premises poses a risk of imminent and foreseeable harm to identifiable invitees." *Id*. at 636, citing *MacDonald v PKT, Inc*, 464 Mich 322, 326, 335, 338; 628 NW2d 33 (2001). We then reasoned that the limited duty to involve the police applied equally to landlords. *Bailey*, 293 Mich App at 640-642. Because Bailey's complaint adequately alleged a claim against Evergreen and Radney premised on this limited duty, we determined that the trial court erred when it dismissed Bailey's claims against Evergreen and Radney under MCR 2.116(C)(8). *Id*. at 642.

Finally, we determined that Hi-Tech had no common-law duty to protect Evergreen and Radney's invitees from criminal acts by third parties; we explained that any duty that Hi-Tech may have had arose from its contract to provide security services, which Bailey could not use as a basis for his claim because he was not a third-party beneficiary under the contract. *Id*. at 642-643, citing *Fultz v Union-Commerce Assoc*, 470 Mich

460, 461-462; 683 NW2d 587 (2004). For that reason, we concluded that the trial court did not err when it dismissed Bailey's claim against Hi-Tech. *Id*. at 643.

On further appeal, our Supreme Court affirmed this Court's extension of the duty stated in *MacDonald* to the landlord-tenant relationship. *Bailey*, 494 Mich at 618-619. It did not, however, affirm this Court's judgment in its entirety; it vacated a portion of the opinion and remanded the case for consideration of two issues. *Id*. at 619.

First, it asked this Court to consider Evergreen and Radney's argument that the dismissal of the claims against the security guards relieved them of vicarious liability under the decision in *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280; 731 NW2d 29 (2007). See *Bailey*, 494 Mich at 619. The Supreme Court indicated that this Court should additionally consider whether Evergreen and Radney properly preserved that issue for appeal. *Id*.

Second, the Supreme Court asked this Court to reconsider our decision concerning Hi-Tech's duty to Bailey—if any—in light of the decisions in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011), and *Hill v Sears, Roebuck & Co*, 492 Mich 651; 822 NW2d 190 (2012), which clarified and applied the holding in *Fultz*. See *Bailey*, 494 Mich at 619.

II. HI-TECH'S DUTY

A. STANDARD OF REVIEW

We first reconsider whether the trial court properly dismissed Bailey's claim against Hi-Tech on the grounds that he failed to show that Hi-Tech owed him a duty that was distinct from those provided under Hi-

Tech's agreement with Evergreen and Radney. This Court reviews de novo whether the trial court properly granted 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 common law. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). Likewise, whether Hi-Tech owed a duty to Bailey is a question of law that this Court reviews de novo. See *Fultz*, 470 Mich at 463.

B. CONTRACTUAL DUTIES AND TORT LIABILITY

In our prior opinion, we determined that Bailey "failed to identify a duty that was separate and distinct from Hi-Tech's duties under its contract with Evergreen." *Bailey*, 293 Mich App at 642. We noted that Hi-Tech had no common-law duty to protect Bailey from Schaaf or even to take some affirmative step to aid him after he was injured. *Id*. Instead, we stated, to the extent that Hi-Tech had any duty to act, its "duties were created by the terms of the contract" that it had with Evergreen. *Id*. Because Bailey had no right to enforce a "duty imposed solely under a contract to which he is not a party or an intended beneficiary," we concluded that Bailey failed to state a claim against Hi-Tech. *Id*. at 643. Although we applied our Supreme Court's decision in *Fultz*, the Supreme Court has now nevertheless asked us to reconsider our decision in light of the clarification of *Fultz* that it provided in *Loweke* and *Hill*. *Bailey*, 494 Mich at 619. Accordingly, we briefly trace the evolution of the test stated in *Fultz* and clarified in *Loweke* and *Hill*.

In order to recover against Hi-Tech, Bailey had to establish as a threshold matter that Hi-Tech owed him

a duty of care. See *Hill*, 492 Mich at 660. Whether one person owes a duty of care to another depends—in significant part—on the relationship between those persons: "At common law, [t]he determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part *to act* for the benefit of the subsequently injured person." *Id*. at 661 (quotation marks and citations omitted) (alteration in original). A duty to act for another person's benefit may arise by contractual agreement, by statute, or under the common law. *Id*. at 660-661.

A party to an agreement has an enforceable contractual duty to perform as agreed in the contract. See *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212-213; 737 NW2d 670 (2007) (characterizing the right to make and enforce contracts as a fundamental right and stating that, "when parties have freely established their mutual rights and obligations through the formation of unambiguous contracts," the courts must enforce the contract's terms). But not every person benefited by the contractual agreement may sue to enforce the duties arising under it. Rather, only the parties to the agreement and those third parties that the contracting parties intended to benefit by the agreement may sue to enforce it. *Brunsell v City of Zeeland*, 467 Mich 293, 295-299; 651 NW2d 388 (2002). See also *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427-429; 670 NW2d 651 (2003).

Nevertheless, even though a party to a contract does not have a duty to perform for the benefit of third parties, Michigan courts have long recognized that persons acting pursuant to a contract may be liable to third parties at common law for negligently performing

their contractual duties. *Fultz*, 470 Mich at 464-465 (recognizing that once a party voluntarily undertakes to perform an act, whether gratuitously or for consideration, despite having no prior obligation to do so, that party may have a duty to perform the act in a nonnegligent manner). See also *Hill*, 492 Mich at 663 ("Having engaged to perform this undertaking, defendant installers had a common-law duty to do so with due care . . . ."). Michigan courts have, however, struggled with distinguishing between harms caused by a contracting party's breach of a contractual duty, for which the third party will have no cause of action, and harms caused by the contracting party's breach of the common-law duty to perform a contract in a nonnegligent manner, for which the third party may recover in an action for negligence. See *Fultz*, 470 Mich at 466, citing *Hart v Ludwig*, 347 Mich 559, 564-565; 79 NW2d 895 (1956).

In *Hart*, our Supreme Court had to determine whether Hazen Hart and Lorene Hart properly stated a claim in tort against Frederick Ludwig. *Id*. at 560. The Harts had hired Ludwig to care for their orchard, but shortly after beginning work for the 1953 season, Ludwig refused to continue working. *Id*. The Harts alleged a tort claim premised on Ludwig's negligent failure to remove shoots, prune, fertilize, and protect the orchard from destructive animal life, which caused them damage. *Id*.

Turning to whether the Harts' claim sounded in tort, our Supreme Court recognized that the "question is not without difficulty." *Id*. The Court explained that there had arisen a distinction between claims arising from misfeasance and nonfeasance. This distinction was between claims arising from the negligent failure to perform or timely perform under the contract (nonfea-

sance), which were actionable only in contract, and claims arising from active negligence causing harm (misfeasance), which were actionable in tort. *Id*. at 561-565. The Court stated that it was often difficult to distinguish between nonfeasance and misfeasance in borderline cases. According to the Court, such cases may involve nonfeasance, as with a surgeon's failure to sterilize his instruments or a builder's failure to fill a ditch, which also constitute misfeasance. *Id*. at 564-565. In examining the facts from those decisions in which the courts had concluded that an action in tort would lie, our Supreme Court surmised that the common thread was whether the claim involved a breach of duty that was distinct from enforcing the contractual promise:

> These are all, it is true, failures to act, each disastrous detail, in itself, a "mere" nonfeasance. But the significant similarity relates not to the slippery distinction between action and nonaction but to the fundamental concept of "duty"; in each a situation of peril has been created, with respect to which a tort action would lie without having recourse to the contract itself. Machinery has been set in motion and life or property is endangered. It avails not that the operator pleads that he simply failed to sound the whistle as he approached the crossing. The hand that would spare cannot be stayed with impunity on the theory that mere nonfeasance is involved. In such cases . . . we have a "breach of duty distinct from contract." Or, as Prosser puts it "if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." [*Id*. at 565 (citations omitted).]

Because the "only duty, other than that voluntarily assumed in the contract to which [Ludwig] was subject, was his duty to perform his promise in a careful and skillful manner without risk of harm to others, the violation of which is not alleged," the Court concluded

that the Harts' claim sounded in contract: "This is not a duty imposed by the law upon all, the violation of which gives rise to a tort action, but a duty arising out of the intentions of the parties themselves and owed only to those specific individuals to whom the promise runs." *Id*. at 565-566.

Our Supreme Court reexamined the distinction between a claim arising from the failure to perform under a contract and the negligent performance of a contractual obligation in *Fultz*. In that case, Sandra Fultz fell and injured her ankle while walking across a parking lot owned by Comm-Co Equities. *Fultz*, 470 Mich at 462. Fultz sued Comm-Co as the premises possessor, but also sued Creative Maintenance Limited, which was the company that Comm-Co had hired to provide snow removal services for its lot. *Id*. Fultz alleged that, once Creative Maintenance undertook to clear Comm-Co's lot, it had a common-law duty to exercise reasonable care in performing its contractual duties. *Id*. at 463-464. A jury eventually found that Creative Maintenance breached its duty to provide reasonable snow removal, and this Court affirmed. *Id*. at 462. Our Supreme Court, however, determined that Fultz's claim against Creative Maintenance did not implicate a duty recognized under the common law.

In analyzing the issue, our Supreme Court first acknowledged that persons who undertake to perform an act for another—as with a typical agent or independent contractor—have a duty to perform the act in a nonnegligent manner. *Id*. at 465. The Court explained that this duty must nevertheless be one that the person specifically owed to the plaintiff or must be one that the person owed to the general public. *Id*., quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). The Court recognized that Michigan courts had tradi-

tionally examined the "contours of this common-law duty" by drawing a distinction between "misfeasance (action) and nonfeasance (inaction) for tort claims" arising from contractual obligations. *Fultz*, 470 Mich at 465. Thus, "[w]e have held that a tort action will not lie when based solely on the nonperformance of a contractual duty." *Id*. at 466, citing *Hart*, 347 Mich 559, *Chase v Clinton Co*, 241 Mich 478; 217 NW 565 (1928), and *Churchill v Howe*, 186 Mich 107; 152 NW 989 (1915).

But the Court felt that this distinction was largely "semantic" and "somewhat artificial." *Id*. As had been recognized in *Hart*, the Court stated, the real distinction was not one of misfeasance or nonfeasance, but of duty. *Fultz*, 470 Mich at 466, quoting *Hart*, 347 Mich at 564-565. It recognized that it had, since the decision in *Hart*, "defined a tort action stemming from misfeasance of a contractual obligation as the 'violation of a legal duty separate and distinct from the contractual obligation.' " *Fultz*, 470 Mich at 467, quoting *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). It then concluded that the "separate and distinct" definition noted in *Hart* and explained in *Rinaldo's* offered "better guidance in determining whether a negligence action based on contract may lie because it focuses on the threshold question of duty in a negligence claim." *Fultz*, 470 Mich at 467. Accordingly, it stated that Michigan courts should in the future analyze whether the claim was one that arose solely from a contract by examining whether the plaintiff pleaded that the agent or contractor violated a duty that was "separate and distinct from the defendant's contractual obligations." *Id*. "If no independent duty exists, no tort action based on a contract will lie." *Id*.

Turning to the facts of the case, the Court determined that Fultz's claims against Creative Mainte-

nance failed because she did not establish that Creative Maintenance had a common-law duty to remove the snow and ice from Comm-Co's parking lot; instead, she essentially alleged that Creative Maintenance breached its contract with Comm-Co "by failing to perform its contractual duty of plowing or salting the parking lot." *Id*. at 468. Moreover, although the Court agreed that the performance of a contractual obligation may amount to a breach of duty that is separate and distinct when the performing party creates a new hazard, Fultz did not allege that Creative Maintenance created a new hazard; she only alleged that it failed to clear the lot. *Id*. at 469. Because Fultz could not rely on Creative Maintenance's breach of its contractual duty to Comm-Co to establish a claim against Creative Maintenance, the Supreme Court reversed the jury's verdict against Creative Maintenance. *Id*. at 470.

As can be seen from a careful reading of *Fultz*, the Court did not alter the substantive law applicable to claims arising from the negligent performance of a contractual duty; instead, it adopted the analytical framework stated in *Hart* and *Rinaldo's*. Nevertheless, after the decision in *Fultz*, some courts "misconstrued" the decision in *Fultz* to create a "form of tort immunity" for negligence claims raised by noncontracting third parties. *Loweke*, 489 Mich at 168. Specifically, some courts began to apply *Fultz* not by examining whether the plaintiff alleged a claim premised on a duty that was separate and distinct from the underlying contractual obligation, but by examining whether the defendant's conduct "was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract." *Id*. Because of the confusion arising from these decisions, in *Loweke* our Supreme Court again addressed the proper analysis

for determining whether a tort action will lie for the negligent performance of a contract.

In *Loweke*, our Supreme Court rejected the notion that *Fultz* established a new test premised on the nature of the obligations under the contract. In *Fultz*, it explained, it had merely "recast the test to focus on whether any legal duty independent of the contract existed." *Id*. at 169.

> Determining whether a duty arises separately and distinctly from the contractual agreement, therefore, generally does not necessarily involve reading the contract, noting the obligations required by it, and determining whether the plaintiff's injury was contemplated by the contract. Instead, *Fultz's* directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another. As this Court has historically recognized, a separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties, and the generally recognized common-law duty to use due care in undertakings. [*Id*. at 169-170 (citations omitted).]

Because the trial court and this Court had misapplied the test stated in *Fultz* to the facts in *Loweke*, the Supreme Court reversed the trial court's dismissal and remanded the case for further proceedings. *Id*. at 172-173.

Our Supreme Court applied the clarified *Fultz* decision in *Hill*, 492 Mich 651. In that case, Marcy Hill, Patricia Hill, and Christopher Hill sued Sears, Roebuck and Co. for injuries that they sustained after Marcy Hill inadvertently released gas into her home through an uncapped gas line, which later ignited. *Hill*, 492 Mich at 656-657. The Hills alleged that Sears negligently in-

stalled an electric dryer more than three years earlier and that its negligence proximately caused their injuries. *Id*. at 656-657.

On appeal, the Court determined that Sears had a limited relationship with the Hills that involved meeting its contractual obligation to deliver and install the dryer and to do so with due care. *Id*. at 662-664. The Court rejected the contention that, by agreeing to deliver and install the electric dryer, Sears assumed additional duties not associated with the delivery and installation. *Id*. at 665. Instead, it held that Sears had no duty with respect to the gas line. *Id*. Finally, the Court agreed that Sears could be liable for breaching a duty that was separate and distinct from its contract as stated in *Fultz*, but concluded that the Hills failed to establish that Sears breached such a duty by creating a "new dangerous condition" or making "an existing dangerous condition more hazardous": "The placement of the dryer did not affect the existence or nature of the hazard in any manner because the danger posed by the uncapped gas line was *exactly the same* before and after the electric dryer was installed." *Id*. at 671.

Turning to this case, under *Fultz*, as clarified in *Loweke* and applied in *Hill*, Bailey could not rely solely on Hi-Tech's promise to provide security services to Evergreen to establish a claim against Hi-Tech. Because Bailey was not a party to Hi-Tech's agreement with Evergreen and was not a third-party beneficiary under that agreement, Bailey had to plead and be able to prove that Hi-Tech breached a duty to him that was separate and distinct from Hi-Tech's promises to Evergreen.[1]

[1] In our prior opinion, we rejected Bailey's argument that the trial court erred when it dismissed his third-party beneficiary claim. See *Bailey*, 293 Mich App at 623-626. And that decision is not at issue in this appeal.

And, under *Hill*, Bailey cannot establish the breach of its common-law duty of ordinary care if Hi-Tech's actions did not create a new hazard or make an existing hazard more dangerous.

C. ANALYSIS

Here, Evergreen negotiated and entered into an agreement with Hi-Tech that obligated Hi-Tech to provide certain security services for Evergreen's property. In accordance with the terms of its agreement with Evergreen, Hi-Tech assigned its security guards to the apartment complex where Schaaf shot Bailey. Although Hi-Tech had a contractual obligation to provide security guards who would presumably protect Evergreen's property, tenants, and guests, Hi-Tech had no legal duty to provide such protection because, under Michigan's common law, a person generally does not have a duty to protect or intervene to help others who might be in danger. See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988) (noting that courts are reluctant to establish duties that "force persons to help one another" and recognizing the general rule is "there is no duty that obligates one person to aid or protect another").

And, although a person may become obligated to act to protect another on the basis of certain special relationships, it is clear that none of those special relationships apply to the relationship between Hi-Tech and Bailey. See *Bailey*, 494 Mich at 604 (recognizing that the common law imposes a duty of care when a special relationship exists as when one person entrusts himself to the control and protection of another); *Williams*, 429 Mich at 499 (stating that there are "special relationships"—such as those between a common carrier and its passengers, between an innkeeper and his

or her guests, between an employer and its employees—that may give rise to a duty to provide a place of safety); *Dawe v Bar-Levav & Assoc, PC (On Remand)*, 289 Mich App 380, 390; 808 NW2d 240 (2010) (holding that the psychiatrist-patient relationship is a special relationship that may give rise to a duty to protect another from harm by a third party).

Bailey did not allege that Hi-Tech had possession and control over the premises at issue; accordingly, Hi-Tech had no duty to keep the common areas safe. See *Duffy v Irons Area Tourist Ass'n*, 300 Mich App 542, 547; 834 NW2d 508 (2013) (explaining that premises liability usually applies to land owners, tenants, and lessees because those persons or entities are in possession and control of the land). For the same reason, Hi-Tech had no duty as a landlord or merchant to expedite the involvement of police officers once it became aware—through its employees—that Bailey and the other guests at the gathering were in imminent danger. See *Bailey*, 494 Mich at 614-617.

Finally, Bailey did not allege that Hi-Tech's employees breached their common-law duty to act with ordinary care by creating a new hazard or increasing the danger posed by an existing hazard; given the allegations, the danger posed by Schaaf was the same without regard to Baker and Campbell's presence at the apartment complex. See *Hill*, 492 Mich at 671-672 (stating that the installers did not create a new hazard or increase the danger posed by an existing hazard when they installed the dryer; therefore, there was no breach of the common-law duty of ordinary care); *Hart*, 347 Mich at 565 (stating that the case at issue did not involve allegations that the defendant breached his duty to perform his promise "in a careful and skillful manner without risk of harm to others"); compare *Ross*

v Glaser, 220 Mich App 183, 186-187; 559 NW2d 331 (1996) (holding that the provision of a firearm to a person with known mental instability was actionable misfeasance as opposed to mere nonfeasance).

If Hi-Tech and its employees had any duty to protect Bailey or otherwise intervene on his behalf, that duty was solely a matter of the contractual agreements between Hi-Tech, its employees, and Evergreen. While Evergreen might be able to recover for a beach of the agreement to provide security services should it ultimately be held liable for the Hi-Tech employees' failure to properly respond to the events, Bailey cannot rely on Hi-Tech's purported breach of the agreement with Evergreen to establish his tort claim. See *Hart*, 347 Mich at 565-566 ("This is not a duty imposed by the law upon all, . . . but a duty arising out of the intentions of the parties themselves and owed only to those specific individuals to whom the promise runs."). Because Bailey failed to allege that Hi-Tech breached a duty that was separate and distinct from its obligations under its agreement with Evergreen, the trial court did not err when it dismissed Bailey's claim against Hi-Tech. See *Fultz*, 470 Mich at 469.

III. VICARIOUS LIABILITY AND AGENCY

A. STANDARDS OF REVIEW

We next consider Evergreen and Radney's argument that this Court should affirm the trial court's decision to dismiss Bailey's claims under the rule stated in *Al-Shimmari*, 477 Mich 280. On appeal, Evergreen and Radney contend that Bailey's claims against them are premised on the failure of their purported agents, Baker and Campbell, to involve police officers and, under our Supreme Court's decision in *Al-Shimmari*,

the claims against them as principals must be dismissed because the claims against their agents were dismissed. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 369. This Court also reviews de novo the proper scope and application of the common law, such as the common law of agency. *Brecht*, 297 Mich App at 736.

B. PRESERVATION

As a preliminary matter, we must address whether Evergreen and Radney properly preserved this issue for appeal.

In February 2009, Evergreen, Radney, Hi-Tech, Campbell, Baker, and Johnson moved for summary disposition under MCR 2.116(C)(8). In their motion and brief, they argued that the claims against them must be dismissed because Bailey failed to properly plead that any one of them breached a duty owed to Bailey. Specifically, they maintained that Michigan law does not impose a duty on premises possessors, such as Evergreen or Radney, to provide security or make their premises safe from criminal activity, and does not impose a duty to protect or aid others. They did not address Evergreen or Radney's vicarious liability for any tort committed by Baker or Campbell and did not raise or discuss our Supreme Court's decision in *Al-Shimmari*.

The trial court held a hearing on the motion in March 2009. At the hearing, defendants' lawyer began by arguing that the individual defendants—Johnson, Baker, and Campbell—plainly had no duty to protect or aid Bailey. After defendants' lawyer summarized his position as to the duty owed by the individual defendants, the trial court interrupted:

> Well, let's stop there for just a second. Mr. Robinson [addressing Bailey's lawyer], that's probably the part that I have the most difficulty with from your position. How [are] Tim Johnson and these individuals personally liable? This is a corporation. How are they personally liable? I don't even believe there's been an allegation that would suggest the piercing of the corporate veil or any ultra [sic] ego theory. How are they personally liable?

In response, Bailey's lawyer stated that he was "really not contending that" and noted that he had not "address[ed] that in our response." After this brief colloquy, the trial court granted the request for dismissal as to the claims against the individual defendants. The trial court went on to rule that Evergreen, Radney, and Hi-Tech also had no duty to provide security or to otherwise protect or aid Bailey. In May 2009, the trial court entered an order dismissing the claims against each defendant other than Schaaf that was consistent with that determination.

As can be seen, Evergreen and Radney did not argue before the trial court that Bailey's claims against them had to be dismissed once the trial court determined that Baker and Campbell could not be held individually liable. Because the parties did not raise this issue before the trial court and the trial court did not address it, this issue was not preserved for appellate review. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

In civil cases, Michigan courts generally follow the rule that a "a litigant must preserve an issue for appellate review by raising it in the trial court." *Id*. This "raise or waive"[2] rule of appellate review has its origins in judicial efficiency and fundamental fairness:

---

[2] We recognize that there is a distinction between the terms "waiver" and "forfeiture" in Michigan law. See *Walters*, 481 Mich at 384 n 14. However, for purposes of determining whether this Court should exercise its discretion to consider an issue that was not raised and addressed by

> By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [*Id*. at 388 (citations omitted).]

When a litigant waives appellate review by failing to properly preserve a claim of error, although under no obligation to do so, this Court may exercise its discretion to consider the claim.[3] *Id*. at 387. See also *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) ("[T]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is

---

the trial court, we elect to use the term "waiver" in its broader sense, as our Supreme Court elected to do when discussing the issue in *Walters*. *Id*. at 384 n 14, 387-390.

[3] In contrast to civil cases, Michigan courts will review even unpreserved errors from criminal trials; we will do this to ensure the defendant's constitutional right to a fair trial. See *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987). Nevertheless, even then, this Court's review is limited to plain errors affecting the defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Similarly, because a parent's right to custody of his or her child is an important liberty interest protected by the United States Constitution, this Court will also review unpreserved errors in termination proceedings for plain error. See *In re Rose*, 174 Mich App 85, 88; 435 NW2d 461 (1989), rev'd on other grounds 432 Mich 934; *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). The same concerns, however, do not arise with civil cases. See *Napier*, 429 Mich at 233-234 (refusing to characterize an erroneously entered civil judgment as a miscarriage of justice and noting that a criminal defendant cannot obtain adequate relief for a wrongful conviction by suing his or her lawyer for malpractice).

necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]"). But this Court will exercise its discretion to review such claims sparingly and only when exceptional circumstances warrant review. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993); *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987) (advising that this power should be "exercised quite sparingly").

Whether *Al-Shimmari* applies to this case is solely a question of law that requires no further factual development and plainly implicates the proper determination of the case. See *Smith*, 269 Mich App at 427. Moreover, given the peculiar procedural history of this case, it is not clear that Evergreen or Radney's lawyer had a reasonable opportunity to raise this alternate basis for relief before the trial court; by declining to argue a basis for imposing liability, Bailey's lawyer essentially conceded that whether the individual defendants could be personally liable was not at issue, and the trial court soon after determined that it would be appropriate to dismiss the claims against Evergreen and Radney on the grounds that Bailey also failed to state a claim against them. Thus, it is not surprising that Evergreen and Radney did not offer an alternate basis for dismissal at the hearing. Finally, even if we declined to review this issue, we can see no reason that would preclude Evergreen and Radney from raising this ground for dismissal in a new motion on remand, which in turn could result in yet further appeals. Therefore, in the interests of justice and efficiency, we elect to exercise our discretion and consider this issue for the first time on appeal. See *Walters*, 481 Mich at 387-388.

C. AGENCY AND TORT LIABILITY

In order to properly understand the decision in *Al-Shimmari* and how it might apply to the facts of this case, it is useful to briefly summarize the law of agency as it applies to a principal's vicarious liability for the torts of the principal's agent, an agent's liability to third parties for the agent's own torts, and a principal's direct liability for the principal's own torts.

A principal may be vicariously liable to a third party for harms inflicted by his or her agent even though the principal did not participate by act or omission in the agent's tort. See *Al-Shimmari*, 477 Mich at 294. "Vicarious liability is indirect responsibility imposed by operation of law." *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988). Courts impose indirect responsibility on the principal for his or her agent's torts as a matter of public policy, but the "principal, having committed no tortious act, is not a 'tortfeasor' as that term is commonly defined." *Id*. Because liability is imputed by law, a plaintiff does not have to prove that the principal acted negligently. "Rather, to succeed on a vicarious liability claim, a plaintiff need only prove that an agent has acted negligently." *Al-Shimmari*, 477 Mich at 294-295. Concomitantly, if the agent has not breached a duty owed to the third party, the principal cannot be held vicariously liable for the agent's actions or omissions. *Lincoln v Gupta*, 142 Mich App 615, 622; 370 NW2d 312 (1985).

A principal, however, remains directly liable for his or her own tortious conduct. See *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 11; 651 NW2d 356 (2002) (recognizing that a principal may be directly liable for the principal's own torts or vicariously liable for torts committed by its agents); *Malcolm v City of East Detroit*, 437 Mich 132, 145-146; 468 NW2d 479 (1991)

(explaining that "[w]hether liability is vicarious or direct depends upon whether the focus is upon the entity or the individual employee committing the tort"); *Cascarella v Nat'l Grocer Co*, 151 Mich 15, 18; 114 NW 857 (1908). Thus, a principal may be directly liable—as opposed to vicariously liable—for negligently hiring, training, or supervising an employee, if the employee's actions harm a third party. See *Zsigo v Hurley Med Ctr*, 475 Mich 215, 227; 716 NW2d 220 (2006); *Hersh v Kentfeld Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971); but see *DeShambo v Anderson*, 471 Mich 27, 31; 684 NW2d 332 (2004) (stating that it "has been long established in Michigan that a person who hires an independent contract is not liable for injuries that the contractor negligently causes"); *Campbell v Kovich*, 273 Mich App 227, 235; 731 NW2d 112 (2006) (stating that Michigan law does not recognize a cause of action for negligently hiring an independent contractor). And, in those types of cases, the plaintiff's ability to establish his or her claims against the principal does not depend on the plaintiff's ability to prove that the agent breached a duty that the agent owed to another.

As for an agent, he or she is personally liable for his or her own tortious conduct, even when acting on behalf of his or her principal. *Dep't of Agriculture v Appletree Marketing, LLC*, 485 Mich 1, 17 n 39; 779 NW2d 237 (2010). The agent remains liable even though his or her principal may also be vicariously liable. *Wines v Crosby & Co*, 169 Mich 210, 215; 135 NW 96 (1912). An agent is not, however, liable to a third party merely because he or she neglects to perform a duty that his or her principal owes to a third party. In such a case, the third party's remedy is against the principal alone. See *Ellis v McNaughton*, 76 Mich 237, 240-242; 42 NW 1113 (1889) (acknowledging that an agent is not normally liable for his or

her nonfeasance, but distinguishing the facts therein, and concluding that the agent's duty was "imposed upon him by law as a responsible individual in common with all other members of society"); 2 Restatement Agency, 3d, § 7.02 ("An agent's breach of a duty owed to the principal is not an independent basis for the agent's tort liability to a third party. An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party.") (emphasis omitted); 2 Restatement Agency, 2d, § 352, p 122; 2A CJS, Agency, § 399, p 695; but see 2 Restatement Agency, 2d, § 354, p 125 (noting that an agent who specifically undertakes to protect another for his principal may be liable for failing to protect the third party under certain circumstances).

As our Supreme Court recognized more than 100 years ago, when an agent breaches a duty owed solely to his or her principal, a third party may not rely on that breach to establish a tort claim; but when the agent breaches a separate duty owed to the third party, the third party may hold the agent liable:

> "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. * * * But, if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing, but it is misfeasance,—doing improperly." [*Ellis*, 76 Mich at 241, quoting *Osborne v Morgan*, 130 Mass 102, 103 (1881).]

Although no longer framed as a matter of misfeasance versus nonfeasance, this rule is consistent with modern application of the rule:

> [C]onduct that breaches an agent's duties to the principal does not always, additionally, subject the agent to liability to a third party although the agent's conduct also harms the third party. An agent is subject to liability to a third party only when the agent's conduct breaches a duty that the agent owes the third party. The duty may be derived from tort law, from a contract between the third party and the principal when the agent is a party to the contract, from a promise made by the agent to the principal for which the third party is an intended third-party beneficiary, or from the agent's assumption of duties toward the third person that are independent of the duties the agent owes the principal. [2 Restatement Agency, 3d, § 7.02, comment *b*.]

Because the distinction between misfeasance and nonfeasance is analogous to that addressed by the *Fultz* line of cases discussed earlier in this opinion, the analytic framework applied in *Fultz* applies equally to determining whether an agent can be liable in tort to a third party. Accordingly, a plaintiff cannot sue an agent to recover for harm caused by the agent's breach of a duty owed *solely* to his or her principal. Rather, the plaintiff must allege and be able to prove that the agent breached a duty that was separate and distinct from his or her agency agreement with the principal. See *Fultz*, 470 Mich 467; *Ellis*, 76 Mich at 240-242.

D. AL-SHIMMARI

With these basic principles of agency law in mind, we now examine our Supreme Court's decision in *Al-Shimmari*. In that case, Abdul Al-Shimmari sued his surgeon, Dr. Setti Rengachary, and several institutional defendants after he discovered that he had suffered a

nerve injury during a surgery that Rengachary performed. *Al-Shimmari*, 477 Mich at 284. Our Supreme Court determined that the trial court did not err when it dismissed the claim against Rengachary because Al-Shimmari failed to serve process on Rengachary within the period of limitations. *Id*. at 287-293. After concluding that the trial court did not err when it dismissed the claim against Rengachary, the Court analyzed whether the claims against the institutional defendants could nevertheless proceed. *Id*. at 294.

The Court first noted that Al-Shimmari's claims against the institutional defendants were premised solely on their vicarious liability for Rengachary's alleged negligence (there were no claims against the institutional defendants involving direct liability). *Id*. at 285, 294-295. The Court then examined MCR 2.504(B)(3) and determined that the dismissal of the claim against Rengachary constituted an adjudication on the merits under that rule. *Id*. at 295. Because the dismissal of the claim against Rengachary amounted to a dismissal on the merits, Al-Shimmari could no longer argue the merits of the claim against Rengachary and, therefore, could not impute Rengachary's negligence to the institutional defendants. *Id*. at 295-296. For that reason, the Supreme Court determined that Al-Shimmari's vicarious-liability claims against the institutional defendants had to be dismissed. *Id*. at 297.

As explained by our Supreme Court in *Al-Shimmari*, a principal cannot be held vicariously liable for his or her agent's alleged tort if the trial court dismisses the claim against the agent and that dismissal constitutes an adjudication on the merits. This is so because the plaintiff can no longer argue the merits of the underlying tort claim. *Al-Shimmari*,

477 Mich at 295-296. The decision in *Al-Shimmari* did not, however, involve—and therefore did not address—whether the dismissal of claims against an agent constitutes an adjudication on the merits concerning any acts or omissions that the agent took on the principal's behalf, which did not themselves amount to a breach of a duty owed by the agent to the third party, but nevertheless constituted a breach of a duty owed by the principal to that third party. Because the Court in *Al-Shimmari* only addressed those situations in which the principal's liability arose solely from its agent's breach of a duty to the injured party, we conclude that it applies only to claims premised solely on true vicarious liability.

If a plaintiff's claim against the principal does not involve an agent's breach of a duty that the agent separately owed to the third party, that claim does not involve true vicarious liability and the dismissal of the plaintiff's claims against the agent will not constitute an adjudication on the merits as to whether the agent's acts or omissions constitute the breach of duty independently owed by the principal. Similarly, in those situations in which a plaintiff has alleged separate claims of vicarious and direct liability against the principal on the basis of an agent's conduct, the dismissal of the claims—if any—against the agent will only constitute an adjudication on the merits as to those claims against the principal involving true vicarious liability. Accordingly, if Bailey's remaining claims against Evergreen and Radney are not solely based on vicarious liability—that is, do not solely depend on holding Evergreen and Radney liable for a tort committed by Baker and Campbell—the dismissal of the claims against Baker and Campbell will not constitute an adjudication on the merits under *Al-Shimmari*.

E. APPLYING THE LAW

In his second amended complaint, Bailey did allege that Evergreen and Radney were vicariously liable for any torts committed by Hi-Tech, Baker, or Campbell. But he also alleged that his injuries were caused by Evergreen's failure to keep its premises safe and by both Evergreen and Radney's negligence in hiring, supervising, and retaining Hi-Tech. That is, he plainly alleged traditional claims of direct liability against both Evergreen and Radney. Although this Court eventually determined that Bailey failed to state claims against Evergreen and Radney to the extent that his complaint alleged that Evergreen and Radney had a duty to provide security or make its premises safe from criminal activity, this Court nevertheless determined that Bailey's allegations were sufficient to state a claim that Evergreen and Radney—as landlords or premises possessors—breached their duty to adequately respond to an ongoing criminal emergency. *Bailey*, 293 Mich App at 641-642. Accordingly, the claims at issue on appeal do not solely involve true vicarious liability. This is so because Bailey does not have to prove that Baker and Campbell breached a duty that they owed to him in order to establish that Evergreen and Radney breached their duty to respond to an ongoing criminal emergency.

Evergreen and Radney had a common-law duty to their invitees: they had to expedite the involvement of the police "when a situation presently occurring on the premises pose[d] a risk of imminent and foreseeable harm to identifiable invitees." *Bailey*, 293 Mich App at 636, citing *MacDonald*, 464 Mich at 326, 335, 338. Their contractor, Hi-Tech, and its employees, Baker and Campbell, in contrast, had no common-law duty to either protect Bailey from criminal acts by third parties or to involve the police. *Bailey*, 494 Mich at 604 ("It is a

basic principle of negligence law that, as a general rule, 'there is no duty that obligates one person to aid or protect another.' "), quoting *Williams*, 429 Mich at 498-499. Rather, the limited duty to protect others from criminal acts applied solely to Evergreen and Radney as the premises possessors or landlords. *Bailey*, 494 Mich at 614-617.

Moreover, the fact that Evergreen or Radney contracted with Hi-Tech to meet their duty to involve the police did not relieve them of direct liability should Hi-Tech fail to perform its contractual duty. *Fultz*, 470 Mich at 467 n 2. See also *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164, 172-173; 13 NW 499 (1882) (COOLEY, J.) (explaining that, when the "duty which has been neglected is personal to the master himself," it does not matter that an agent or employee neglected the duty; in such cases the principal remains liable in his or her own right). Because Bailey's remaining claims against Evergreen and Radney involve direct liability rather than true vicarious liability, the trial court's decision to dismiss the claims against Baker and Campbell does not implicate *Al-Shimmari*'s holding that the principal cannot be held vicariously liable when the court dismisses on the merits the negligence claims against the agent.

We acknowledge that it might appear incongruous to hold that a principal can be liable for a breach of duty that was caused by its employee or agent's actions while nevertheless holding that the employee or agent's actions do not amount to a breach of duty by the employee or agent in his or her individual capacity. This is particularly true where, as here, the principal's duty would not have been triggered had its security personnel not been informed of the ongoing emergency.

But the same would be true even if Hi-Tech and its employees had not been in the business of providing security. If Evergreen and Radney had hired Hi-Tech to provide maintenance, and had Baker and Campbell been informed of the ongoing emergency while they were conducting maintenance, the outcome might be the same; Bailey could similarly have alleged that Baker and Campbell were Evergreen and Radney's agents, that Evergreen and Radney had notice of the ongoing emergency through their agents, and that their knowledge triggered a duty to involve the police, which Evergreen and Radney breached by failing to call the police. See *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 134; 762 NW2d 178 (2009) (discussing the doctrine of imputed knowledge). Here, Bailey alleged a direct cause of action against Evergreen and Radney. Should Evergreen or Radney be found liable for their purported agents' failure to properly perform their contract, Evergreen and Radney are not without a remedy: they may seek damages for their agents' breach of the agency agreement or security contract. See *Fultz*, 470 Mich at 467 n 2.

IV. CONCLUSION

The trial court did not err when it determined that Bailey failed to allege that Hi-Tech breached a duty to him that was separate and distinct from its obligations under its agreement with Evergreen to provide security services. For that reason, we again conclude that the trial court properly dismissed Bailey's claim against Hi-Tech. Bailey's remaining claims against Evergreen and Radney were not, however, solely premised on vicarious liability. Rather, Bailey alleged that Evergreen and Radney directly breached their duty to involve the police after learning of an ongoing criminal emergency.

Because Bailey did not have to allege or prove that Baker and Campbell committed a tort in order to hold Evergreen or Radney liable under this theory, the trial court's decision to dismiss Bailey's claims against Baker and Campbell does not implicate *Al-Shimmari*. Consequently, we decline to affirm the trial court's decision to dismiss on this alternative basis.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Bailey may tax his costs. MCR 7.219(A).

BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., concurred.

PAUL v GLENDALE NEUROLOGICAL ASSOCIATES, PC

Docket No. 309927. Submitted January 15, 2014, at Detroit. Decided February 20, 2014, at 9:05 a.m. Leave to appeal sought.

Jennifer Paul brought an action in the Oakland Circuit Court against Glendale Neurological Associates, PC, alleging violations of the Medical Records Access Act (MRAA), MCL 333.26261 *et seq*., and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., as a result of defendant's refusal to provide plaintiff copies of her "medical chart including office notes, diagnostic test results, consulting physician reports, correspondence, and related documents[.]" Plaintiff had been allegedly injured at work and filed a workers' compensation claim. Her employer's insurance company hired Medicolegal Services, Inc., to obtain an independent medical evaluation (IME) of plaintiff. A doctor contracted by Medicolegal Services examined plaintiff and ordered an MRI and an arthrogram of plaintiff's shoulder, for which Medicolegal Services hired defendant. Plaintiff requested her records from defendant after the procedures were performed. The court, Wendy Potts, J., held that plaintiff had standing to sue under the MRAA but that the records she sought were not "medical records" as defined by the MRAA. The court also held that the MCPA did not apply to plaintiff's claim. The court entered an opinion and order granting summary disposition in favor of defendant, denying summary disposition in favor of plaintiff, and dismissing plaintiff's complaint with prejudice. Plaintiff appealed.

The Court of Appeals *held*:

1. The MRAA defines "medical record" as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." MCL 333.26263(i). The phrase "caring for the patient's health" refers to records maintained in the course of providing some sort of diagnostic or treatment service for the treatment and betterment of the patient. The records of defendant's examination of plaintiff for the benefit of a third party were not produced "in the process of caring for the patient's health" within the meaning of the MRAA.

The MRAA does not apply in the context of an IME. The trial court properly granted summary disposition in favor of defendant on plaintiff's MRAA claim.

2. The arthrogram and MRI performed on plaintiff were performed on plaintiff at the request of Citizens Management for the business purpose of evaluating plaintiff's workers' compensation claim. The MCPA did not apply to those procedures because they were not undertaken "primarily for personal, family, or household purposes," MCL 445.902(1)(g). The trial court appropriately granted summary disposition in favor of defendant on plaintiff's MCPA claim.

Affirmed.

SERVITTO, P.J., concurring in part and dissenting in part, agreed with the majority that summary disposition was properly granted in favor of defendant with regard to the claim under the MCPA but would reverse the grant of summary disposition in favor of defendant and remand for the entry of summary disposition in favor of plaintiff with regard to the claim under the MRAA. To qualify as a "medical record" within the scope of the MRAA, a record must have only two qualities: (1) it must be information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition, and (2) it must be maintained by a health care provider or health facility in the process of caring for the patient's health. There is no serious dispute that the requested records met the first criterion. Judge SERVITTO would additionally find that the requested records met the second criterion. The phrase "caring for the patient's health" is the verb form of "health care," which the MRAA defines as "any care, service, or procedure provided by a health care provider or health facility to diagnose, treat, or maintain a patient's physical condition, or that affects the structure or a function of the human body." MCL 333.26263(d). The doctor who conducted the MRI and arthrogram for defendant indicated that he performed the tests in order to diagnose plaintiff and performed the tests in the process of caring for plaintiff's health. The second criterion was met. Health facilities and agencies that provide services to patients and are licensed under the Public Health Code must adopt and treat all patients in accordance with a policy providing that an individual who is or has been a patient or resident is entitled to inspect, or receive for a reasonable fee, a copy of the individual's medical record upon request in accordance with the MRAA. MCL 333.20201(2)(b). Because a "patient" is defined by the MRAA as an individual who receives or has received health care from a health care provider or

health facility, MCL 333.26263(n), and "health care" is defined by the MRAA as any care, service, or procedure provided by a health care provider or health facility to diagnose, treat, or maintain a patient's physical condition, or that affects the structure or a function of the human body, MCL 333.26263(d), the records sought by plaintiff were medical records within the meaning of the MRAA. Plaintiff was entitled to access the records consistent with both the MRAA and the Public Health Code.

1. MEDICAL RECORDS ACCESS ACT — INDEPENDENT MEDICAL EVALUATIONS — MEDICAL RECORDS.

The Medical Records Access Act provides that, except as otherwise provided by law or regulation, a patient or a patient's authorized representative has the right to examine or obtain the patient's medical record; the act defines a "medical record" as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health"; the phrase "in the process of caring for the patient's health" refers to records maintained in the course of providing some sort of diagnostic or treatment service for the treatment and betterment of the patient; a physician's goal in the particularized setting of an independent medical evaluation is to gather information for the examinee or a third party to use in employment or related financial decisions, not to provide a diagnosis or treatment of medical conditions; the Medical Records Access Act does not apply in the context of an independent medical evaluation (MCL 333.26263(i); MCL 333.26265(1)).

2. CONSUMER PROTECTION — MICHIGAN CONSUMER PROTECTION ACT — WORDS AND PHRASES — TRADE OR COMMERCE.

The Michigan Consumer Protection Act provides that unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful; the act defines "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity" (MCL 445.902(1)(g); MCL 445.903(1)).

Adler Stillman, PLLC (by *Barry D. Adler*), and *Donald M. Fulkerson* for plaintiff.

The Juip Richtarik Law Firm (by *Randall A. Juip* and *Anthony D. Pignotti*) for defendant.

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

BOONSTRA, J. Plaintiff appeals by right the opinion and order of the trial court granting summary disposition to defendant, denying plaintiff's motion for summary disposition, and dismissing plaintiff's complaint with prejudice. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff allegedly injured her shoulder while at work and filed a workers' compensation claim. Plaintiff's employer's insurance company, Citizens Management, Inc., hired Medicolegal Services, Inc. to obtain an independent medical evaluation (IME) of plaintiff. Plaintiff was examined by Dr. Joseph Salama, who had been contracted by Medicolegal Services. Salama ordered an MRI and an arthrogram of plaintiff's left shoulder, for which Medicolegal Services hired defendant.[1]

Plaintiff underwent the MRI and arthrogram procedures on January 4, 2011. A report was then sent to Salama, who authored his own report and sent it to Citizens. On February 8, 2011, plaintiff's counsel wrote to defendant and requested copies of plaintiff's "medical chart including office notes, diagnostic test results, consulting physician reports, correspondence, and related documents[.]" Defendant declined to send the requested records.

---

[1] An arthrogram is "a test using X-rays to obtain a series of pictures of a joint after a contrast material (such as a dye, water, air, or a combination of these) has been injected into the joint." WebMD, *Arthrogram (Joint X-Ray)* <http://arthritis.webmd.com/arthrogram-joint-x-ray> (accessed January 7, 2014) [http://perma.cc/Y597-KHVS].

Plaintiff filed suit, alleging that defendant denied her access to records of those procedures in violation of the Medical Records Access Act (MRAA), MCL 333.26261 *et seq*., and that this denial also constituted "an unfair, unconscionable, or deceptive method, act or practice in the conduct of trade or commerce" in violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Defendant answered and denied that plaintiff was "a patient" because the services she received were "part of a legal evaluation pursuant to a [w]orker's [c]ompensation claim she had filed" and she "signed a consent [form] acknowledging that she was not receiving medical care and that no physician-patient relationship was being formed."

Both parties moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court heard the motions on April 4, 2012. On April 6, 2012, the trial court entered a written opinion and order. It first found that plaintiff had standing to sue under the MRAA because her "allegations that she is a patient of [d]efendant and is entitled to access her records give her a substantial interest in the MRAA that confers standing." It then found that the records plaintiff sought were not "medical records" as defined by the MRAA because plaintiff "present[ed] no evidence that [d]efendant performed any part of its evaluation, ordered the MRI, or created any medical records while caring for [p]laintiff's health,"[2] and, therefore, plaintiff did not "demonstrate that she has a right to access the records. Thus, [d]efendant [was] entitled to summary disposition of [p]laintiff's MRAA claim." Finally, the trial court

[2] The MRAA defines "medical record" as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." MCL 333.26263(i).

held that the MCPA did not apply to plaintiff's claim because the independent medical examination was "requested and paid for by the worker's compensation insurance carrier for the sole purpose of evaluating the merits of [p]laintiff's worker's compensation claim," and, citing *Zine v Chrysler Corp*, 236 Mich App 261, 273; 600 NW2d 384 (1999), the MCPA does not apply to services purchased primarily for business or commercial, rather than personal, purposes. This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). We also review issues of statutory interpretation de novo. *In re Conservatorship of Townsend*, 293 Mich App 182, 186; 809 NW2d 424 (2011).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is appropriate if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Constr, 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). "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). "When a motion under [MCR 2.116(C)(10)] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must . . . set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006).

"A court's primary purpose in interpreting a statute is to ascertain and effectuate legislative intent." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). "[T]his task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of [the Legislature's] intent . . . ." *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009) (quotation marks and citation omitted). "The words used by the Legislature are given their common and ordinary meaning. If the statutory language is unambiguous, we presume that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012).

III. PLAINTIFF'S CLAIM UNDER THE MRAA

Plaintiff first argues that the trial court erred both when it granted summary disposition in favor of defendant on the basis that the records plaintiff sought were not within the scope of the MRAA and when it denied plaintiff's motion for summary disposition. The MRAA provides in relevant part that "[e]xcept as otherwise provided by law or regulation, a patient or his or her authorized representative has the right to examine or

obtain the patient's medical record." MCL 333.26265(1). A "patient" means "an individual who receives or has received health care from a health care provider or health facility." MCL 333.26263(n). "Health care" means "any care, service, or procedure provided by a health care provider or health facility to diagnose, treat, or maintain a patient's physical condition, or that affects the structure or a function of the human body." MCL 333.26263(d). Finally, the MRAA defines "medical record" as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." MCL 333.26263(i).

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), reasoning that the records plaintiff sought were not "medical records" as defined by the MRAA because plaintiff "present[ed] no evidence that [d]efendant performed any part of its evaluation, ordered the MRI, or created any medical records while caring for [p]laintiff's health," and, therefore, plaintiff did not "demonstrate that she has a right to access the records. Thus, [d]efendant [was] entitled to summary disposition of [p]laintiff's MRAA claim." We agree.

An IME differs significantly from the typical interaction between a physician and patient. "In the particularized setting of an IME, the physician's goal is to gather information for the examinee or a third party to use in employment or related financial decisions. It is not to provide a diagnosis or treatment of medical conditions." *Dyer v Trachtman*, 470 Mich 45, 51; 679 NW2d 311 (2004). The relationship is a "limited" one that "does not involve the full panoply of the physi-

cian's typical responsibilities to diagnose and treat the examinee for medical conditions." *Id*. at 50. "[T]he general duty of diagnosis and treatment is inappropriate in the IME setting given the purpose of the examination." *Id*. at 52.

Plaintiff urges this Court to adopt a definition of the words "caring" and "care," culled from a dictionary,[3] that defines "caring" as "to give care," and that further defines "care" as "responsibility," "watchful attention," and "charge, supervision." Plaintiff further argues that adoption of these definitions necessarily results in finding that defendant was engaged "in the process of caring for [plaintiff's] health" when plaintiff underwent the examinations at issue. We disagree, because we do not find "the process of caring for the patient's health" to be consistent with the limited nature of a physician's duty in an IME context. Our Supreme Court has stated that, in the context of an IME, a physician owes a "limited duty" to "exercise care consistent with his professional training and expertise so as not to cause physical harm by negligently conducting the examination." *Dyer*, 470 Mich at 55.[4] However,

---

[3] Plaintiff states that this definition comes from "The Merriam-Webster Dictionary" but does not provide an edition number, date of publication, or page number.

[4] Because the "limited physician-patient relationship" recognized by our Supreme Court in the IME context "requires that the examiner conduct the examination in such a way as not to cause harm," it can result in a claim for medical malpractice. *Dyer*, 470 Mich at 53-54. We reject, however, as both hypothetical and incorrect, plaintiff's suggestion that absent access to records under the MRAA, an IME patient will be precluded from bringing a medical malpractice cause of action. MCL 600.2912b(5) specifically affords to a medical malpractice claimant "access to all medical records related to the claim that are in the control of the health professional or health facility." That access must be provided within 56 days after the claimant provides notice of intent to file a claim. *Id*. Thus, in the context of a medical malpractice action against an IME physician, a claimant is to be afforded access to the IME records

this duty does not constitute a duty to diagnose or treat an examinee's medical conditions. *Id*. at 51. We decline to adopt plaintiff's proposed definition of "caring for the patient's health" as meaning, essentially, any situation where a patient, for whatever reason, undergoes an examination by a medical professional. Read in context, it is clear that this phrase refers to records maintained in the course of providing some sort of diagnostic or treatment service for the treatment and betterment of the patient. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) (statutory language should be interpreted with regard to context).

Plaintiff essentially asks this Court to interpret the statutory phrase "in the process of caring for the patient's health" so broadly that it is difficult to conceive of a record maintained by a health care provider or health facility that would not fit this criterion. Such an interpretation would essentially render portions of the statute nugatory, in contravention of our principles of statutory construction. *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007) ("A statute is rendered nugatory when an interpretation fails to give it meaning or effect."). We therefore hold that records of defendant's examination of plaintiff for the benefit of a third party were not produced "in the process of caring for the patient's health," within the meaning of the MRAA, and that the MRAA does not apply in the context of an IME.

We affirm the trial court's grant of summary disposition to defendant regarding plaintiff's MRAA claim.

---

before the time for filing a complaint for malpractice, and before the time by which the claimant must file an expert witness's affidavit of merit. MCL 600.2912d; see also *Ligons v Crittenton Hosp*, 285 Mich App 337, 349; 776 NW2d 361 (2009).

IV. PLAINTIFF'S CLAIM UNDER THE MCPA

Plaintiff also argues that the trial court erred when it granted summary disposition in favor of defendant with respect to plaintiff's claims under the MCPA. We disagree.

The MCPA provides, in pertinent part, that "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful," and sets forth several examples of proscribed activity. MCL 445.903(1); *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 208; 732 NW2d 514 (2007). "Trade or commerce" is defined as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(1)(g). "Except in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees." MCL 445.911(2); *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 130 n 5; 839 NW2d 223 (2013).

"Given the variety of deceptive practices prohibited by the act, a single act may violate more than one subsection." *Zine*, 236 Mich App at 282. "[O]nly allegations of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of the entrepreneurial, commercial, or business aspect of a physician's practice may be brought under the MCPA." *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005). In contrast, " '[a]llegations that concern misconduct in the actual performance of medical services or

the actual practice of medicine would be improper.' " *Id*. at 33, quoting *Nelson v Ho*, 222 Mich App 74, 83; 564 NW2d 482 (1997).

Plaintiff's complaint alleged that defendant violated MCL 445.903(1)(n),[5] (s),[6] and (bb)[7] when it "falsely told [p]laintiff that she had no right to obtain her medical records because she was not 'a patient.' " The trial court found that the MCPA did not apply to plaintiff's claim, adopting defendant's argument that its actions were not "trade or commerce" as defined by the act:

> Defendant's IME was requested and paid for by the worker's compensation insurance carrier for the sole purpose of evaluating the merits of Plaintiff's worker's compensation claim. Plaintiff did not contract for or purchase Defendant's services, and there is no evidence that Defendant provided services to Plaintiff for personal purposes. Because Plaintiff fails to establish a question of fact whether Defendant performed the IME for business purposes, the MCPA does not apply and Defendant is entitled to summary disposition of Plaintiff's MCPA claim.

Claims under the MCPA require an inquiry into the quality of the specific transaction at issue to determine whether the alleged violator provided "goods, property, or service primarily for personal, family, or household purposes . . . ." MCL 445.902(1)(g); *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363, 367-368; 395

---

[5] "Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction." MCL 445.903(1)(n).

[6] "Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer." MCL 445.903(1)(s).

[7] "Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is." MCL 445.903(1)(bb).

NW2d 322 (1986). Plaintiff's cursory argument that the tests performed were "personal" is unpersuasive, because it relies upon the conclusion that such tests were "diagnostic" in nature. The arthrogram and MRI performed on plaintiff were done at the request of Citizens Management for the business purpose of evaluating plaintiff's workers' compensation claim. Thus, the MCPA did not apply to those procedures because they were not undertaken "primarily for personal, family, or household purposes," MCL 445.902(1)(g), and the trial court appropriately granted summary disposition in favor of defendant on plaintiff's claims under the MCPA.

Affirmed.

MURRAY, J., concurred with BOONSTRA, J.

SERVITTO, P.J. (*concurring in part/dissenting in part*). While I agree that the trial court properly granted summary disposition in favor of defendant with respect to plaintiff's claims under the MCPA, I believe that the records plaintiff sought were within the scope of the MRAA. I, therefore, respectfully dissent from that part of the majority's opinion affirming the trial court's grant of summary disposition in favor of defendant on plaintiff's claim of violation of the MRAA.

As indicated by the majority, MCL 333.26265(1) provides a patient the right to examine or obtain his or her medical record except as otherwise provided by law or regulation. The MRAA defines "medical record" as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the

patient's health." MCL 333.26263(i). "Health care" means "any care, service, or procedure provided by a health care provider or health facility to diagnose, treat, or maintain a patient's physical condition, or that affects the structure or a function of the human body." MCL 333.26263(d). A "patient" means "an individual who receives or has received health care from a health care provider or health facility." MCL 333.26263(n).

In granting summary disposition in defendant's favor, the trial court held that the records sought were not "medical records within the meaning of the MRAA." The trial court specifically focused its attention on the words "in the process of caring for the patient's health," taken from the MRAA's definition of "medical record," MCL 333.26263(i), and determined that, because the arthrogram and MRI performed on plaintiff were not undertaken for the sake of her health, the records were not covered by the MRAA. The majority likewise concludes that because the records of defendant's examination of plaintiff were for the benefit of a third party and the physician's duty when performing an independent medical examination is of a limited nature, such records produced during the same do not qualify as being produced in "the process of caring for the patient's health." However, the MRAA contains a specific definition of medical records that the trial court and the majority unnecessarily limited.

To qualify as a medical record within the scope of the MRAA, a record must have only two qualities: (1) it must be "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition," and (2) it must be "maintained by a health care provider or health facility in the process of caring for the patient's health." MCL 333.26263(i). That the requested records

meet the first criterion is not seriously disputed. The doctor conducting the MRI and arthrogram, Dr. Steven Seidman, testified at his deposition that plaintiff's medical procedures were performed to diagnose whether or not plaintiff had a problem with her shoulder and that his role in the context of his examination of plaintiff was the same as an independent medical examiner as it would have been outside of that context in that he was using the procedures to "[d]iagnose something wrong" with plaintiff.

I would further find that the requested records met the second criterion. Again, there is no dispute that the records were maintained by a health care provider. Where the majority and I part ways is our interpretation of the phrase "in the process of caring for the patient's health." "[C]aring for the patient's health" is the verb form of "health care," which the MRAA defines as "any care, service, or procedure provided by a health care provider or health facility to *diagnose*, treat, or maintain a patient's physical condition, *or* that affects the structure or a function of the human body." MCL 333.26263(d) (emphasis added). As Dr. Seidman indicated, he was performing the tests in order to diagnose plaintiff; he was performing tests in the process of caring for her health. I would thus find that the second criterion has been met.

Further, all health facilities and agencies that provide services to patients and are licensed under the Michigan Public Health Code are required to adopt and treat all patients in accordance with a policy that includes the following: "An individual who is or has been a patient or resident is entitled to inspect, or receive for a reasonable fee, a copy of his or her medical record upon request in accordance with the medical records access act . . . ." MCL 333.20201(2)(b). Dr. Seidman testified

that he is a licensed radiologist and a partner at defendant, who he is "pretty sure," is licensed by the state as a health care facility. He testified that the defendant's business is to provide healthcare to people and to, additionally, help physicians diagnose and treat their patients. Because a "patient" is defined under the MRAA as an "an individual who receives or has received health care from a health care provider or health facility," MCL 333.26263(n), and "health care" is broadly defined under the MRAA as "*any* care, service, or procedure provided by a health care provider or health facility to *diagnose*, treat, or maintain a patient's physical condition, or that affects the structure or a function of the human body," MCL 333.26263(d)(emphasis added), I would find that the records sought by plaintiff were, indeed, medical records within the meaning of the MRAA and that plaintiff was entitled to access said records consistent with both the MRAA and the Public Health Code. I would therefore reverse the trial court's grant of summary disposition in defendant's favor and remand for the entry of summary disposition in favor of plaintiff on this issue.

TALMER BANK & TRUST v PARIKH

Docket Nos. 312632 and 313122. Submitted February 5, 2014, at Detroit. Decided February 25, 2014, at 9:00 a.m. Leave to appeal sought.

Vrajmohan C. Parikh and Sivaji Gundlappalli (hereafter defendants) executed two promissory notes in Michigan related to the purchase of two condominium units in Nevada. The lender on the notes was Citizens First Savings Bank, who had a Michigan address. The notes provided for the monthly payments to be mailed or delivered to Citizens in Michigan. One of the notes included a choice-of-law provision specifying the application of Michigan law to any disputes regarding the note. Both notes provided for the payment of reasonable attorney fees associated with any collection efforts should there be a default. The notes were secured by deeds of trust executed by defendants in favor of Citizens. The deeds of trust granted and conveyed to the trustee, Nevada Title Company, to be held in trust with the power of sale, the condominium units being purchased. They provided that they would be governed by federal law and the law of the jurisdiction where the property was located. Citizens became CF Bancorp, which then failed, resulting in the Federal Deposit Insurance Corporation (FDIC) taking CF Bancorp into receivership. The FDIC and First Michigan Bank (FMB), which later became Talmer Bank & Trust (hereafter plaintiff), entered into a purchase and assumption agreement, pursuant to which FMB was to assume CF Bankcorp's liabilities and purchase its assets, including the two promissory notes and deeds of trust concerning the condominiums. Defendants allege that FMB paid 20 cents on the dollar relative to the assets being purchased. Defendants stopped making their payments. The FDIC thereafter formally granted, assigned, and transferred CF Bancorp's assets to FMB. Notices of default and elections to sell under the deeds of trust were served on defendants. Both condos were thereafter sold at public auction in a trustee's sale. One condo was sold to a third party, leaving an outstanding loan balance of $233,261. The other was sold to plaintiff, leaving an outstanding loan balance of $454,932. Talmer then brought separate actions in the Oakland Circuit Court against defendants, alleging breach of each note and seeking to collect the deficiencies. Plaintiff and defendants moved for summary disposition in both actions. In the action involving the note containing the choice-of-law provision (LC No. 2011-

123327-CK), the trial court, Martha D. Anderson, J., denied plaintiff's motion for summary disposition. The court then granted plaintiff's motion for reconsideration. The court eventually granted summary disposition in favor of plaintiff and ordered a deficiency judgment against defendants. The court denied plaintiff's motion for an award of attorney fees. Defendants appealed and plaintiff cross-appealed. (Docket No. 312632). In the action involving the note that did not contain a choice-of-law provision (LC No. 2011-123328-CK), the trial court, Wendy L. Potts, J., granted summary disposition in favor of plaintiff and awarded plaintiff a deficiency judgment. The court granted plaintiff's motion for an award of attorney fees. Defendants appealed. (Docket No. 313122). The appeals were consolidated by the Court of Appeals.

The Court of Appeals *held*:

1. The law regarding deficiency actions in Michigan and Nevada is comparable for purposes of the factual circumstances of this case, except for Nevada Revised Statutes (NRS) 40.459(1)(c), which, if applicable, could potentially make an enormous difference in the amount recoverable by plaintiff. No ruling was made regarding whether NRS 40.459(1)(c) actually applies to and benefits defendants because that question is beyond the scope of this appeal.

2. The deeds of trust and the trustee sales were governed by Nevada law.

3. The factors listed in 1 Restatement Conflict of Laws, 2d, § 188(2)(a) to (e) favor applying Michigan law. 1 Restatement Conflict of Laws, 2d, § 195 favors the application of Michigan law.

4. Michigan had a substantial relationship to the parties and the transaction to the extent that there was a reasonable basis for the parties to have chosen the application of Michigan law to the note containing the choice-of-law provision. A balancing of the relevant factors supports the conclusion that the choice-of-law provision is valid and enforceable.

5. Michigan and Nevada law with respect to deficiency actions are sufficiently similar to the extent that Nevada policies and interests are not circumvented or defeated by the application of Michigan law under the facts presented in this case.

6. NRS 40.459(1)(c) does not support applying Nevada law and ignoring Michigan's policies and interests and the direct connection Michigan has to the notes, to the parties to the notes, and to the performances under the notes.

7. Plaintiff's exercise of the power-of-sale provisions in the deeds of trust did not constitute an "action" under Nevada law

that necessitated the joinder of the deficiency suits with the trustee sales, even if Nevada law applied.

8. Plaintiff is contractually entitled to reasonable attorney fees incurred in litigating this action, including reasonable attorney fees associated with this appeal.

9. The trial courts' rulings granting summary disposition in favor of plaintiff and entering deficiency judgments are affirmed in Docket Nos. 312632 and 313122. The award of attorney fees to plaintiff in Docket No. 313122 is affirmed. The denial of the motion for attorney fees in Docket No. 312632 is reversed and the case is remanded to the trial court for determination of plaintiff's reasonable attorney fees and an order to that effect.

Affirmed (Docket No. 313122).

Affirmed in part and reversed and remanded in part (Docket No. 312632).

1. MORTGAGES — FORECLOSURES — CONFLICT OF LAWS.

The method for the foreclosure of a mortgage on land and the interests in the land resulting from the foreclosure are determined by the local law of the situs; issues that do not affect any interest in the land, although they do relate to the foreclosure, are determined by the law which governs the debt for which the mortgage was given.

2. CONTRACTS — CONFLICT OF LAWS.

The rights and duties of the parties with respect to an issue in a contract not governed by a choice-of-law provision are determined by the local law of the state that, with respect to that issue, has the most significant relationship to the transaction and the parties under principles that consider the various needs of interstate systems, pertinent policies of the forum state, the relevant policies of other interested states in determining particular issues, the protection of justified expectations, policies underlying particular fields of law, the certainty, uniformity, and predictability of results, and the ease in determining the law subject to selection; contacts to be taken into account in applying these principles include the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.

3. CONTRACTS — CONFLICT OF LAWS.

The validity of a contract for the repayment of money lent and the rights created thereby are determined, in the absence of an

effective choice of law by the parties, by the local law of the state where the contract requires that repayment be made, unless, with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties, in which event the local law of the other state will be applied.

4. ACTIONS — CONFLICT OF LAWS.

Michigan courts, in determining what state law applies in any given case, will apply Michigan law unless a rational reason to do otherwise exists following a two-step analysis that encompasses, first, a determination if any foreign state has an interest in having its law applied (if no state has such an interest, the presumption that Michigan law will apply cannot be overcome) and, second, if a foreign state does have an interest in having its law applied, a determination whether Michigan's interests mandate that Michigan law be applied despite the foreign interests.

5. CONTRACTS — CONFLICT OF LAWS.

The law of the state chosen by the parties to a contract to govern their contractual rights and duties applies to an issue that the parties could have resolved by an explicit provision in the contract directed to that issue; the law of the state chosen by the parties applies, even if the particular issue is an issue that the parties could not have resolved by an explicit provision directed to that issue, unless the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice or unless application of the law of the chosen state would be contrary to a fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and the other state would be the state of the applicable law in the absence of the contract's choice-of-law provision.

Barris, Sott, Denn & Driker, PLLC (by *Matthew J. Bredeweg*, *Morley Witus*, and *James S. Fontichiaro*), for plaintiff.

Dailey Law Firm, PC (by *Brian T. Dailey* and *Justin G. Grove*), for defendants.

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

MURPHY, C.J. In Docket No. 312632, defendants, Vrajmohan C. Parikh and Sivaji Gundlappalli, appeal as of right the trial court's order that granted a motion for reconsideration filed by plaintiff, Talmer Bank & Trust (Talmer), which then resulted in summary disposition being granted in favor of Talmer after its earlier motion for summary disposition had been denied by the court. Talmer cross-appeals the trial court's order denying its request for attorney fees in the case. In Docket No. 313122, the same defendants appeal as of right the trial court's order, issued by a different judge in a separate action, granting Talmer's motion for summary disposition. The court awarded Talmer attorney fees in the action. These consolidated appeals arise out of defendants' purchase of two condominium units in Las Vegas, Nevada, foreclosure sales of the condos following defaults pursuant to power-of-sale provisions in deeds of trust that had secured two promissory notes executed by defendants relative to their purchase of the condos and Talmer's attempts to collect deficiency judgments in Michigan against defendants on the notes in the instant actions. Separate suits were filed regarding each note. Defendants are presently residents of Michigan and were so when they executed the promissory notes, and the bank that initially provided the loans was a Michigan bank, as is Talmer. The notes were executed in Michigan, and defendants, until the defaults, performed under the notes by way of making payments in Michigan. The crux of the dispute is whether Nevada law or Michigan law governs the deficiency actions, with the trial courts ultimately concluding that, as urged by Talmer, Michigan law controls. Deficiency judgments were entered against defendants in the amounts of $244,476 in LC No. 2011-123327-CK (Docket No. 312632) and $454,932 in LC No. 2011-123328-CK (Docket No. 313122). We affirm in all re-

spects, except that we reverse the trial court's order in Docket No. 312632 that denied Talmer's request for attorney fees and remand for entry of an award of reasonable attorney fees.

I. BACKGROUND

On November 14, 2006, defendants, who are both Michigan doctors, executed a 30-year promissory note as borrowers in the amount of $336,000. The lender on the note was Citizens First Savings Bank (Citizens), which had an address in Port Huron, Michigan. Defendants obtained the loan in order to purchase a condominium unit in Las Vegas, Clark County, Nevada, as part of an investment strategy. The promissory note provided that the monthly payments of $2,235 were to be mailed or delivered to Citizens' Port Huron address. The note also indicated that, upon default, Citizens could declare the entire unpaid principal balance on the note and all accrued unpaid interest immediately due and payable. The note further provided for the payment of reasonable attorney fees associated with any collection efforts should there be a default. In a paragraph addressing the governing law, the promissory note provided:

> This NOTE will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Michigan without regard to its conflicts of law provisions. This NOTE has been accepted by Lender in the State of Michigan.

The promissory note was secured by a deed of trust executed by defendants on November 14, 2006, in favor of Citizens. The deed of trust granted and conveyed to the trustee, Nevada Title Company (NTC), to be held "in trust, with power of sale," the Las Vegas condominium unit being purchased. The deed of trust pro-

vided that it "shall be governed by federal law and the law of the jurisdiction in which the Property is located." The deed of trust was recorded on November 22, 2006, with the Register of Deeds for Clark County, Nevada.

On August 31, 2007, defendants executed a second 30-year promissory note as borrowers in the amount of $760,000 relative to the purchase of another Las Vegas condominium. The lender on the note was again Citizens. The promissory note provided that the monthly payments of $5,056 were to be mailed or delivered to Citizens' Port Huron address. This note did not include a choice-of-law or governing-law provision as was included in the first note. The note provided for the payment of reasonable attorney fees associated with any collection efforts should there be a default.

The promissory note was secured by a deed of trust executed by defendants on August 31, 2007, in favor of Citizens. As with the first deed of trust, it granted and conveyed to trustee NTC, to be held "in trust, with power of sale," the Las Vegas condominium unit being purchased in the second transaction. Also as with the first deed of trust, it provided that the deed of trust "shall be governed by federal law and the law of the jurisdiction in which the Property is located." The deed of trust was recorded on September 7, 2007, with the Register of Deeds for Clark County, Nevada.

Subsequently, Citizens became CF Bancorp, and CF Bancorp later failed, resulting in the Federal Deposit Insurance Corporation (FDIC) taking CF Bancorp into receivership. In April 2010, the FDIC and First Michigan Bank (FMB), which was later to become Talmer, entered into a purchase and assumption agreement, pursuant to which FMB was to assume CF Bancorp's liabilities and purchase its assets. These assets included the two promissory notes and deeds of trust regarding

the loans used to purchase the Las Vegas condominiums. The purchase and assumption agreement between the FDIC and FMB reflected the FDIC's acceptance of FMB's "[a]sset premium (discount) bid of (19.8)% (negative)," which meant, according to defendants, that FMB paid approximately 20 cents on the dollar relative to the assets being purchased from the FDIC. In May 2010, defendants stopped making the monthly payments on the promissory notes given the severe downturn in the economy and drastically reduced real property values. In October 2010, and pursuant to the earlier purchase and assumption agreement, the FDIC formally granted, assigned, and transferred CF Bancorp's assets to FMB. Accordingly, Talmer, formerly known as FMB, came to hold the notes and deeds of trust executed by defendants. Talmer is a Michigan bank.

In light of defendants' failure to pay on the notes, in November 2010, notices of default and election to sell under the deeds of trust were served on defendants and recorded. With respect to the condo covered by the first note and deed of trust, it was sold at public auction in a trustee's sale on September 15, 2011, to a third party, GMM Investments, LLC, for $133,450, leaving an outstanding loan balance of $233,261 as of the sale's date. With respect to the condo covered by the second note and deed of trust, it was sold at public auction in a trustee's sale on September 15, 2011, to Talmer for $382,590, leaving an outstanding loan balance of $454,932 as of the sale's date.

On November 30, 2011, in LC No. 2011-123327-CK (Docket No. 312632), Talmer filed a breach-of-note action in the trial court against defendants in regard to the first note, seeking a deficiency judgment for the outstanding balance on the note, $233,261, plus inter-

est, costs, and attorney fees that had accrued since the trustee's sale. On November 30, 2011, in LC No. 2011-123328-CK (Docket No. 313122), Talmer also filed a breach-of-note action in the trial court (different judge) against defendants in regard to the second note, seeking a deficiency judgment for the outstanding balance on the note, $454,932, plus interest, costs, and attorney fees that had accrued since the trustee's sale.

In both actions, Talmer filed motions for summary disposition under MCR 2.116(C)(9) and (10), arguing that defendants had failed to raise any dispute regarding the material facts, nor had they presented any colorable defense. In response, defendants argued that Talmer elected to foreclose pursuant to Nevada law and was required to abide by the mortgage foreclosure deficiency collection laws and procedures of Nevada, which allegedly presented hurdles not found under Michigan law. We shall explore later the particulars of Nevada law relied on by defendants. Defendants contended that Talmer had been required to pursue any deficiency claims in Nevada in association with the earlier trustee sales and failed to do so. Defendants additionally argued that summary disposition was premature, because discovery had not yet been completed. Defendants further maintained that one of the promissory notes did not specify that it was secured by collateral and thus the trustee sale was improper. Defendants also emphasized that FMB, now known as Talmer, purchased the notes and deeds of trust at a significant discount from the FDIC, which should be taken into consideration with regard to any claimed deficiency. Finally, defendants contended that Talmer lacked the authority to exercise the power-of-sale clauses because the FDIC assignment was never recorded.

In LC No. 2011-123327-CK (Docket No. 312632), a hearing was held in May 2012 on Talmer's motion for summary disposition. The trial court denied Talmer's motion, concluding that the note and deed of trust were interrelated, that the deed trumped the note given the sale at auction, that the choice of Nevada law set forth in the deed of trust therefore governed, that Nevada had a substantial relationship to and interest in the transaction considering that the condo was located in that state, that Michigan did not have a materially greater interest in the matter than Nevada, and that there were factual issues with respect to whether Talmer complied with the relevant provisions of Nevada law. Talmer filed a motion for reconsideration, which the trial court granted in August 2012. The court relied on 2 Restatement Conflict of Laws, 2d, § 229, and a comment thereto, along with cases from other jurisdictions, in ruling that, while foreclosure of a mortgage is governed by the law of the state in which the mortgaged property is located, the underlying promissory note is governed by the state law applicable to the note. The court ruled that the parties had agreed that the note would be governed by Michigan law and that Michigan had the more significant relationship to the note, considering that it was executed and delivered in Michigan by Michigan parties; the only connection of the note to Nevada was that the property securing the note was located in Nevada. The trial court, however, declined to award Talmer attorney fees, determining that defendants' choice-of-law arguments were not frivolous, that the case was otherwise a simple, routine collection action, and that any award of fees would not be reasonable. On September 11, 2012, the trial court entered an order granting summary disposition in favor of Talmer and awarding Talmer a deficiency judgment against defendants, jointly and severally, in the amount of

$244,476. Defendants appeal as of right the trial court's ruling awarding Talmer the deficiency judgment, while Talmer cross-appeals the court's denial of attorney fees.

In LC No. 2011-123328-CK (Docket No. 313122), after Talmer had filed its motion for summary disposition, defendants filed their own motion for summary disposition under MCR 2.116(C)(8) and (10), arguing that Nevada law applied and that Talmer had failed to act in accordance with Nevada law. In September 2012, a hearing was conducted on the competing motions for summary disposition. The trial court granted Talmer's motion for summary disposition and denied defendants' motion, employing an analysis that essentially mimicked the analysis set forth by the judge in deciding Talmer's motion for reconsideration in the first action. As opposed to the ruling in the first suit, the trial court awarded Talmer attorney fees. Pursuant to an order entered on October 10, 2012, the trial court formally granted summary disposition in favor of Talmer and awarded Talmer a deficiency judgment against defendants, jointly and severally, in the amount of $454,932, plus interest and $18,345 in attorney fees. Defendants appeal as of right.

II. ANALYSIS

A. STANDARD OF REVIEW AND SUMMARY DISPOSITION TESTS

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). "We review a trial court's ruling on a motion for reconsideration for an abuse of discretion." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Issues concerning choice and conflicts of law are subject to review de novo. *Frederick v Federal-*

Mogul Corp, 273 Mich App 334, 336; 733 NW2d 57 (2006). A trial court's decision to grant or deny a request for attorney fees is reviewed for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). However, underlying factual findings made in support of a decision regarding attorney fees are reviewed for clear error. *Id*. We review de novo legal issues related to a trial court's ruling relative to attorney fees. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296-297; 769 NW2d 234 (2009).

Summary disposition was granted by the trial court on the basis of MCR 2.116(C)(9) and (10). "When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim." *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). Granting summary disposition under MCR 2.116(C)(9) is appropriate if the defendant's pleadings are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recover. *Id*. at 425-426.

In *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), this Court acknowledged the foundational principles applicable to the analysis of a motion under MCR 2.116(C)(10), stating:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed

> in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

B. DISCUSSION

1. INTRODUCTION

The provisions in the deeds of trust that indicated that Nevada law governed with regard to the deeds are not in dispute, and Nevada law was employed with respect to the exercise of the power-of-sale clauses. Talmer filed the lawsuits to collect on the two promissory notes, so our focus is on determining the law that governs the notes and related deficiency claims. In regard to the two promissory notes, one contained a choice-of-law provision, stating that Michigan law governed, while the other note was silent on the matter. Initially, we shall review and compare Michigan and Nevada law with respect to deficiency actions.

2. DEFICIENCY ACTIONS—MICHIGAN AND NEVADA LAW—REVIEW AND COMPARISON

In Michigan, MCL 600.3201 *et seq*., addresses foreclosure by advertisement pursuant to power-of-sale clauses, and MCL 600.3280 is the only statute that directly pertains to deficiency actions. See *Citizens Bank v Boggs*, 299 Mich App 517, 521; 831 NW2d 876

(2013) (the power to render a deficiency ruling in foreclosure proceedings is entirely statutory and MCL 600.3280 provides defenses to a deficiency action). MCL 600.3280 provides:

> When, in the foreclosure of a mortgage by advertisement, any sale of real property has been made after February 11, 1933, or shall be hereafter made by a mortgagee, trustee, or other person authorized to make the same pursuant to the power of sale contained therein, at which the mortgagee, payee or other holder of the obligation thereby secured has become or becomes the purchaser, or takes or has taken title thereto at such sale either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent. This section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument. Such proceedings, as aforesaid, shall in no way affect the title of the purchaser to the lands acquired by such purchase. This section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any chancery sale heretofore or hereafter made and confirmed.

"The clear language of the statute provides a defense, or setoff, to a deficiency action where a purchaser

purchased property for less than the value of the property[, but it] does not apply where . . . the purchase bid far exceeds the 'value' of the property." *Pulleyblank v Cape*, 179 Mich App 690, 694; 446 NW2d 345 (1989). Under MCL 600.3280, if "the lender bids less than the amount of the loan and seeks a deficiency, the lender may be challenged by the debtor on the grounds that the bid was below the fair market value." 1 Cameron, Michigan Real Property Law (3d ed), Mortgages, § 18.86, p 753; see also *Reconstruction Fin Corp v Mercury Realty Co, Inc*, 97 F Supp 491, 494 (ED Mich, 1951) ("[T]he Michigan statute provides that in determining the amount of deficiency the fair market value of the property at the time of sale . . . shall be considered[.]"). The "true value" of the foreclosed property is thus relevant and can aid a defending debtor in a deficiency action when the true value is more than the purchase price. MCL 600.3280 otherwise provides a setoff or credit against a deficiency claim for the amount of a winning bid at a foreclosure sale. In *Citizens Bank*, 299 Mich App at 520-521, this Court explained what is known as the "full credit bid" rule:

> "When a lender bids at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it. If this credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure, this is known as a 'full credit bid.' When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished." [Quoting *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 68; 761 NW2d 832 (2008) (citations omitted), which referred to MCL 600.3280.]

We next examine Nevada law. Nevada Revised Statutes (NRS) 40.451 *et seq.*, address the joint topic of

foreclosure sales and deficiency judgments. Defendants emphasize the language in NRS 40.453, which provides:

> Except as otherwise provided in NRS 40.495 [inapplicable]:
>
> (1) It is hereby declared by the Legislature to be against public policy for any document relating to the sale of real property to contain any provision whereby a mortgagor or the grantor of a deed of trust or a guarantor or surety of the indebtedness secured thereby, waives any right secured to the person by the laws of this state.
>
> (2) A court shall not enforce any such provision.

"This section is part of the anti-deficiency statutes, and the obvious intent of the legislature was to preclude lenders from requiring borrowers to waive their rights under the anti-deficiency statutes." *Lowe Enterprises Residential Partners, LP v The Eighth Judicial Dist Court of Nevada*, 118 Nev 92, 103; 40 P3d 405 (2002). But the *Lowe Enterprises* court also noted that, with regard to NRS 40.453, the legislature could not have intended "to prohibit the waiver of any right secured by law, then such things as arbitration agreements, forum selection clauses and choice-of-law provisions would be unenforceable." *Id*. at 102-103. NRS 40.453 quite clearly would encompass a loan obtained for the purpose of purchasing real property; the promissory notes related to the sales of real property. Defendants maintain that NRS 40.453, which specifically alludes to Nevada public policy and governs real property sales in Nevada, is circumvented, with deficiency protections effectively being waived, if Michigan law is applied to Talmer's collection actions.[1]

NRS 40.455(1) provides:

---

[1] Defendants note the case of *Welburn v The Eighth Judicial Dist Court of Nevada*, 107 Nev 105, 107; 806 P2d 1045 (1991), wherein the Nevada Supreme Court stated, "Nevada has a strong interest in protecting the

> [U]pon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.

NRS 40.455(3) does not allow for a deficiency judgment, even if a deficiency exists, with respect to a single-family dwelling owned by the debtor or deed of trust grantor and purchased with the loan proceeds secured by a deed of trust, but only if the "debtor or grantor continuously occupied the real property as the debtor's or grantor's principal residence after securing the . . . deed of trust[.]" There is no dispute that defendants, who reside in Michigan, did not continuously occupy the condos as their principal residences after executing the deeds of trust. Accordingly, although Michigan does not have a provision similar to NRS 40.455(3), the statute would not afford defendants any protection under the circumstances. NRS 40.457 provides:

> (1) Before awarding a deficiency judgment under NRS 40.455, the court shall hold a hearing and shall take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale or trustee's sale. . . . .
>
> (2) Upon application of any party made at least 10 days before the date set for the hearing the court shall, or upon

---

efficacy of the deficiency statute[s] with respect to out of state owners of Nevada real property[.]" See also *Verreaux v D'Onofrio*, 108 Nev 142, 144; 824 P2d 1021 (1992).

> its own motion the court may, appoint an appraiser to appraise the property sold as of the date of foreclosure sale or trustee's sale.

"NRS 40.457 requires a hearing and the taking of evidence concerning the fair market value of the property sold and notice of the hearing to all defendants against whom a deficiency judgment is sought." *First Interstate Bank of Nevada v Shields*, 102 Nev 616, 619; 730 P2d 429 (1986) (emphasis omitted). Although MCL 600.3280 does not expressly refer to an evidentiary hearing being conducted, a deficiency lawsuit and a defense to a deficiency action under MCL 600.3280 would necessarily entail a hearing and possibly a trial, the presentation of evidence, and all the protections afforded by the Michigan Court Rules and constitutional due process principles. In *Guardian Depositors Corp v Darmstaetter*, 290 Mich 445; 288 NW 59 (1939), the Michigan Supreme Court addressed a deficiency action brought under the nearly identical predecessor to MCL 600.3280, 1937 PA 143, and found that the parties were entitled to a jury trial on an issue of fact concerning the value of the property, even though the statute then expressly permitted only a bench trial. With regard to an appraisal, nothing in MCL 600.3280 precludes an appraisal, and, indeed, an appraisal would be an almost necessary evidentiary tool to determine true value under MCL 600.3280. See *Guardian Depositors Corp v Hebb*, 290 Mich 427, 432-433; 287 NW 796 (1939) (reviewing and accepting an appraiser's testimony in a deficiency action brought under the predecessor to MCL 600.3280).

NRS 40.459 provides, in relevant part:

> (1) After the hearing, the court shall award a money judgment against the debtor, guarantor or surety who is personally liable for the debt. The court shall not render judgment for more than:

> (a) The amount by which the amount of the indebtedness which was secured exceeds the fair market value of the property sold at the time of the sale, with interest from the date of the sale;
>
> (b) The amount which is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured, with interest from the date of sale; or
>
> (c) If the person seeking the judgment acquired the right to obtain the judgment from a person who previously held that right, the amount by which the amount of the consideration paid for that right exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold, whichever is greater, with interest from the date of sale and reasonable costs,
>
> whichever [of the three] is the lesser amount.

NRS 40.459(1)(a) and (b) appear to be fairly comparable to the provisions in MCL 600.3280, effectively providing a credit or setoff based on either the actual winning bid at a sale or the fair market value of the property at the time of sale. See *Shields*, 102 Nev at 619 (If "the fair market value of the property at the time of sale exceeded the amount due the creditor, no deficiency exists and no party . . . may be held liable to the creditor.").[2]

NRS 40.459(1)(c) perhaps supports defendants' argument that the price of the promissory notes paid to the FDIC needs to be contemplated in determining the amount of the deficiencies. If NRS 40.459(1)(c) applies, and if the purchase of the notes from the FDIC was for 20 cents on the dollar as claimed by defendants, any

[2] NRS 40.459 does appear to allow an assessment of fair market value even when a third party submits a winning bid at a trustee sale and pays the lender said amount, whereas MCL 600.3280 only addresses situations in which the "mortgagee, payee or other holder of the obligation" makes the purchase at the auction.

deficiencies would appear to be wiped clean. Michigan does not have a comparable provision. NRS 40.459(1)(c) is a recent addition to Nevada law, it only became effective June 10, 2011. See 2011 Nev Stat, ch 311, § 5. In the fall of 2013, the Nevada Supreme Court issued an advisory opinion regarding NRS 40.459(1)(c). *Sandpointe Apartments, LLC v The Eighth Judicial Dist Court of Nevada*, 313 P3d 849; 129 Nev Adv Rep 87 (2013). The court held "that the limitations in NRS 40.459(1)(c) apply to sales, pursuant to either judicial foreclosures or trustee's sales, occurring on or after the effective date [June 10, 2011] of the statute[,]" regardless of when underlying rights in promissory notes were transferred or assigned. *Id*. at 851. The trustee sales here took place after June 10, 2011, in September 2011. The court in *Sandpointe Apartments* noted that NRS 40.459(1)(c) was designed to prevent profiteering and to encourage negotiations between creditors and borrowers. *Id*. at 853.[3] In order to accomplish those goals, the statute greatly limited "the amount of a deficiency judgment that a successor in interest can recover, thereby discouraging these entities from purchasing notes or mortgages 'for pennies on the dollar.' " *Id*. (citation omitted).

In summation, and as can be gleaned from our earlier discussion, we find that the law regarding deficiency

[3] The court reflected on the Nevada Legislature's motivation:

> The recent recession severely affected Nevada's real estate market. As a result, a large secondary market emerged wherein various entities, including collection companies, would purchase distressed loans at deep discounts. These entities would then exercise their power of sale or judicially foreclose on the collateral securing the loans and seek deficiency judgments against the debtors and guarantors based upon the full indebtedness. [*Sandpointe Apartments*, 313 P3d at 852, citing Hearing on Assembly Bill 273 Before the Assembly Commerce and Labor Committee, 76th Leg (Nev, March 23, 2011).]

actions in Michigan and Nevada is quite comparable for purposes of our factual circumstances, *with the exception of NRS 40.459(1)(c)*, which could potentially make an enormous difference in the amount recoverable by Talmer if applicable. Because it is beyond the scope of this appeal, we make no ruling with respect to whether NRS 40.459(1)(c) actually applies to and benefits defendants, but we shall proceed on the assumption that it does as part of our analysis.

3. LEGAL PRINCIPLES REGARDING CHOICE AND CONFLICT OF LAWS

The Restatement Conflict of Laws, 2d, has generally been followed and applied by Michigan courts. *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 489 n 17, 502 n 51; 835 NW2d 363 (2013); *Chrysler Corp v Skyline Indus Servs, Inc*, 448 Mich 113, 124-128; 528 NW2d 698 (1995) (specifically adopting §§ 187 and 188 of the Restatement, which are relevant here); *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 45; 742 NW2d 624 (2007). "The method for the foreclosure of a mortgage on land and the interests in the land resulting from the foreclosure are determined by the local law of the situs." 2 Restatement Conflict of Laws, 2d, § 229, p 29. Consistent with this provision, and as indicated earlier, the deeds of trust and trustee sales were governed by Nevada law. Comment *e* to § 229 of the Restatement, which addresses issues collateral to foreclosure, provides:

> The courts of the situs would apply their own local law to determine questions involving the foreclosure which affect interests in the land. Issues which do not affect any interest in the land, although they do relate to the foreclosure, are determined, on the other hand, by the law which governs the debt for which the mortgage was given. Examples of such latter issues are the mortgagee's right to hold the mortgagor liable for any deficiency remaining

> after foreclosure or to bring suit upon the underlying debt without having first proceeded against the mortgaged land. The rules for ascertaining the state whose local law governs the underlying debt are stated in §§ 187-188. [Section 187 addresses contracts with choice-of-law provisions, and § 188 addresses contracts that are silent on the issue.]

With respect to 1 Restatement Conflict of Laws, 2d, § 188, p 575, it addresses situations in which, as is the case for one of the promissory notes here, the parties have entered into a contract that is silent in regard to the choice of state law that will govern the parties' rights under the contract. Section 188 provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.[4]
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and

[4] 1 Restatement Conflict of Laws, 2d, § 6, p 10, indicates that a court, subject to constitutional restrictions, must follow statutory directives of its own state regarding choice of law, but if there are no such directives, the following factors are relevant to determining choice of law: the various needs of interstate systems; pertinent policies of the forum state; the relevant policies of other interested states in determining particular issues; the protection of justified expectations; policies underlying particular fields of law; certainty, uniformity, and predictability of results; and the ease in determining and applying the law subject to selection. Michigan has no *statutory* directives concerning choice of law. Michigan does have a forum-selection statute, MCL 600.745.

> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Defendants direct our attention to 1 Restatement Conflict of Laws, 2d, § 189, p 586, as generally alluded to above in subsection (3) of § 188; however, § 189 addresses contracts for the transfer of interests in land, which would pertain to purchase or buy-sell agreements for property, not promissory notes. 1 Restatement Conflict of Laws, 2d, § 195, p 619, which is also encompassed by the reference in subsection (3) of § 188, provides:

> The validity of a contract for the repayment of money lent and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that repayment be made, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

In *Sutherland v Kennington Truck Serv, Ltd*, 454 Mich 274, 286; 562 NW2d 466 (1997), our Supreme Court discussed, in general, the issue of what state law applies in any given case:

> [W]e will apply Michigan law unless a "rational reason" to do otherwise exists. In determining whether a rational reason to displace Michigan law exists, we undertake a two-step analysis. First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law

> will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests. [Citations omitted.]

With respect to 1 Restatement Conflict of Laws, 2d, § 187, p 561, it addresses situations in which the parties have entered into a contract containing a choice-of-law provision, as is the case regarding one of the promissory notes here. Section 187 provides:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

As indicated in subsection (2)(b) of § 187, the factors in § 188, previously quoted, can also become relevant when analyzing § 187. Mostly consistent with § 187, in *Hudson v Mathers*, 283 Mich App 91, 96-97; 770 NW2d 883 (2009), this Court observed:

> When determining the applicable law, the expectations of the parties must be balanced with the interests of the states. The parties' choice of law should be applied if the issue is one the parties could have resolved by an express contractual provision. However, there are exceptions. The parties' choice of law will not be followed if (1) the chosen state has no substantial relationship to the parties or the transaction or (2) there is no reasonable basis for choosing that state's law. Also, the chosen state's law will not be applied when it would be contrary to the fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and whose law would be applicable in the absence of an effective choice of law by the parties. [Citations omitted.]

4. APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

Upon analysis of 1 Restatement Conflict of Laws, 2d, § 188(2)(a) to (e), the factors favor applying Michigan law, because the place of negotiating the promissory notes was Michigan, the place of contracting was Michigan, the place of performance with regard to making the payments on the notes was Michigan, the place of defendants' residence was Michigan, and the place of Citizens' business, as well as the place of Talmer's business, was Michigan. Even in regard to the "location of the subject matter of the contract," § 188(2)(d), the subject matter of the promissory notes was technically the funds being loaned, with the subject matter of the deeds of trust and purchase agreements being the condos. That said, the funds received by defendants were used to purchase condos in Nevada, and the notes were secured by the Nevada condos. Nevertheless, the factors in § 188(2)(a) to (e) still weigh heavily in favor of Michigan law.

Under 1 Restatement Conflict of Laws, 2d, § 195, which pertains to "Contracts for the Repayment of

Money Lent," the analysis calls for applying the law of the state where the contract required repayment to be made, which here was indisputably Michigan, unless another state had a more significant relationship to the transaction and the parties. Again, the transactions on the notes occurred in Michigan and solely involved Michigan parties.

Under *Sutherland*, 454 Mich at 286, with respect to which state law should apply generally, we start with the presumption that Michigan law applies, and the issue then becomes whether Nevada has an interest in having its laws apply, and if so, whether Michigan interests nevertheless mandate application of Michigan law. We additionally note that 1 Restatement Conflict of Laws, 2d, § 6, p 10, as incorporated by §§ 188 and 195 (see footnote 4 of this opinion), also refers to, among other matters, the interests and policies of the competing states. We shall return to the issue of state policies and interests momentarily.

Relative to the promissory note that provides for application of Michigan law, under 1 Restatement Conflict of Laws, 2d, § 187, and *Hudson*, 283 Mich App at 96-97, our starting point is that Michigan law applies given the parties' contract, but the choice can be overcome if Michigan lacked a substantial relationship to the parties or the transaction and there was no reasonable basis for the parties to have chosen Michigan. Consistent with our analysis under §§ 188 and 195, Michigan had a substantial relationship to the parties and transaction and there was thus a reasonable basis for the parties to have chosen application of Michigan law, considering that the parties were from Michigan, the note was negotiated and executed in Michigan, and performance of the note occurred in Michigan. The parties' choice of law can also be overcome under § 187

and *Hudson*, 283 Mich App at 96-97, if applying Michigan law would be contrary to the fundamental policies of Nevada, if Nevada has a materially greater interest than Michigan in the issue presented, *and* if Nevada law would govern under a balancing of the factors in 1 Restatement Conflict of Laws, 2d, § 188. We have already determined that the balancing of the factors in § 188 weighs in favor of applying Michigan law; therefore, application of § 187 and *Hudson* supports the conclusion that the choice-of-law provision in the one promissory note is valid and enforceable.

With respect to the interests and policies of Michigan and Nevada in regard to deficiency actions, defendants adamantly argue that the protections afforded mortgagors under Nevada law are substantial, cannot be waived, are effectively waived by applying Michigan law, and must be honored in order to fulfill the public policy goals of Nevada and safeguard its interests. In support, defendants cite myriad statutes and Nevada cases referenced by us earlier in this opinion. In our view, one of the problems with defendants' argument is that it essentially presupposes the applicability of Nevada law rather than provides support for choosing Nevada law over Michigan law. Defendants, for the most part, ignore or inaccurately trivialize Michigan policy and law, reviewed earlier in this opinion, regarding deficiency actions and protections given to both debtors and creditors. Setting aside for the moment consideration of NRS 40.459(1)(c), which might perhaps defeat Talmer's deficiency claims if applied, Michigan and Nevada law with respect to deficiency actions, under the facts presented here, are sufficiently similar to the extent that Nevada policies and interests are not circumvented or defeated by the application of Michigan law. Moreover, defendants have not directly argued

that the fair market values of the condos at the time of the sales were greater than the amounts of the successful bids.

In regard to NRS 40.459(1)(c), it certainly creates a new source of protection against deficiency actions for certain debtors, while at the same time clearly frustrating entities that purchase notes and security instruments at discounted rates. In O'Steen & Johansson, *AB 273 Creates New Challenges for Secured Lenders*, 19 Nevada Lawyer 22, 23-24 (2011), the authors, after noting that "borrowers will undoubtedly assert that the effect of [NRS 40.459(1)(c)] is to limit a deficiency award whenever the underlying debt has been acquired," opined:

> This statute has a tremendous potential to undermine the value of commercial transactions involving Nevada real estate loans. Loans are often acquired for a number of reasons, including pooling transactions, bank failures and note sales. Indeed, it is a fundamental aspect of a promissory note that it is a "negotiable instrument" and thus freely transferrable.

Michigan, at this time, has not opted to impose such constraints on deficiency claims, which absence of legislation must also be given some consideration. Indeed, MCL 600.3280 provides, in part, that the statute shall not "be held to *affect or defeat the negotiability* of any note, bond or other obligation secured by [a] mortgage, deed of trust or other instrument." (Emphasis added.) As suggested by the authors of the Nevada Lawyer article, NRS 40.459(1)(c) can be viewed as affecting the negotiability of promissory notes, which, perhaps arguably, would be contrary to Michigan policy as reflected in MCL 600.3280. Contemplation of Nevada's and Michigan's policies and interests does not mean favoring and supporting only those laws that benefit borrow-

ers to the detriment of lenders or giving weight to laws, or the absence thereof, that benefit lenders to the detriment of borrowers. Ultimately, NRS 40.459(1)(c) does not support applying Nevada law and ignoring Michigan's policies and interests and the direct Michigan connections to the promissory notes, to the parties to those notes, and to the performances under the notes. We also question Nevada's interests in seeing Michigan residents avoid deficiency judgments at the hands of a Michigan bank merely because the properties securing the loans, which originated and were paid in Michigan, were located in Nevada. Moreover, while we appreciate that the Nevada Supreme Court has ruled in *Sandpointe Apartments*, 313 P3d at 851, that NRS 40.459(1)(c) applies to trustee sales that took place on or after June 10, 2011, regardless of when underlying transfers or assignments occurred, the fact remains that the statutory provision did not exist when the notes were executed or when the notes and deeds of trust were purchased from the FDIC. *Sandpointe Apartments* dealt with the issue of retroactive versus prospective application, not conflicts of law. And 1 Restatement Conflict of Laws, 2d, § 6, directs courts to protect the justified expectations of the parties and to consider the certainty and predictability of results. There was no expectation of the applicability of NRS 40.459(1)(c) in 2006 and 2007 when the notes and deeds of trust were executed, nor would the application of a statutory provision that did not exist at the time of contracting lend support to the certainty and predictability of results.

Turning to another argument posed by defendants, they maintain, citing NRS 40.430, that Nevada law required the trustee sales to be joined with the deficiency suits in a single action. Defendants contend that once Talmer opted to have the condos sold

at auction, it was locked into pursuing any deficiencies in Nevada or under Nevada law. Again, these arguments presuppose the applicability of Nevada law and are inconsistent with the Restatement approach and Michigan cases analyzed earlier. Furthermore, NRS 40.430(1) provides:

> Except in cases where a person proceeds under subsection 2 of NRS 40.495 or subsection 1 of NRS 40.512, and except as otherwise provided in NRS 118C.220 [all exceptions inapplicable], there may be but *one action* for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate. That action must be in accordance with the provisions of NRS 40.430 to 40.459, inclusive. In that action, the judgment must be rendered for the amount found due the plaintiff, and the court, by its decree or judgment, may direct a sale of the encumbered property, or such part thereof as is necessary, and apply the proceeds of the sale as provided in NRS 40.462. [Emphasis added.]

The flaw in defendants' argument is that NRS 40.430(6)(e) specifically provides that an "action" does not include an act or proceeding "[f]or the exercise of a power of sale . . . ." Accordingly, Talmer's exercise of the power-of-sale provisions in the two deeds of trust did not constitute an action that necessitated the joinder of deficiency suits, even if Nevada law applied.

Finally, we note that our ruling finds support in other jurisdictions. See *Fed Deposit Ins Corp v Henry*, 818 F Supp 452, 454-455 (D Mass, 1993) (Massachusetts law governed deficiency action on a note executed in Massachusetts even though the property securing the loan was located in New Hampshire); *Cardon v Cotton Lane Holdings, Inc*, 173 Ariz 203; 841 P2d 198 (1992); *Consol Capital Income Trust v Khaloghli*, 183 Cal App 3d 107, 112; 227 Cal Rptr 879 (1986) ("[T]he rule is clear and

solidly grounded: The law of the situs of the debt controls when the suit is brought against the debt . . . and not the land.").

5. ATTORNEY FEES

In Docket No. 312632, Talmer cross-appeals the trial court's denial of its request for attorney fees. Attorney fees are not recoverable as an element of damages or costs unless expressly allowed by court rule, statute, common-law exception, or contract. *Reed*, 265 Mich App at 164. Parties can contract for the payment of attorney fees, and contractual provisions for the payment of reasonable attorney fees are judicially enforceable. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). "In other words, a contractual clause providing that in the event of a dispute the prevailing party is entitled to recover attorney fees is valid." *Id*. Attorney fees that are awarded pursuant to contractual provisions are considered damages, not costs. *Id*. "A contractual provision for reasonable attorney fees in enforcing provisions of [a] contract may validly include allowance for services rendered upon appeal." *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536, 549; 362 NW2d 823 (1984).

Here, the promissory note required defendants to pay the lender's reasonable attorney fees incurred in collecting on the note upon default. Given our holding affirming entry of the summary disposition judgment, Talmer is contractually entitled to reasonable attorney fees incurred in litigating the case, including reasonable attorney fees associated with this appeal. The trial court's reasoning that defendants' arguments regarding choice and conflicts of law were not frivolous and that the case was otherwise a simple, routine collection action has no relevancy to defendants' contractual

obligation to pay Talmer's attorney fees, although it might have a bearing on the amount of fees awarded in the context of evaluating reasonableness. See *Dep't of Transp v Randolph*, 461 Mich 757, 766; 610 NW2d 893 (2000), employing Rule 1.5(a) of the Michigan Rules of Professional Conduct; *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982). The trial court's ruling that any award of attorney fees would be unreasonable circumvents defendants' clear contractual obligation to pay fees and Talmer's clear contractual right to be reimbursed for its attorney fees, as long as they are reasonable. On remand, the trial court is to award Talmer reasonable attorney fees consistent with applicable legal authorities. To the extent that defendants may be challenging the award of attorney fees in Docket No. 313122, we affirm for the same reasons set forth above.

III. CONCLUSION

We affirm the trial courts' rulings granting summary disposition in favor of Talmer and entering deficiency judgments against defendants in Docket Nos. 312632 and 313122. We also affirm the trial court's ruling awarding attorney fees to Talmer in Docket No. 313122. Finally, we reverse the trial court's ruling in Docket No. 312632 that denied Talmer's request for attorney fees and remand for a determination of Talmer's reasonable attorney fees.

Affirmed in part and reversed and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, Talmer is awarded taxable costs pursuant to MCR 7.219.

M. J. KELLY and RONAYNE KRAUSE, JJ., concurred with MURPHY, C.J.

SAL-MAR ROYAL VILLAGE, LLC v MACOMB COUNTY TREASURER
(ON REMAND)

Docket No. 308659. Submitted December 18, 2013, at Lansing. Decided February 25, 2014, at 9:05 a.m. Leave to appeal granted, 495 Mich 988.

Sal-Mar Royal Village, LLC, filed a complaint for a writ of mandamus against the Macomb County Treasurer in the Macomb Circuit Court, requesting that he be required to accept funds that plaintiff had tendered as payment in full for a three-year period of property taxes in accordance with a consent judgment entered by the Michigan Tax Tribunal (MTT). In 2007, plaintiff had filed an appeal of its property-tax assessment by Macomb Township in the MTT, and because plaintiff did not pay taxes while the appeal was pending, it incurred substantial interest on the delinquent taxes. Ultimately, plaintiff entered into a stipulation with the township that reduced the property's value and waived any penalty and interest that would be due from either party if the applicable taxes or refunds were paid. These terms were incorporated into the consent judgment entered by the MTT. Following entry of the judgment, defendant, as a representative of Macomb County, issued plaintiff a revised tax bill for 2007 through 2010, but refused to recognize the waiver-of-interest provision in the consent judgment and billed plaintiff for interest of $127,971.29. Plaintiff paid the taxes, but did not pay the interest. Plaintiff moved for summary disposition in the circuit court pursuant to MCR 2.116(C)(9) and (10), arguing that defendant was bound by the consent judgment as the township's privy. Defendant moved for summary disposition pursuant to MCR 2.116(C)(4), (8), and (10), arguing that because he was not a party to the MTT case, he could not be bound by the decision. Defendant also argued that the MTT lacked the statutory authority to accept the parties' stipulation waiving the interest. The trial court, David F. Viviano, J., denied plaintiff's motion for summary disposition and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff appealed. The Court of Appeals, DONOFRIO, P.J., and MARKEY and OWENS, JJ., reversed the decision of the circuit court, holding that the consent judgment bound defendant as the township's privy, that

the MTT had the power to waive the interest, and that plaintiff's request for a writ of mandamus should have been granted. 301 Mich App 234 (2013). In lieu of granting defendant's application for leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration of whether plaintiff's complaint for mandamus fell within the exclusive jurisdiction of the MTT under MCL 205.731. The Supreme Court retained jurisdiction. 495 Mich 897 (2013).

On remand, the Court of Appeals *held*:

Under Const 1963, art 6, § 13; MCL 600.605; and MCR 3.305(A), the circuit court had jurisdiction to hear the mandamus action unless MCL 205.731 deprived it of jurisdiction. The jurisdiction of the MTT is determined by subject matter, not the type of relief requested. MCL 205.731 gives the MTT exclusive and original jurisdiction over (1) a proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization under Michigan's property tax laws, (2) a proceeding for a refund or redetermination of a tax levied under Michigan's property tax laws, (3) mediation of a proceeding before the tribunal, (4) certification of a mediator in a tax dispute, and (5) any other appeal taken under the Tax Tribunal Act provided by law. The plain language of MCL 205.731 does not confer jurisdiction on the MTT to entertain a mandamus action. While the MTT may issue writs, orders, or directives, the MTT cannot compel enforcement of its decisions. In this case, plaintiff was only seeking to compel enforcement of the consent judgment. Plaintiff was not seeking direct review of a final decision, finding, ruling, determination, or order of an agency. Nor was plaintiff seeking a refund or redetermination of a tax. Plaintiff's enforcement action was not subject to the exclusive jurisdiction of the MTT.

Plaintiff's complaint for relief did not fall within the exclusive jurisdiction of the MTT under MCL 205.731.

TAXATION — TAX TRIBUNAL — JURISDICTION — MANDAMUS — ENFORCEMENT OF A CONSENT JUDGMENT.

The jurisdiction of the Michigan Tax Tribunal (MTT) is determined by subject matter, not the type of relief requested; MCL 205.731 gives the MTT exclusive and original jurisdiction over (1) a proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization under Michigan's property tax laws, (2) a proceeding for a refund or redetermination of a tax levied under Michigan's

property tax laws, (3) mediation of a proceeding before the tribunal, (4) certification of a mediator in a tax dispute, and (5) any other appeal taken under the Tax Tribunal Act provided by law; the plain language of MCL 205.731 does not confer jurisdiction on the MTT to entertain a mandamus action, and a mandamus action brought only to compel enforcement of a consent judgment is not subject to the exclusive jurisdiction of the MTT.

Hoffert & Associates, PC (by *David B. Marmon*), for plaintiff.

Frank Krycia, Macomb County Assistant Corporation Counsel, for defendant.

ON REMAND

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

PER CURIAM. In this property tax dispute, this Court previously held that the Macomb Circuit Court should have issued a writ of mandamus directing the Macomb County Treasurer to accept plaintiff's tendered funds as payment in full for its delinquent property taxes in accordance with a consent judgment entered by the Michigan Tax Tribunal. *Sal-Mar Royal Village, LLC v Macomb Co Treasurer*, 301 Mich App 234; 836 NW2d 236 (2013). In an order dated November 20, 2013, in lieu of granting leave to appeal, the Supreme Court, citing *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46; 832 NW2d 728 (2013), remanded this case to this Court "for consideration of whether the plaintiff's complaint for relief falls under the exclusive jurisdiction of the Michigan Tax Tribunal pursuant to MCL 205.731." *Sal-Mar Royal Village, LLC v Macomb Co Treasurer*, 495 Mich 897 (2013). After consideration of the issue, we hold that the tribunal did not have exclusive jurisdiction over the mandamus action.

I. FACTS AND PROCEDURAL HISTORY

In 2007, plaintiff filed a property tax appeal against Macomb Township in the Michigan Tax Tribunal and did not pay its property taxes while the appeal was pending, thus incurring substantial interest. Ultimately, the parties entered into a consent judgment that included a provision waiving any penalty and interest due from either party if all applicable taxes or refunds were paid. However, defendant, as representative of Macomb County, refused to recognize the waiver-of-interest provision and issued plaintiff a revised tax bill that included interest of $127,971.29. Plaintiff did not pay the interest; instead, it sought a writ of mandamus in the circuit court to enforce the waiver-of-interest provision in the consent judgment. The circuit court granted defendant summary disposition, ruling that the consent judgment only applied to plaintiff and the township because they were the only parties to the tax appeal. This Court reversed the circuit court's decision and, as noted, held that it should have granted the writ of mandamus. *Sal-Mar*, 301 Mich App at 235-236. This Court held that the county was bound by the consent judgment because it was in privity with the township with respect to the litigation, given that the two parties shared the same interest in collecting property taxes and worked together to collect those taxes. *Id*. at 240-241. This Court also held that the tribunal had the authority to waive interest on the delinquent taxes. *Id*. at 242-243. As noted, defendant sought leave to appeal in our Supreme Court, which, in lieu of granting leave, remanded the case to this Court "for consideration of whether the plaintiff's complaint for relief falls under the exclusive jurisdiction of the Michigan Tax Tribunal pursuant to MCL 205.731," in light of *Hillsdale Co Senior Servs*. *Sal-Mar*, 495 Mich at 897.

II. STANDARD OF REVIEW

We review de novo whether a court has subject-matter jurisdiction, as well as issues of statutory interpretation. *Hillsdale Co Senior Servs*, 494 Mich at 51.

III. ANALYSIS

Pursuant to Const 1963, art 6, § 13, MCL 600.605, and MCR 3.305(A), the circuit court had jurisdiction to hear the mandamus action at issue unless MCL 205.731 is deemed to have denied it jurisdiction. See *Hillsdale Co Senior Servs*, 494 Mich at 51-53. MCL 205.731 provides:

> The tribunal has exclusive and original jurisdiction over all of the following:
>
> a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state.
>
> (b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state.
>
> (c) Mediation of a proceeding described in subdivision (a) or (b) before the tribunal.
>
> (d) Certification of a mediator in a tax dispute described in subdivision (c).
>
> (e) Any other proceeding provided by law.

Under the Tax Tribunal Act, MCL 205.701 *et seq*., "proceeding" is defined as "an appeal taken under this act." MCL 205.703(e). "Agency" is defined as "a board, official, or administrative agency empowered to make a decision, finding, ruling, assessment, determination, or order that is subject to review under the jurisdiction of the tribunal or that has collected a tax for which a refund is claimed." MCL 205.703(a).

The plain language of MCL 205.731 does not confer jurisdiction on the tribunal to entertain a mandamus action. A complaint for mandamus is not a "proceeding for direct review," a "proceeding for a refund or redetermination of a tax," a proceeding relative to mediation, or a proceeding that any law confers jurisdiction upon the tribunal to hear. See MCL 205.731.[1] Further, this Court has indicated that while the tribunal has the power to "issu[e] writs, orders, or directives," MCL 205.732(c),[2] as necessary, the plaintiff must seek equitable relief in the circuit court to enforce a tribunal decision. *Sessa v State Tax Comm*, 134 Mich App 767, 771; 351 NW2d 863 (1984), citing *Edros Corp v Port Huron*, 78 Mich App 273; 259 NW2d 456 (1977) (stating that the tribunal has the authority to direct a taxing agency to take no further action regarding a disputed assessment, that the orders, writs, and directives of the

[1] Although a mandamus action is based on equitable principles, it is regarded as an action at law. See *Franchise Realty Interstate Corp v Detroit*, 368 Mich 276, 279; 118 NW2d 258 (1962). Additionally, in *Woodworth v Old Second Nat'l Bank*, 144 Mich 338; 107 NW 905 (1906), the Court indicated that mandamus proceedings are civil actions, not prerogative writs. See also 12 Michigan Pleading & Practice (2d ed), § 94.1, p 97. Moreover, MCR 3.305 provides that actions for mandamus against state officers may be brought in this Court or a circuit court, while "[a]ll other actions for mandamus must be brought in the circuit court unless a statute or rule requires or allows the action to be brought in another court." See also MCL 600.4401.

[2] MCL 205.732 outlines the tribunal's powers as including, but not being limited to, the following:

> (a) Affirming, reversing, modifying, or remanding a final decision, finding, ruling, determination, or order of an agency.
>
> (b) Ordering the payment or refund of taxes in a matter over which it may acquire jurisdiction.
>
> (c) Granting other relief or issuing writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it may acquire jurisdiction.

tribunal are valid and binding, and that enforcement may be obtained by application to the circuit court). Accordingly, while the tribunal might have been able to issue an order directing the county treasurer to comply with the consent judgment, it does not appear that the tribunal had the power to compel enforcement. Therefore, plaintiff's complaint for mandamus did not fall under the exclusive jurisdiction of the tribunal.

However, in *Hillsdale Co Senior Servs*, which was decided one day after this Court issued its decision in this case, the Supreme Court indicated that a circuit court action seeking enforcement can, upon closer scrutiny, be revealed as an action seeking direct review, which would have to be heard by the tribunal. *Hillsdale Co Senior Servs*, 494 Mich at 61-63. In that case, the electorate approved a proposition raising the limit on the amount of property taxes by 0.5 mill for, in essence, services to senior citizens. *Id*. at 49. Thereafter, the Hillsdale County Board of Commissioners declined to levy and spend the full 0.5 mill. *Id*. at 50. The plaintiffs filed a complaint for mandamus in circuit court seeking to compel the county to levy and appropriate the full 0.5 mill. *Id*. The Supreme Court held that the circuit court did not have jurisdiction over the mandamus action. *Id*. at 54-55. Citing MCL 205.731(a), the Court held that the four elements necessary to confer original and exclusive jurisdiction on the tribunal were present: (1) the action was a proceeding for a direct review of the board's final decision not to levy and spend the full 0.5 mill, (2) the board constituted an "agency" as defined by the statute, (3) the issue arose under the property tax laws, and (4) the action related to rates because "the heart of the dispute pertains to the 'amount of a charge' by defendant to its property taxpayers." *Id*. at 53-54.

The Court went on to discuss *Wikman v City of Novi*, 413 Mich 617; 322 NW2d 103 (1982), *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728; 322 NW2d 152 (1982), and *Jackson Dist Library v Jackson Co No 2*, 146 Mich App 412; 380 NW2d 116 (1985), rev'd on other grounds, *Jackson Dist Library v Jackson Co*, 428 Mich 371 (1987). It noted that these cases had created confusion regarding the tribunal's jurisdiction, but concluded that they were consistent with the Court's holding in that the tribunal's jurisdiction is determined by the subject matter, not the type of relief requested. *Hillsdale Co Senior Servs, Inc*, 494 Mich at 55, 59-61.

In this case, defendant focuses on the fact that after the tribunal issued its ruling, he issued plaintiff a revised tax bill. He suggests that plaintiff is seeking to have this tax bill corrected so that it conforms with the consent judgment and that, as an appeal of a tax bill, exclusive jurisdiction would rest with the tribunal. Plaintiff argues that this is not a new tax bill since there is an existing consent judgment that has decided the issue of interest and that this is an action aimed at enforcing the consent judgment.

The Supreme Court indicates that to discern whether the circuit court had jurisdiction over the mandamus action, this Court must first analyze whether the claim was for "direct review of a final decision, finding, ruling, determination, or order of an agency," or a proceeding for "a refund or redetermination of a [property] tax . . . ." MCL 205.731.[3]

[3] The other alternatives—a proceeding relative to mediation or a proceeding that any law confers jurisdiction upon the tribunal to hear—are not relevant. Moreover, with regard to the other requirements of MCL 205.731, the county treasurer would be an "agency" because that term includes an "official" "empowered to make a decision," MCL 205.703(a), and the issue would relate to "rates," even though it

This claim had aspects of both an enforcement action and a review action. Specifically, plaintiff was seeking to enforce the consent judgment, but in the course of enforcing the judgment, the validity of the judgment was called into question by a challenge to the tribunal's authority to waive interest. However, the authority question, as well as the question regarding whether "interest" referred to interest on the delinquent taxes or the judgment, were raised by defendant. If the circuit court had jurisdiction over the mandamus action, defendant could not defeat jurisdiction by raising a defense that invoked a review function.

The county treasurer's decision in this case was in direct violation of the consent judgment issued by the tribunal. Plaintiff was not seeking to appeal or obtain review of the county treasurer's decision to ignore the consent judgment and was not seeking a redetermination of the taxes owed. Rather, plaintiff was seeking enforcement of the consent judgment. If plaintiff had proceeded in the tribunal, rather than the circuit court, it presumably would have obtained another judgment which would have had equal force and effect as the consent judgment. The decision in *Hillsdale Co Senior Servs* notes that "although the tribunal cannot *itself* issue injunctions, it can issue orders that may be enforced in circuit court." *Hillsdale Co Senior Servs, Inc*, 494 Mich at 59. Similarly, while the tribunal cannot entertain a mandamus action and issue a writ of mandamus, it can issue orders that may be enforced in the circuit court. It issued such an order when it issued the consent judgment. Thus, the subsequent mandamus action for enforcement was not an appeal subject to the exclusive jurisdiction of the tribunal.

---

technically dealt with interest, under the "amount of a charge" definition of "rates" relied on in *Hillsdale Co Senior Servs*, 494 Mich at 54.

We hold that plaintiff's complaint for relief did not fall under the exclusive jurisdiction of the Michigan Tax Tribunal pursuant to MCL 205.731.

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

MOODY v HOME OWNERS INSURANCE COMPANY

HODGE v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket Nos. 301783, 301784, and 308723. Submitted September 10, 2013, at Detroit. Decided February 25, 2014, at 9:10 a.m. Leave to appeal sought.

Charles Moody brought an action in the 36th District Court against Home Owners Insurance Company seeking no-fault benefits. Moody was injured by an unidentified motor vehicle while he was walking in the street. Get Well Medical Transport, Progressive Rehab Center, and Carol Reints, Inc., brought a separate action in the 36th District Court, seeking payment for services, products, and accommodations that they had provided to Moody as a result of the accident. The court consolidated the actions. In light of Moody's answers to interrogatories and his deposition testimony, Home Owners informed the court that Moody intended to claim damages far in excess of the court's $25,000 jurisdictional limit. The court, Roberta Archer, J., ruled that it would not transfer the case to circuit court, that Moody's counsel would not be restricted in the evidence he could present, and that if the jury returned a verdict in excess of $25,000, the court would cure the jurisdictional problem by limiting the judgment to $25,000, exclusive of attorney fees, interest, and costs. The jury ultimately awarded Moody $32,447.23, which the court reduced to $25,000. The jury awarded the providers the amounts that they sought: $5,604 to Get Well, $13,845 to Progressive, and $2,533.14 to Carol Reints. Homeowners appealed in the Wayne Circuit Court. The circuit court, Robert J. Colombo, Jr., J., ruled that it was inappropriate for the district court to allow a plaintiff to present evidence of damages greater than the district court's jurisdictional limit and reversed the jury verdict and judgment. The circuit court remanded the case to the district court for the district court to either dismiss the case for lack of jurisdiction under MCR 2.116(C)(4) or transfer it to the circuit court under MCR 2.227. The circuit court ruled that the providers' judgment also had to be reversed and the case remanded for a new trial. Finally, the circuit court held that Moody's counsel had made improper comments during the trial that deprived Home

Owners of a fair trial. Moody (Docket No. 301784) and the providers (Docket No. 301783) sought leave to appeal, which the Court of Appeals denied. In lieu of granting leave to appeal, the Supreme Court remanded both cases to the Court of Appeals for consideration as on leave granted. 491 Mich 923 (2012).

Linda Hodge brought an action in the 36th District Court against State Farm Mutual Automobile Insurance Company seeking no-fault benefits. Hodge was injured when a motor vehicle struck her as she walked across a road. State Farm moved in limine to exclude evidence of damages exceeding the court's jurisdictional limit. The court, Kenneth J. King, J., denied the motion. The jury returned a verdict of $85,957 against State Farm. The court entered a judgment of $25,000, its jurisdictional limit, on the verdict. State Farm appealed in the Wayne Circuit Court. The circuit court, Brian R. Sullivan, J., reversed the jury verdict and subsequent judgment, holding that the district court lacked subject-matter jurisdiction because the amount in controversy exceeded $25,000. Hodge sought leave to appeal (Docket No. 308723), which the Court of Appeals denied. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 493 Mich 937 (2013). The Court of Appeals consolidated the three appeals.

The Court of Appeals *held*:

1. Under MCL 600.8301(1), the district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000. The plain, ordinary, and legal meaning of "amount in controversy" is the amount of money that the parties to the lawsuit dispute, argue about, or debate during the litigation. In these cases, Moody and Hodge presented evidence of damages far exceeding the $25,000 jurisdictional limit of the district court. The only actions a district court judge in that situation may properly take are (1) to dismiss the case under MCR 2.116(C)(4) or (2) to transfer it to the circuit court under MCR 2.227(A)(1). The general rule requiring that the court's jurisdiction be initially determined from the allegations in the complaint does not permit a plaintiff to artfully plead a claim for relief ostensibly within the limits of the court's subject-matter jurisdiction but then place in dispute, through the argument and evidence at trial, an amount of damages greater than the court's jurisdictional limit. A court is continually obliged to question its own jurisdiction over a person, the subject matter of an action, and the limits of the relief it may afford. In determining whether the court has jurisdiction when a motion under MCR 2.116(C)(4) has been brought, the court must consider the affidavits, together with the pleadings, depositions,

admissions, and documentary evidence. Because Moody and Hodge, contrary to their initial pleadings, claimed and presented evidence of damages far in excess of $25,000, it was the duty of the district court judges to take notice of their lack of subject-matter jurisdiction and dismiss the cases or transfer them to the circuit court. Because the district court judges failed to do either, the subsequent judgments were void for want of subject-matter jurisdiction, and the circuit court correctly vacated those judgments.

2. The fact that the providers' combined claims in Docket No. 301783 were within the district court's $25,000 jurisdictional limit did not cure the jurisdictional defect arising from consolidating the providers' claims with those of Moody. All no-fault claims for benefits due a single injured party based on the same accidental injuries must be aggregated for the purpose of determining compliance with the district court's subject-matter jurisdiction under MCL 600.8301(1). The providers' and Moody's claims were identical with respect to the requisites of Home Owners' liability. Because there was an identity between Moody's claims and those of the providers and because the claims were consolidated for trial, they were merged for the purpose of determining the amount in controversy. In other words, because the providers' claims were derivative of Moody's claims, they could be aggregated to determine whether the court had subject-matter jurisdiction under MCL 600.8301(1). The aggregated claims of Moody and the providers exceeded the district court's subject-matter jurisdiction. Therefore, the circuit court correctly vacated the judgment for the providers.

3. Home Owners also preserved for appeal the issue of Moody's counsel's improper remarks to the jury concerning the assigned claims facility in Docket Nos. 301783 and 301784. The circuit court determined that counsel's remarks purposely injected an irrelevant issue in order to prejudice Home Owners by erroneously suggesting that Home Owners could recover from a third-party source any damages that the jury awarded. Despite Home Owners' objection, the district court permitted Moody's counsel to present to the jury conflicting views on this irrelevant issue. Although a motion for a mistrial would have been appropriate, it was not required to preserve the issue for review. The circuit court did not clearly err regarding the facts and did not commit legal error by concluding that the improper remarks, in which the providers' counsel joined, denied Home Owners a fair trial. Accordingly, this alternative, independent basis also warranted reversal and a new trial.

Circuit court orders vacating the judgments in all three cases affirmed; all three cases remanded to the circuit court for further proceedings.

1. JURISDICTION — SUBJECT-MATTER JURISDICTION — DISTRICT COURT — AMOUNT IN CONTROVERSY.

Under MCL 600.8301(1), the district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000; the plain, ordinary, and legal meaning of "amount in controversy" is the amount of money that the parties to the lawsuit dispute, argue about, or debate during the litigation; a plaintiff may not plead a claim for relief ostensibly within the limits of the court's subject-matter jurisdiction but then place in dispute, through the argument and evidence at trial, an amount of damages greater than the court's jurisdictional limit; when a plaintiff presents evidence of damages exceeding $25,000, the only actions the district court judge may properly take are (1) to dismiss the case under MCR 2.116(C)(4) or (2) to transfer it to the circuit court under MCR 2.227(A)(1).

2. JURISDICTION — SUBJECT-MATTER JURISDICTION — DISTRICT COURT — AMOUNT IN CONTROVERSY — NO-FAULT INSURANCE BENEFITS — AGGREGATION OF CLAIMS.

All no-fault claims for benefits due a single injured party based on the same accidental injuries must be aggregated for the purpose of determining compliance with the district court's subject-matter jurisdiction under MCL 600.8301(1); claims brought by providers for services, products, and accommodations provided to an injured no-fault claimant are derivative of the claims of the injured party and must be aggregated with the claims of the injured party to determine whether the district court has subject-matter jurisdiction under MCL 600.8301(1).

Richard E. Shaw for Charles Moody.

Law Offices of Nicholas A. Cirino, PLLC (by *Nicholas A. Cirino*), and *Law Offices of Michael S. Cafferty & Associates* (by *Michael S. Cafferty*) for Get Well Medical Transport, Progressive Rehab Center, and Carol Reints, Inc.

Anselmi & Mierzejewki, PC (*by Kurt A. Anselmi*), for Home Owners Insurance Company.

Michael H. Fortner and *Sheldon L. Miller* for Linda Hodge.

Hewson & Van Hellemont, PC (by *James F. Hewson* and *Stacey L. Heinonen*), for State Farm Mutual Automobile Insurance Company.

Amicus Curiae:

Gross & Nemeth, PLC (by *James G. Gross*), for Auto Club Insurance Association.

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

MARKEY, P.J. These consolidated appeals are before this Court for consideration as on leave granted.[1] Each case concerns the jurisdiction of the district court under MCL 600.8301(1) when a plaintiff presents evidence and argument of damages far in excess of the district court's $25,000 amount-in-controversy jurisdictional limit. In Docket No. 301783, plaintiffs Get Well Medical Transport, Progressive Rehab Center and Carol Reints, Inc., appeal the order of Wayne Circuit Judge Robert Colombo, Jr., reversing a district court judgment in their favor following a jury trial and remanding for a new trial. In Docket No. 301784, plaintiff Charles Moody appeals the same order of Judge Colombo vacating the judgment in Moody's favor because the district court lacked subject-matter jurisdiction and remanding to the district court to either dismiss the case or transfer it to the circuit court. Similarly, in Docket No. 308723, plaintiff Linda C. Hodge appeals the order of Wayne Circuit Judge Brian R. Sullivan vacating a

[1] See *Hodge v State Farm Mut Auto Ins Co*, 493 Mich 937 (2013); *Moody v Getwell Med Transp*, 491 Mich 923 (2012). This Court entered an order on April 3, 2013, consolidating the appeal in Docket No. 308723 with those in Docket Nos. 301783 and 301784.

district court judgment in her favor in the amount of $25,000 plus interest following a jury verdict of $85,957 against defendant State Farm Mutual Automobile Insurance Company. We affirm.

I. FACTS AND PROCEEDINGS

Moody filed his complaint for no-fault benefits in 36th District Court on September 15, 2008. Paragraph 3 of his complaint alleges that he "claims damages do not exceed $25,000.00." The complaint's prayer for relief sought "damages in whatever amount Plaintiff is found to be entitled not in excess of [$]25,000.00, plus interest, costs, and no-fault attorney fees."

The providers filed their complaint in 36th District Court on June 11, 2009, seeking payment for "reasonably necessary products, services and accommodations" that they provided Moody as a result of the motor vehicle accident. Get Well Medical Transport, Progressive Rehab Center and Carol Reints, Inc., sought no-fault benefits in the amounts, respectively, of $5,604; $14,845; and $2,533.14, for a combined total claim for damages of $21,982.14.

While still awaiting discovery regarding the extent of Moody's claims, Home Owners moved on July 29, 2009, to consolidate Moody's case with that of the providers. An order doing so was entered without objection. Meanwhile, Home Owners filed several motions to compel discovery. The district court finally entered an order compelling signed answers to Homeowners' interrogatories on October 6, 2009, to which Moody responded on October 12, 2009. In his answers to the interrogatories, Moody indicated that, in addition to a $32,447.23 bill from Henry Ford Hospital, he also intended to present to the jury damage claims for over $110,000 in lost wages and over $262,800 in attendant-care benefits.

In light of Moody's answers to the interrogatories and subsequent depositions taken just before trial, Home Owners, on the day trial was scheduled to commence, raised the issue of the trial court's subject-matter jurisdiction because it appeared certain Moody intended to claim damages far exceeding the $25,000 jurisdictional limit of the district court under MCL 600.8301(1). Home Owners asserted several arguments, including (1) when Moody's counsel presented argument and evidence of damages in excess of $25,000, the district court would lose jurisdiction, and defendant would move for summary disposition under MCR 2.116(C)(4) (the court lacks jurisdiction of the subject matter); (2) Moody's action could be transferred to circuit court under MCR 2.227(A)(1); and (3) if Moody's counsel were permitted to present argument and evidence of damages in excess of $25,000, Home Owners should be allowed to impeach Moody's claims through evidence or by judicial notice of the fact that the district court's jurisdiction is limited to claims not exceeding $25,000.

The district court ruled that it would not restrict Moody's counsel in the evidence or argument he could present, and that if the jury returned a verdict for Moody in excess of $25,000, it would cure the jurisdictional problem by limiting the judgment to $25,000, exclusive of attorney fees, interest, and costs. Furthermore, the district court ruled that it would not take judicial notice of the district court's jurisdictional limit and that defense counsel could not advise the jury of it. Finally, the district court ruled it would not transfer Moody's action to the circuit court. The district court entered a hand written order that provided: "This action will not be transferred to circuit court. Each plaintiff's complaint is limited to the jurisdictional dollar amount of $25,000 exclusive of attorney fees,

interest and costs. Defendant will be precluded from advising [the] jury of [the] court's jurisdictional limits."

During his opening statement, Moody's counsel repeatedly told the jury that if Home Owners were required to pay no-fault benefits, it could obtain reimbursement from the assigned claims facility. After defense counsel's third objection to the comments, the district court ruled it would not preclude the argument but that it would permit defense counsel to argue in its opening statement that Home Owners would not be entitled to reimbursement from the assigned claims facility. And that is what defense counsel did. The providers' counsel supported Moody's counsel on this point in his opening statement, indicating that he understood that an insurance company could obtain reimbursement from the assigned claims facility if it were determined within one or two years that the company should not have been paying the claim in the first place.

The main issue at trial was whether at the time of the accident Moody was "domiciled in the same household" as his father and stepmother, whom Home Owners insured, or whether Moody lived with his mother in Detroit. The trial extended over three weeks, and Moody's counsel presented evidence of no-fault claims far in excess of $25,000. In addition to the proofs of the $32,447.23 hospital bill from Henry Ford, Moody presented evidence of lost wages of $28,288 to $29,298.28, replacement services of $14,600, and claims of attendant care for $192,720. After presentation of this evidence, Home Owners twice renewed its motion for summary disposition under MCR 2.116(C)(4) because Moody's claims for damages far exceeded the district court's $25,000 jurisdictional limit; the district again denied Home Owners' motions.

The jury found against Home Owners on its coverage defense, deciding that Moody lived with his father and stepmother at the time of the accident; that issue has not been appealed. The jury awarded Moody $32,447.23 for the hospital expense. But the jury found that Moody did not sustain any lost wages nor did he incur any attendant-care expenses. The jury further found that Moody's allowable expenses were not overdue. When entering its judgment, the district court reduced the award to $25,000, the court's jurisdictional limit. The jury awarded the providers the amounts that they sought: $5,604 to Get Well, $13,845 to Progressive Rehab, and $2,533.14 to Carol Reints, Inc. Home Owners appealed in the circuit court.

Judge Colombo heard oral argument on Home Owners' appeal on October 19, 2010, and issued a lengthy opinion from the bench. Judge Colombo considered that MCL 600.605 provides that circuit courts have original jurisdiction over "all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court," and that MCL 600.8301(1) provides that the "district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." The circuit court concluded that it was inappropriate for the district court to allow a plaintiff to present evidence of damages greater than the district court's jurisdictional limit, noting that although district courts formerly were permitted to award damages in excess of the limit when a case was remanded from the circuit court, the statute authorizing that practice, former MCL 600.641, had been repealed. Judge Colombo also noted that Moody was bound by his pleadings, which alleged damages of not more than $25,000. Accordingly, "Moody could not present damage proofs that exceeded $25,000."

Judge Colombo also rejected Moody's reliance on the principle that a court's subject-matter jurisdiction is determined only by the allegations in the plaintiff's complaint. Instead, Judge Colombo reasoned that a court must at all times question its own jurisdiction over parties, the subject matter of the action, and the limits of the relief that it may grant. Further, when a court determines that it lacks jurisdiction, it should not pursue the matter further except to dismiss the action or transfer it to the proper court. The circuit court opined:

> Once [Home Owners] raised the issue of the district court's jurisdiction, the district court was obliged to determine whether it had subject matter jurisdiction. The district court concluded that it had jurisdiction because it could reduce any verdict to $25,000. This was clearly error on the part of the district court. It had no jurisdiction to try Moody's case when the damage proofs exceeded its jurisdiction.

Judge Colombo also stated he believed that Moody's counsel engaged in forum shopping as a matter of strategy in hopes of having a better opportunity to win on the issue of residence. Judge Colombo summarized his reasons for reversing the judgment for Moody:

> The facts in this case are too compelling to do anything but to set aside the jury verdict and the judgment in this case. Counsel for Moody presented damage proofs of hundreds of thousand dollars [sic] in excess of the district court's jurisdictional amount. His proofs did not comply with his pleadings. He attempted to proceed in district court, even though the district court was without jurisdiction and [he] improperly engaged in forum shopping. . . . The only appropriate remedy is reversal of the jury verdict and the judgment under all the circumstances in this case. The case is remanded to the district court to either dismiss the Moody case for lack of jurisdiction or transfer it to [the circuit court] pursuant to MCR 2.227.

The circuit court also ruled that the judgment for the providers must be reversed and the case remanded for a new trial because the providers' claims were so intertwined with Moody's case for which the district court lacked jurisdiction. The circuit court reasoned that because the providers' case was consolidated with Moody's case, "significant evidence was admitted in the case that normally would not have been admitted in the medical providers' case." The court believed that the presentation of the extra evidence "may have affected the outcome on both the issues of residence and damages."

With respect to Home Owners' claims regarding improper comments by Moody's counsel at trial, Judge Colombo opined that error warranting reversal occurred when Moody's counsel purposefully interjected the irrelevant issue of the assigned claims facility. The court concluded that the cumulative effect of counsel's comments, particularly regarding the assigned claims facility and subrogation, deprived Home Owners of a fair trial. Accordingly, in addition to finding that the district court lacked subject-matter jurisdiction, the circuit court ordered a new trial on the basis that counsel's improper comments deprived Home Owners of a fair trial. Also, for this additional reason, Judge Colombo reversed as to all plaintiffs and ordered a new trial.

The appeal in Docket No. 308723 presents the same central legal issue as in Docket Nos. 301783 and 301784 regarding the district court's jurisdiction under MCL 600.8301(1). Plaintiff Linda C. Hodge brought an action in 36th District Court asserting a first-party no-fault claim and presented proof of damages far in excess of the district court's $25,000 jurisdictional limit. The jury returned a verdict of $85,957 against defendant State

Farm Mutual Automobile Insurance Company, and on October 1, 2010, the district court entered a judgment of $25,000 plus interest against State Farm. State Farm appealed in the circuit court, which held a hearing on December 16, 2011. Judge Brian R. Sullivan reversed and issued an order on February 1, 2012, providing in pertinent part that "[t]he amount in controversy in this case was in excess of the $25,000.00" jurisdictional limit of MCL 600.8301. The circuit court ordered that "the jury verdict and subsequent judgment . . . is reversed and vacated for the reason that the court lacked jurisdiction over the subject matter because the amount in controversy exceeded the district court's jurisdictional limits contained in MCL 600.8301[.]"

II. THE DISTRICT COURT'S JURISDICTION

The central issue in all three appeals pertains to the application of MCL 600.8301(1), which provides: "The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." Whether the district court has subject-matter jurisdiction on the facts presented is a question of law reviewed de novo. *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 51; 832 NW2d 728 (2013). Likewise, the interpretation and application of both statutes and court rules are questions of law that are reviewed de novo. *Id.*; *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

We conclude that nothing in MCL 600.8301(1), MCR 2.227(A)(1), or MCR 2.116(C)(4) requires that a court limit its jurisdictional query to the amount in controversy alleged in the pleadings. Here, plaintiffs Moody and Hodge patently claimed damages far in excess of the $25,000 amount-in-controversy limit of the district court's jurisdiction throughout litigation. The district

court judges presiding over these actions were duty-bound to recognize the limits of their subject-matter jurisdiction, *In re Fraser Estate*, 288 Mich 392, 394; 285 NW 1 (1939),[2] and either dismiss the cases brought by Moody and Hodge or transfer them to the circuit court, *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965),[3] and MCR 2.227(A)(1). Because the district court judges failed to either dismiss these cases that were patently outside their subject-matter jurisdiction or transfer them to the circuit court, the subsequent judgments—and on the facts presented here, also the judgment on the providers' claims—are void. *In re Hatcher*, 443 Mich 426, 438; 505 NW2d 834 (1993),[4] *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935),[5] and *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992).[6]

These cases are governed by principles of statutory construction, which apply to both statutes and court

---

[2] "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding." *Fraser*, 288 Mich at 394.

[3] "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox*, 375 Mich at 242.

[4] "[A] proven lack of subject matter jurisdiction renders a judgment void." *Hatcher*, 443 Mich at 438.

[5] "When there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly." *Jackson City Bank*, 271 Mich at 544.

[6] "When there is a want of jurisdiction over the parties or the subject matter, no matter what formalities may have been taken by the trial court, the action is void because of its want of jurisdiction." *Altman*, 197 Mich App at 472-473.

rules. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Brausch v Brausch*, 283 Mich App 339, 352; 770 NW2d 77 (2009). "The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 51; 731 NW2d 94 (2006). Similarly, the language used in a court rule and its place within the organization of the Michigan Court Rules is important. *Henry*, 484 Mich at 495. Thus, when addressing how to construe a statute or a court rule, one must first look to the language used and give the words their plain and ordinary meaning unless defined otherwise. *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246; 801 NW2d 629 (2010); *Ferguson*, 273 Mich App at 51-52. In this regard, when words are undefined, one may properly consult a dictionary concerning their plain and ordinary meaning. *Cairns v East Lansing*, 275 Mich App 102, 107; 738 NW2d 246 (2007). When the language used in a court rule or statute is clear and unambiguous, no further interpretation is either necessary or permitted. *People v Lown*, 488 Mich 242, 254-255; 794 NW2d 9 (2011); *Ferguson*, 273 Mich App at 52. The overarching rule of statutory construction is that a court must enforce clear and unambiguous statutory provisions as written. *Johnson v Recca*, 492 Mich 169, 175; 821 NW2d 520 (2012). Furthermore, when a court interprets a statute, it may not read anything into an unambiguous statute that is not within the Legislature's manifest intent as derived from the words used in the statute itself. *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011); *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 218; 801 NW2d 35 (2011).

The circuit court is the primary court in Michigan having jurisdiction over civil cases. MCL 600.605 pro-

vides, "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, 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." MCL 600.8301(1) provides for an exception for bringing civil actions in district court "when the amount in controversy does not exceed $25,000.00." The critical phrase "amount in controversy" and the critical word "controversy" are not defined by statute or Michigan caselaw. See *Szyszlo v Akowitz*, 296 Mich App 40, 51; 818 NW2d 424 (2012). But this Court has suggested that "amount in controversy" is "based on the damages claimed." *Id*. See also *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 475; 628 NW2d 577 (2001).

The word "amount" clearly refers to a dollar value because the district court's jurisdictional limit is stated in the dollar value of $25,000. The plain and ordinary meaning of "controversy" is confirmed by consulting a dictionary which defines it as "a [usually] prolonged public dispute concerning a matter of opinion." *Random House Webster's College Dictionary* (1996). Also, "controversy" is defined in *The American Heritage Dictionary of the English Language* (new college ed., 1981), as "[a] dispute, especially a lengthy and public one, between sides holding opposing views." Both dictionaries list "argument" as the synonym of "controversy." These dictionaries also define, respectively, "controvert"—the verb version of "controversy"—as "to argue against; dispute; deny; oppose . . . . ; debate; [and] discuss," and "[t]o raise arguments against; voice opposition to; deny [and] [t]o argue or dispute about; to debate." Also, because the phrase "amount in controversy" concerns a court's jurisdiction, it may have acquired a "peculiar and appropriate meaning in the

law," MCL 8.3a, so it is also appropriate consult a legal dictionary. *People v Steele*, 283 Mich App 472, 488 n 2; 769 NW2d 256 (2009). *Black's Law Dictionary* (9th ed), defines "amount in controversy" as "[t]he damages claimed or relief demanded by the injured party in a lawsuit." But *Black's* also defines the word "controversy" to mean "[a] disagreement or a dispute, [especially] in public [or] [a] justiciable dispute." *Id*. Likewise, *Black's Law Dictionary* defines "controvert" as "[t]o dispute or contest[.]" *Id*.

On the basis of these definitions, we conclude that the plain, ordinary, and legal meaning of "amount in controversy" under MCL 600.8301(1) is the amount the parties to a lawsuit dispute, argue about, or debate during the litigation. While the amount in controversy in a lawsuit will most often be determined by reviewing the amount of damages or injuries a party claims in his or her pleadings, the statute does not explicitly state this. Indeed, the statute does not provide any method for determining the amount in controversy. "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Breidenbach*, 489 Mich at 10 (quotation marks and citation omitted). If the Legislature had intended to establish that the limits of the district court's jurisdiction were to be determined solely on the basis of the amount demanded in the complaint, it could easily have done so, but it did not. Rather, the Legislature used the phrase "amount in controversy," which is the dollar value of the damages that are disputed in the lawsuit. Stated otherwise, it is the amount the parties argue about, debate, or controvert. Here, Moody's pretrial discovery answers, the arguments of Moody's counsel before trial, and the presentation of evidence at trial, all showed that the amount in controversy in that case far ex-

ceeded the $25,000 subject-matter jurisdiction of the district court. MCL 600.8301(1). Hodge similarly presented evidence of damages far exceeding the $25,000 subject-matter jurisdiction of the district court. Without subject-matter jurisdiction over Moody's and Hodge's complaints, the only actions the district court judges could have properly taken would have been to dismiss the cases, MCR 2.116(C)(4), or transfer them to the circuit court, MCR 2.227(A)(1). See *Fox*, 375 Mich at 242; *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002).

We find appellants' arguments to the contrary unpersuasive. First, appellants cite several cases for the proposition that subject-matter jurisdiction is determined only by the allegations in the plaintiff's complaint and prayer for relief. See *Fox v Martin*, 287 Mich 147, 151; 283 NW 9 (1938) ("Jurisdiction does not depend upon the facts, but upon the allegations."); *Zimmerman v Miller*, 206 Mich 599, 604-605; 173 NW 364 (1919); *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 586; 644 NW2d 54 (2002) (" 'A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint.' "), quoting *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996); and *Altman*, 197 Mich App at 472 ("Jurisdiction always depends on the allegations and never upon the facts."). None of these cases is factually similar to the ones at hand—in which a plaintiff has set forth in the complaint a request for relief up to the $25,000 jurisdictional limit of the district court, knowing that the true amount sought exceeded $25,000, and then presented to the jury evidence of and argument for damages far exceeding the jurisdictional limit of the court. Rather, the cited cases address the point in time when a court's jurisdiction is initially determined and also whether the

subject matter of the suit other than the amount in controversy is cognizable in the circuit court. See *Fox*, 287 Mich at 153 (effort to foreclose on an expired lien); *Trost*, 249 Mich App at 587 (libel action); *Grubb Creek Action Comm*, 218 Mich App at 666 (review of drain board's determination of necessity); and *Altman*, 197 Mich App 473-474 (a paternity and custody action). In *Zimmerman*, for instance, the issue was whether the circuit court lost jurisdiction because the plaintiff alleging breach of contract failed to establish damages more than the court's jurisdictional minimum. The Court held on the basis of longstanding caselaw that the "jurisdiction of the court is determined by the amount demanded in the plaintiff's pleadings, not by the sum actually recoverable or that found by the judge or jury on the trial . . . ." *Zimmerman*, 206 Mich at 604-605. Properly understood, these cases stand for the proposition that what the plaintiff alleges he or she will be able to prove at trial, not what the fact-finder later determines (or the amount entered in a judgment), establishes the amount in controversy for the purpose of determining the court's subject-matter jurisdiction.

This principle has ancient roots in Michigan, sprouting from *Strong v Daniels*, 3 Mich 466, 471 (1855), which held "upon general principles . . . that jurisdiction must be determined from the record, and, where it depends on amount, by the sum claimed in the declaration or writ." The Court in a later case stated the rule that "the damages claimed in the declaration or process, and not the amount found by the court or jury upon trial, must be the test of jurisdiction . . . ." *Inkster v Carver*, 16 Mich 484, 487-488 (1868). So, according to these early cases, determining a court's jurisdiction at the outset on the basis of what the plaintiff believed he or she could prove was "the only practical rule . . . ." *Id.* at 488.

The rule requiring the determination of the jurisdictional amount on the basis of the plaintiff's allegations does not support, as here, a plaintiff's artfully pleading a claim for relief ostensibly within the limits of the district court's subject-matter jurisdiction but then placing in dispute through evidence and argument at trial an amount of damages much greater than the court's jurisdictional limit. Furthermore, appellants' contention that the subject-matter jurisdiction of the court may be determined by the amount ultimately awarded by the court, i.e., by limiting judgment to the jurisdictional amount, is contrary to the longstanding rule adopted in *Strong* of determining the subject-matter jurisdiction of the court by the amount in controversy before trial and the determination of the facts by a judge or jury. We recognize dicta in *Strong* about a jury's ability to award more than the jurisdictional limit of the court,[7] but the *Strong* Court's holding was that jurisdiction is determined using the amount claimed *before* the facts are determined. Moreover, the implication of appellants' argument—that subject-matter jurisdiction may be conferred by artful pleading and by limiting a judgment to the district court's jurisdictional limit after the facts are determined—violates the principle that the parties to a lawsuit cannot confer jurisdiction on a court that does not have it. *In re Hatcher*, 443 Mich at 433. A plaintiff may not merely say some magic words and confer jurisdiction where it otherwise would not exist. In fact, a "court must make its own determination regarding the

[7] The Court opined: "It is well settled in actions commenced before a justice of the peace, that the test of jurisdiction is the sum demanded in the writ or declaration, and the justice will not be ousted of his jurisdiction by the jury returning a verdict, or by proof of damages beyond his jurisdiction. In such case the excess may be remitted, and judgment rendered for the balance." *Strong*, 3 Mich at 473.

existence of a statutory basis for jurisdiction." *Id*. And the court must make this jurisdictional determination *before* the fact-finding of the trial has concluded. See *Fox*, 287 Mich 151-152; *Zimmerman*, 206 Mich at 604-605.

Appellants cite other cases regarding federal district court jurisdictional limits, the removal of state court actions to the federal district court, and cases involving entry of default judgments that are simply not relevant to interpreting MCL 600.8301(1) or the Michigan Court Rules. Furthermore, the case of *Brooks v Mammo*, 254 Mich App 486, 489-492, 494 n 3; 657 NW2d 793 (2002), had such a unique procedural history—including the repeal and amendment of pertinent statutes and a trial court that declined to exercise jurisdiction that it actually possessed—that the Court itself referred to *Brooks* as presenting a "factual oddity." Therefore, *Brooks* has virtually no value in deciding the issues presented in these appeals, which involve a very different scenario. The case of *Krawczyk v Detroit Auto Inter-Ins Exch*, 117 Mich App 155; 323 NW2d 633 (1982), rev'd in part on other grounds 418 Mich 231 (1983), also does not assist appellants' argument. The defendant in *Krawczyk* did not initially contend that the district court lacked subject-matter jurisdiction, only that judgment could not be entered for more than the district court's jurisdictional limits. *Krawczyk*, 117 Mich App at 162. The Court held that certain benefits were not recoverable, thus reducing the judgment amount, exclusive of interest, costs, and attorney fees, to within the district court's jurisdictional limits. *Id*. at 163. Our Supreme Court affirmed in part and reversed in part this Court's decision regarding recoverable no-fault benefits, but it did not address the issue of the district court's jurisdictional limits. *Krawczyk*, 418 Mich at 236.

We also find that *Clohset v No Name Corp (On Remand)*, 302 Mich App 550; 840 NW2d 375 (2013), does not alter our analysis of the issues presented in these cases because it is factually unique and addresses the district court's "more specific" equitable jurisdiction regarding "claims arising under chapter 57 of the Revised Judicature Act (RJA), MCL 600.5701 *et seq*., which concerns proceedings to recover possession of premises." *Clohset*, 302 Mich App at 560. The Court held that because the district court's equitable jurisdiction under MCL 600.8302(1) and (3) was invoked, that specific jurisdictional grant took precedence over the more general jurisdictional grant provided in MCL 600.8301(1). *Clohset*, 302 Mich App at 561-562. Therefore, the Court held the district court had jurisdiction to enter the parties' stipulated consent judgment even though it would have otherwise exceeded the jurisdictional limit of MCL 600.8301(1). *Id*. at 562-563. The court reasoned that if the district court erred entering the stipulated judgment, the defendant could not collaterally attack the error "in the 'exercise of jurisdiction.' " *Clohset*, 302 Mich App at 564, citing *Bowie v Arder*, 441 Mich 23, 49; 490 NW2d 568 (1992), quoting *Jackson City Bank*, 271 Mich at 545. The *Clohset* court further noted that a consent judgment is different from a judgment after trial because it represents the agreement of the parties, and, absent fraud, mistake, or unconscionable advantage, it cannot be appealed or set aside without the consent of the parties. *Id*. at 565-566, 572-573. Finally, the Court found applicable the principle that a party may not participate in and harbor error. *Id*. at 566-567. In sum, because the present cases do not involve summary proceedings, the equitable jurisdiction of the district court under MCL 600.8302, or the entry of a stipulated consent judgment, *Clohset* has no application to the circumstances presented in the instant cases.

Appellants' arguments also fail when considered in light of pertinent court rules. Before the trial of these cases, it was patent to the parties and the district court judges that Moody and Hodge were asserting claims for damages far in excess of the district court's jurisdictional limit of $25,000. Given that "a court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford," *Yee*, 251 Mich App at 399, the district court judges should have either dismissed these cases or transferred them to circuit court pursuant to MCR 2.227(A)(1), which provides:

> When the court in which a civil action is pending *determines* that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper. If the question of jurisdiction is raised by the court on its own initiative, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue. [Emphasis added.]

The court rule provides no particular manner in which a court "determines that it lacks jurisdiction of the subject matter of the action . . . ." Rather, it only provides that if the court acts sua sponte regarding its determination, the parties must be "given notice and an opportunity to be heard on the jurisdictional issue." MCR 2.227(A)(1). Further, the court rule plainly requires that the court may consider matters other than the pleadings when considering whether it has subject-matter jurisdiction and whether it must either dismiss or transfer a case to court having jurisdiction. MCR 2.227(A)(1) does not restrict a court in its jurisdictional determination to a review of the pleadings, and such a requirement may not be read into the rule when not derived from its manifest intent as evidenced by the

words of the rule itself. See *Breidenbach*, 489 Mich at 10; *Mich Ed Ass'n*, 489 Mich at 218; *Henry*, 484 Mich at 495.

Also pertinent is MCR 2.116(C)(4), which provides that summary disposition may be entered when "[t]he court lacks jurisdiction of the subject matter." Home Owners moved for summary disposition under this rule in Moody's case after he presented evidence of damages far in excess of the district court's subject-matter jurisdictional limit of $25,000. A motion brought on the grounds of lack of subject-matter jurisdiction may be brought at any time. MCR 2.116(D)(3); *Hillsdale Co Senior Servs*, 494 Mich at 51 n 3. The determination whether the court has jurisdiction when a motion under MCR 2.116(C)(4) is brought is explicitly not restricted to the pleadings alone. MCR 2.116(G)(5) provides (with emphasis added): "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, *must be considered by the court* when the motion is based on subrule (C)(1)-(7) or (10)." See also *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008); *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007). Because Moody and Hodge claimed and presented evidence of damages far in excess of $25,000, "it was the [district] court's duty to take notice of its lack of subject-matter jurisdiction and dismiss [the cases] pursuant to MCR 2.116(C)(4)." *Yee*, 251 Mich App at 399.

To summarize, there is nothing in MCL 600.8301(1), MCR 2.227(A)(1), or MCR 2.116(C)(4) that limits the district court's duty-bound jurisdictional query to the pleadings. Plaintiffs Moody and Hodge plainly claimed damages far in excess of the $25,000 "amount in con-

troversy" limit of the district court's subject-matter jurisdiction. The district court judges were required to either dismiss each plaintiff's case or transfer it to the circuit court. See *Fox*, 375 Mich at 242; MCR 2.227(A)(1); MCR 2.116(C)(4). Because the district court judges failed to do either, the subsequent district court judgments—including that with respect to the providers' claims that were consolidated with those of Moody—are void for want of subject-matter jurisdiction. *Fox*, 375 Mich at 242; *Jackson City Bank & Trust Co*, 271 Mich at 544.

III. DOCKET NO. 301783

The providers argue that they may bring a direct claim against Home Owners for no-fault benefits. See *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35; 645 NW2d 59 (2002). Furthermore, the providers note that even their combined claims did not exceed the court's $25,000 jurisdictional limit and that it was Home Owners that moved to consolidate the providers' claims with those of Moody. Therefore, the providers argue, under the "invited error" doctrine, see *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003), Home Owners cannot complain of any taint from consolidation of the providers' case with Moody's case as the circuit court held.

We find that the providers' invited-error argument is without merit. In *Jones*, 468 Mich at 52 n 6, the Court noted that " '[i]nvited error' is typically said to occur when a party's own affirmative conduct directly causes the error." Under the invited-error doctrine, appellate relief is generally not available because "when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *Id*. A related rule is that "error requiring reversal may only be

predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). See also *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964) ("Error to be reversible must be error of the trial judge; not error to which the aggrieved appellant has contributed by planned or neglectful omission of action on his part.").

Waiver is the intentional relinquishment or abandonment of a known right. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). Here, Home Owners moved to consolidate the providers' case with Moody's case before discovery disclosed that Moody's claims for damages were far in excess of the district court's jurisdictional limit. After discovery disclosed that the amount in controversy with respect to Moody's claims exceeded the district court's jurisdictional limit, Home Owners brought the issue to the attention of the court and requested that Moody's claims be transferred to circuit court. Further, when Moody's counsel presented evidence of claims exceeding the court's jurisdictional limit, Home Owners moved for summary disposition under MCR 2.116(C)(4) because Moody claimed damages far in excess of the district court's $25,0000 jurisdictional limit. Thus, as a factual matter, Home Owners did not waive its jurisdictional arguments and preserved its claim that the district court erred by denying severance of Moody's claims or by not dismissing them.

Moreover, defects in subject-matter jurisdiction cannot be waived and may be raised at any time. *Hillsdale Co Senior Servs*, 494 Mich at 51 n 3. Because subject-matter jurisdiction "concerns the court's power to hear a case, it is not subject to waiver." *Lown*, 488 Mich at

268. In addition, a court must at all times be cognizant of its own jurisdiction and sua sponte question whether it has jurisdiction over a person or the subject matter of an action. *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999); *Yee*, 251 Mich App at 399. "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox*, 375 Mich at 242.

In the providers' case, based on pretrial discovery, it was patently obvious before the trial began, to the district court and to the parties, that Moody's claims for damages far exceeded the $25,000 amount-in-controversy jurisdictional limit of MCL 600.8301(1). Given the clear evidence supporting the determination that Moody's claims for damages exceeded the district court's subject-matter jurisdiction, the district court should have dismissed Moody's claims. *Fox*, 375 Mich at 242. Alternatively, under the Michigan Court Rules, the district court could have transferred Moody's case to the circuit court. MCR 2.227(A)(1). Because the district court failed to either dismiss Moody's claims or transfer them to circuit court, the subsequent proceedings, including the consolidated providers' claims, were void. *Fox*, 375 Mich at 242.

We also reject the providers' argument that their claims may be saved by severing them after the fact of trial and judgment from the extra-jurisdictional claims of Moody. While the providers may bring an independent cause of action against a no-fault insurer, the providers' claims against Home Owners are completely derivative of and dependent on Moody's having a valid claim of no-fault benefits against Home Owners. Specifically, the providers' claims are dependent on establishing Moody's claim that he suffered "accidental bodily injury arising out of the . . . use of a motor

vehicle," MCL 500.3105(1), that they provided "reasonably necessary products, services and accommodations for [Moody's] care, recovery, or rehabilitation," MCL 500.3107(1)(a), and that at the time of the accident, Moody was "domiciled in the same household" as his father who was insured by Home Owners, MCL 500.3114(1). The providers' and Moody's claims with respect to the requisites of Home Owners' liability are therefore identical. Because there is an identity between Moody's claims and those of the providers and because the claims were consolidated for trial, we consider them merged for the purpose of determining the amount in controversy under MCL 600.8301(1). The providers cite *Boyd v Nelson Credit Ctrs, Inc*, 132 Mich App 774, 780-781; 348 NW2d 25 (1984), for the proposition that the claims of individual plaintiffs may not be aggregated to satisfy the circuit court's jurisdictional minimum amount in controversy. We note that *Boyd* has precedential effect under the rule of stare decisis, MCR 7.215(C)(2), but because it was decided before November 1990, *Boyd* is not binding precedent, MCR 7.215(J)(1). Further, because the providers' claims are derivative of Moody's claims, we find applicable the exception noted in *Boyd* that permits aggregating the claims of a single plaintiff for the purpose of determining whether a court has subject-matter jurisdiction because the amount-in-controversy limitation is satisfied or, as here, exceeded. *Boyd*, 132 Mich App at 781.

This analysis is also consistent with the general rule that when the claims of multiple parties are consolidated to facilitate the presentation of proofs, the cases are not merged into one cause. They retain their own separate identities. See *Armstrong v Commercial Carriers, Inc*, 341 Mich 45, 52; 67 NW2d 194 (1954). But this Court has observed that when cases are consoli-

dated under MCR 2.505(A) because of "a substantial and controlling common question of law or fact," the "court rule is silent with regard to whether the consolidated cases are effectively merged into a single case." *Chen*, 284 Mich App at 195. The Court in *Chen*, citing 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2505.3, p 79, discussed two situations. In one, the consolidated cases are ordered tried together " 'but each retains its separate character and requires the entry of a separate judgment.' " *Chen*, 284 Mich App at 195, quoting Longhofer, § 2505.3, p 79. But in the other situation, when actions that are " '*normally* between the same parties' " are consolidated, the " 'actions are joined together to form a single action in which a single judgment is entered.' " *Chen*, 284 Mich App at 195, quoting Longhofer, § 2505.3, p 79 (emphasis added). This latter situation exists "where several actions are pending between the same parties stating claims which could have been brought in separate counts of a single claim." *People ex rel Conservation Director v Babcock*, 38 Mich App 336, 342; 196 NW2d 489 (1972).

Here, there is virtual identity between the providers' and Moody's claims, and Moody could have brought all the claims in a single case in which a single judgment was entered. Indeed, it is Moody's claim against Home Owners that the providers are allowed to assert because the no-fault act states that "benefits are payable to or for the benefit of an injured person," MCL 500.3112. See *Lakeland Neurocare Ctrs*, 250 Mich App at 38-40. But the providers' claims actually belong to Moody because "the right to bring an action for personal protection insurance [PIP] benefits, including claims for attendant care services, belongs to the injured party." *Hatcher v State Farm Mut Auto Ins Co*, 269 Mich App 596, 600; 712 NW2d 744 (2006). Thus, the injured party may waive by agreement his or her claim against

an insurer for no-fault benefits, and a service provider is bound by the waiver. See *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 447-449; 830 NW2d 781 (2013). If an injured party waives a PIP claim, a service provider's remedy is to seek payment from the injured person. *Id*. at 449-450.

We conclude on the basis of the foregoing analysis that there is such an identity between the providers' and Moody's claims that consolidation for trial resulted in merging the claims for purpose of determining the amount in controversy under MCL 600.8301(1). Because the providers' claims are derivative of Moody's claims, the consolidated claims are the equivalent of a single plaintiff asserting multiple claims against a single defendant. See *Boyd*, 132 Mich App at 781.

In sum, Home Owners did not waive its objection to the district court's jurisdiction by initially moving to consolidate the claims of Moody and the providers. The fact that the providers' combined claims were within the district court's $25,000 jurisdictional limit does not cure the jurisdictional defect arising from consolidating the providers' claims with those of Moody given that the amount in controversy with regard to the consolidated claims clearly exceeded the district court's $25,000 subject-matter jurisdiction. See MCL 600.8301(1). The entire judgment that included both the providers' and Moody's claims was void. See *Fox*, 375 Mich at 242; *Jackson City Bank & Trust Co*, 271 Mich at 544. Also, as discussed next, the circuit court did not err by finding that Home Owners was denied a fair trial by counsel's improper remarks, which independently warranted reversal and remand for a new trial concerning the providers' claims. See *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 100-103; 330 NW2d 638 (1982).

IV. DOCKET NOS. 301783 AND 301784: COUNSEL MISCONDUCT

A. PRESERVATION

Moody and the providers argue that Home Owners failed to preserve this issue for appeal and, in fact, waived the issue. Appellants contend that while Home Owners asserted in the trial court and on appeal in the circuit court that alleged attorney misconduct entitled it to a directed verdict, Home Owners did not request a new trial in either court. We disagree.

Contrary to appellants' argument, Home Owners preserved for appeal the issue of Moody's counsel's improper remarks to the jury when Home Owners objected and obtained a ruling on the issue from the trial court. Generally, an issue is properly preserved if it is raised before, addressed by, or decided by the lower court or administrative tribunal. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). And, in *Reetz*, 416 Mich at 101-102, the Court referred to the appellate preservation requirement as the "no objection—no ruling—no error presented" rule. *Reetz* could be read as generally requiring a request for a curative instruction or a motion for a mistrial to preserve appellate review of remarks by counsel. But appellate review without such actions may be granted when counsel's remarks are so improper that they might have denied a party a fair trial. *Id*. at 100. Thus, "incurable errors are not shielded from appellate review because an attorney fails to request what in that case would be a futile instruction." *Id*. at 101.

In these cases, the district court judge abdicated both her responsibility to control the trial proceedings, MCR 2.513(B), and to instruct the jury regarding the law, MCR 2.512(B). See *Reetz*, 416 Mich at 103 n 9 ("[T]he

trial court has a duty to assure that all parties who come before it receive a fair trial. Consequently, if counsel exceeds the proper bounds of argument, a judge should interrupt to correct counsel and take any curative measures which are necessary."); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 293; 602 NW2d 854 (1999) ("The trial court has a duty to assure that the parties before it receive a fair trial."). It is apparent from the record that the district court judge presiding over Moody's case simply allowed Moody's counsel to present conflicting views on an irrelevant issue and that a defense request for a curative instruction would have been futile. Although a motion for a mistrial would have been appropriate, it was not mandatory. *Reetz*, 416 Mich at 102. As a result, this record demonstrates that Home Owners' counsel sufficiently preserved for appellate review the issue of improper remarks of counsel.

B. STANDARD OF REVIEW

Appellate review of claims of misconduct by counsel is de novo to determine whether a party was denied a fair trial. See *Reetz*, 416 Mich at 100. Analysis of such claims requires two steps: (1) did error occur and (2) does it require reversal. *Id*. at 102-103; *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). "A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191; 600 NW2d 129 (1999). Stated otherwise, "[r]eversal is required only where the prejudicial statements of an attorney reflect a studied

purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunt*, 217 Mich App at 95. Proper instructions to the jury will cure most, but not all, misconduct by counsel. See *Reetz*, 416 Mich at 106.

On this issue, the circuit court sitting in its appellate capacity also made a pertinent finding of fact: "Counsel for Moody purposely injected an irrelevant issue to prejudice [Home Owners] and to erroneously suggest to the jury that [Home Owners] may not be liable for any of the claims and can recover from a third-party source." A lower court's finding of fact is reviewed on appeal for clear error. MCR 2.613(C). "A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009).

C. DISCUSSION

Based on our determination that the judgment entered in these cases is void, this issue may be moot. An issue is moot when a judicial determination cannot have any practical legal effect on the existing controversy. *People v Richmond*, 486 Mich 29, 34-35; 782 NW2d 187 (2010). But this Court "may review a moot issue if it is publicly significant and likely to recur, yet may evade judicial review." *Gen Motors Corp*, 290 Mich App at 386. That is the case here. We conclude that the circuit court did not clearly err regarding the facts and did not commit legal error by concluding that the improper remarks of Moody's counsel, in which the providers' counsel joined, denied Home Owners a fair trial, thus warranting reversal and remand for a new trial.

Moody's appellate counsel concedes for the purposes of this appeal that his trial counsel's comments regarding the assigned claims facility were "either wrong or irrelevant." We agree that counsel's arguments were both wrong and irrelevant. Home Owners' policy insuring Moody's father requires it to pay Moody PIP benefits if Moody were determined to be "domiciled in the same household" as his father. MCL 500.3114(1). The assigned claims facility is not liable for no-fault benefits unless

> no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. [MCL 500.3172(1).]

Furthermore, the insurer to which a claim is assigned, if it pays benefits, "is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility." *Id*.

This record supports that the circuit court did not clearly err by holding that Moody's counsel "purposely injected an irrelevant issue to prejudice [Home Owners] and to erroneously suggest to the jury that [Home Owners] may not be liable for any of the claims and can recover from a third-party source." This finding warrants granting a new trial. See *Ellsworth*, 236 Mich App at 191; *Hunt*, 217 Mich App at 95. The district court judge "failed to instruct the jury to ignore these refer-

ences and the references were so numerous that it is doubtful any instruction would have been effective." *Reetz*, 416 Mich at 106.

As noted already, appellants' arguments regarding preservation fail. Appellants' arguments regarding waiver and due process must also fail. Home Owners did not and could not waive the circuit court's authority to grant appropriate relief on appeal of improper remarks of counsel that deny a fair trial. Although Home Owners requested in the district court and on appeal to the circuit court that a verdict be directed in its favor, rather than requesting a new trial, the underlying issue of counsel misconduct was nonetheless preserved and presented on appeal. Appellants' contention that they were denied due process regarding this issue is without merit. The essential requisites of procedural due process are adequate notice, an opportunity to be heard, and a fair and impartial tribunal. *Hughes*, 284 Mich App at 69. Appellants received ample notice and opportunity to be heard on this issue, and nothing suggests that the circuit court was not fair and impartial. Thus, appellants were not denied due process of law.

Moreover, the circuit court possessed the authority to grant a new trial. MCR 7.112 provides that in its appellate capacity "the circuit court may grant relief as provided in MCR 7.216," which in turn provides in pertinent part that the Court of Appeals may, "in its discretion, and on the terms it deems just" enter "any judgment or order or grant further or different relief as the case may require[.]" MCR 7.216(A)(7). Misconduct by a party's attorney that denies another party a fair trial is a basis for granting a new trial. See MCR 2.611(A)(1)(a) and (b); *Reetz*, 416 Mich at 100; *Badalamenti*, 237 Mich App at 289-290. Consequently, we

affirm the circuit court's alternative basis for granting Home Owners relief in these cases.

V. CONCLUSION

In all three cases, we affirm the circuit court's ruling that the district court lacked subject-matter jurisdiction under MCL 600.8301(1). Consequently, the district court judgments are void, and we affirm the circuit court orders vacating those judgments.

We also hold that all no-fault claims for benefits due a single injured party based on the same accidental injuries must be aggregated for the purpose of determining compliance with the district court's subject-matter jurisdiction under MCL 600.8301(1). Consequently, we affirm the circuit court's order vacating the judgment for the providers in Docket No. 301783.

Finally, we affirm the circuit court's determination in Docket Nos. 301783 and 301784 that counsel misconduct denied Home Owners a fair trial and independently warranted reversal and remand for new trial.

We remand to the circuit court for further proceedings consistent with this opinion. As the prevailing parties, appellees may tax costs under MCR 7.219. We do not retain jurisdiction.

FITZGERALD and OWENS, JJ., concurred with MARKEY, P.J.

PEOPLE v WOOLFOLK

Docket No. 312056. Submitted December 11, 2013, at Detroit. Decided February 27, 2014, at 9:00 a.m. Leave to appeal sought.

Deandre M. Woolfolk was convicted following a jury trial in the Wayne Circuit Court, Vera Massey Jones, J., of first-degree murder and possession of a firearm during the commission of a felony. He was sentenced to life in prison without the possibility of parole for the murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appealed, alleging, in part, that the court erred by sentencing him to life in prison without the possibility of parole for a murder that took place on the evening before the day of defendant's 18th birthday.

The Court of Appeals *held*:

1. Defendant failed to show actual and substantial prejudice resulting from the nearly five-year delay in arresting him for the murder. The delay that occurred was reasonable and justified under the circumstances. In the absence of a demonstration of specific prejudice to defendant's defense, or evidence that the delay was caused by deliberate misconduct on the part of the police or the prosecution, the Court of Appeals declined to reverse the convictions on the ground that the three-month delay between the issuance of the felony complaint and defendant's arraignment was a denial of due process. Defendant failed to demonstrate plain error affecting his substantial rights. Defendant's trial counsel was not ineffective for failing to object to the delay.

2. Under the circumstances, the use of a single photograph by the police to help confirm the identity of the person (defendant) a witness had already identified as the shooter did not create a substantial likelihood of misidentification or violate defendant's right to due process. The prior relationship between the witness and defendant established an untainted, independent basis for the in-court identification of defendant by the witness.

3. The "birthday rule" of age calculation applies in Michigan. Under the rule, a person attains a given age on the anniversary date of his or her birth. The common-law rule, that one becomes of full age the first moment of the day before the anniversary of his or her birth, does not apply in Michigan. The common-law rule, to

the extent that it was ever applicable in Michigan, was long ago abrogated by decisions of the Michigan Supreme Court. The Legislature's subsequent statutory enactments must be interpreted with that judicial abrogation in mind.

4. Defendant's convictions are affirmed, however, resentencing with regard to the sentence for the murder conviction is required. Under the birthday rule, defendant was not yet 18 when the murder occurred. The United States Supreme Court provided in *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), that violation of the prohibition against cruel and unusual punishment occurs when individuals under the age of 18 at the time of their crimes are sentenced to mandatory life without the possibility of parole. Defendant was under the age of 18 at the time he killed the victim. The case must be remanded for resentencing in accordance with *Miller*.

Convictions affirmed, remanded for resentencing for the first-degree murder conviction.

CRIMINAL LAW — SENTENCES — MINORS — CALCULATING AGE — BIRTHDAY RULE.

The "birthday rule" of age calculation applies in Michigan; under the birthday rule, a person attains a given age on the anniversary date of his or her birth; the common-law rule of age calculation, under which one becomes of full age the first moment of the day before the anniversary of his or her birth, to the extent that it was ever applicable in Michigan, has been abrogated by decisions of the Michigan Supreme Court.

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

State Appellate Defender (by *Jessica L. Zimbelman* and *Valerie R. Newman*) for defendant.

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

BOONSTRA, P.J. Defendant appeals by right his jury trial convictions of first-degree murder, MCL 750.316,

and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to life in prison without the possibility of parole for the murder conviction, consecutive to two years in prison for the felony-firearm conviction. We affirm defendant's convictions and remand for resentencing in light of *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a shooting in Detroit on January 28, 2007. Witnesses saw a black car drive past a house. Shortly after, three men approached the house and someone shot a gun at the people inside. The victim, Mone Little, was shot and killed. Defendant was eventually identified by a witness, Michael Watson, as the person who fired a gun at the house. Watson had grown up with defendant and knew him by his street name.

Watson gave a statement to the police the day after the shooting. Watson did not implicate defendant at that time and told the police that he did not know who did the shooting. Sometime after the shooting, Watson was arrested in connection with the 2006 shooting of Robert Sawyer, who was related to one of the two men who accompanied defendant the night Little was shot. After Watson was released from custody in 2007 when a key witness against him died, he moved to St. Louis, Missouri, and lived there under an assumed name. Watson was arrested in Missouri in 2009 for unrelated first-degree murder and kidnapping charges. In November 2009, after receiving an anonymous tip that Watson was incarcerated in Missouri, Sergeant Barbara Kozloff (the police officer in charge of the Little case) went to Missouri to speak to Watson. Watson testified that he

told Kozloff what happened the night of the Little shooting, identified the shooter by referring to defendant's nickname, and then identified a photograph Kozloff showed him as being a photograph of defendant. Watson pleaded guilty to a charge of second-degree murder in Missouri in 2011. After Watson was sentenced, Kozloff again contacted him, and Watson stated that he was willing to testify in the Little case. Watson was granted use immunity, so that any information derived directly or indirectly from his testimony or the information he provided could not be used against him in a criminal case, except for impeachment purposes or in a perjury prosecution, and he testified at defendant's trial pursuant to that grant of use immunity.

The jury found defendant guilty of first-degree murder and felony firearm. Defendant was given a mandatory sentence of life in prison for the first-degree murder conviction and sentenced to two years' imprisonment for the felony-firearm conviction. Defendant's official date of birth is January 29, 1989. The offense therefore occurred on the evening before defendant's 18th birthday. Defendant appeals his convictions and his mandatory life sentence.

II. DELAY IN ARREST

Defendant argues that the delay of nearly five years in arresting him for the murder of Little violated his due process rights, or, alternatively, that he was denied the effective assistance of trial counsel because his counsel did not object to the prearrest delay. We disagree. This Court denied defendant's motion to remand for an evidentiary hearing.[1] Review of defendant's claim

[1] *People v Woolfolk*, unpublished order of the Court of Appeals, entered August 21, 2013 (Docket No. 312056).

of ineffective assistance of counsel is therefore limited to any mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant did not raise the issue of prearrest delay in the trial court. Therefore, this Court reviews this issue for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999).

A prearrest delay that causes substantial prejudice to a defendant's right to a fair trial and that was used to gain tactical advantage violates the constitutional right to due process. *United States v Marion*, 404 US 307, 324; 92 S Ct 455; 30 L Ed 2d 468 (1971); *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009); *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). Defendant must present evidence of actual and substantial prejudice, not mere speculation. *Patton*, 285 Mich App at 237; *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). A defendant cannot merely speculate generally that any delay resulted in lost memories, witnesses, and evidence, *Marion*, 404 US at 325-326, even if the delay was an especially long one, *Adams*, 232 Mich App at 134-135.

Here, defendant has not demonstrated actual and substantial prejudice. Defendant has offered on appeal an affidavit asserting that he was at a party at his father's residence "the entire night" in question, that he was not driving and did not have access to a black car that evening, and that no one could testify with certainty regarding either of those circumstances because of the long delay. This affidavit was not introduced in the trial court and is not part of the lower court record. This Court's review is limited to the lower court record. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000), aff'd sub nom

Byrne v Michigan, 463 Mich 652 (2001). Even if we were to consider defendant's affidavit, however, it does not purport to identify any witnesses who would have testified on his behalf but for the delay. Defendant also does not allege that he asked his trial counsel to contact any specific person in an attempt to obtain alibi testimony. We conclude that defendant has not established actual and substantial prejudice. See *Patton*, 285 Mich App at 237; *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000); *Adams*, 232 Mich App at 134.

We further conclude that the delay was reasonable and justified under the circumstances. Defendant argues that the delay had four components: (a) the period between the 2007 incident resulting in Little's death and the anonymous tip in early 2009 regarding Watson's location, (b) the several months between the tip and the police sergeant's first visit to Missouri, (c) the period between the first and second visit to Missouri, and (d) the four months between the issuance of the felony complaint and defendant's arraignment.[2] Defendant suggests that Kozloff should have spoken to Watson while Watson was incarcerated and charged with Sawyer's murder in the spring of 2007, before Watson went to Missouri and began living under a different name. Kozloff testified, however, that she interviewed Watson the day after the shooting and that Watson denied knowing the perpetrators' identities. Watson

[2] Defendant alleges that a delay of four months occurred between the issuance of the complaint and warrant for his arrest and his arraignment. However, the record indicates that defendant was arraigned in the district court on February 23, 2012, that a preliminary examination was held on March 9, 2012, after a continuance was granted to the defense, and that defendant was arraigned in the circuit court on March 20, 2012. Thus, the delay between the issuance of the complaint on November 14, 2011, and defendant's first arraignment is approximately three months and nine days, not four months.

later explained that he did so because someone had threatened him and his family. But while there is no indication in the lower court record that Kozloff interviewed Watson again while he was in custody, there is also no indication that she had any reason to believe that he was not being truthful. During that time, Kozloff was also tracking down another suspect and was not aware that Watson was about to disappear. We hold that this delay was justified under the circumstances. It is appropriate for a prosecuting attorney to wait for the collection of sufficient evidence before charging a suspect, even when that wait is extended by the disappearance of a key witness. See *People v Herndon*, 246 Mich App 371, 390-391; 633 NW2d 376 (2001); *People v Cain*, 238 Mich App 95, 110-111; 605 NW2d 28 (1999). With regard to the other precomplaint claimed periods of delay, we similarly conclude that they were reasonable and justified under the circumstances. Kozloff indicated that she did not wish to interfere with the proceedings in Missouri. Moreover, the prosecution lacked access to and jurisdiction over Watson, its principal witness, during this time.

Finally, with regard to the delay between the issuance of a felony complaint and warrant on November 14, 2011, and defendant's arraignment on February 23, 2012, defendant has not provided this Court with any authority to support the notion that a three-month delay between the issuance of a complaint and an arraignment is unreasonable, especially when for the majority of that time the defendant was incarcerated on other charges. However, no reason for the delay appears in the record. Generally, mere delay between the issuance of a complaint and an arrest and arraignment, absent actual and substantial prejudice, is not a denial of due process. See *Patton*, 285 Mich App at 237. In the absence of a demonstration of specific prejudice to

defendant's defense, or evidence that the delay was caused by deliberate misconduct on the part of the police or the prosecution, we decline to reverse defendant's convictions on the ground that he was prejudiced by this relatively minimal delay. *Id*. Defendant has not demonstrated plain error affecting his substantial rights. *Carines*, 460 Mich at 761.

Because we conclude not only that defendant has not established actual and substantial prejudice, but that the delay was not unreasonable, we do not find defendant's trial counsel ineffective for failing to object to it. An attorney does not have a duty to make a meritless argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III. IDENTIFICATION

Defendant also argues that his trial counsel was ineffective for failing to object to the use of a single photograph in an interview with the only witness (Watson) who thereafter identified defendant in court. A photographic identification procedure violates a defendant's right to due process when it is so impermissibly suggestive that it creates a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.). Showing a witness a single photograph is considered to be one of the most suggestive photographic identification procedures. See *Gray*, 457 Mich at 111. However, whether it violates due process depends on the totality of the circumstances. *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); *Kurylczyk*, 443 Mich at 306 (opinion by GRIFFIN, J.).

In this case, the photograph was used only to help confirm the identity of the person the witness had

already identified—using a nickname—as the shooter. The witness testified that he knew, and grew up with, the shooter. Under these circumstances, the use of a single photograph did not create a substantial likelihood of misidentification and, therefore, did not violate defendant's right to due process. See *Gray*, 457 Mich at 111; *Kurylczyk*, 443 Mich at 302 (opinion by GRIFFIN, J.). Further, the prior relationship and the witness's identification of the shooter by name before seeing the photograph established an untainted, independent basis for the in-court identification. See *Gray*, 457 Mich at 114-115; *Kurylczyk*, 443 Mich at 303 (opinion by GRIFFIN, J.). Any objection by trial counsel would have been meritless. *Snider*, 239 Mich App at 425.

IV. SENTENCING

Defendant argues that his sentence of mandatory life imprisonment without the possibility of parole is cruel and unusual punishment under the United States and Michigan Constitutions. US Const, Am VIII; Const 1963, art 1, § 16. In light of *Miller*, we agree.[3] At first glance, that result would appear obvious, because the murder of Little occurred on the evening *before* defendant's 18th birthday, and *Miller* and its progeny would therefore seem to mandate that defendant be resentenced in accordance with the requirements of the caselaw. However, the issue is more complicated than it first appears, inasmuch as the common-law rule of age

[3] Given that we find *Miller* to be controlling, and that it requires resentencing here, we need not separately address whether defendant's sentence violates Michigan's constitutional proscription of "cruel or unusual punishment." Const 1963, art 1, § 16; see *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992) (interpreting the Michigan Constitution's protection against "cruel or unusual punishment" as offering broader protection than the United States Constitution's protection against "cruel and unusual punishments").

calculation, if applicable here, would deem defendant to have reached the age of 18 *before* shooting Little, in which event *Miller* would not apply and resentencing would not be required. We therefore must decide whether the common-law rule of age calculation applies.

A. *MILLER* v *ALABAMA* AND ITS PROGENY

In *Miller*, 567 US at ___, ___; 132 S Ct at 2460, 2469; 183 L Ed 2d at 414-415, 424, the United States Supreme Court held that the Eighth Amendment's protection against cruel and unusual punishment prohibits sentencing schemes that mandate life in prison without the possibility of parole for those "under the age of 18 at the time of their crimes." The Court held that the sentencing court must take into account the differences among juveniles and their crimes when determining whether life imprisonment without the possibility of parole is the appropriate punishment. *Id*. 567 US at ___ n 8, ___; 132 S Ct at 2469 n 8, 2475; 183 L Ed 2d at 424 n 8, 430.

In *People v Carp*, 298 Mich App 472, 531; 828 NW2d 685 (2012), lv gtd 495 Mich 890 (2013), this Court found, under *Miller*, that MCL 791.234(6)(a), which mandates a sentence of imprisonment for life, without eligibility for parole, for first-degree murder, was unconstitutional as applied to juveniles. This Court held that *Miller* applied to all cases still pending on direct review, although it did not apply to cases on collateral review. *Carp*, 298 Mich App at 511, 522. This Court also noted that, under *Miller*, a "juvenile" must be defined to include not only those individuals who are " 'less than 17 years of age,' " as the term is defined in this state's Code of Criminal Procedure and the Revised

Judicature Act, MCL 764.27; MCL 600.606(1),[4] but additionally must include those individuals "between 17 and 18 years of age." *Carp*, 298 Mich App at 536-537. This Court also held that a sentencing court must evaluate and review the characteristics of youth and the circumstances of the offense delineated in *Miller* and *Carp* in determining whether, following the imposition of a life sentence, a juvenile is to be deemed eligible or not eligible for parole, and that the parole board must respect the sentencing court's decision by providing a meaningful determination and review when parole eligibility arises. *Id*. at 538.

Neither *Miller* nor *Carp*, nor any applicable statute, provides a means for calculating *when* a defendant reaches the age of 18. Resolution of this question requires this Court to decide, as an issue of first impression, whether the common-law rule of age calculation or, alternatively, the so-called "birthday rule," governs age calculation under Michigan law.

B. THE COMMON-LAW RULE OF AGE CALCULATION

Contrary to common assumption or understanding, the common law has long held that an individual's age is computed differently than time is computed under general computation principles. The common-law rule has been stated thusly:

> Where the common law prevails, the general rule for the computation of time is to exclude the first and include the last day. For over 200 years, the common law has, however, recognized a remarkable exception to the foregoing rule, to the effect that in computing a person's age the day upon which that person was born, even though he was born on

[4] Although not referred to in *Carp*, we note that the Michigan Probate Code similarly defines "juvenile" as a person who is "less than 17 years of age." MCL 712A.1(1)(h).

> the last moment thereof, is included, and he therefore reaches his next year in age at the first moment of the day prior to the anniversary date of his birth. [*Nelson v Sandkamp*, 227 Minn 177, 179; 34 NW2d 640 (1948) (citations omitted).]

Stated another way, under the common law, "[t]he law ordinarily taking no cognizance of fractions of days, one becomes of full age the first moment of the day before" the anniversary of his or her birth. *United States v Wright*, 197 F 297, 298 (CA 8, 1912).[5] See also Anno: *Inclusion or Exclusion of the Day of Birth in Computing One's Age*, 5 ALR2d 1143, § 1 (1949) ("This rule constitutes a thoroughly entrenched exception to the general method of measuring time by excluding one terminal day.") (collecting cases).[6]

Courts of numerous other state jurisdictions also have followed the common-law rule, in various contexts. See, e.g., *In re APS*, 304 Ga App 513, 516; 696 SE2d 483 (2010) ("The application of the common law

---

[5] The United States Court of Appeals for the Eighth Circuit in *Wright* did not indicate whether it was applying the common law of a particular state or federal common law; it cited only cases from the state courts in Delaware, Indiana, and Kentucky. The issue presented in *Wright* concerned the right of the federal government to set aside a lease of real property located in the Quapaw reservation that had been entered into by a member of the Quapaw Tribe who was a minor at the time of entering into the lease. While it has long been held that "[t]here is no federal general common law," *Erie R Co v Tompkins*, 304 US 64, 78; 58 S Ct 817; 82 L Ed 1188 (1938), specialized areas of post-*Erie* federal common law have developed. See Wright, Miller & Cooper, 19 Fed Prac & Proc, Jurisdiction (2d ed), § 4514.

[6] Our citation of cases following the common-law rule, or alternatively the birthday rule, is intended to be exemplary, not exhaustive. See also Turner, *The Maryland Survey*: *2002-2003*: *Recent Decision*: *The Court of Appeals of Maryland*, 63 Md L Rev 992 (2004); 5 ALR2d 1143, § 3, p 1147; 42 Am Jur 2d, Infants, § 10; 45 Am Jur Proof of Facts, 2d, 631, Age of Person, § 2; Williston, Contracts (4th ed), 9.3; 43 CJS, Infants, § 2; 86 CJS, Time, § 4.

rule in this State occurred at least as early as 1930, it was applied to juvenile court jurisdiction in 1980, and it has remained unchanged by the legislature. . . . [W]e therefore affirm."); *Mason v Baltimore Co Bd of Ed*, 143 Md App 507, 515; 795 A2d 211 (2002) ("In the absence of Maryland authority to the contrary, we shall follow the common law rule and hold that appellant attained age eighteen, thereby removing the disability of infancy, on April 3, 1997."); *Velazquez v State*, 648 So 2d 302, 304 (Fla Dist Ct App, 1995) ("[T]he common-law rule for determining a person's age is that a person reaches a given age at the earliest moment of the day before the anniversary of his birth. . . . While we conclude that . . . the common law controls in this case, we note that the modern trend is to adopt what has been described as the more commonsense rule that a person attains a certain age on that person's corresponding birthday."); *State of New Jersey in the Interest of FW*, 130 NJ Super 513; 327 A2d 697 (Juvenile and Domestic Relations Ct, 1974) (applying the common-law rule in finding that the juvenile court lacked jurisdiction where the offense was committed at 5:03 a.m. on the day before the defendant's 18th birthday); *State v Brown*, 443 SW2d 805, 807 (Mo, 1969) ("[A] person reaches his next year in age at the first moment of the day prior to the anniversary of his birth. . . . This exception has been followed for such a long period of time that it has achieved a status of its own and should be followed in the absence of a statutory enactment to the contrary."); *Fox v Manchester*, 88 NH 355, 361-362; 189 A 868 (1937), quoting *Wright*, 197 F at 298 (" 'The law ordinarily' takes 'no cognizance of fractions of days, one becomes of full age the first moment of the day before his twenty-first anniversary.' "); *Inhabitants of Town of Gouldsboro v Inhabitants of Town of Sullivan*,

132 Me 342, 343; 170 A 900 (1934) (an individual "attained full age July 18, 1922, the day preceding the twenty-first anniversary of his birth"); *Thomas v Couch*, 171 Ga 602, 606; 156 SE 206 (1930) ("One becomes of full age on the day preceding the twenty-first anniversary of his birth, on the first moment of that day."); *Frost v State*, 153 Ala 654, 664; 45 So 203 (1907), overruled on other grounds by *Graves v Eubank*, 205 Ala 174, 176 (1921) ("[A] person reaches a designated age on the day preceding the anniversary of his birth."); *Erwin v Benton*, 120 Ky 536, 549; 87 SW 291 (Ky App, 1905) ("In law a man is twenty-one years old on the day preceding his twenty-first birthday . . . ."); *Montoya De Antonio v Miller*, 7 NM 289, 291; 34 P 40 (1893) ("[T]he common law fixes the beginning of such period on the day preceding the twenty-first anniversary of birth . . . ."); *Ross v Morrow*, 85 Tex 172, 175; 19 SW 1090 (1892) ("The rule adopted in computing the age of a person is, that the day of his birth is included" so that age advances the day before the anniversary of birth.); *Bardwell v Purrington*, 107 Mass 419, 425 (1871) ("A person who was born on the eighth day of September 1852 would become of the full age of twenty-one years if he should live to the seventh day of that month in 1873."); *Wells v Wells*, 6 Ind 358, 359 (1855) ("If from this statement we fix his birth-day at September 23, 1828, he was of age September 22, 1849."); *State v Clarke*, 3 Del (3 Harr) 557, 558 (Ct of Oyer and Terminer, 1840) ("A person is 'of the age of twenty-one years' the day *before* the twenty-first anniversary of his birth day.").

Similarly, like the United States Court of Appeals for the Eighth Circuit in *Wright*, various federal courts have applied the common-law rule. See, e.g., *Fisher v Smith*, 319 F Supp 855, 858 (WD Wash, 1970) ("The common law rule for computing age is that one is

deemed to have reached a given age at the earliest moment of the day preceding an anniversary of birth.") (applying the common law of the state of Washington); *Turnbull v Bonkowski*, 419 F2d 104, 105 (CA 9, 1969) ("The logic of the common law rule is apparent. Since one is in existence on the day of his birth, he is, in fact, on the first anniversary of his birth, of the age of one year plus a day or some part of a day. The appellant did, then, reach the age of nineteen years on the day before the nineteenth anniversary of his birth . . . .") (applying the common law of the state of Alaska); *Taylor v Aetna Life Ins Co*, 49 F Supp 990, 991 (ND Tex, 1943) ("A year must be counted, not from the day of birth, but from the preceding day . . . . That has been the rule for so long that it may not now be successfully attacked, nor need it be labored.") (applying the common law of the state of Texas); *In re Richardson*, 20 F Cas 699, 701 (Cir Ct, D Mass, 1843) ("Thus, if a man should be born on the first day of February, at 11 o'clock at night, and should live to the 31st day of January, twenty-one years after, and should at one o'clock of the morning of that day make his will, and afterwards die by six o'clock in the evening of the same day, he will be held to be of age, and his will be adjudged good.").

C. THE BIRTHDAY RULE

By contrast, certain other jurisdictions[7] have rejected the common-law rule in favor of the birthday rule, where "a person attains a given age on the anniversary date of his or her birth." *In re Robinson*, 120 NC App 874, 877; 464 SE2d 86 (1995). The California Supreme Court, for example, applied the birthday rule in *In re Harris*, 5 Cal 4th 813, 844-845; 21 Cal Rptr 2d 373; 855

[7] See, generally, 1 Restatement Contracts, 2d, § 14, Infants, comment *a*, p 37 (stating generally that "[t]he birthday rather than the preceding day is the date of majority in some States").

P2d 391 (1993). The court in *Harris* did so not by judicial fiat, but rather did so on the basis of the fact that the California Legislature had explicitly abrogated the common-law rule of age calculation by adopting a statute stating that age must be calculated " 'from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority' " (which the court interpreted as an intent to adopt the birthday rule). *Id*. (citation omitted).

In *State v Alley*, 594 SW2d 381, 382 (Tenn, 1980), the Supreme Court of Tennessee, while noting that the common-law rule was generally applicable in Tennessee, held that a specific statutory provision, dealing with trying minor defendants as adults for the crime of murder if they were " 'fifteen (15) or more years of age' " at the time of the offense, required the calculation of that age by use of the birthday rule. *Id*. at 383 (citation omitted). In doing so, the court recognized that the "legislative intent is not apparent from this phraseology," but it inferred a legislative intent favoring the birthday rule, in the context of the statute, from the statute's later references to "birthday" (in fixing the time for holding or transferring the defendant according to the defendant's 18th birthday). The court concluded that it was "evident that the Legislature had in mind birthdays and ages in the conventional, usual and ordinary sense of these words." *Id*.

Meanwhile, other states appear to have chosen, in the absence of statutory guidance, to adopt the birthday rule rather than the established common-law rule. See, e.g., *State v Wright*, 24 Kan App 2d 558; 948 P2d 677 (1997) (adopting the birthday rule and rejecting the "fraction of a day" argument when the offense occurred on the defendant's birthday, but before the anniversary of the moment of his birth); *In re Robinson*, 120 NC App

at 877 ("Since North Carolina courts have not expressly decided which rule applies, we hold today that the 'birthday rule' is the better approach and apply it to respondent under [the relevant juvenile delinquency statute]."); *Commonwealth v Iafrate*, 527 Pa 497, 502; 594 A2d 293 (1991) ("For purposes of the [Juvenile] Act, an individual becomes a year older on the day of his birthday and not the day before."); *Fields v Fairbanks North Star Borough*, 818 P2d 658, 661 (Alas, 1991) ("We decline to follow [the common-law rule] which defies logical explanation and which is utterly inconsistent with popular and legal conceptions of time and birthdate."); *State v Hansen*, 304 Or 169; 743 P2d 157 (1987) ("Unofficial commentary [in accordance with the birthday rule] to a separate, albeit related, provision of a code is a thin reed on which to base the interpretation of a statute. Nevertheless, we are convinced that the interpretation is correct because it accords both with the popular method for computing age and with the method by which the passage of time is computed in other areas of the law. . . . Moreover, so far as we are able to ascertain, no reported decision of any Oregon court has ever used the common-law method for calculating age."); *Patterson v Monmouth Regional High Sch Bd of Ed*, 222 NJ Super 448, 454-455; 537 A2d 696 (1987) (opting for birthday rule over common-law rule for reasons of "uniformity and familiarity" so as to "provide[] an infant more than a full measure of protected status"); *United States v Tucker*, 407 A2d 1067, 1070 (DC App, 1979) ("In the absence of any reasons supported in logic, we decline to follow a rule which defies human experience by determining age on the day preceding one's birthday. Moreover, we believe that in view of the rehabilitative purposes of our juvenile justice system, D.C. Code 1973, § 16-2301(3) should be strictly construed against the prosecution and in favor

of the person being proceeded against."); *State v Stangel*, 284 NW2d 4, 5-6 (Minn, 1979) (notwithstanding *Nelson*, 227 Minn 177, rejecting common-law rule in favor of birthday rule in liberally construing Juvenile Court Act enacted after *Nelson*, stating that "the common-law rule is so at odds with common understanding that it should be abandoned, at least in determining when a person was under the age at which the district court gains jurisdiction over people charged with committing criminal acts"); *People v Stevenson*, 17 NY2d 682, 683; 269 NYS2d 458; 216 NE2d 615 (1966) (adopting the reasoning of the dissent in *People v Stevenson*, 23 AD2d 472, 476; 262 NYS2d 238 (1965), rev'd 17 NY2d 682 (1966) (Christ, J., dissenting) ("I am confident that the common understanding [of the statute granting the Family Court jurisdiction over juveniles] is that it means the birth date itself shall control, not some artificial arrangement resulting in the day before the birth date."); *In re Smith*, 1960 Okla Crim 41; 351 P2d 1076, 1078 (Okla Crim App, 1960) (denying writ of habeas corpus, concluding that "where reference is made in the penal statutes to a 'male over eighteen years of age', that any fractional part, or the first moment, of the 18th birthday is the drawing line and constitutes him over 18 years of age . . . .").

D. RATIONALE FOR COMMON-LAW RULE

"Although the point of origin of the [common-law] rule is uncertain, it clearly was a part of the English common law and appeared in cases decided as early as the seventeenth century." *Patterson*, 222 NJ Super at 452, citing *Nichols v Ramsel*, 2 Mod 280; 86 Eng Reprint 1072 (1677); *Herbert v Turball*, 1 Keble 590; 83 Eng Reprint 1129; 1 Sid 162; 82 Eng Reprint 1033 (1663). See also 1 Blackstone, Commentaries Abridged

(9th ed) (Chicago: Callaghan & Co, 1915), p 92 ("So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant and so styled in law.").

Perhaps the earliest expression in this country of the rationale for the common-law rule of age calculation was that of the Court of Oyer and Terminer of Delaware in 1840:

> On this question the law is well settled; it admits of no doubt. A person is "of the age of twenty-one years" the day *before* the twenty-first anniversary of his birth day. It is not necessary that he shall have entered upon his birth day, or he would be more than twenty-one years old. He is, therefore, of age the day before the anniversary of his birth; and, as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birth day; and upon any and every moment of that day may do any act which any man may lawfully do. [*Clarke*, 3 Del (3 Harr) at 558, citing 1 Chit Gen Prac, 766 (emphasis in original).]

Subsequent decisions have focused on the "no fractions of a day" component of that expression to highlight the fact that age changes not only as of the day before one's birthday, but as of the first moment of that day. See, e.g., *Wright*, 197 F at 298 ("[t]he law ordinarily taking no cognizance of fractions of days, one becomes of full age the first moment of the day before" the anniversary of his birth). As to that component of the analysis, the United States Supreme Court has recognized that the "no fractions of a day" rule is not absolute:

> It is true that for many purposes the law knows no division of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into the

> fractions of any other unit of time. The rule is purely one of convenience, which must give way whenever the rights of parties require it. . . . The law is not made of such unreasonable and arbitrary rules. [*Louisville v Savings Bank*, 104 US (14 Otto) 469, 474-475; 26 L Ed 775 (1881) (quotation marks and citations omitted).]

In expounding this principle, the United States Supreme Court in *Louisville* discussed Justice Story's opinion in *In re Richardson*, 20 F Cas 699, 702; 2 Story 571 (Cir Ct, D Mass, 1843), to emphasize the proposition that fractions of a day should be considered " 'whenever it will promote the purposes of substantial justice.' " *Louisville*, 104 US at 476, quoting *In re Richardson*, 20 F Cas at 702.

In *In re Richardson*, Justice Story explained that the rule that there is no fraction in a day is a limited doctrine to be applied only where it will promote justice in a case:

> I am aware, that it is often laid down, that in law there is no fraction of a day. But this doctrine is true only sub modo, and in a limited sense, where it will promote the right and justice of the case. *It is a mere legal fiction, and, therefore, like all other legal fictions, is never allowed to operate against the right and justice of the case.* On the contrary, the very truth and facts, in point of time, may always be averred and proved in furtherance of the right and justice of the case . . . . The common case put to illustrate the doctrine, that there is no fraction in a day, is the case, when a person arrives at majority. . . . Here the rule is applied *in favor of the party*, *to put a termination to the incapacity of infancy*. . . . So that we see, that there is no ground of authority, and, certainly, there is no reason to assert, that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, *common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice. Indeed, I know of no case, where the doctrine of relation, which is a mere*

> *fiction of law, is allowed to prevail, unless it be in furtherance and protection of rights, pro bono publico.* [*In re Richardson*, 20 F Cas at 701-702 (citations omitted; emphasis added).]

On the basis of these articulations, it is arguable that the common-law rule of age calculation (sometimes referred to as the "coming of age rule") is a flexible concept, designed to be applied only when it "promotes substantial justice" or benefits a party by extending the protections afforded to a minor. Indeed, certain courts that have rejected the common-law rule in favor of the birthday rule have so argued:

> A fiction which takes away some of the protections of minority status by eliminating any period during which one is actually an infant and requiring that infant to be treated as one of full age should be rejected. That is exactly what the coming of age rule does. . . . We think that a calculation method which foreshortens the protections with which we blanket infants must be discarded in favor of the uniform rule which provides an infant more than a full measure of protected status. For these reasons, we hold that the common law coming of age rule should be rejected in favor of our ordinary rules of calculation in deciding the date of the anniversary of one's birth. [*Patterson*, 222 NJ Super at 454-455.]

Before exploring that further, however, we note that the "no fractions of a day" concept, in and of itself, is not necessarily pertinent to the question before us, which is whether to apply the common-law rule or the birthday rule. That is because the "no fractions of a day" concept would appear to apply in *either* event, regardless of which rule is applied, and serves merely to address the related inquiry of whether age changes at a particular point in time during a day. The common-law rule and the birthday rule determine to *which* day (the birthday or the day

before) the "no fractions of a day" concept should be applied. As the court in *Velazquez* noted:

> In order to avoid disputes, the common-law rule regarding age does not recognize fractions of a day. Under the common-law rule a person is deemed to have been born on the first minute of the day of his birth. In accordance with this principle, the common-law rule for determining a person's age is that a person reaches a given age at the earliest moment of the day before the anniversary of his birth. The underlying rationale for this rule is that a person is in existence on the day of his birth; thus, he has lived one year and one day on the first anniversary of his birth.
>
> . . . *Like the common-law rule, the birthday rule does not recognize fractions of a day*; thus, under the birthday rule a person attains a given age at 12:01 a.m. or at the beginning of the anniversary date of the person's birth. [*Velazquez*, 648 So 2d at 303-304 (emphasis added; citations omitted).]

This is further apparent from the language of *Clarke* itself, which found *first* that the common-law rule applied, and *then* found that in applying the common-law rule, age was established as of the first moment of the day. *Clarke*, 3 Del (3 Harr) at 558 ("He is, therefore, of age the day before the anniversary of his birth; and, as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birth day; and upon any and every moment of that day may do any act which any man may lawfully do.").

It is apparent, therefore, that the rationale for the common-law rule, while linked to the "no fractions of a day" concept, has its essential underpinnings elsewhere. Specifically, the common-law rule is premised on the rationale that "[a] person is in existence on the day of his birth. On the first anniversary he or she has lived

one year and one day." *Alley*, 594 SW2d at 382; see also *In re Harris*, 5 Cal 4th at 844; *Velazquez*, 648 So 2d at 304. In other words, the common-law rule is premised on the fact that a person is alive on the day of one's birth and, therefore, that day should be counted in the computation of one's age, so that the last day of the succeeding year (on which age therefore changes) is the day before one's birthday.

The logic of the common-law rule has long been the subject of debate. The court in *Alley* concluded that "[t]he logic of the common law rule is unassailable." *Alley*, 594 SW2d at 382. Yet assailed it has been since at least early in its application in this country. As the court stated in *Tucker*, 407 A2d at 1070, in opting for the birthday rule, "this common law exception was criticized as early as 1876 as being contrary to reason and common sense. See 1 Minor's Institute [2d ed, 472 (1876)] at 472-73." See also *Patterson*, 222 NJ Super at 453 ("This rule has been criticized regularly over the course of its history. . . . If, as it has been said, the logic of the coming of age rule is unassailable, the logic of our computation rule, which would skip the day of birth recognizing that few people actually have lived out the entirety of that day, is equally unassailable.") (citations omitted). Yet, others have criticized the critics of the common-law rule. See, e.g., 5 ALR2d 1143, 1145, § 2 (footnotes omitted) ("[Professor] Minor's assertion that at early common law attainment of a given age was delayed until the anniversary of birth is not supported by his single citation, and existence of authority for his conclusion is most doubtful."); *Erwin*, 120 Ky at 550 (finding that the common-law rule "is supported by the great majority of the adjudged cases; indeed, the courts seem quite unanimous on the point. . . . Professor Minor assails the doctrine as absurd. . . . Redfield also seems to regard it as 'a blunder.' . . . But it has been too

long established now to depart from it, particularly as no good could come from the change.") (citing 1 Minor's Institute, p 514, and Redfield, Law of Wills, p 19; other citations omitted).

What appears true regardless of the logic, or lack thereof, of either the common-law rule or the birthday rule, is that *both* are legal fictions. As the court stated in *Patterson*:

> Whether we compute age by the common-law method (counting the date of birth), or by our uniform method (excluding the date of birth) we are diverging from what, in fact, is real. Only the Roman principle of *de momento en momentum* reflects the reality of time: that a person comes to his next age one year from the exact moment of the person's birth not from the earliest or latest instant of the day on which he was born. There are good reasons involving uniformity of approach and avoidance of litigation to reject a rule requiring proof as to the very second of one's birth in order to ascertain one's rights some years later. *The only question is what fiction shall take its place. Both the common law coming of age rule and the ordinary calculation rule are such fictions*. [*Patterson*, 222 NJ Super at 453-454 (emphasis added).]

Further, given that both rules are fictions, the above-quoted commentary of Justice Story, although stated in dicta and with reference specifically to the "no fraction of a day" fiction, arguably applies to either rule. That is, according to Justice Story's reasoning, all such fictions are not without exception, but instead should be applied "whenever it will promote the purposes of substantial justice" and "in furtherance and protection of rights," and should "never [be] allowed to operate against the right and justice of the case." *In re Richardson*, 20 F Cas at 701-702.

It has thus been suggested that the common-law rule of age calculation should be applied only when doing so

favors the interests of the minor. See, e.g., 5 ALR2d 1143, 1145, § 2, n 5 ("Acceleration of the legal advantage of majority attained as the reason for inclusion of the day of birth in computation of age was suggested in a dictum by Judge Story in a bankruptcy case, *Re Richardson* . . . where it was stated . . . 'Here the rule is applied in favor of the party, to put a termination to the incapacity of infancy.' ") (citing *In re Richardson*, 20 F Cas at 701-702). Further, the court in *Tucker* has opined, with regard to the common-law rule, that "[t]his legal fiction therefore was originally established *to aid persons who would experience hardship or loss by virtue of the general rule of computation*." *Tucker*, 407 A2d at 1070 (emphasis added).

Whether that assessment is accurate or not, our review of the caselaw suggests that the common-law rule has not always been applied in furtherance of such an objective. Rather, where the common-law rule has been held to apply, it has at least sometimes been applied irrespective of the perceived equities. And other courts have been critical as a result. See, e.g., *Tucker*, 407 A2d at 1070 ("The courts which have adopted it have candidly admitted that rather than being persuaded by the soundness of its application, they have adopted it on the basis that it was so well established over a long period of time that the rule attained an independent status of its own."); *Patterson*, 222 NJ Super at 453 ("The courts of other jurisdictions, relying mainly on the longevity of the rule, have *listlessly* continued to apply it as an exception to ordinary rules of calculation.") (emphasis added; citation omitted).

The problem, of course, in applying a legal fiction when and if a court perceives it as "promot[ing] the purposes of substantial justice" and "in furtherance and protection of rights," as Justice Story suggested, is

that persons (and courts) can have differing viewpoints regarding when those ends are achieved. For example, a criminal defendant and a crime victim are likely to perceive them quite differently. Moreover, such a fluid application does not lend itself to the goal of clarity in the law; rather, clarity would give way to flexibility on the part of the courts in applying the rule when and only when they perceived it as promoting justice.

Further, were we to find that the common-law rule applies in Michigan, and that it has been applied without regard to whether a party is affected positively or negatively, we then would face the dilemma of whether to, "listlessly" or not, follow the caselaw that has preceded us, under the long-standing doctrine of stare decisis, see *Parker v Port Huron Hosp*, 361 Mich 1, 10; 105 NW2d 1 (1960), and we would plunge into the age-old debate about when, if at all, the courts should change the common law. See, e.g., *Woodman v Kera LLC*, 486 Mich 228, 257-258; 785 NW2d 1 (2010). And in that regard, we are mindful that we are an error-correcting court. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). As such, we must confine our role to that function. Were we inclined to effect a significant change to Michigan law, such as by abrogating established common law in favor of a rule more to our liking, "prudence would counsel against it because such a significant departure from Michigan law should only come from our Supreme Court [or the Legislature], not an intermediate appellate court." *Teel v Meredith*, 284 Mich App 660, 666; 774 NW2d 527 (2009) (declining to recognize a cause of action for spoliation of evidence); see also *Dahlman v Oakland Univ*, 172 Mich App 502, 507; 432 NW2d 304 (1988) (declining to recognize a cause of action for breach of an implied covenant of good faith and fair dealing "because

such a radical departure from the common law and Michigan precedent should come only from the Supreme Court.")

We will consider these and other issues as we evaluate the state of the law as it has been applied in Michigan.

E. APPLICATION IN MICHIGAN

It appears from our review that no Michigan court has directly considered the issue before us. We therefore address the issue as a matter of first impression. In doing so, we will first endeavor to discern whether *Miller* mandates, or other federal authorities suggest, a particular outcome in Michigan. We will then address Michigan law as reflected in the Michigan Constitution and in expressions of the Michigan Legislature, Michigan Supreme Court, and Michigan Attorney General.

In undertaking this analysis, we are mindful that our decision could have ramifications far beyond the narrow factual circumstance that is presented in this case. As important as our decision certainly is in the context of defendant and this case, the determination of the precise moment at which age is determined could have broad implications in other areas as well, e.g., in determining who is eligible to vote, to consume alcoholic beverages, to marry, and to enter into contracts, as well as in determining who may be required to attend school (and when).[8] Our decision further may have implica-

[8] Our decision further may have implications regarding the processes that are employed by those who are responsible for ascertaining whether such eligibility or other requirements have been met and for enforcing the law in those circumstances. Generally, the documentation utilized for such purposes includes a proof of age in the form of a photographic identification card, a birth certificate, or an affidavit or other statement reflecting date of birth. See, e.g., MCL 168.495 (voting eligibility);

tions in the context of various criminal prosecutions, such as criminal sexual conduct charges that may require a precise determination not only of the defendant's age, but also that of the victim. See, e.g., MCL 750.520b to MCL 750.520d. Given the broad reach of these and other matters potentially implicated by the decision before us, we are particularly cognizant of the need for clarity in the law.[9]

As will become apparent as we progress through our analysis, we note at the outset that none of the authorities we have reviewed appears to definitively answer the question before us to any level of certainty. This indeed gives us pause, given that we are mindful that our proper role is to interpret, not to make, the law. See *Mich Residential Care Ass'n v Dep't of Social Servs*, 207 Mich

---

MCL 436.1203 (alcoholic liquor sales); MCL 551.103 (marriage eligibility); MCL 600.1403(2) (minor's ability to void a contract not available if minor represented with written document that he or she had reached the age of majority). We think it likely that persons charged with confirming age by such mechanisms typically, according to the common understanding of age calculation, assess age according to the date of birth reflected in the documentation (as would be consistent with the birthday rule), rather than by a computation that subtracts one day from the age suggested by the documentation (as would be consistent with the common-law rule of age calculation).

[9] Indeed, other courts have properly foreshadowed additional issues that could arise in applying the common-law rule of age calculation:

> Because the rule is footed in a calculation at the point of one's birth, it does not simply affect the single transition between infancy and minority but every single relevant annual calculation from birth for a lifetime. This underscores a separate problem. How does the coming of age rule interface with the regulatory schemes in effect in this State? Did the Legislature intend that one could drive on the eve of his or her 17th birthday, vote on the eve of his or her 18th birthday and consume alcoholic beverages on the eve of his or her 21st birthday? Does the coming of age rule constitute a defense in a case in which one is charged with engaging in such act prior to the statutorily prescribed date? [*Patterson*, 222 NJ Super at 455 n 4.]

App 373, 377; 526 NW2d 9 (1994). We also note that defendant does not specifically argue that this Court should abrogate the common law by adopting the birthday rule; rather, defendant argues that the United States Supreme Court required the use of the birthday rule in *Miller* or, in the alternative, that the Michigan Legislature has already adopted such a rule. Those arguments would seem to presume, of course, that the common-law rule was previously applicable in Michigan. We examine each of those arguments, and others, in this opinion.

1. *MILLER*

Defendant contends that a reference to the term "birthday" in Justice Alito's *dissent* in *Miller*, 567 US at ___; 132 S Ct at 2489; 183 L Ed 2d at 445 (in the context of a murder occurring "just nine months shy of [the perpetrator's] 18th birthday"), as well as language from Justice O'Connor's *dissent* in *Roper v Simmons*, 543 US 551, 587, 598; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (which presented the very "nine month" circumstance later referenced by Justice Alito in his *dissent* in *Miller*), indicate that the majority opinion in *Miller* meant to establish a blanket rule for age calculation, essentially wiping out the common-law rule in all jurisdictions. Generally speaking, however, we do not believe that isolated references in dissenting opinions suffice to accomplish a change in the law. See *Rohde v Ann Arbor Pub Sch*, 265 Mich App 702, 707; 698 NW2d 402 (2005) (dissenting opinions are neither precedential nor binding). Simply put, the issue before us was not presented in *Miller* (where the defendants were 14 years old at the time of the murder) or *Roper* (where, as noted, the defendant was approximately "nine months shy" of turning 18) and in that context a passing reference to the word "birthday" in a dissenting opinion would not have merited a response from the

majority to put a fine point on an issue that was neither before the Court nor intended to be parsed by either the dissent or the majority.

The circumstances of *Miller* further suggest that the Supreme Court did not consider the issue now before us. The two defendants in *Miller* were convicted, *inter alia*, of capital crimes. One was convicted, under Arkansas law, of capital felony murder. The other was convicted, under Alabama law, of murder in the course of committing an arson. *Miller*, 567 US at ___; 132 S Ct at 2461-2463; 183 L Ed 2d at 415-417. In neither defendant's case was it necessary to precisely calculate the defendant's age according to either the common-law rule of age calculation or the birthday rule. Both of the defendants were 14 years old at the time of their respective crimes.

Were it to have considered the issue, we believe the Supreme Court would have found the underlying law in Arkansas and Alabama (regarding age calculation) muddled and worthy of distinguishing and clarifying. The Arkansas Juvenile Code, for example, defines a "juvenile" in pertinent part as "an individual who is . . . [f]rom birth to eighteen (18) years of age . . . or [who is] [a]djudicated delinquent . . . prior to eighteen (18) years of age and for whom the juvenile division of circuit court retains jurisdiction[.]" Ark Code Ann 9-27-303. It does not indicate how age is to be calculated. The court in *Allen v Baird*, 208 Ark 975; 188 SW2d 505 (1945), in considering statutory age eligibility requirements for employment in the Little Rock police and fire departments, used language consistent with the birthday rule in concluding that persons are not "over" a given age "until they reach their [next] birthday." *Id*. at 977.[10]

[10] We note that the holding in *Allen* is expressly contrary to the holding of our Michigan Supreme Court in *Bay Trust Co v Agricultural Life Ins Co*, 279 Mich 248, 252; 271 NW 749 (1937), discussed later in this opinion.

The court provided no analysis, however, and the circumstances presented no need for a pinpoint computation of time.

In Alabama, by contrast, the courts had long endorsed the common-law rule of age calculation. See *Frost*, 153 Ala at 664 ("[A] person reaches a designated age on the day preceding the anniversary of his birth."). The subsequently adopted Alabama Juvenile Justice Act, Ala Code 12-15-102, however, establishes juvenile court jurisdiction over a "minor" and "child." It defines "child" in § 12-15-102(3) as "[a]n individual under the age of 18 years, or under 21 years of age and before the juvenile court for a delinquency matter arising before that individual's 18th birthday." *Id*. Further, "[w]here a delinquency petition alleges that an individual, prior to the individual's 18th birthday, has committed an offense for which there is no statute of limitations . . . , the term child also shall include the individual subject to the petition, regardless of the age of the individual at the time of filing." *Id*. Although we are not aware that the Alabama Legislature has expressly abrogated the common-law rule, its use of the term "birthday" in this context suggests that it may consider a birthday to be the date on which age changes.[11]

Regardless of the state of the law in the underlying jurisdictions of Arkansas and Alabama, however, the

[11] The Alabama code further defines a "minor" as "[a]n individual who is under the age of 19 years and who is not a child within the meaning of this chapter." Ala Code 12-15-102(18). While this provision does not address when an individual reaches the age of 19, the court in *Alabama Dep't of Mental Health v ECJ*, 84 So 3d 926 (Ala Civ App, 2011), concluded that "the juvenile court's . . . commitment order necessarily expired when E.C.J. reached the age of 19" and that the "juvenile court erred in holding that its . . . order remained in effect beyond E.C.J.'s 19th birthday . . . ." *Id*. at 929-930. Whether the court intended to expressly endorse the birthday rule of age calculation, as opposed to the common-law rule of age calculation, is unclear.

Supreme Court in *Miller* did not address it, did not distinguish the law of those states one from the other or from that of any other state, and did not expressly endorse or reject either the common-law rule of age calculation or the birthday rule. What the Supreme Court opinions do suggest, however, is that our society's common parlance, in gauging age according to one's birthday, extends even to the United States Supreme Court when not expressly and precisely considering an issue not presented to it. While not dispositive, that fact serves to inform our analysis.

2. OTHER FEDERAL AUTHORITIES

Although defendant was convicted in a Michigan state court of a Michigan state-law crime, we think it prudent to briefly review certain federal authorities, insofar as they may also inform our analysis. In particular, we note that the federal criminal statutory scheme includes the federal Juvenile Delinquency Act, 18 USC 5031 *et seq*. As the United States Court of Appeals for the Second Circuit has described, this act "establishes certain procedural protections for juveniles . . . that may remove them from the ordinary criminal justice system and place them in a separate scheme of treatment and rehabilitation." *United States v Hoo*, 825 F2d 667, 669 (CA 2, 1987).[12]

[12] *Hoo* describes the federal Juvenile Delinquency Act as "set[ting] forth, *inter alia*, the prerequisites for the exercise of federal jurisdiction over juvenile defendants, standards governing the disposition of juveniles found to be delinquent and the procedures for the transfer of juveniles to adult status." *Id*. at 669 n 1. *Hoo* continued:

> Specifically, a juvenile alleged to have committed an act of juvenile delinquency may not be prosecuted in a federal district court unless the Attorney General certifies to the court that (1) state courts either do not have, or will refuse to exercise, jurisdiction over the juvenile; (2) the appropriate state does not have "available

Although this federal statutory scheme applies only in federal courts, 18 USC 5032, its provisions have not escaped the notice of the United States Supreme Court in assessing the validity, under the Eighth Amendment, of state-law sentencing schemes. See *Graham v Florida*, 560 US 48, 62; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (citing, in part, § 5032 of the federal Juvenile Delinquency Act in noting that, like the laws of many states, "[f]ederal law also allows for the possibility of life without parole for offenders as young as 13."). The Court's decision in *Graham* was a precursor to its decision in *Miller*, 567 US at ___; 132 S Ct at 2463; 183 L Ed 2d at 418, where the Court described *Graham* as holding that the Eighth Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense.

The federal act defines "juvenile" as follows:

> For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States

---

programs and services adequate for the needs of juveniles"; or (3) the offense charged is a "crime of violence that is a felony," or is one of several specifically enumerated narcotics-related offenses. The Act also provides that a juvenile who is adjudicated to be a delinquent may be placed on probation or may be committed to the custody of the Attorney General, but may not be "placed or retained in an adult jail or correctional institution." When a juvenile who is not a previous offender is alleged to have committed a violent felony or one of several specified narcotics-related offenses, the Attorney General may make a motion to transfer the juvenile to adult proceedings. This motion may be granted if the district court "finds, after hearing, [that] such transfer would be in the interest of justice" given, among other things, the juvenile's age, background and maturity. For certain previous offenders, however, transfer is automatic. [*Id*. (citations omitted).]

> committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x). [18 USC 5031.]

By defining a "juvenile" and "juvenile delinquency" according to whether a person has "attained [a] birthday" or committed a wrongful act "prior to his eighteenth birthday," it would certainly appear that, in enacting the federal Juvenile Delinquency Act, Congress had in mind the birthday rule of age calculation.[13] Certainly, this is not dispositive of whether the common-law rule of age calculation or, alternatively, the birthday rule, is in effect under the laws of Michigan or any other state, but it is another factor that informs our analysis.

3. THE MICHIGAN CONSTITUTION

Article 3, § 7 of the current 1963 Michigan Constitution states, "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." This constitutional provision raises several questions relative to our consideration of whether the common-law rule of age calculation applies in Michigan: (1) whether the common-law rule of age calculation was "now in force," i.e., was in force at the time of the adoption of the 1963 Michigan Constitution; (2) if so, whether it is "repugnant to this constitution"; and (3) whether, if

[13] We further note that Congress also seemed to have birthdays in mind when calculating age at a later stage in life. See, e.g., 10 USC 7084 ("[a] civilian member [of the teaching staffs of the United States Naval Academy and United States Naval Postgraduate School] may be retired at any time after his sixty-fifth birthday, and shall be retired by June 30 following that birthday").

then in force in Michigan, it has "expire[d] by [its] own limitations," or has been "changed, amended or repealed."

We are aware of no authority suggesting that the common-law rule of age calculation is "repugnant to [the] constitution," or that it "expire[d] by [its] own limitations." We will address together the remaining questions of whether the common-law rule was "in force" at the time of the adoption of the 1963 Constitution and whether it has been "changed, amended or repealed." We do so because in the overall context of Michigan's constitutional history, the two questions largely meld into one.

The natural presumption is that, absent evidence to the contrary, the common-law rule was indeed "[then] in force," at the time of the adoption of the 1963 Constitution. That presumption is arguably supported by the language of earlier versions of the Michigan Constitution, insofar as it relates to the applicability of the common law before 1963. In particular, we note that Michigan's first Constitution, which was adopted two years before Michigan became a state, did not specifically refer to the "common law," but stated that "[a]ll laws now in force in the territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature." Const 1835, sched § 2. Presumably, the reference to "[a]ll laws" includes the then-existing common law, even though the specific constitutional reference to the common law did not arise until later. See *Woodman*, 486 Mich at 267 (opinion by MARKMAN, J.) ("each of [Michigan's] constitutions (starting in 1835) generally adopted the common law").

The first specific constitutional reference to the "common law" appeared in the Michigan Constitution

of 1850, which stated that "[t[he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature." Const 1850, sched § 1. The Michigan Constitution of 1908, which is the last constitution adopted in Michigan before the current Constitution in 1963, similarly stated, "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are altered or repealed." Const 1908, sched § 1.

This history suggests that the common law generally carried over from England[14] at the time of the adoption of Michigan's very first Constitution in 1835. The question then arises regarding whether the common-law rule of age calculation continued to be applicable in Michigan throughout Michigan's history, so as to continue to be "in force" upon the adoption of the current 1963 Michigan Constitution.

To answer that question, we must consider the differing verbiage that appears in Michigan's four Constitutions relative to altering the common law. As noted, the current 1963 Constitution provides, in pertinent part, that the common law that is "now in force" shall

---

[14] As Justice MARKMAN has described:

> The common law originated in the decisions of English judges, starting in the early Middle Ages, and developed over the ensuing centuries. . . . Sir Edward Coke explained that the common law was the "custom of the realm." . . . He indicated that if a custom was "current throughout the commonwealth," it was part of the common law. . . . Sir William Blackstone similarly discussed "[g]eneral customs; which are the universal rule of the whole kingdom, and form the common law." . . . .
>
> The "common law and its institutions were systemically extended to America, at least insofar as appropriate for frontier conditions." [*Woodman*, 486 Mich at 266-267 (opinion by MARKMAN, J.) (citations omitted).]

"remain in force until . . . *changed, amended or repealed*." Const 1963, art 3, § 7 (emphasis added). By contrast, the preceding 1908 Constitution provided, in pertinent part, that the common law that is "now in force" shall "remain in force until . . . *altered or repealed*." Const 1908, sched § 1 (emphasis added). Significantly, both the earlier 1850 Constitution and the original 1835 Constitution (the latter by the implicit inclusion, as noted, of the common law within the term "[a]ll laws") provided, in pertinent part, that the common law that is "now in force" shall "remain in force until . . . *altered or repealed by the legislature*." Const 1850, sched § 1 (emphasis added); Const 1835, sched § 2 (emphasis added).

As the emphasized language demonstrates, Michigan's four Constitutions employed different terms in describing the conditions under which the common law would no longer remain in force. From 1835 to 1908, the Constitutions provided that the common law would remain in force "until . . . *altered or repealed by the legislature*." From 1908 to 1963, the Constitution provided that the common law would remain in force "until . . . *altered or repealed*." And since 1963, the Constitution has provided that the common law would remain in force "until . . . *changed, amended or repealed*."

In interpreting the quoted language from the 1963 Michigan Constitution, our Supreme Court has stated, "The meaning of the article is readily discernible. The common law as well as statutes abide unless 'changed, amended or repealed.' 'Amendment' and 'repeal' refer to the legislative process. 'Change' must necessarily contemplate judicial change. The common law is not static, fixed and immutable as of some given date." *Myers v Genesee Co Auditor*, 375 Mich 1, 7; 133 NW2d

190 (1965) (opinion by O'HARA, J.) (emphasis omitted); see also *Placek v Sterling Hts*, 405 Mich 638, 657; 275 NW2d 511 (1979) ("This provision has been construed to authorize both judicial change and legislative amendment or repeal.") (citing *Myers*, 375 Mich at 7); *Woodman*, 486 Mich at 269 (opinion by MARKMAN, J.) ("Thus, the ability to alter the common law is constitutionally vested in both the Legislature and the judiciary.").

Indeed, given that the common law has its genesis in decisions of judges, it is unsurprising that the judiciary would also be empowered to change the common law. As Justice MARKMAN has stated, "[o]ur constitution gives the judiciary the authority to change the common law because the common law is 'judge-made law.' " *Id*. at 271 (MARKMAN, J.) (emphasis omitted), citing *Placek*, 405 Mich at 657.

That said, however, it must again be noted that before 1963, the Michigan Constitution did not contain the language "changed, amended or repealed." Beginning in 1908, the pertinent constitutional language instead was "altered or repealed." As stated in *Myers* and *Placek*, "repeal" relates to the legislative process. But those cases did not address the meaning of "altered" in this context, because that term did not exist in the Constitution at the time of those decisions. We conclude, however, in part on the basis of Justice MARKMAN's reasoning and his use of the term "alter" in describing the authority of the judiciary relative to the common law, that the 1908 Constitution (like the 1963 Constitution) authorized the judiciary to alter the common law. See *Woodman*, 486 Mich at 269 (opinion by MARKMAN, J.) ("Thus, the ability to *alter* the common law is constitutionally vested in both the Legislature and the judiciary.") (emphasis added). We further note that the Michigan Supreme Court indeed altered the

common law in certain respects even before the adoption of the 1963 Constitution, thereby demonstrating that it perceived that it had the constitutional authority to do so at that time. See, e.g., *Williams v Detroit*, 364 Mich 231, 255; 111 NW2d 1 (1961) (opinion by EDWARDS, J.)[15] (finding constitutional authority for judicial overruling of the common-law doctrine of governmental immunity relative to municipalities), superseded by statute as stated in *Mack v Detroit*, 467 Mich 186; 202; 649 NW2d 47 (2002). This lends further support to our conclusion that the "altered or repealed" language of the then-effective 1908 Constitution contemplated both legislative and judicial action relative to effecting changes to the common law.

That brings us to our next observation, i.e., that Michigan's 1835 and 1850 Constitutions provided that the common law shall "remain in force until . . . *altered or repealed by the legislature*." Const 1850, sched § 1 (emphasis added); Const 1835, sched § 2 (emphasis added). The specific constitutional reference to the "legislature" suggests that, notwithstanding the fact that the common law is "judge-made law," the then-effective common law was alterable only by the Legislature, and not by the judiciary, during the effective dates of the 1835 and 1850 Constitutions, i.e., from 1835 to 1908. The deletion of the language "by the legislature" upon the adoption of the 1908 Constitution further suggests that, from that date forward, the common law could be altered not only by the Legislature, but also by the judiciary. See, e.g., *People v*

[15] In *Williams*, the decision of the trial court was affirmed by an equally divided Court. Chief Justice DETHMERS and Justice KELLY concurred with the opinion of Justice CARR for affirmance and Justice BLACK wrote a separate opinion for affirmance. Justices SMITH, KAVANAGH, and SOURIS concurred with the opinion of Justice EDWARDS for reversal.

Henderson, 282 Mich App 307, 328; 765 NW2d 619 (2009) (deriving legislative intent from a change in statutory language). Before the adoption of the 1963 Constitution, four of the eight justices of our Supreme Court found that 1908 constitutional revision to be a "significant omission," concluding that "[c]learly, the Constitution presents no barrier to removal of an unjust rule—by the action of the Court which made it." *Williams*, 364 Mich at 255 (opinion by EDWARDS, J.) (see n 15 of this opinion).

Later in this opinion, we will discuss whether the Legislature or the judiciary has in fact done so with respect to the common-law rule of age calculation.

4. MICHIGAN ATTORNEY GENERAL OPINIONS

Our Attorney General has twice opined, in noncriminal contexts, that Michigan would adhere to the common-law principle that one reaches an age on the day preceding the anniversary of his or her birth. Both of these opinions predated the adoption of the current Michigan Constitution in 1963, and were issued while the Constitution of 1908 was in effect. First, in 1929, Attorney General Wilber M. Brucker rendered an opinion stating that a foreign-born child who became 21 years of age (which then was the age of majority) on the very day that his father became a citizen of the United States did not obtain the right to vote by virtue of his father's citizenship because he was no longer a minor child at that time. Attorney General Brucker opined that under the law it mattered not that the son was born in the afternoon, and that the father became a citizen in the morning of the anniversary of that day, because "the law does not recognize fractions of days." See OAG, 1928-1930, pp 247-248 (February 27, 1929).

In rendering that opinion, Attorney General Brucker stated that "[o]ne becomes of full age on the day preceding the twenty-first anniversary of his birth on the first moment of that day." *Id*. at 248. That, of course, is the portion of the opinion that is pertinent to the issue before us. But its significance and legal import is somewhat called into question by the fact that this quoted portion of the opinion was not pertinent to the precise issue that was presented to the Attorney General. In that matter, the pivotal event (citizenship) occurred on the very day on which the child attained the age of majority. Therefore, an endorsement of the "day before" component of the common-law rule of age calculation was not essential to answering the question that was the subject of the Attorney General opinion. What *was* essential was his endorsement of the "no fraction of a day" concept.

It is also noteworthy that the authorities on which Attorney General Brucker based his opinion did not include any caselaw, statute, or other authority from Michigan. Rather, the opinion cited only 31 CJ 987 (which itself contained no Michigan citations), as well as cases from Delaware and Indiana state courts.

Subsequently, in 1956, Attorney General Thomas M. Kavanagh (who later served as Chief Justice of our Michigan Supreme Court) was asked for an opinion regarding whether a person whose birthday is the day following an election is eligible to vote in that election. Attorney General Kavanagh opined that the person was eligible. 2 OAG, 1955-1956, No. 2677, pp 402-403 (July 13, 1956). The question as posed noted that " '[i]t appears that under common law, a person is twenty-one at the beginning of the day preceding his anniversary and there seems to be no statute law in Michigan to the contrary.' " *Id*. at 402. In response,

Attorney General Kavanagh accepted the premise of the question, noting that "[a]s indicated by you, under the common law rule one attains the age of twenty-one years 'the first moment of the day before his twenty-first anniversary.' " *Id*. The support for that statement consisted of citations of the Eighth Circuit's decision in *Wright*, a single New York state court case, 43 CJS, Infants, § 3, and 27 Am Jur, Infants, § 5. In reliance on those authorities, Attorney General Kavanagh opined as follows, "[t]here being no statute to the contrary, such common law rule is, in the opinion of the Attorney General, in effect in this state." *Id*. at 403.

Interestingly, and while this opinion indeed depended on application of the common-law rule of age calculation (because the election occurred the day before the voter's birthday), the question as presented to Attorney General Kavanagh assumed its applicability as a fact, and specifically inquired whether the voter satisfied the then-applicable qualification for being an elector, as set forth in Article 3, § 1 of the then-effective 1908 Michigan Constitution, that the elector be "*above* the age of 21 years." (Emphasis added.) Attorney General Kavanagh's conclusion was that the law does not "differentiate between parts of a day," and therefore that the then-applicable constitutional language ("above the age of 21 years") was "synonymous" with the language "attained the age of twenty-one years."[16] *Id*. at 403. Again, therefore, the Attorney General's ultimate conclusion was not dependent on his preliminary acceptance of the presumption of the applicability of the common-law rule of age calculation in Michigan, and

[16] The current 1963 Michigan Constitution describes the qualifications of electors with the language, "has attained the age of 21 years." Const 1963, art 2, § 1.

therefore again does not translate definitively to the question presented in this case.

Such opinions, while not binding on this Court, can be persuasive authority. *Williams v Rochester Hills*, 243 Mich App 539, 557; 625 NW2d 64 (2000). We therefore evaluate their persuasiveness in the overall context of our analysis.

5. MICHIGAN STATUTES AND COURT RULES

Defendant calls attention to MCR 6.903(E) as evidence that the Michigan Court Rules provide for use of the birthday rule. Indeed, MCR 6.903(E) provides that a juvenile is "a person 14 years of age or older, who is subject to the jurisdiction of the court for having allegedly committed a specified juvenile violation on or after the person's 14th birthday and before the person's 17th birthday." Defendant further points out that this Court in *Carp* referred to MCR 6.903(E) in determining that *Miller* applied to defendants between the ages of 17 and 18. *Carp*, 298 Mich App at 536-537. Defendant also notes that the "Note to 2003 Amendment" following MCR 6.903 indicates that the 2003 amendments to the rule "adjust several definitions to conform to statutory changes . . . reducing the age of juveniles subject to the provisions to 14 years[.]" The note refers, in part, to MCL 712A.2(a)(1), MCL 764.1f, and MCL 600.606.

In a note by the Reporter, it was indicated that subchapter 6.900 was adopted April 13, 1989, "in response to 1988 PA 51-54, 64, 67, 73, 75-78, and 182 . . . ." 432 Mich ccii (1989). These citations refer to public acts establishing and amending the jurisdiction of the family division of the circuit court over juveniles, MCL 712A.2; the adoption of the law authorizing a prosecuting attorney to seek an arrest warrant for a juvenile who has committed a juvenile violation,

MCL 764.1f; the adoption and amendment of the Juvenile Facilities Act, MCL 803.221 *et seq*.; and the adoption of the law allowing the family division to waive jurisdiction over a juvenile who has committed a felony, MCL 712A.4. The Note to the 2003 Amendment stated, in part, that the rule was amended to "conform to" certain statutory changes reducing the age of juveniles to 14 years. See 467 Mich cccxxxv; cccxxxix (2003).

While the language employed by our Supreme Court in MCR 6.903 indeed informs our analysis, we must conclude that in adopting MCR 6.903, our Supreme Court acted to put into effect a court rule in *conformity* with the policy choices of the Michigan Legislature, as expressed in the public acts (or perhaps in conformity with the law as set forth in its prior opinions, as discussed later in this opinion). It did not act by court rule to put into effect a policy choice *different* from that expressed by the Legislature. We further conclude that the determination whether a defendant is a juvenile, rather than an adult, concerns a substantive rule of law, not a procedural one. See *McDougall v Schanz*, 461 Mich 15, 35; 597 NW2d 148 (1999) (Substantive rule of law reflects policy considerations rather than the "mere dispatch of judicial business."). Court rules cannot intrude upon substantive rules of law. *In re Gordon Estate* , 222 Mich App 148; 564 NW2d 497 (1997); see also *People v Conat*, 238 Mich App 134, 164; 605 NW2d 49 (1999). Thus, even if we were to read MCR 6.903(E) as suggesting that age is determined by one's birthday, that conclusion should not prevail by virtue of the court rule alone, but rather should derive from statute (or prior court precedent). Statutory language prevails over court rule language in regard to substantive matters. *Conat*, 238 Mich App at 163. Thus, it is in statutory language that this Court should look to ascertain the intent of the Legislature relative to the computation of age.

However, none of the statutes or public acts referred to in the notes to MCR 6.903 or the related Supreme Court orders make reference to the calculation of age by the use of a defendant's birthday (or otherwise, for that matter). For example, MCL 712A.2(a) establishes in the family division of circuit courts certain exclusive jurisdiction over juveniles "under 17 years of age . . . ." MCL 712A.4(1) authorizes the waiver of that jurisdiction if the offense, if committed by an adult, would be a felony and the accused juvenile is "14 years of age or older . . . ." MCL 764.1f(1) authorizes the filing of a complaint for specified juvenile violations committed by a juvenile "14 years of age or older but less than 17 years of age . . . ." The Probate Code and the Juvenile Facilities Act define a "juvenile" as a person who is less than or under "17 years of age . . . ." MCL 712A.1(1)(h); MCL 803.222. MCL 600.606(1) simply states that "[t]he circuit court has jurisdiction to hear and determine a specified juvenile violation if committed by a juvenile 14 years of age or older and less than 17 years of age[,]" while MCL 764.27 merely refers to "a child less than 17 years of age . . . ."[17]

We therefore do not find in these statutes alone any legislative intent to abrogate the common law with respect to the method for calculating age. As noted, the above-referenced statutes refer to a juvenile as being of, "under," "less than," or "over" a certain age. They do not purport to alter the common-law rule for determining how that computation is made.

Defendant also refers this Court to a reference to birthdays in the Youthful Trainee Act (YTA), MCL 762.11(1):

---

[17] MCL 712A.18, also under the Probate Code, pertains to orders of disposition of juveniles and refers to individuals "not less than 18 years of age" and "not less than 17 years of age . . . ." MCL 712A.18(1)(b), and (e).

> [I]f an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee.

The classification of "youthful trainee" is created entirely by statute. "The YTA offers a mechanism by which youths charged with committing certain crimes between their seventeenth and twenty-first birthdays may be excused from having a criminal record." *People v Bobek*, 217 Mich App 524, 528-529; 553 NW2d 18 (1996).

We do not find the YTA's reference to "birthdays" conclusive because nothing in the act purports to alter or affect the process used to calculate an individual's age for the purpose of determining juvenile status. The fact that the Legislature placed temporal limitations on the assignment of "youthful trainee" status does not necessarily mean that, by implication, the Legislature abolished the common-law rule of age calculation for all purposes. To the contrary, the fact that the Legislature made reference to birthdays in the YTA, while refraining from such a reference in other statutes relating to juveniles, arguably may suggest different meanings. *U S Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 14; 795 NW2d 101 (2009). However, this statutory reference to "birthdays" is another factor informing our analysis.

Other Michigan statutes have addressed age in a variety of ways. The Age of Majority Act, MCL 722.51 *et seq*., sets the legal age of adulthood at 18 years of age and provides that an adult of legal age is "a person who is at least 18 years of age on or after January 1, 1972 . . . ." MCL 722.52(1). However, the act makes no

mention of the method of age calculation to be used. MCL 552.17a(1) provides for the jurisdiction of a divorce court over minor children of the parties "until each child has attained the age of 18 years . . . ." MCL 257.314 indicates that the expiration of operator's and chauffeur's licenses occurs on the licensee's birthday[18] in the relevant year. MCL 257.314(1) to (3). Similarly, vehicle registrations issued by the Secretary of State generally expire on the owner's birthday, with a few specific exceptions. MCL 257.226(1), (2), (5)(c), and (6).

Michigan's Revised School Code requires a child who turns age 11 on or after December 1, 2009, or a child who was age 11 before that date and enters grade 6 in 2009 or later to attend public school "during the entire school year from the age of 6 to the child's eighteenth birthday." MCL 380.1561(1). The code also considers a child "aged 7 to his or her . . . eighteenth birthday" who meets certain criteria to be "a juvenile disorderly person." MCL 380.1596(2). Juvenile disorderly persons may be assigned to an ungraded school. MCL 380.1596(1). Thus, for the purposes of determining eligibility for placement in alternative schooling, the Legislature arguably appears to have opted to use the birthday rule. However, as noted above, the specific language of this statute differs from language used in the Probate Code and the Juvenile Facilities Act. A "juvenile disorderly person" under this section is thus not necessarily a "juvenile" for the purposes of other

[18] The Michigan Vehicle Code also provides a definition of "birthday" that means "any anniversary of the original date of birth . . . ." MCL 257.4a. However, the definition also deems persons born during a leap year on February 29 to have been born on March 1 "for the purposes of this act . . . ." It thus appears that this definition is meant to be applied to the Michigan Vehicle Code, rather than generally.

statutes, and may be ineligible to be considered as such, if he or she is over 17 years of age but has not attained his or her 18th birthday.

As noted, "[t]he Legislature has the authority to abrogate the common law." *Hoertsman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). However, "[w]hen it does so, it should speak in no uncertain terms." *Id*. Language used by the Legislature should show a clear intent to abrogate the common law. *Id*. at 74-75. Common-law principles are not to be abolished by implication. *People v Williams*, 288 Mich App 67, 81; 792 NW2d 384 (2010), aff'd 491 Mich 164 (2012).

We are unable to discern from these statutes an intent by the Michigan Legislature to explicitly abrogate the common-law rule of age calculation. The situation before us is therefore unlike that presented in *In re Harris* (which applied the "birthday" rule on the basis of the California Legislature's explicit abrogation of the common-law rule in favor of the "birthday" rule). This raises the further question, however, regarding whether the common-law rule of age calculation had previously been abrogated by the courts, so that explicit legislative abrogation was unnecessary. We thus next turn to a discussion of the relevant Michigan caselaw.

6. MICHIGAN CASELAW

Notwithstanding our presumption that the common-law rule of age calculation carried over from England to be "in force" in Michigan at the time of the adoption of Michigan's first Constitution in 1835, we have not found a single case in Michigan that ever applied that common-law rule, either before or after the adoption of the 1963 Michigan Constitution. Nor have the parties directed us to any such case. Nor, as noted, did the Michigan Attorney General cite any Michigan case in rendering opinions in

1929 and 1956. This fact alone gives us pause in presuming that the common-law rule of age calculation was "in force" in Michigan in 1963, or that, by virtue of Article 3, § 7 of the 1963 Michigan Constitution, it thereafter "remain[ed] in force . . . ." That said, we also have found no case in Michigan, nor have the parties directed us to any, that directly considered the alternatives of applying the common-law rule of age calculation or the birthday rule, and that opted for either.

We have, however, located Michigan caselaw that we find pertinent to our consideration of the issue, and that thus informs our analysis.[19] For example, in *Bay Trust Co v Agricultural Life Ins Co*, 279 Mich 248, 249, 252; 271 NW 749 (1937), our Supreme Court interpreted an insurance policy provision that by its terms did not cover any person " 'over the age of 60 years.' " The Court unanimously held that an insured who had attained the age of 60 but who had not reached the age of 61 was nonetheless "over the age of 60 years." *Id*. at 253. The Court stated that "[t]he insured was born November 28, 1875; he had finished the entire span of 60 calendar years on November 28, 1935, when he came to his death February 8, 1936, 2 months and 10 days later. It must necessarily follow that upon the last-mentioned date he was over the age of 60 years." *Id*. The Court therefore concluded that the insured was not covered by the policy and reversed the trial court's judgment in favor of the plaintiff.[20]

---

[19] We note that all of the cited cases postdate the amendment of the Michigan Constitution in 1908, so that at the time of those decisions there was no longer any arguable constitutional prohibition on the amendment of the common law by the judiciary. See our discussion earlier in this opinion.

[20] The Court in *Bay Trust* found persuasive the earlier holding of our Supreme Court in *Jackson v Mason*, 145 Mich 338, 339-340; 108 NW 697 (1906), which interpreted a penal statute requiring parents to send to

It is certainly true that, in *Bay Trust*, the precise date at which the insured turned 60 years of age was not at issue, because it was undisputed that he died 2 months and 10 days after his 60th birthday. Thus, the Court was not specifically tasked with determining whether the common-law rule or the birthday rule applied in Michigan. Moreover, the Court's statement suggesting that the insured attained the age of 60 on his 60th birthday was not necessary to its adjudication and was therefore obiter dictum. See *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985). Nonetheless, we find the unanimous statement of our Supreme Court in *Bay Trust* to be of persuasive value, *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001), inasmuch as it demonstrates the mindset of our Supreme Court, at least as early as 1937, in following popular usage to speak of "finish[ing] the entire span of 60 calendar years," and therefore attaining that age, on one's birthday. *Bay Trust*, 279 Mich at 253. Whether or not it intended to do so in a precedential fashion, our Supreme Court thus stated and seemingly endorsed the birthday rule of age calculation. It is therefore arguable, under the *Bay Trust* decision of 1937, that the common-law rule of age calculation was no longer in force at the time of the adoption of the current Michigan Constitution in 1963.

Subsequently, in *Evans v Ross*, 309 Mich 149; 14 NW2d 815 (1944), our Supreme Court considered a husband's complaint seeking to have his marriage declared void. By statute, a female was " 'capable in law of contracting marriage' " if she " 'shall have attained the full age of sixteen years . . . .' " *Id.* at 151 (citation

---

public schools children " 'between and including the ages of seven and fifteen years' " and held that the statute did not encompass a child who was 15 years and 3 months old. The precise issue before us was therefore also not presented in *Jackson*.

omitted). The defendant wife was 15 years of age at the time of marriage. The Court thus considered the effect of a further statutory provision that provided that " 'a marriage solemnized when either of the parties was under the age of legal consent' " was void " 'if they shall separate during such nonage, and not cohabit together afterwards . . . .' " *Id*. (citation omitted). In assessing the circumstances insofar as they related to this statute, the Court stated that "[t]he parties separated *prior to her 16th birthday* and have not cohabited together since." *Id*. at 150 (emphasis added). Accordingly, the Court held that if the lower court determined that the defendant wife was under the age of consent at the time of the marriage ceremony, the marriage was void. *Id*. at 153.

Again, the precise issue that is before us was not presented in *Evans*. However, *Evans* again reflects that our Supreme Court, in equating "during such nonage" with "prior to her 16th birthday," considered the defendant's birthday as the critical date on which her age changed, and on which she attained the age of consent. *Evans* thus further calls into question whether the common-law rule of age calculation was in force in Michigan as of at least 1944.

Further, in *O'Neill v Morse*, 385 Mich 130; 188 NW2d 785 (1971), our Supreme Court reversed the dismissal of a wrongful death action where the decedent was an unborn child. In doing so, the Court commented as follows on the subject of age calculation: "The phenomenon of birth is an arbitrary point from which to measure life. True, *we reckon age by counting birthdays*. The Chinese count from New Years. The choice is arbitrary." *Id*. at 136 (emphasis added). Once again, we note that the precise issue before us was not presented in *O'Neill*. Nonetheless, that decision again reflects the mindset of our Supreme Court in deeming age to

change as of one's birthday. Also noteworthy is the fact that among the justices concurring in the *O'Neill* opinion was then Chief Justice THOMAS M. KAVANAGH, who as Attorney General had formerly authored the above-referenced Attorney General opinion in 1956 (thereby suggesting that his view of the applicable rule of age calculation arguably may have changed by the time of the *O'Neill* decision in 1971).

More recently, the Supreme Court arguably applied the birthday rule for purposes of the Age of Majority Act, MCL 722.51 *et seq*., and the child support statute, MCL 552.17a. In *Smith v Smith*, 433 Mich 606, 609-611; 447 NW2d 715 (1989) (opinion by RILEY, C.J.), the Supreme Court addressed whether amendment of the age of majority, to 18 years of age from 21 years of age, rendered null and void the child support act's exceptional-circumstances provision, which authorized support payments beyond the child support act's prescribed age of 18 until the age of majority. Discussing the preamendment interplay of the statutes, the Court opined:

> Thus, absent exceptional circumstances, § 17a statutorily limited support payments *up to* the time of a child's *eighteenth birthday*, three years before the age of majority. It was this Court in *Johnson* [*v Johnson*, 346 Mich 418; 78 NW2d 216 (1956)], that interpreted the exceptional-circumstances clause to allow support payments beyond a child's *eighteenth birthday*, but not beyond the age of majority.
>
> * * *
>
> . . . [B]ecause the court's jurisdiction in a divorce proceeding is defined by statute, the court rule cannot expand jurisdiction to authorize child support *beyond a child's eighteenth birthday*.
>
> * * *

> Though the courts have never dissented from the rule that the age of majority limits the duration of child-support payments, this saving clause has been used, when applicable, to provide for support *up to* a child's *twenty-first birthday*. [*Id*. at 612-613, 620, 624 (opinion by RILEY, C.J.) (emphasis added).]

The Court ultimately held that because of the amendment of the age of majority to 18 years of age, the exceptional-circumstances provision of the child support act was "legally void" and, thus, a court could not "authorize child support beyond a child's *eighteenth birthday*." *Id*. at 618-620 (emphasis added).[21]

Still more recently, in *People v Chapman*, 485 Mich 859 (2009), the Supreme Court again appeared to apply the birthday rule in the context of the criminal sexual conduct statute. The defendant had been convicted of third-degree criminal sexual conduct for engaging in "sexual penetration with a victim who 'is at least 13 years of age and under 16 years of age.' " *Id*., quoting MCL 750.520d(1)(a). In reversing the defendant's convictions of third-degree criminal sexual conduct, the Court explained that "[t]he evidence established that the defendant engaged in sexual penetration with the victim on several occasions between September 2005 and June 2006, but did not establish that these acts occurred *prior to* the victim's *sixteenth birthday* in February 2006." *Id*. (emphasis added).

In considering these cases, we take note of the long-standing debate over whether and when it is appropriate for the judiciary to alter the common law, and whether and when the courts should defer to the

---

[21] The Legislature subsequently adopted legislation providing for post-majority support, effectively superseding the holding in *Smith*. See *Rowley v Garvin*, 221 Mich App 699, 706; 562 NW2d 262 (1997). Currently, MCL 552.16 and MCL 552.605b provide for such support.

Legislature in this area of shared authority. See, e.g., *Woodman*, 486 Mich at 257-258 (opinion by YOUNG, J.). And in that regard, we appreciate the fact that, just as "legislative amendment of the common law is not lightly presumed," *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006), so too the Supreme Court does not "lightly exercise its authority to change the common law." *Woodman*, 486 Mich at 245 (opinion by YOUNG, J.). The Supreme Court has articulated that the reason it should act with "utmost caution" in exercising its authority to modify the common law is that "it is difficult for the judiciary to assess the competing interests that may be at stake and the societal trade-offs relevant to one modification of the common law versus another in relation to the existing rule." *Id*. at 231 (opinion by YOUNG, J.). Further, in evaluating whether to "alter a common law doctrine that has existed undisturbed for well over a century," the Supreme Court should " 'exercise caution and . . . defer to the Legislature when called upon to make a new and potentially societally dislocating change to the common law.' " *Id*. at 245 (opinion by YOUNG, J.), quoting *Henry v Dow Chem Co*, 473 Mich 63, 89; 701 NW2d 684 (2005) (declining to recognize a cause of action for medical monitoring, describing it as a "radical change in our negligence jurisprudence"). The Court in *Henry* further described that "separation of powers considerations may operate as a *prudential* bar to judicial policy-making in the common-law arena. This is so when we are asked to modify the common law in a way that may lead to dramatic reallocation of societal benefits and burdens." *Henry*, 473 Mich at 89 (emphasis in original).

The question before us is not, however, whether the judiciary *should* exercise its authority to change the common law, but rather whether our Supreme Court

has already effectively done so. In that regard, we note that it is far from clear that a recognition of the applicability of the birthday rule of age calculation in Michigan would effect a "radical change" in the law, or a "new and potentially societally dislocating change to the common law," or that it would "lead to dramatic reallocation of societal benefits and burdens." To the contrary, it seems to us, given all the factors discussed in this opinion, that those consequences more likely would flow from a recognition of the applicability of the common-law rule of age calculation, where age would be deemed to change on the first moment of the day *before* one's birthday.

F. THE BIRTHDAY RULE APPLIES IN MICHIGAN

After evaluating all of the above factors, we conclude that the birthday rule of age calculation applies in Michigan. Again, we acknowledge that none of the cited authorities alone answers the question decisively. Nonetheless, a number of considerations, taken together, persuade us to apply the birthday rule and to conclude that the common-law rule of age calculation does not apply in Michigan. First and foremost, as noted, we have found no case in Michigan ever applying the common-law rule of age calculation. Given that fact, we are hard-pressed to conclude that what once was an established rule in England was ever established in Michigan. While it may be that the rule is presumed to have carried over upon the adoption of Michigan's first Constitution in 1835, it nonetheless was never applied in this state. Consequently, while the common-law rule may have reflected the "custom of the realm" from which Sir William Blackstone hailed, it never became the custom of the realm that is the state of Michigan.

To the contrary, the Michigan Supreme Court, to the extent that it has addressed the issue even in passing, has commonly and routinely used language consistent with the birthday rule and contrary to the common-law rule. It has confirmed its earlier enunciations consistent with the birthday rule by a court rule that, while procedural rather than substantive, specifically defines a "juvenile" according to one's "birthday." MCR 6.903(E). In our view, the Supreme Court thus confirmed its understanding of what the Legislature intended in the statutes to which the court rule conformed, and of what prior courts had proclaimed as a matter of substantive law. Similarly, the Legislature, while not explicitly abrogating the common-law rule (which it may have felt was unnecessary given the language of the caselaw), has at times used language consistent with the birthday rule. The only authority in Michigan supportive of applying the common-law rule are two Attorney General opinions that lack persuasive value, for the reasons already indicated.

For these reasons, we hold that the common-law rule of age calculation, to the extent that it was ever applicable in Michigan, was long ago abrogated by decisions of the Michigan Supreme Court and the Michigan Legislature's subsequent statutory enactments must be interpreted with that judicial abrogation in mind. Further, given all the above-discussed factors, we believe that the Michigan Supreme Court, if called upon to decide the issue today, would confirm the applicability of the birthday rule of age calculation in Michigan.

Having reached this conclusion, we nonetheless would prefer a more express articulation of public policy from our Legislature or the Supreme Court than what

we have currently. Consequently, we would encourage the Legislature and the Supreme Court to clearly articulate the public policy of the state of Michigan regarding age calculation by specific legislation and definitive ruling.[22]

V. CONCLUSION

For the reasons noted, we find no due process or other errors relative to defendant's convictions. We conclude, however, that resentencing is required. Defendant admits that he was born on January 29, 1989. Defendant shot and killed Little on the evening of January 28, 2007. Under the birthday rule of age calculation, which we conclude applies, he was not yet 18 years of age when the shooting occurred. *Miller* makes it clear that violation of the prohibition against cruel and unusual punishment occurs when individuals "*under* the age of 18 *at the time of their crimes*" are sentenced to mandatory life without the possibility of parole. *Miller*, 567 US at ___; 132 S Ct at 2460; 183 L Ed 2d at 414-415 (emphasis added). Defendant was under the age of 18 at the time he shot and killed Little. We therefore hold that *Miller* applies to this case and that resentencing is required.[23]

---

[22] We will not endeavor to address the various facets of the issue that might be considered. The precise issue before us in this case may, however, only be one. Others may include, for example, whether "fractions of a day" should be considered, whether one is "over" an age before reaching one's next birthday, and whether any difference exists between one who has "attained" the age in question versus one who is "not less than" the age in question, or other formulations of this concept.

[23] We express no opinion regarding the effect on remand in this case of the *Miller* factors, although we note from the record the approximately one- to two-hour differential from the time of the crime to the time of defendant's attaining the age of 18.

We affirm defendant's convictions and remand for resentencing in accordance with *Miller*. We do not retain jurisdiction.

DONOFRIO and BECKERING, JJ., concurred with BOONSTRA, P.J.

WELLS FARGO BANK, NA v NULL

Docket No. 312485. Submitted February 4, 2014, at Lansing. Decided March 6, 2014, at 9:00 a.m.

Wells Fargo Bank, NA, brought an action in the Cass Circuit Court against Auto-Owners Insurance Company and Elizabeth A. Null, claiming that, as the mortgagee of Null's home, Wells Fargo was entitled to any insurance proceeds Null recovered from Auto-Owners in connection with the fire that destroyed her home in 2009. The home was owned by Null's brother-in-law, Lonnie Null, who had bought it with a mortgage from Wells Fargo and insured it under a policy issued by Auto-Owners. In a previous separate proceeding, Elizabeth Null had named Wells Fargo as a defendant in her suit for breach of contract against Auto-Owners after it denied her insurance claim for the fire damage to her home on the ground that Lonnie Null, the named insured, did not reside there, which was a requirement under the policy. The trial court had granted summary disposition for the defendants on this basis, and the Court of Appeals affirmed. *Null v Auto-Owners Insurance Co*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2013 (Docket No. 308473). Auto-Owners argued that this prior ruling supported its motion for summary disposition in the instant case, but Wells Fargo asserted that the ruling did not bar its claim because its rights were governed by a clause in Lonnie Null's policy that gave coverage to the mortgagee in certain circumstances, even if the insured himself would not have been covered. The court, Michael E. Dodge, J., granted Auto-Owners' motion for summary disposition and dismissed all Wells Fargo's claims with prejudice. Wells Fargo appealed.

The Court of Appeals *held*:

1. The issue whether the residence was covered under the policy was barred from relitigation by the doctrine of collateral estoppel because this exact issue was actually litigated and determined by a valid and final judgment, all three parties had a full and fair opportunity to litigate the issue in the previous proceeding, and, had the trial court ruled against Auto-Owners, Auto-Owners would have been bound by that adverse decision.

2. The trial court erred by granting summary disposition to Auto-Owners. The standard mortgage clause is a separate contract between Wells Fargo and Auto-Owners that, by its plain language, affords coverage to the mortgagee under the circumstances presented, even though coverage was denied to the insured. Further, the language of the policy itself provided that a denial of the insured's claim would not apply to a valid claim of the mortgagee as long as the mortgagee complied with certain conditions.

3. The trial court's order in the previous related litigation did not bar Wells Fargo's claim in this case under the doctrine of judicial estoppel because Wells Fargo did not take a wholly inconsistent position in the prior proceeding. Further, Wells Fargo's claim was not barred by laches because there was no evidence that Auto-Owners was prejudiced by the delay between that case and this one or by the resolution of the claims in separate actions. Accordingly, the case was remanded for the trial court to determine whether there was a genuine issue of material fact about whether Wells Fargo complied with the policy requirements.

Reversed and remanded for further proceedings.

INSURANCE — STANDARD MORTGAGE CLAUSES — DENIAL OF COVERAGE TO INSURED.

A standard mortgage clause in a residential insurance policy issued by an insurer to an insured operates as a separate contract that affords coverage to the mortgagee, even when coverage is denied to the insured in a context other than the application of a policy exclusion and even when the act or neglect of the insured occurred before the policy was issued.

Plunkett Cooney (by *Jeffrey C. Gerish*, *Hilary A. Ballentine*, and *Matthew J. Boettcher*) for Wells Fargo Bank, NA.

Yeager, Davison & Day, PC (by *Phillip K. Yeager*) for Auto-Owners Insurance Company.

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

BOONSTRA, P.J. In this insurance dispute, plaintiff Wells Fargo Bank, N.A., appeals by right the September 4, 2012 order of the trial court granting summary

disposition in favor of defendants Elizabeth A. Null and Auto-Owners Insurance Company under MCR 2.116(C)(10).[1] Specifically, the trial court ruled that Wells Fargo, the mortgagee, was not entitled to coverage under an insurance policy issued by Auto-Owners to the mortgagor, Lonnie Null, Elizabeth's brother-in-law. The trial court also held that a previous order, entered in an earlier case brought by Elizabeth against Auto-Owners and Wells Fargo, which barred her claims because the property was not covered under the Auto-Owners policy, also barred Wells Fargo's claims in this case. We reverse the trial court's award of summary disposition in favor of Auto-Owners, and remand for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The underlying insurance dispute in this case arose from an April 11, 2009 fire that destroyed a residence located at 17285 Williamsville Street, Cassopolis, Michigan. In 1994, Lonnie purchased the residence and obtained from Auto-Owners a homeowners insurance policy covering the residence (hereinafter "the policy"). Wells Fargo held the note on the residence. Accordingly, Lonnie was the mortgagor of record and Wells Fargo the mortgagee. In 1997, Lonnie executed a "Residential Real Estate Contract" with Elizabeth; however, the mortgage was never assigned to Elizabeth and the Auto-Owners policy remained in Lonnie's name. Lonnie stayed in the residence with Elizabeth sporadically for a few days or weeks at a time, through approximately 2004. However, when the fire occurred in April 2009, Lonnie had not lived in the residence for several years.

[1] The trial court's grant of summary disposition in favor of Elizabeth is not at issue on appeal, and we do not disturb that ruling.

In fact, evidence of record indicates that Lonnie was incarcerated in 2008 and had not resided or stayed in the home since that time.

After the fire, Elizabeth filed a claim for insurance benefits from Auto-Owners under the policy that was then in effect for the policy term of December 22, 2008 to December 22, 2009. In a letter dated April 21, 2009, Auto-Owners advised Wells Fargo, as the mortgagee, that fire had damaged the residence and that a claim had been filed. As Lonnie remained the named insured under the policy, the letter indicated that Lonnie, not Elizabeth, was the individual who suffered damages resulting from the fire. The letter also informed Wells Fargo that, as the mortgagee, its name would be included on any insurance checks, in accordance with Auto-Owners's policy.

In late 2009, Auto-Owners denied Elizabeth's insurance claim for damage to the residence and her personal property on the ground that Lonnie, who was the named insured, did not reside there, which was a requirement under the policy. Specifically, the insurance policy provided in relevant part:

> **a. Coverage A—Dwelling**
>
> **(1) Covered Property**
>
> **We** cover:
>
> **(a) your** dwelling located at the **residence premises** including structures attached to that dwelling. Thisdwelling [sic] must be used principally as **your** private residence.
>
> * * *
>
> **c. Coverage C—Personal Property**
>
> **(1) Covered Property**
>
> **We** cover:

(a) personal property owned or used by any **insured** anywhere in the world including property not permanently attached to or otherwise forming a part of realty.

(b) at **your** option, personal property owned by others while it is in that part of the **residence premises** occupied by any **insured**.

Additionally, the policy defined "insured" as:

a. you;

b. your **relatives**; and

c. any other person under the age of 21 residing with **you** who is in **your** care or the care of a **relative**.

"Relative" was defined as "a person who resides with **you** and who is related to **you** by blood, marriage or adoption. **Relative** includes a ward or foster child who resides with **you**." "You" or "your" was defined as the "first named insured," which was Lonnie. Finally, "residence premises" was defined as "the one or two family dwelling where **you** reside . . . ."

A. THE COMPANION CASE

Elizabeth sued Auto-Owners for breach of contract in March 2010, naming both Auto-Owners and Wells Fargo as defendants in the case. That case was captioned in the trial court as *Null v Auto-Owners Ins Co*, LC No. 10-228-NI. Wells Fargo and Auto-Owners continued to correspond during the pendency of that companion case.

On December 2, 2010, the trial court entered an order granting summary disposition in favor of defendant Wells Fargo. The order stated, "This is a final Judgment as to [Wells Fargo] only and does not resolve all pending matters in this case." Although it had been dismissed from the litigation, Wells Fargo moved to intervene as a counterplaintiff sometime in May 2011.

The motion stated that Wells Fargo was not asserting a new claim against Auto-Owners, that its claim was derivative of the policy held by Lonnie, and that, if intervention was granted, Wells Fargo intended to file a counterclaim against Elizabeth only. The trial court denied this motion on May 9, 2011.

After a bench trial, the trial court reversed its earlier initial grant of summary disposition in favor of Elizabeth and granted summary disposition in favor of Auto-Owners, denying coverage in an opinion dated October 5, 2011, and an order entered on October 21, 2011.

Elizabeth appealed, and this Court issued an opinion affirming the trial court's order on October 22, 2013. See *Null v Auto-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2013 (Docket No. 308473) at 1, 3. Relevant to this appeal, this Court stated that the residence did not fall within the policy's definition of covered property because

> [t]he controlling Michigan case law establishes that defendant properly denied coverage on the basis of the policy's residence requirements. In *Heniser* [*v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995)], our Supreme Court explained that when a property insurance policy includes a "residence premises" definition, there is no coverage if the insured does not reside at the property. The property at issue in *Heniser* was a vacation home that the insured had sold on a land contract, and the insured did not live in the home. *Id*. at 157. The Court held, "[w]e agree with those courts that have found the exact language of this policy to unambiguously require the insured to reside at the insured premises at the time of the loss." *Id*. at 168.
>
> This Court applied *Heniser* to confirm a denial of insurance coverage in *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 619 (2010). The *McGrath* Court determined that the residence premises requirement pre-

cluded coverage unless the insured lived in the premises at the time of the loss. *Id*. at 441. The Court rejected the argument that the insured could be deemed to reside in the premises if the insured intended to return at some time in the future. *Id*. at 442. The Court determined that the term "reside" had no technical meaning in the policy, and that the policy plainly required the insured to live in the premises in order to obtain coverage. *Id*. at 442-443.

* * *

Heniser and *McGrath* control the coverage question in this case. There is no ambiguity in the policy language at issue; the policy limits coverage to the dwelling in which the insured resides and which is used as the insured's primary residence. The record confirms that Lonnie did not reside in the home at the time of the fire. Plaintiff testified in deposition that Lonnie lived at the Cassopolis house with plaintiff and her husband for approximately one month after being released from jail in 1997. After that, Lonnie "bounced around a lot," meaning he stayed sporadically at the Cassopolis house for a few days at a time, and stayed there for two weeks in approximately 2005. Nothing in the record indicates that Lonnie resided in the home after 2005. Accordingly, the home did not fall within the policy definition of covered property, and defendant properly denied coverage. [*Null*, unpub op at 1-3.]

B. THE INSTANT CASE

While the companion case was proceeding, Wells Fargo filed a complaint against Auto-Owners and Elizabeth on June 13, 2011, asserting that it was entitled to any insurance proceeds recovered by Elizabeth. The complaint also alleged unjust enrichment and requested injunctive relief. Wells Fargo later amended the complaint and added a breach of contract claim against Auto-Owners.

On February 28, 2012, Auto-Owners moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Auto-Owners acknowledged that the policy at issue contained a mortgage clause that gave rise to a separate contract with the mortgagee, and that the clause would afford coverage to the mortgagee, even if coverage would not be afforded to the insured, in cases of fraud or arson. However, Auto-Owners asserted that the first step in interpreting an insurance policy is to determine whether coverage is afforded to any named insured by virtue of the satisfaction of all conditions precedent to coverage. Then, and only then, if coverage is afforded, the policy is reviewed to determine whether any exclusions apply.

Auto-Owners argued, on the basis of the trial court's ruling in the companion case, that the policy did not cover the residence because Lonnie did not reside there at the time of the fire. Because the residence was not a "residence premises" under the policy, it was not "covered property," and there accordingly was no coverage under the policy in the first instance. Auto-Owners contrasted this circumstance with situations such as fraud and arson, in which coverage was afforded but then negated by a policy exclusion. Therefore, because the trial court had already held (in the companion case) that the residence was not covered under the policy, there was no coverage under the policy in the first instance, and the mortgage clause accordingly did not provide coverage to Wells Fargo as the mortgagee. Additionally, Auto-Owners argued that the order entered by the trial court in the companion case precluded Wells Fargo from bringing its claims in a new case, under the doctrines of judicial estoppel and estoppel by laches, because Wells Fargo had an opportunity and an obligation to bring its claims in the previous companion case but failed to do so.

Wells Fargo filed a response on July 12, 2012. Wells Fargo asserted that it was entitled to coverage under the policy's mortgage clause. Specifically, Wells Fargo argued that the mortgage clause was a separate contract that was distinct from any contract Auto-Owners may have had with Lonnie, the insured. Therefore, the fact that the insured was precluded from coverage under the policy did not negate the separate contract between Auto-Owners and Wells Fargo, and Wells Fargo remained covered under the policy. Wells Fargo also argued that, as of December 8, 2010, Auto-Owners had not informed Wells Fargo of the status of its claim, as evidenced by a letter sent from Wells Fargo to Auto-Owners requesting information about the status of the claim on December 8, 2010. Auto-Owners did not advise Wells Fargo that its claim was denied until October 11, 2011. Therefore, Wells Fargo argued that the companion case did not bar the present case because it would have been "absurd" to require Wells Fargo to bring this action before it knew the status of its claim with Auto-Owners.

The trial court held a hearing on Auto-Owners' motion on July 16, 2012. After taking the matter under advisement, the trial court entered an order on July 19, 2012, stating that "the insurance policy at issue does not provide coverage to plaintiff Wells Fargo Bank for damages to the structure arising from the fire of April 11, 2009," and further stating that "the Order of December 2, 2010 . . . does constitute a dismissal of all claims Wells Fargo Bank may have had arising from the fire of April 11, 2009." The court therefore granted summary disposition to Auto-Owners under MCR 2.116(C)(10).[2] This appeal followed.

[2] The July 19, 2012 order made no mention of Elizabeth, who was also a defendant in the action. The trial court entered another order on

II. STANDARD OF REVIEW

We review de novo the trial court's grant of summary disposition. *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 7; 792 NW2d 372 (2010). 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), citing *Greene v A P Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). Ultimately, 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*. "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2007).

With regard to whether this case is barred by the order in the companion case, the trial court granted summary disposition to defendants under MCR 2.116(C)(10); however, the correct subrule for summary disposition based upon a prior order is (C)(7). See *Bd of Co Rd Comm'rs for Eaton Co v Schultz*, 205 Mich App 371, 373; 521 NW2d 847 (1994); MCR 2.116(C)(7) (providing that motion may be based on "prior judgment"). However, summary disposition under the incorrect subrule is not fatal, even if the moving party failed to cite the correct subrule, if the record supports review under the proper subrule. *Detroit News, Inc v Policemen & Firemen Ret Sys of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002) ("If summary disposition is granted under one subpart of the court rule

---

September 4, 2012, providing that all claims, against both Auto-Owners and Elizabeth, were dismissed with prejudice for the reasons provided in the previous order.

when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart.") (citation and quotation marks omitted). This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013).

The issue whether the policy covered the residence was not raised or decided in this case; it is therefore unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). "This Court has repeatedly declined to consider arguments not presented at a lower level . . . . We have only deviated from that rule in the face of exceptional circumstances." *Id*. at 234 n 23. Nevertheless, this Court may consider an unpreserved issue "if the question is one of law and all the facts necessary for its resolution have been presented or where necessary for a proper determination of the case." *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195; 412 NW2d 690 (1987) (citations omitted).

The "proper interpretation and application of an insurance policy is a question of law that we review de novo." *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 196; 702 NW2d 106 (2005). We therefore review de novo the trial court's interpretation of the mortgage clause of the policy. *Id*. Generally, when reviewing an insurance policy dispute, an appellate court "look[s] to the language of the insurance policy and interpret[s] the terms therein in accordance with

Michigan's well-established principles of contract construction." *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007) (citation and quotation marks omitted).

> First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity. [*Id*. (citation and quotation marks omitted).]

"An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Heniser*, 449 Mich at 161. Policy language should be given its plain and ordinary meaning, and this Court must construe and apply unambiguous contract terms as written. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). "[A]n insurance contract should be viewed as a whole and read to give meaning to all its terms," and "[c]onflicts between clauses should be harmonized . . . ." *Busch v Holmes*, 256 Mich App 4, 8; 662 NW2d 64 (2003) (citation and quotation marks omitted). This Court gives meaning to all the terms contained within the policy. See *Mich Twp Participating Plan v Pavolich*, 232 Mich App 378, 383; 591 NW2d 325 (1998).

III. ANALYSIS

A. THE ISSUE WHETHER THE RESIDENCE WAS COVERED UNDER THE POLICY IS BARRED FROM RELITIGATION BY THE DOCTRINE OF COLLATERAL ESTOPPEL

Wells Fargo argues that the residence was covered under the policy, and that the trial court erred by

holding to the contrary. We note that, as stated earlier, this Court could decline to address this issue as unpreserved. *Booth Newspapers*, 444 Mich at 234 n 23. The issue presented was raised and decided in the companion case, not in the instant case. Nonetheless, as this issue presents a question of law for which all facts necessary for its resolution have been presented, we address this issue, and conclude that collateral estoppel bars its relitigation.

Generally, application of collateral estoppel requires that (1) the issue was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there is mutuality of estoppel. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). The issue to be decided must be identical to the one decided in a prior action, and not merely similar. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 340; 657 NW2d 759 (2002).

> [M]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue[,] that party must have been a party, or in privy to a party, in the previous action. In other words, [t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. [*Monat*, 469 Mich at 684-685 (citations and quotation marks omitted).]

"By preventing relitigation, this doctrine attempts 'to relieve parties of multiple litigation, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.' " *Bithell*, 254 Mich App at 341, quoting *Dearborn Hts Sch Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998).

In the instant case, whether the residence was covered under the policy is an issue that has already been

actually litigated and determined by a valid and final judgment. See *Monat*, 469 Mich at 682. The trial court in the companion case entered an order stating that the residence was not covered under the Auto-Owners policy. Elizabeth appealed that order and a panel of this Court affirmed, specifically holding that the residence was not covered under the policy in question at the time of the fire with regard to Elizabeth's claim because "the policy limits coverage to the dwelling in which the insured resides and which is used as the insured's primary residence." *Null*, unpub op at 3. Therefore, this exact issue was the subject of a valid and final judgment. See MCR 7.202(6)(a)(i) (stating that a final judgment "disposes of all the claims and adjudicates the rights and liabilities of all the parties"); *Wurzer v Geraldine*, 268 Mich 286, 289; 256 NW 439 (1934) ("Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for.") (citation and quotation marks omitted). The first prong of the collateral estoppel analysis is satisfied.

Next, the same parties or privies had a full and fair opportunity to litigate the issue.

> A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment. A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase. [*Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999)].

In *Null v Auto-Owners Ins Co*, LC No. 10-228-NI, Elizabeth was the plaintiff and Auto-Owners and Wells Fargo were defendants. In this case, Wells Fargo

is the plaintiff and Elizabeth and Auto-Owners are defendants. Thus, the cases involved the exact same parties. Wells Fargo had a full and fair opportunity in the companion case to litigate whether the residence was covered under the Auto-Owners policy. Although there is no evidence of record indicating that Wells Fargo actually filed any briefing or motions in support of coverage under the Auto-Owners policy, it had the opportunity to do so as a party to the action. Moreover, Wells Fargo was dismissed from the case on its own motion. The general rule permits relitigation only if "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action[.]" *Monat*, 469 Mich at 685 (citation, quotation marks, and emphasis omitted). Here, Wells Fargo—the party against whom preclusion applies—was a defendant in the initial action, was dismissed on its own motion, and as a named defendant could have participated in the appeal to this Court. See *Null*, unpub op at 1. Accordingly, relitigation is not permitted. *Monat*, 469 Mich at 685. The second prong of the doctrine is thus satisfied.

Finally, the mutuality prong is satisfied if the party "taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Monat*, 469 Mich at 684-685 (citation and quotation marks omitted). The party that benefitted from the earlier judgment in this case is Auto-Owners; the earlier judgment concluded that the Auto-Owners policy did not cover the residence. However, if the earlier judgment had held that the residence *was* covered under the Auto-Owners policy, Auto-Owners, as a party to the judgment, would have been bound by that adverse decision. *Id.*; *Wurzer*, 268 Mich at 289. Accordingly, Auto-Owners would have been bound by

the previous judgment, had it gone against it, and the third prong of the analysis is satisfied. *Monat*, 469 Mich at 684-685.[3]

Because we conclude that all three prongs of the collateral estoppel doctrine have been satisfied, we hold that the doctrine bars the relitigation of whether the residence was covered under the Auto-Owners policy.[4]

B. WELLS FARGO WAS COVERED UNDER THE STANDARD MORTGAGE CLAUSE OF THE POLICY

"In general, there are two types of loss payable clauses, otherwise known as mortgage clauses, contained in insurance policies which protect lienholders." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 383; 486 NW2d 600 (1992). The effect of a loss payable clause on a mortgagee's claim depends on whether such a clause is "ordinary" or "standard." Under an ordinary loss payable clause, "the lienholder is simply an appointee to receive the insurance fund to the extent of its interest, and its right of recovery is no greater than the right of the insured." *Id*. There is "no privity of contract" between the insurer and the lienholder. *Id*. However, under a standard loss payable clause, sometimes termed a standard mortgage clause,

---

[3] We note that our Supreme Court has held that "where collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required." *Monat*, 469 Mich at 695. However, we find the mutuality prong to be satisfied in this case, whether or not applicable.

[4] We disagree with Wells Fargo's contention that denial of coverage to Elizabeth under the policy renders the policy illusory or in violation of Michigan law. Had Lonnie resided in the home as required by the policy, the home would have been covered under the policy. The policy was thus not "so insubstantial as to impose no obligation," *Black's Law Dictionary* (9th ed), p 1332 (defining "illusory promise"), nor did it violate any statutory provisions governing the issuance of fire insurance policies, see MCL 500.2833 and *Heniser*, 449 Mich at 161.

> a lienholder is not subject to the exclusions available to the insurer against the insured because an independent or separate contract of insurance exists between the lienholder and the insurer. In other words, there are two contracts of insurance within the policy—one with the lienholder and the insurer and the other with the insured and the insurer. [*Id*. at 384.]

See also *Singer v American States Ins*, 245 Mich App 370, 379; 631 NW2d 34 (2001) ("It is well settled that a policy's standard mortgage clause constitutes a separate and distinct contract between a mortgagee and an insurance company for payment on the mortgage."). In sum, under a standard mortgage clause, "the lienholder's interest in the insured's property will not be avoided by any acts, representations, or omissions of the insured." *Foremost*, 439 Mich at 389. Thus, a standard mortgage clause "effects a new and independent insurance which protects the mortgagee as stipulated, and which cannot be destroyed or impaired by the mortgagor's acts or by those of any person other than the mortgagee or someone authorized to act for him and in his behalf." *Id*. at 389-390 (citation and quotation marks omitted).

The two types of clauses are generally identifiable within an insurance policy on the basis of their language. An ordinary loss payable clause simply provides that the mortgagee will be paid as its "interest may appear," meaning that the mortgagee will only receive insurance proceeds to the extent of its interest in the insured property and will not have a right of recovery under the policy that is any greater than that of the insured. *Id*. at 383. A standard loss payable clause may contain the same language; however, it provides additional language that serves to afford coverage to the mortgagee even where it is not afforded to the insured. The result of such language is that "the lienholder's interest in the insured's property will not be avoided by

any acts, representations, or omissions of the insured." *Id*. at 389. A standard loss payable clause thus may contain language indicating, for example, that the mortgagee will be covered notwithstanding "any act or neglect by the insured" that may result in the denial of coverage to the insured. *Id*. at 386, 388.

In the instant case, the Auto-Owners policy includes the following mortgage clause:

> **k. MORTGAGE CLAUSE**
>
> This provision applies to only the mortgagee named in the Declarations. It does not affect **your** [the insured's] rights or duties under this policy.
>
> The word mortgagee includes a trustee under a deed of trust and a contract seller under a land contract.
>
> Loss covered by the policy, if any, shall be payable to the mortgagee, as their interest may appear, under all present or future mortgages upon the property described in the Declarations of this policy in which the mortgagee may have an interest. If more than one mortgagee is named in the Declarations, payment shall be made in order of precedence of the mortgages.
>
> If **we** [Auto-Owners] deny **your** [the insured's] claim, such denial will not apply to a valid claim of the mortgagee, provided the mortgagee:
>
> (1) notifies **us** [Auto-Owners] of any change of ownership or occupancy or substantial change in exposure which has come to the knowledge of the mortgagee;
>
> (2) pays any premium due under this policy that **you** [the insured] or the mortgagor has neglected to pay; and
>
> (3) submits to **us** [Auto-Owners], within 60 days after receiving notice from **us** [Auto-Owners] of **your** [the insured's] failure to do so, a proof of loss signed and sworn by the mortgagee.
>
> Whenever **we** [Auto-Owners] pay the mortgagee any sum for loss under this policy and deny payment to **you** [the insured] for such loss:

> (1) to the extent of such payment, **we** [Auto-Owners] are legally subrogated to all rights of the mortgagee under the terms of the mortgage on the covered property; or
>
> (2) at **our** [Auto-Owners'] option, **we** [Auto-Owners] may pay to the mortgagee the whole principal due, with interest accrued, and shall then receive full assignment and transfer of the mortgage and of all collateral.
>
> Subrogation shall not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.
>
> **We** [Auto-Owners] may cancel or nonrenew [sic] this policy at any time as provided by its terms. **We** will notify the mortgagee at least 10 days prior to the effective date of the cancellation or nonrenewal. **We** may also cancel this agreement by providing 10 days notice to the mortgagee.
>
> All policy terms and conditions apply to the mortgagee.

Wells Fargo maintains that this mortgage clause constitutes a standard mortgage clause that acts as a separate contract between it and Auto-Owners, and that coverage under the standard mortgage clause is not avoided by Lonnie's failure to comply with the policy's requirement that he reside in the premises. Auto-Owners does not dispute that the clause is a standard mortgage clause, and in fact concedes that it gives rise to a separate contract that protects Wells Fargo against certain actions of the insured under the policy.

We agree with the parties, and conclude that the policy in this case contains a standard mortgage clause. The clause provides that the mortgagee will be paid "as their interest may appear," like an ordinary loss payable clause, see *Foremost*, 439 Mich at 383, but it also provides that if Auto-Owners denies the insured's claim, "such denial will not apply to a valid claim of the mortgagee," provided the mortgagee complies with certain conditions. Thus, the policy provides that the mortgagee will be protected from loss even if coverage is

denied to the insured, which is consistent with the requirements for a standard mortgage clause. *Id*. at 389-390.

Wells Fargo argues that this clause provides coverage for it, as mortgagee, even though it was determined in the companion case that Elizabeth was barred from recovery. That determination was based on Lonnie's failure to reside in the premises, as a result of which the property did not meet the policy's definition of "residence premises." According to Wells Fargo, Lonnie's act or neglect did not operate to avoid coverage for Wells Fargo under the separate contract of the standard mortgage clause. Auto-Owners responds that the standard mortgage clause is not applicable in situations where the policy does not provide coverage for an insured in the first instance, rather than where coverage is afforded but then negated by an exclusion.

The trial court did not provide any rationale for its conclusion that Wells Fargo was not covered under the policy. The trial court's order only provided that it granted summary disposition under MCR 2.116(C)(10) because "the insurance policy at issue does not provide coverage to plaintiff Wells Fargo Bank for damages to the structure arising from the fire of April 11, 2009."

Our review de novo of the language of the policy leads us to conclude that the trial court erred by granting summary disposition to Auto-Owners. We thus agree with Wells Fargo, and hold that the standard mortgage clause in this case is a separate contract between Wells Fargo and Auto-Owners that, by its plain language, affords coverage to the mortgagee under the circumstances presented.

As noted, "it is well settled that a policy's standard mortgage clause constitutes a separate and distinct contract between a mortgagee and an insurance com-

pany for payment on the mortgage." *Singer*, 245 Mich App at 379. Accordingly, under a standard mortgage clause, "the lienholder's interest in the insured's property will not be avoided by any acts, representations, or omissions of the insured." *Foremost*, 439 Mich at 389. However, the standard mortgage clause in the Auto-Owners policy also provides that it only applies to a "valid claim of the mortgagee" when certain conditions are met and that "[a]ll policy terms and conditions apply to the mortgagee[.]" The Auto-Owners policy does not explain or define the phrase "valid claim of the mortgagee." Likewise, the trial court did not address the meaning of this language.

Generally, the circumstances under which Michigan courts have had occasion to consider coverage under a standard mortgage clause have been in the context of policy exclusions such as those noted on appeal by Auto-Owners, i.e., fraud, arson, or loss resulting from the negligence of the insured. See, e.g., *Ramon v Farm Bureau Ins Co*, 184 Mich App 54, 58; 457 NW2d 90 (1990) (considering a standard loss payable clause in the context of "arson and fraud"). In *Foremost Ins Co*, 439 Mich at 384-390, our Supreme Court held that the insured's intentional destruction of his motor home by arson, and the insured's acts of fraud and misrepresentation, did not preclude coverage to the mortgagee under the standard mortgage clause. In holding that the mortgagee could still recover under the policy even though the insured's acts precluded coverage to the insured, however, the Court stated:

> As we have previously noted, there are two contracts of insurance involved in this case. One covers risk and outlines exclusions for the insured and the insurer. The other operates as an independent contract for the limited purpose of preventing the loss of coverage by any act or neglect between the insurer and the insured. The prevention of

> recovery under the contract between the insured and the insurer does not prohibit the recovery by the lienholder under its separate contract of insurance with the insurer . . . . [*Id*. at 388-389.]

Thus, the Court indicated that the standard mortgage clause was an independent contract of insurance meant to prevent loss of coverage for the mortgagee for *any act or neglect* between the insured and the insurer. While the case may have involved denial of coverage to the insured pursuant to an exclusion, rather than a finding that no coverage existed, the Court did not make a distinction between acts that precluded coverage and acts that excluded coverage when setting forth the rule of law.

We also reject that distinction in the circumstances presented in this case. Our decision in that regard is supported not only by *Foremost*, but also by our Supreme Court's earlier decision in *Citizens State Bank of Clare v State Mut Rodded Fire Ins Co of Mich*, 276 Mich 62; 267 NW 785 (1936). The mortgagee in that case similarly sought coverage, notwithstanding denial of the insured's claim, after a fire loss. The denial of the insured's claim was not premised on a policy exclusion, but rather on the insurer's position that the insured lacked an insurable interest or, alternatively, had obtained the policy through fraudulent representations in the application. That is, the insurer contended, as does Auto-Owners in this case, that there was no coverage in the first instance. In describing the effect and nature of a standard mortgage clause, the Court stated:

> The effect of this clause has been the subject of much litigation, and the conclusion derived is well stated in 5 Couch, Cyclopedia Insurance Law, p 4435, § 1215b:
>
> > The so-called "standard" or "union" mortgage clause, making the mortgagee payee, and stipulating

> that the insurance shall not be invalidated by the mortgagor's acts or neglect, constitutes an independent contract between said mortgagee and insurer, and in such case the subject-matter of the insurance is the mortgagee's insurable interest, and not the real estate, and the risk will not be avoided by any acts, representations, or omissions of the mortgagor or owner, *whether done or permitted prior or subsequently to, or at the time of, the issuance of the policy*.
>
> Since the case of *Hastings* [*v Westchester Fire Ins Co*, 73 NY 141 (1878)], the courts have declared this to be a separate contract between insurer and mortgagee and not subject to most of the defenses which the insurer might have against the mortgagor. Consequently, since the clause operates as a separate and distinct contract of insurance upon the mortgagee's interest, it gives the mortgagee such an independent status as might authorize a recovery on the policy by him even though the mortgagor were precluded. [*Citizens State Bank*, 276 Mich at 67-69 (emphasis added; citations omitted).]

Thus, standard mortgage clauses operate to afford coverage to mortgagees even when coverage is denied to an insured in a context other than the application of a policy exclusion, and even when the act or neglect of the insured occurs before the issuance of the policy.

This reading is consistent with the very purpose of standard mortgage clauses. A mortgagee is in a real sense a bystander to the negotiation of an insurance policy between an insured and an insurer, and to the resulting relationship between them. Although a mortgagee facilitates an insured's property ownership and is thus essential both to the insured's ownership of property and to the insured's ability then to insure that property, the mortgagee's role in the process of obtaining insurance is essentially nonexistent. That process occurs solely between the insured and the insurer; the mortgagee is merely along for the ride. The insured

makes an application to the insurer; the insurer bears the responsibility for and assumes the risks associated with evaluating the insured's application and related representations, and the facts and circumstances attendant thereto; and it proceeds accordingly. Similarly, the mortgagee is not a party to the resulting relationship between the insured and the insurer, and possesses neither the rights nor the responsibilities that are attendant to that relationship. Unlike the insurer, the mortgagee plays no role in the application evaluation process or in any resulting relationship with the insured; consequently, in the standard mortgage clause context, the mortgagee is entitled under the law to rely on the insurer's assumption of responsibility to engage in that evaluation to its satisfaction, and to assume the risks of the resulting relationship.

The consequence of this is that the mortgagee is protected in the event that any act or neglect by the insured, either before, during, or after the application process, causes the insured to be denied coverage under the policy. It matters not whether that act or neglect by the insured falls within a policy exclusion or causes there to be no coverage under the policy in the first instance. In either event, the standard mortgage clause affords protection to the mortgagee.

In this case, it was the insured's act of ceasing to reside in the residence that negated the insured's coverage. We hold that, under the rule of law announced in *Foremost* and *Citizens State Bank*, that circumstance does not negate coverage for Wells Fargo, as mortgagee, under the standard mortgage clause of the Auto-Owners policy.

Our conclusion is further supported on these facts by the language of the Auto-Owners policy itself. Specifically, the standard mortgage clause of the policy provides that a

denial of the insured's claim "will not apply to a valid claim of the mortgagee," provided the mortgagee complies with certain conditions. One of those conditions is that the mortgagee "notifies [Auto-Owners] of any change of ownership or occupancy or substantial change in exposure which has come to the knowledge of the mortgagee[.]" The inclusion of this language in the standard mortgage clause demonstrates that a mere "change of ownership or occupancy"—such as occurred in this case—will not, in and of itself, avoid coverage to the mortgagee. Even though the consequence of that circumstance may be that no coverage exists for the insured in the first instance, the standard mortgage clause continues to afford protection to the mortgagee.

For the same reason, the use of the adjective "valid" within the phrase "valid claim of the mortgagee" is inconsequential to our analysis. The standard mortgage clause is clear that, notwithstanding the above circumstance, a mortgagee still may have a "valid claim." To read the term more broadly, so to exclude as "invalid" any claim arising in the context of a change in ownership or occupancy, would give rise to an internal inconsistency in the policy language, and effectively would undermine the policy's own standard mortgage clause. We decline to so interpret the policy language. See *Ingersoll-Rand Fin Corp v Employers Ins of Wausau*, 771 F2d 910, 914 (CA 5, 1985), quoting Couch, Insurance, 2d (rev ed), § 42:720 (1982) (" '[I]nsofar as the provisions of the policy are inconsistent with or antagonistic to the clause protecting the interest of the mortgagee, they must be regarded as inapplicable in determining his rights.' ") (citation and quotation marks omitted).[5] Further, to the extent that this or other

[5] For the same reason, we decline to read the language "[a]ll policy terms and conditions apply to the mortgagee" as meaning that the

language may be read as giving rise to an ambiguity in the policy, such ambiguities must be construed against Auto-Owners as the drafter. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003) ("[I]t is already well established that ambiguous language should be construed against the drafter, i.e., the insurer.").

Our conclusion draws further support from decisions in other jurisdictions. There are no Michigan cases that squarely consider whether a mortgagee continues to have a "valid claim" under a standard mortgage clause even when the property is not covered because it was not a "residence premises" at the time of the loss. However, other jurisdictions have considered the application of standard mortgage clauses in similar contexts. Caselaw from other states is not binding on this court, but may be "instructive" and used as a guide. *A&E Parking v Detroit Metro Wayne Co Airport Auth*, 271 Mich App 641, 645; 723 NW2d 223 (2006); see also *Holland v Trinity Health Care Corp*, 287 Mich App 524, 529; 791 NW2d 724 (2010).

In *Ingersoll-Rand*, 771 F2d at 911-914, the United States Court of Appeals for the Fifth Circuit addressed a standard mortgage clause that provided no coverage for the insured. The case involved an insurance policy covering a ship that was stolen because of the insured's negligence; however, theft of the ship was not covered under the policy. *Id*. at 911. As the Fifth Circuit explained, "[b]oth parties agree that loss by theft of the vessel was not among the named perils covered by the

---

mortgagee is subject to all defenses to which the insured may be subject. Such a reading would be contrary to specific language of the policy, would serve to undermine the law's recognition of the purpose and effect of the standard mortgage clause, and would be inconsistent with and antagonistic to the clause that protects the interest of the mortgagee. *Ingersoll-Rand*, 771 F2d at 913.

policy; so that the insured mortgagor-owner . . . could not itself recover on the policy for the present loss if occasioned by a theft of the vessel." *Id*. at 912. Nevertheless, the Fifth Circuit held that the mortgagee could recover under the policy's standard mortgage clause, stating:

> Where the issue has been squarely presented, the modern decisions are unanimous, and the earlier decisions virtually so, in holding that a mortgagee under a standard mortgage clause may (where not guilty himself of any breaches of policy conditions) recover from the insurer for a loss sustained by the mortgaged property, even though the risk be excluded from the policy coverage . . . .
>
> * * *
>
> . . . The intent of the standard mortgage clause is that the mortgagee's right to recover will not be invalidated by the act or negligence of the mortgagor and that no act or default of any person other than the mortgagee . . . shall affect the rights of the mortgagee to recover in case of loss. "[I]nsofar as the provisions of the policy are inconsistent with or antagonistic to the clause protecting the interest of the mortgagee, they must be regarded as inapplicable in determining his rights." [*Id*. at 913-914, quoting Couch, § 42:720 (citations and quotation marks omitted).]

Additionally, under facts closely resembling the facts of the instant case, the California Court of Appeals has held that a mortgagee was covered under a policy's standard mortgage clause. In *Home Savings of America, FSB v Cont'l Ins Co*, 87 Cal App 4th 835; 104 Cal Rptr 2d 790, 792 (Cal App, 2001), the insured homeowners vacated their residence and demolished the property with the intent to rebuild; however, they did not notify the insurer or the mortgagee of their actions. *Id*. After the loan went into default, the mortgagee learned of the vacancy and demolition and sought to recover under the

policy's standard mortgage clause. Similar to the terms of the policy in this case, the policy contained a "residence premises" definition and a standard mortgage clause providing that a denial of the insured's claim would not apply to a "valid claim of the mortgagee, if the mortgagee . . . notifies [the insurer] of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware[.]" *Id*. at 792, 796. The California court cited with approval *Foremost*, 439 Mich at 383-384, for its description of the nature and effect of standard mortgage clauses. The court concluded that, even though the insured did not reside in the home, and had actually demolished the home when the mortgagee filed its claim, the mortgagee remained covered under the policy's standard mortgage clause. More specifically, the court held that "[e]ven though ownership and occupancy are requirements of coverage as far as the named insured is concerned . . . , a change in ownership and occupancy will not defeat coverage for the mortgagee, provided the mortgagee gives notice of the changes of which it is aware." *Id*. at 796.

In *Waterstone Bank, SSB v American Family Mut Ins Co*, 2013 Wis App 60, 348 Wis 2d 213, 221-222; 832 NW2d 152 (2013), however, the Wisconsin Court of Appeals upheld the insurance company defendant's denial of coverage to the plaintiff mortgagee, because the business-owner's policy did not cover certain losses if the property was "vacant" (defined as less than 31% of the total space rented or used) for a specified period of time prior to the occurrence of the losses. Importantly, the court noted that vacancy was not prohibited by the policy; in fact the policy specifically contemplated that a building may become vacant, in which case certain losses would not be covered; thus, the vacancy clause was "not a term or condition, the violation of which by the property owner's act would forfeit or void the policy." *Id*. at ¶ 11.

We find *Ingersoll-Rand* and *Home Savings* to be persuasive and to support our conclusion that the rule of *Foremost* provides for coverage for Wells Fargo in the instant case. We find *Waterstone Bank* to be distinguishable, because it involved a business-owner's policy under which "noncoverage existed by virtue of the vacancy provision and not by any breach or violation by the property owner," *Waterstone Bank*, 2013 Wis App at ¶ 10, rather than, as here, a homeowner's policy under which the insured was denied coverage because the insured had failed to abide by the residency requirement of the policy ("Thisdwelling [sic] must be used principally as **your** private residence."). Thus, unlike this case, *Waterstone Bank* did not involve the sort of act or neglect on the part of the insured from which the standard mortgage clause was designed to protect the mortgagee.

For all these reasons, we conclude that the trial court erred by granting summary disposition to Auto-Owners with respect to Wells Fargo's coverage under the standard mortgage clause of the policy. Further, for the reasons indicated, we hold that the standard mortgage clause of the policy unambiguously provides coverage for Wells Fargo in the circumstances presented. For the reasons discussed later in this opinion, however, we conclude, on the basis of the record that is now before us, that it would be premature to direct the entry of summary disposition in favor of Wells Fargo.

C. THE ORDER GRANTING SUMMARY DISPOSITION TO WELLS FARGO IN THE COMPANION CASE DOES NOT BAR WELLS FARGO'S CLAIM IN THIS CASE

Finally, Wells Fargo argues that the trial court's order granting summary disposition to Wells Fargo in the companion case does not bar its claim in this case. Auto-Owners responds that the doctrines of judicial

estoppel and estoppel by laches apply to bar Wells Fargo's claim because Wells Fargo was aware of the claim and had an opportunity to bring the claim during the companion case. The trial court did not provide any rationale or reasoning for its conclusion that the companion case barred Wells Fargo's claim in this case. The trial court only stated that its previous order "does constitute a dismissal of all claims Wells Fargo Bank may have had arising from the fire of April 11, 2009." We agree with Wells Fargo that the companion case does not bar its claim in the instant case.

"Judicial estoppel precludes a party from adopting a legal position in conflict with a position taken earlier in the same or related litigation. The doctrine protects the integrity of the judicial and administrative processes." *Ford Motor Co v Pub Serv Comm*, 221 Mich App 370, 382-383; 562 NW2d 224 (1997). This Court has held that "[u]nder the doctrine of judicial estoppel, a party that has unequivocally and successfully set forth a position in a prior proceeding is estopped from setting forth an inconsistent position in a later proceeding." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 672; 760 NW2d 565 (2008). For the doctrine to apply, the party's position in the prior proceeding must have been " 'wholly inconsistent' " with the same party's position in the later proceeding. *Szyszlo v Akowitz*, 296 Mich App 40, 51; 818 NW2d 424 (2012), quoting *Paschke v Retool Indus*, 445 Mich 502, 510; 519 NW2d 441 (1994). The doctrine was developed to prevent parties from playing " 'fast and loose' with the legal system." *Paschke*, 445 Mich at 509 (citation omitted).

"Estoppel by laches is the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458

NW2d 659 (1990), citing *Bartnicki v Wayne Co Drain Comm'r*, 18 Mich App 200, 205; 170 NW2d 856 (1969). "To successfully assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by the delay." *Id*., citing *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982).

We conclude that neither of these doctrines is applicable to the circumstances of the instant case. With regard to judicial estoppel, there is no record evidence that Wells Fargo "unequivocally and successfully set forth a position in a prior proceeding" and is now attempting to present "an inconsistent position" in this proceeding. *Detroit Int'l Bridge Co*, 279 Mich App at 672. The companion case concerned whether Elizabeth was entitled to benefits under the Auto-Owners policy. This case concerns whether Wells Fargo is covered under the standard mortgage clause of the Auto-Owners policy. There is no evidence of record that Wells Fargo argued in the companion case that it was not entitled to coverage under the standard mortgage clause of the policy. In fact, even after Wells Fargo was dismissed from the companion case, it moved to intervene as a counterplaintiff, seeking to assert that it was entitled to its share of the proceeds that Auto-Owners owed Elizabeth. This position is congruent with the one Wells Fargo takes in this case, by arguing both that coverage was afforded to the insured under the policy, and that coverage was separately afforded to it under the standard mortgage clause of the policy. Wells Fargo's position thus is not " 'wholly inconsistent' " with its position in the companion case, and the doctrine of judicial estoppel does not apply. *Szyszlo*, 296 Mich App at 51, quoting *Paschke*, 445 Mich at 510.

Further, even though it may have been more efficient for Wells Fargo to have asserted its claim against Auto-Owners in the companion case, "[t]o successfully

assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by the delay." *Schmude Oil*, 184 Mich App at 583. There is no evidence of record that Auto-Owners was prejudiced by virtue of the disposition of Elizabeth's claim and Wells Fargo's claim in two different lawsuits. Wells Fargo acted promptly to protect its interest upon the denial of its claim in late 2011. In fact, the present case was filed while the companion case was still pending in the trial court. Regardless of these circumstances and judicial efficiency, however, the record does not support the conclusion that Auto-Owners was prejudiced by the resolution of these claims in separate actions. Accordingly the doctrine of estoppel by laches does not apply.

IV. REMAND IS NECESSARY FOR DETERMINATION OF WHETHER WELLS FARGO COMPLIED WITH THE REQUIREMENTS OF THE POLICY

In its motion for summary disposition before the trial court, Auto-Owners alternatively argued that, even if coverage was afforded to Wells Fargo under the mortgage clause, Wells Fargo had failed to comply with the requirement that it "submit[] to us [Auto-Owners], within 60 days after receiving notice from us [Auto-Owners] of your [the insured's] failure to do so, a proof of loss signed and sworn by the mortgagee." Auto-Owners alleged that it informed Wells Fargo in correspondence dated August 17, 2009, that it was required to submit a sworn proof of loss within 60 days, and that Wells Fargo failed to do so. Thus, it argued, Auto-Owners properly denied Wells Fargo's claim.

Wells Fargo responded that a genuine issue of material fact existed regarding whether it had "received" the requisite notice from Auto-Owners, so as to trigger its obligation to provide a sworn proof of loss within 60 days. Wells Fargo further argued that deposition testi-

mony from an Auto-Owners claims representative supported the notion that it had made a valid claim under the policy, and that in any event correspondence from Auto-Owners on April 21, 2009, contained the representation that Auto-Owners had received a claim from the insured and that Wells Fargo needed to take no further action to secure its rights under the policy.

The parties addressed this issue at a hearing before the trial court and presented arguments consistent with the positions taken in their respective briefs. However, the trial court made no specific ruling on this issue in its order granting summary disposition to Auto-Owners. Because the trial court concluded that the policy did not provide coverage to Wells Fargo, and further that its order in the companion case barred Wells Fargo's claim, it apparently saw no need to address the issue of Wells Fargo's compliance with policy provisions.

Because we conclude that the trial court erred by ruling that the policy did not provide coverage to Wells Fargo and that the companion case barred Wells Fargo's claim, we conclude that the proper course of action is to remand to allow the trial court to decide whether a genuine issue of material fact exists concerning Wells Fargo's compliance with the requirements of the policy. This comports with the principle that "[a]ppellate review is generally limited to issues decided by the trial court." *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). This is especially true where, as here, the issue has not been briefed on appeal, and it would be inappropriate to request supplemental briefing on the issue in the absence of a ruling from the trial court. *Id*. Consequently, and notwithstanding our holding that the standard mortgage clause of the policy unambiguously provides coverage for Wells Fargo in the circumstances presented, the trial

court, on remand, should determine whether there is any genuine issue of material fact as to whether Wells Fargo complied with the requirements of the policy.

V. CONCLUSION

We conclude that the doctrine of collateral estoppel bars relitigation of whether the residence was covered under the policy. We further conclude that the trial court erred by granting summary disposition to Auto-Owners on the issue of Wells Fargo's coverage under the policy. We hold as a matter of law that the policy's standard mortgage clause afforded coverage to Wells Fargo, the mortgagee, despite the lack of coverage for the insured. Additionally, we conclude that the doctrines of judicial estoppel and estoppel by laches do not bar Wells Fargo's claim in the instant case. We further conclude, however, that it would be inappropriate at this juncture to determine as a matter of law whether Wells Fargo complied with the requirements of the policy, without consideration of that issue by the trial court.

We therefore reverse the trial court's grant of summary disposition in favor of Auto-Owners and remand this case for further proceedings consistent with this opinion. On remand, the trial court should determine whether, in light of our decision that the policy provides for coverage for Wells Fargo and Wells Fargo's claims are not barred by the companion case, a genuine issue of material fact exists regarding Wells Fargo's compliance with the requirements of the policy.

Reversed and remanded. We do not retain jurisdiction.

CAVANAGH and FITZGERALD, JJ., concurred with BOONSTRA, P.J.

WINGET v DEPARTMENT OF TREASURY (ON REMAND)

Docket No. 302190. Submitted October 22, 2013, at Lansing. Decided December 5, 2013. Approved for publication March 11, 2014, at 9:00 a.m. Leave to appeal denied, 496 Mich ___.

Larry J. Winget was the sole shareholder of several subchapter S corporations. Most of the S corporations operated exclusively in Michigan, but during tax years 2001 and 2002, some had multistate operations. Larry and Alicia J. Winget determined their own liability under the Income Tax Act, MCL 206.1 *et seq*., by combining the property, payroll, and sales figures for all the S corporations to calculate a single apportionment percentage and applying this apportionment percentage to each of the S corporations. After reviewing the Wingets' tax returns for 2001 and 2002, the Department of Treasury concluded that the Wingets should have calculated and applied separate apportionment percentages for each corporation. The Tax Tribunal ruled in favor of the department, and the Wingets appealed. The Court of Appeals, TALBOT, P.J., and WILDER and RIORDAN, JJ., affirmed in an unpublished opinion per curiam, issued October 16, 2012 (Docket No. 302190). Citing *Malpass v Dep't of Treasury*, 295 Mich App 263 (2011), the panel concluded that Michigan law did not allow separate entities to be treated as a unitary business in the absence of some common ownership at the entity level and that being owned by the same individual taxpayer was insufficient to trigger this relationship requirement. It was undisputed that the S corporations were legally separate and distinct business entities and that there was no common ownership at the entity level. As a result, the corporations did not form a single business entity, and the department correctly determined that the Wingets were required to apply a separate apportionment percentage to each S corporation, depending on the corporation's unique property, payroll, and sales figures. The Wingets sought leave to appeal, and the Supreme Court held their application in abeyance pending a decision in the appeal of *Malpass*. The Supreme Court subsequently held in *Malpass* that while the Income Tax Act allows either separate-entity reporting or combined reporting, businesses need to be unitary for a taxpayer to apportion under MCL 206.115. 494 Mich 237 (2013). The Supreme Court then vacated the judgment in this case and remanded it for the

Court of Appeals to reconsider the issue in light of the Supreme Court's decision in *Malpass*. 495 Mich 863 (2013).

On remand, the Court of Appeals *held*:

Under the federal Constitution, a state is prohibited from imposing income tax on value earned outside the state's borders. However, a state need not isolate a business's intrastate activities from its interstate activities, but may instead tax an apportioned sum of the corporation's multistate business if the business is unitary. This unitary-business principle allows a state to tax multistate businesses on a share of the multistate business carried on in part in the taxing state. MCL 206.103 provides that any taxpayer having income from business activity that is taxable both within and without Michigan, other than the rendering of purely personal services by an individual, must allocate and apportion the taxpayer's net income. MCL 206.115 sets forth the apportionment formula, which includes the use of a property factor, a payroll factor, and a sales factor. The Wingets asserted that under MCL 206.115 they could calculate the apportionment of business income by adding the property, payroll, and sales of multiple S corporations to establish a single property factor, a single payroll factor, and a single sales factor. While that is a valid method for apportionment, it is only available when the multistate businesses are unitary. For a business or individual to exercise multistate apportionment, there must be some sharing or exchange of value that cannot be precisely identified or measured (beyond the mere flow of funds arising out of a passive investment or a distinct business operation) that renders formula apportionment a reasonable method of taxation. Other than generalized testimony that the S corporations were engaged in automotive-related businesses, there were no facts to support a conclusion that the corporations constituted a unitary business, and the Wingets were therefore not entitled to use combined reporting. Moreover, MCL 206.110 and MCL 206.115 did not require the Wingets as resident individual taxpayers to allocate all taxable business income in accordance with the apportionment formula regardless of whether the businesses were unitary.

Affirmed.

Varnum LLP (by *Thomas J. Kenney* and *Marla Schwaller Carew*) for petitioners.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Jessica A. McGiveny* and *Scott L. Damich*, Assistant Attorneys General, for respondent.

ON REMAND

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

WILDER, J. Previously, in *Winget v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 302190), we affirmed the order of the Michigan Tax Tribunal (MTT) affirming respondent's assessments for tax years 2001 and 2002. Our Supreme Court vacated our judgment and remanded for us to reconsider the issue in light of its decision in *Malpass v Dep't of Treasury*, 494 Mich 237; 833 NW2d 272 (2013). *Winget v Dep't of Treasury*, 495 Mich 863 (2013). For the reasons set forth in this opinion, we again affirm.

Petitioner Larry Winget is the sole shareholder of several subchapter S corporations. Most of the S corporations operate exclusively within Michigan, but during the tax years at issue, two or three S corporations had multistate operations. Petitioners determined their Michigan income tax liability by combining the property, payroll, and sales figures for all the S corporations to calculate a single apportionment percentage. Petitioners applied this apportionment percentage to each of the S corporations. After reviewing petitioners' tax returns for tax years 2001 and 2002, respondent concluded that petitioners should have calculated and applied separate apportionment percentages for each of the S corporations. The MTT ruled in favor of respondent, and petitioners appealed.

In the absence of fraud, we review the MTT's decision for "misapplication of the law or adoption of a wrong principle." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). Issues of statutory interpretation are reviewed de novo. *Id*.

Under the federal Constitution, a state is prohibited from imposing income tax on value earned outside the state's borders. *Container Corp of America v Franchise Tax Bd*, 463 US 159, 164; 103 S Ct 2933; 77 L Ed 2d 545 (1983). However, "[a] state is not required to isolate a business's intrastate activities from its interstate activities; instead, 'it may tax an apportioned sum of the corporation's multistate business *if the business is unitary*.' " *Malpass*, 494 Mich at 246, quoting *Allied-Signal, Inc v Div of Taxation Dir*, 504 US 768, 772; 112 S Ct 2251; 119 L Ed 2d 533 (1992) (emphasis added). This unitary-business principle "allows a state to 'tax multistate businesses "on an apportionable share of the multistate business carried on in part in the taxing state." ' " *Malpass*, 494 Mich at 246, quoting *Preston v Dep't of Treasury*, 292 Mich App 728, 733; 815 NW2d 781 (2011) (citation omitted).

Consistently with the unitary-business principle, MCL 206.103, during the relevant tax years, provided the following:

> Any taxpayer having income from business activity which is taxable both within and without this state, other than the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this act.[1]

The apportionment formula is set forth in MCL 206.115. At the time relevant to this appeal, MCL 206.115 read as follows:

> All business income, other than income from transportation services shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is

[1] MCL 206.103, as amended by 1970 PA 140. Effective January 1, 2012, this statute was modified by replacing "as provided in this act" with "as provided in this part." 2011 PA 38.

> the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.[2]

"The property, payroll, and sales factors represent the percentage of the total property, payroll, or sales of the business used, paid, or made in this state." *Grunewald v Dep't of Treasury*, 104 Mich App 601, 606; 305 NW2d 269 (1981), citing MCL 206.116, MCL 206.119, and MCL 206.121.

Petitioners argue that apportionment of business income under MCL 206.115 may be calculated by adding the property, payroll, and sales of multiple S corporations to establish a single property factor, a single payroll factor, and a single sales factor. While this is a valid method for apportionment, it is only available when the multistate businesses are unitary. In order

> for a business or individual to exercise multistate apportionment, there must "be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation." [*Wheeler Estate v Dep't of Treasury*, 297 Mich App 411, 417; 825 NW2d 588 (2012), aff'd in part and vacated in part on other grounds sub nom *Malpass*, 494 Mich 237, quoting *Container Corp*, 463 US at 166.

In *Malpass*, the plaintiff individuals (i.e., natural persons) owned two separate S corporations. Both were Michigan corporations, but one conducted its business in Michigan, and the other conducted its business in Oklahoma. *Malpass*, 494 Mich at 242-243. The "Michigan" S corporation had a net gain, while the "Oklahoma" S corporation had a net loss. In their amended tax returns, the taxpayers treated the S corporations as

---

[2] MCL 206.115, as amended by 1975 PA 233. The statute was subsequently amended by 2011 PA 38 and 178.

a unitary business. By treating the S corporations as a single unitary business, the taxpayers were able to substantially reduce their Michigan income tax obligations by applying the losses from the "Oklahoma" S corporation against their Michigan income. *Id*. at 243.

The Supreme Court noted that there were different apportionment formulas, including separate-entity reporting and combined reporting, and identified the question as being "whether the ITA [Income Tax Act, MCL 206.1 *et seq*.] prohibits individual taxpayers from using combined reporting." *Id*. at 247. It noted that (1) when an individual taxpayer derives income "from business activity both within and without this state, the ITA requires an individual taxpayer to 'allocate and apportion his net income,' " (2) all taxable income not attributable to another state must be allocated to this state, and (3) the allocation must be in accordance with MCL 206.115, which applies to "all business income." *Id*. at 248. Further, it noted that while MCL 206.115 unambiguously provided for formulary apportionment, it was silent on the method to be used. The Supreme Court concluded that "the phrase, '[a]ll business income . . . shall be apportioned[,]' is certainly broad enough to encompass either of the approaches advocated by the parties." *Id*. at 249. Therefore, it concluded that the ITA did not require separate-entity reporting and that "in the absence of a policy choice by the Legislature, . . . the ITA permits either reporting method." *Id*. at 251.

However, the *Malpass* Court did not eliminate the requirement that the businesses be unitary in order to apportion the income. It also did not indicate that all business that flowed through to the taxpayer would be regarded as a unitary business. In *Malpass*, it was not disputed that the businesses were unitary. *Id*. at 254. In

Wheeler v Dep't of Treasury, the companion case accompanying *Malpass*, it was disputed. *Id*. at 255. And because the Supreme Court agreed that the businesses in *Wheeler* were unitary, it held that the apportionment was proper. *Id*. at 256-258. Thus, the Supreme Court made it clear that it was maintaining the requirement that businesses need to be unitary in order for a taxpayer to apportion under MCL 206.115.

In the present case, the MTT found:

> [5.] d. The [hearing officer] was correct in finding that:
>
> "With regard to all of the entities at issue, other than generalized testimony that they were engaged in automotive related businesses, there are no facts to support a conclusion that the entities constitute a 'unitary' business. This suggests that even under the theory pursuant to which the original return was filed (excluding income and losses of non-unitary businesses) the factors should be combined only for those entities that are together engaged in a unitary business. However, the facts do not support a conclusion that they were so engaged."
>
> * * *
>
> f. Had Petitioners brought forth evidence of a unitary business enterprise for some or all of the S corporations, a different result may have been warranted.
>
> 6. Given the above, the Tribunal adopts the conclusion of the Proposed Opinion and Judgment finding Petitioners failed to prove that a unitary business existed between and amongst any of the S corporations. Therefore, Respondent was correct in determining Petitioners' taxable income is based on the business activities of each separate entity. [Citation omitted.]

Since petitioners failed to establish that the S corporations constituted a unitary business, they were not entitled to use combined reporting.

Petitioners argue that because they are resident individual taxpayers, MCL 206.110 and MCL 206.115 required allocation of all taxable business income in accordance with the apportionment formula, regardless of whether their businesses were unitary. However, *Malpass* forecloses this possibility since it recognized that combined reporting could only occur if the businesses were unitary.

Affirmed.

TALBOT, P.J., and RIORDAN, J., concurred with WILDER, J.

LOGAN v MANPOWER OF LANSING, INC

Docket No. 311167. Submitted March 5, 2014, at Lansing. Decided March 13, 2014, at 9:00 a.m.

Janice Logan sought unemployment benefits from her former employer, Manpower of Lansing, Inc. Manpower is a temporary-staffing agency that provides workers to its clients. Manpower assigned Logan to work as a receptionist at Pennfield Animal Hospital. Logan went on medical leave in August 2008. She returned to work at Pennfield in October 2008 as a direct hire of Pennfield. At that time, Logan had a medical restriction in place that limited her to working no more than four hours a day for no more than three days a week. The medical restriction was lifted on January 3, 2009, but Logan continued to work part-time until she was laid off from Pennfield at the end of January 2009. The Unemployment Insurance Agency initially granted benefits to claimant. Manpower objected and an administrative law judge (ALJ) ruled that Logan did not qualify for benefits because she had not left Manpower to accept permanent, full-time work. The Michigan Employment Security Board of Review remanded the matter to the ALJ for further fact-finding. On remand, the ALJ conducted further fact-finding and again ruled that Logan did not qualify for benefits. The Michigan Compensation Appellate Commission (formerly the Michigan Employment Security Board of Review) affirmed the decision of the ALJ, and Logan appealed in the Calhoun Circuit Court. The circuit court affirmed. The Court of Appeals granted Logan's application for leave to appeal.

The Court of Appeals *held*:

Under MCL 421.29(1)(a), an individual is disqualified from receiving benefits if he or she left work voluntarily without good cause attributable to the employer or employing unit. Under MCL 421.29(5), however, if the individual left work to accept permanent, full-time work with another employer, § 29(1)(a) is inapplicable. One who voluntarily leaves work to accept only part-time employment cannot invoke the exception to disqualification provided in § 29(5). In the context of § 29(1)(a), the term "work" is synonymous with "employment," and the work at issue is that associated with a particular employer or employing unit. Contrary

to Logan's argument, an individual does not have to have been unemployed under MCL 421.48(1) in order to be disqualified from receiving benefits under § 29(1)(a). In this case, the circuit court did not misapprehend or grossly misapply the substantial-evidence test to the ALJ's findings concerning whether claimant accepted part-time employment with Pennfield given the evidence that Pennfield's owner did not recall offering her full-time employment and given that Logan checked a box on a form that she filled out at Pennfield after she was hired in October 2008 indicating that she would be working part-time. Logan's other argument—that Manpower and Pennfield should have been considered dual or joint employers such that she could not be said to have left Manpower when she began working directly for Pennfield—was also correctly rejected. Although the Michigan Employment Security Act, MCL 421.1 *et seq*., recognizes the existence of temporary-staffing firms, there is no statutory language suggesting that such firms and their clients are to be treated as a single employing unit. The circuit court did not err by affirming the determination that Logan was disqualified from receiving unemployment benefits under § 29(1)(a) when she left Manpower and that she never requalified for benefits under MCL 421.29(3).

Affirmed.

UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — VOLUNTARILY LEAVING WORK — TEMPORARY-STAFFING FIRMS.

Under MCL 421.29(1)(a), an individual is disqualified from receiving unemployment benefits if he or she left work voluntarily without good cause attributable to the employer or employing unit; under MCL 421.29(5), however, if the individual left work to accept permanent, full-time work with another employer, § 29(1)(a) is inapplicable; one who voluntarily leaves work to accept only part-time employment cannot invoke the exception to disqualification provided in § 29(5); in the context of § 29(1)(a), the term "work" is synonymous with "employment," and the work at issue is that associated with a particular employer or employing unit; temporary-staffing firms and their clients are not generally treated as a single employing unit under the Michigan Employment Security Act.

Michigan Unemployment Insurance Project (by *Steve Gray*) for Janice Logan.

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

Counsel, and *Peter T. Kotula*, Assistant Attorney General, for the Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency.

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

PER CURIAM. Claimant, Janice Logan, appeals by leave granted an order of the circuit court, disqualifying her from receiving unemployment benefits. Because claimant voluntarily left work in October 2008 without good cause attributable to her employer at the time, she was disqualified from receiving unemployment benefits under MCL 421.29(1)(a), and we affirm.

I. BACKGROUND

Manpower of Lansing, Inc., is a temporary-staffing agency that provides workers to its clients. Claimant began working for Manpower in April 2008 and was assigned to work part-time as a receptionist at Pennfield Animal Hospital where she also provided general office support. At the beginning of August 2008, claimant went on medical leave. Up until that point, Manpower had paid claimant's salary. When claimant was ready to return to work in October 2008, she began working for Pennfield as a direct hire. Upon returning to work, claimant had a medical restriction in place, which limited her to working no more than four hours per day for no more than three days per week. After January 3, 2009, those medical restrictions were removed. But claimant never worked anything close to full-time employment, working only 15.5, 5.0, and 8.0 hours, respectively, during her last three two-week pay periods at Pennfield. Claimant was laid off at the end of January 2009.

Claimant applied for unemployment benefits. The Unemployment Insurance Agency initially granted ben-

efits to claimant, finding that she was not disqualified under § 29(1)(a) of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*. Manpower protested the agency's determination, and after holding a hearing, an administrative law judge (ALJ) ruled that claimant was disqualified for benefits under MCL 421.29(1)(a) because she "did not leave Manpower in order to accept permanent full-time work with Pennfield"; instead, "she abandoned her job with Manpower and took a part-time job with the client company."

Claimant appealed the ALJ's decision to the Michigan Employment Security Board of Review. The board initially found that the ALJ properly applied the law and affirmed the decision. Claimant then requested a rehearing because she asserted that she did not leave Manpower to accept part-time work with Pennfield; instead, she claimed that she left Manpower to accept full-time work. She further asserted that she "in fact work[ed] fulltime for a period after she went back to work at the animal hospital." Claimant acknowledged that the record was not developed on this matter and requested a rehearing to fully develop the record. Alternatively, claimant posited that even if she had left Manpower to accept part-time work with Pennfield, such circumstances would be covered by the intent of § 29(5) of the MESA. The board granted the request for rehearing and remanded the case to the ALJ in order to determine whether Pennfield offered claimant "full-time, permanent employment," which would have implicated the exception in MCL 421.29(5) to the rule in MCL 421.29(1) that disqualifies a person from receiving benefits for voluntarily leaving work.

On remand, the ALJ heard testimony from Mark Atma, the owner of Pennfield. Atma testified that claimant worked for him for approximately three

months, from the end of October 2008 through the end of January 2009. Atma testified that "[claimant] was working part-time" for him during this period. Atma further noted that on claimant's "new employee information sheet," claimant had selected the box indicating that she would be working "part-time." Atma also noted that in January 2009, after claimant's medical restrictions were removed, claimant never worked full-time. The ALJ found that claimant quit her job with Manpower in order to accept permanent, *part-time* employment with Pennfield and, as such, the provisions of MCL 421.29(5) did not apply. Therefore, the ALJ concluded that claimant was disqualified from receiving unemployment benefits under MCL 421.29(1)(a).

The Michigan Compensation Appellate Commission[1] affirmed the ALJ's decision, and claimant appealed in the Calhoun Circuit Court. Claimant reiterated her previous arguments but also argued that Manpower and Pennfield should be considered "joint employers" since she performed the same work before and after her direct hire with Pennfield and, thus, could not have "left" her prior employment. The circuit court was not persuaded and affirmed claimant's status as being disqualified from receiving unemployment benefits.

II. STANDARD OF REVIEW

When reviewing a circuit court's review of an agency's decision, we must determine whether the circuit court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial-evidence test to the agency's factual findings. *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App

[1] By executive order, the Michigan Employment Security Board of Review was replaced with the Michigan Compensation Appellate Commission on August 1, 2011. Executive Order No. 2011-6.

359, 361-362; 663 NW2d 514 (2003). "This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, 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." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).

However, we review questions of statutory interpretation de novo. *Adams v West Ottawa Pub Sch*, 277 Mich App 461, 465; 746 NW2d 113 (2008). The primary goal when interpreting a statute is to ascertain and give effect to the Legislature's intent. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218; 801 NW2d 35 (2011). "The words contained in a statute provide us with the most reliable evidence of the Legislature's intent." *Green v Ziegelman*, 282 Mich App 292, 301; 767 NW2d 660 (2009). In interpreting a statute, this Court considers "both the plain meaning of the critical words or phrases, as well as their placement and purpose in the statutory scheme." *Id*. at 302.

III. ANALYSIS

On appeal, claimant argues that she should not be disqualified from receiving unemployment benefits because, under MCL 421.29(1)(a), she did not "le[ave] work voluntarily" when she left Manpower to start working for Pennfield.

MCL 421.29 provides, in pertinent part, the following:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who

> left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. . . . An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. . . .
>
> * * *
>
> (5) If an individual leaves work to accept permanent full-time work with another employer . . . , all of the following apply:
>
> (a) Subsection (1) does not apply.

At issue is the effect of claimant stopping to work for Manpower and starting to work for Pennfield in October 2008.[2] Claimant first argues that because her "work" did not change when she started working for Pennfield, she had not "left work" under the plain language of the statute. While "work" is not defined in the statute, from its context in MCL 421.29(1)(a), it is easily understood as being synonymous with "employment." The Legislature's intent is ascertained when viewing the phrase in its entirety: "Left work voluntarily without good cause attributable to the employer or employing unit." *Id*. The phrase as a whole demonstrates that "work" is associated with "*the* employer or employing unit." The use of a definite article indicates that the Legislature was referring to a particular employer and not just any general employer. See *Barrow v Detroit Election Comm*, 301 Mich App 404, 414; 836 NW2d 498 (2013) (noting that the definite article "the"

[2] We note that even though claimant was seeking unemployment benefits in relation to her layoff in January 2009, whether she left work voluntarily in October 2008 was still relevant because if she was disqualified from receiving benefits when she left Manpower, she would remain disqualified until she requalified under MCL 421.29(3). MCL 421.29(2).

denotes a particular item instead of a general item). Thus, it is clear that the statute does not refer to work that is unconnected to an employer; instead, the work is linked to a particular employer or employing unit, and when the relationship with that particular employer or employing unit ends, the work at issue necessarily also ends.

Therefore, with this understanding of the statute, it is clear that the circuit court applied the correct legal principles. The circuit court properly ruled that, pursuant to MCL 421.29(1)(a), one who voluntarily leaves work without good cause attributable to his or her prior employer, is disqualified from receiving unemployment benefits. The circuit court also properly noted that one who voluntarily leaves work to accept part-time employment cannot invoke the exception provided in MCL 421.29(5).

Furthermore, the circuit court did not misapprehend or grossly misapply the substantial-evidence test to the agency's factual findings related to whether claimant accepted part-time employment instead of full-time employment with Pennfield. " 'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). "While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Id*. In this case, the circuit court correctly noted that "there is evidence to support the conclusion that the claimant left her position to assume part-time employment." Such evidence included Atma's testimony that he did not recall ever offering full-time employment to claimant and the fact that claimant checked a box on her new-employee form with Pennfield indicating that she would be working part-time. In

short, we are not left with a definite and firm conviction that a mistake was made in this matter.

We note that claimant's reliance on the fact that she was never "unemployed" under § 48(1) of the MESA, MCL 421.48(1), is misplaced. The disqualification under § 29(1)(a) does not require an individual to have been "unemployed" in order to be disqualified from receiving benefits. Instead, the person merely has to have left work voluntarily without good cause attributable to the employer or employing unit. Claimant also avers that her starting to work for Pennfield should not be construed as voluntarily leaving Manpower. However, this argument is facially without merit as there is no dispute that claimant voluntarily ended her employer-employee relationship with Manpower. As our Supreme Court suggested in *Thomas v Employment Security Comm*, 356 Mich 665, 669; 97 NW2d 784 (1959), an employee voluntarily leaves his or her job if the separation is the product of the employee's "hopes, wishes, and intent" to quit. The record here is clear that it was claimant's hope, wish, and intent to quit working for Manpower, which she effectuated when she voluntarily ended her employee-employer relationship with Manpower in October 2008 and began her employment with Pennfield.

Claimant also argues that Pennfield and Manpower should have been considered "dual" or "joint" employers. Claimant relies on the MESA's definition of "employing unit":

> "Employing unit" means any individual or type of organization, . . . which has or subsequent to this amendatory act, had in its employ 1 or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains 2 or more separate establishments within this state shall be considered to be employed by a single

> employing unit for all the purposes of this act. Each individual employed to perform or to assist in performing the work of any *agent or employee of an employing unit* shall be considered to be employed by that employing unit for all the purposes of this act, whether the individual was hired or paid directly by that employing unit or by the agent or employee, provided the employing unit had actual or constructive knowledge of the work. [MCL 421.40 (emphasis added).]

Claimant's reliance on this statute is misplaced. As claimant recognizes in her brief on appeal, part of the purpose of this definition is to prevent employers from using agents to hire individuals to perform work and then deny that those individuals were actually employed by those employers. However, claimant fails to explain how Manpower was an agent (or employee) of Pennfield or vice versa. All claimant relies on is that Pennfield and Manpower had "mutual knowledge" that claimant was performing services for Pennfield. This fact is inadequate to establish an agency relationship. An agency is defined as " 'a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.' " *Breighner v Mich High Sch Athletic Ass'n*, 255 Mich App 567, 582-583; 662 NW2d 413 (2003), quoting *Black's Law Dictionary* (7th ed). There is no evidence that Manpower had any authority whatsoever to bind Pennfield. Moreover, the MESA recognizes the existence of temporary-staffing firms, like Manpower, and defines them as "an employer whose primary business is to provide a client with the temporary services of 1 or more individuals under contract with the employer . . . ." MCL 421.29(1)(*l*). Thus, the MESA, itself, identifies the different parties involved in this situation: (1) the individual is the

"employee," (2) the temporary-staffing firm is the "employer," and (3) the direct beneficiary of the employee's work is the "client," not an "employer." Nowhere in the MESA does it suggest an agency relationship between the employer and the client. If the Legislature had desired to classify the temporary-staffing provider and the client as a single "employing unit," it could have done so. Thus, without any factual basis to support the existence of an agency relationship and without any statutory language to support claimant's view, we decline claimant's invitation to view a temporary-staffing firm and its client as "joint employers" or a single "employing unit."

Therefore, we conclude that the circuit court applied the correct legal principles and correctly applied the substantial-evidence test to the agency's factual findings. Accordingly, it did not err by affirming the agency's determination that claimant was disqualified under MCL 421.29(1)(a) from receiving unemployment benefits because she voluntarily left work without good cause attributable to the employer and she never requalified pursuant to MCL 421.29(3).

Affirmed.

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

In re APPLICATION OF INTERNATIONAL TRANSMISSION COMPANY

Docket No. 317798. Submitted March 4, 2014, at Detroit. Decided March 13, 2014, at 9:05 a.m. Leave to appeal denied, 496 Mich ___.

International Transmission Company (ITC) brought a condemnation action in the Sanilac Circuit Court, seeking to modify an easement across property owned by the Arlie D. Murdock Revocable Living Trust to construct a transmission line for wind energy produced in Michigan's Thumb region. In February 2011, the Public Service Commission (PSC) had issued an order in Case No. U-16200 granting ITC an expedited siting certificate for a transmission route across Murdock Trust's property, but thereafter a wind turbine was constructed on the trust's property in the path of the approved route, leading ITC to seek a modification of the route's placement. Murdock Trust moved for summary disposition, and ITC moved for a stay of proceedings on the ground that the PSC had primary jurisdiction over the matter. The court, Donald A. Teeple, J., granted ITC's motion on that basis, and ITC moved the PSC for a clarification of its 2011 order and for ex parte relief. Murdock Trust moved to intervene, objecting to the location and scope of the proposed modification. The PSC granted the motion to intervene, and ultimately ruled that ITC's proposed modification was within the scope of the minor adjustments contemplated by the February 2011 order. Murdock Trust appealed.

The Court of Appeals *held*:

1. Murdock Trust's unpreserved argument that the notice it received about ITC's application was constitutionally defective was not supported by a showing of plain error affecting its substantial rights. Murdock Trust conceded that the notice complied with MCL 460.1153(1), it received actual notice about ITC's intention to deviate from the proposed route, and it did not assert that a failure of notice put it at an unfair disadvantage.

2. The PSC had subject-matter jurisdiction over the matter in controversy and properly acted pursuant to the circuit court's request that it exercise primary jurisdiction in this case. The proper means for Murdock Trust to challenge the circuit court's

determination that the PSC had primary jurisdiction would have been an interlocutory appeal from the circuit court's decision.

3. The PSC was not obligated by statute or administrative rule to open a new contested case to address ITC's proposed route modification, and it did not abuse its discretion by failing to do so in this instance. Further, the PSC did not abuse its discretion by ruling that the proposed modification was within the scope of the minor adjustments allowed for in the initial order.

4. The PSC did not impermissibly delegate legislative authority to ITC by allowing ITC to modify the approved route because the initial order expressly contemplated minor revisions in the route and the order at issue did not give ITC the authority to deviate from the approved route to whatever extent it wished.

Affirmed.

ADMINISTRATIVE LAW — PUBLIC SERVICE COMMISSION — CONTESTED CASES — EXPEDITED SITING CERTIFICATES FOR TRANSMISSION LINES — ROUTE MODIFICATIONS.

The Public Service Commission is not obligated by statute to open a new contested case to address a proposed modification to a transmission line route authorized by an expedited siting certificate if the modification was contemplated in the order that granted the certificate following a contested case proceeding.

Howard & Howard Attorneys PLLC (by *Rodger A. Kershner*, *Jon D. Kreucher*, and *Miles T. Macik*) for the Arlie D. Murdock Revocable Living Trust.

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

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

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

BOONSTRA, J. Intervenor-Appellant Arlie D. Murdock Revocable Living Trust (Murdock Trust) appeals as of right the July 29, 2013 order of the Michigan Public Service Commission (PSC) approving petitioner-appellee International Transmission Company's (ITC) proposed modification of an approved route over Murdock Trust's land to accommodate a transmission line. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from ITC's proposed modification of an approved route obtained as part of the construction, operation, and maintenance of a 140-mile-long, double-circuit, 345,000-volt transmission line (the "Thumb Loop Project"). ITC's project is subject to the Clean, Renewable, and Efficient Energy Act, MCL 460.1001 *et seq*., which 2008 PA 295 added to the Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*. MCL 460.1001(2) announces the legislative purpose of promoting "the development of clean energy, renewable energy, and energy optimization," the diversification of the resources used to meet the state's energy needs, the use of indigenous energy resources, private investment in renewable energy and energy efficiency, and improved air quality. MCL 460.1149(1) allows the PSC to issue an expedited siting certificate for a transmission line to an independent transmission company. MCL 460.1153(1) and (2) call for notice to affected landowners and for a contested case to be conducted on the application. MCL 460.1153(4) provides that the PSC's decision on these applications overrides local codes and ordinances. MCL 460.1153(5) states that an expedited siting certificate is "conclusive and binding as to the public convenience and necessity for that transmission line and its compatibility with the public health

and safety or any zoning or land use requirements in effect when the application was filed" for purposes of any attendant eminent domain proceedings.

The Thumb Loop Project is being constructed to transmit energy generated from wind power. The transmission route that ITC initially proposed forms a loop that begins just north of Frankenmuth, runs northeast through Tuscola and Huron Counties, loops around the north side of Bad Axe, and runs south through Sanilac and St. Clair Counties. On February 25, 2011, over the objections of various intervenors, the PSC issued an order approving ITC's proposed route for the Thumb Loop Project and granting an expedited siting certificate for it. That decision is not the subject of the instant appeal, inasmuch as it was affirmed in an earlier appeal to this Court.[1]

Sometime after that order was issued, a wind turbine was constructed on Murdock Trust's property in the path of the approved route. ITC determined that the route would need to be modified to allow for the turbine. However, the parties were unable to agree on a modification of the route. On February 8, 2013, ITC brought a condemnation action against Murdock Trust in Sanilac County Circuit Court, seeking an easement across Murdock Trust's property. Murdock Trust moved the circuit court for summary disposition; ITC

[1] This Court affirmed the PSC's approval, but held that the PSC erred by deeming the siting certificate itself to also function as a construction permit. *In re Application of Int'l Transmission Co for Expedited Siting Certificate*, 298 Mich App 338, 343; 827 NW2d 385 (2012). Our Supreme Court, in lieu of granting leave to appeal, reversed this Court's decision in part and declared that a siting certificate does indeed constitute a construction permit, but otherwise denied leave to appeal. *In re Application of Int'l Transmission Co for Expedited Siting Certificate*, 493 Mich 947 (2013). The latter order thus restored the PSC's decision to full effect and closed the case.

moved for a stay of proceedings in the circuit court based on the primary jurisdiction of the PSC. The circuit court granted the motion to stay the proceedings, and the parties proceeded before the PSC. On April 23, 2013, ITC filed with the PSC a motion for clarification of the February 25, 2011 order and a request for ex parte relief, or, alternatively, immediate consideration of its motion. The basis for the motion was ITC's decision to modify the route to allow for the turbine.

Murdock Trust raised no objections to the route across its land as originally proposed, but the day after ITC moved for clarification and ex parte relief, Murdock Trust petitioned to intervene out of time in response to ITC's plan to change the location of the route. According to the application to intervene, the original route for the transmission line "was to be placed on the far west side of Landowner's primary parcel, such that the full 200 foot width of the easement would not be entirely placed on Landowner's parcel," and "ITC's originally-proposed occupation of Landowner's parcel in question was . . . expected to amount to approximately 9 acres," but "[t]he materially-altered centerline route change just now requested by ITC would divide Landowner's primary parcel in two, increase the distance traversed across the parcel, . . . cut the distance between the high voltage line and a house on the parcel by almost one-half, and . . . increase the number of acres that would be taken to over 13 acres." The PSC granted Murdock Trust's motion to intervene.

The PSC, in later approving the requested modification of the route, held as follows:

> ITC's proposed adjustment to the route is no greater than 700 feet at its widest, results in a line that is considerably shorter than the approved line on the Trust's property, and

> avoids the necessity of cutting a 200-foot swath through a large stand of trees on the Trust's property. . . . The adjusted route remains on cropland, and remains on the parcel that would have hosted the approved route (but avoids the adjacent treed parcel that was affected by the approved route). Finally, the adjusted route does not cross the property of any landowner that did not receive notice of this proceeding. In sum, the adjustment facilitates the delivery of wind power and is relatively narrow; and the adjusted route remains with the same landowner, affects the same type of land, and runs over the same parcel as the approved route.

Accordingly, the PSC concluded that "the route adjustment proposed by ITC is within the scope of minor adjustments contemplated by the February 25 order," issued an order to that effect on July 29, 2013, and thus approved the modified route as proposed by ITC. This appeal followed. On September 27, 2013, this Court granted ITC's motion to expedite this appeal.[2]

II. NOTICE

Murdock Trust argues that the notice provided to it (in 2010) pursuant to MCL 460.1153(1) was constitutionally defective, because the notice did not provide a map of proposed or alternate routes or state that the route might subsequently be altered by ITC. Further, Murdock Trust argues that recipients of the notice were given only a week to sift through hundreds of pages of documents to ascertain whether their parcels would be affected, and to seek intervention. We disagree.

Murdock Trust made only cursory reference to this issue in a footnote to its initial trial brief before the PSC. There is no indication that Murdock Trust actu-

[2] *In re Application of Int'l Transmission Co for Expedited Siting Certificate*, unpublished order of the Court of Appeals, entered September 27, 2013 (Docket No. 317798).

ally made this argument to the PSC or that the PSC considered it in making its decision. The purposes of preservation requirements include encouraging parties to give the trial tribunal the opportunity to make the correct decision. See *Napier v Jacobs*, 429 Mich 222, 228-229; 414 NW2d 862 (1987). In this case, the footnote in Murdock Trust's brief did not call for a decision or otherwise challenge the propriety of past or present proceedings, nor did it invoke constitutional due process. Therefore, we deem this issue to be unpreserved. Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCL 460.1153(1) provides:

> Upon applying for a certificate, an electric utility, affiliated transmission company, or independent transmission company shall give public notice in the manner and form the commission prescribes of an opportunity to comment on and participate in a contested case with respect to the application. Notice shall be published in a newspaper of general circulation in the relevant wind energy resource zone within a reasonable time period after an application is provided to the commission and shall be sent to each affected municipality, electric utility, affiliated transmission company, and independent transmission company and each affected landowner on whose property a portion of the proposed transmission line will be constructed. The notice shall be written in plain, nontechnical, and easily understood terms and shall contain a title that includes the name of the electric utility, affiliated transmission company, or independent transmission company and the words "Notice of Intent to Construct a Transmission Line to Serve a Wind Energy Resource Zone."

Murdock Trust concedes that the notices provided to the affected landowners in this case "appear to comply with the legislative requirements of MCL 460.1153(1)."

However, Murdock Trust now argues for the first time that the lack of additional information renders the notice constitutionally deficient and denies Murdock Trust due process of law. See US Const, Am XIV, § 1; Const 1963, art 1, § 17.

To satisfy the demands of due process, if notice is due, the " 'means employed must be such as one desirous of actually informing the [party in interest] might reasonably adopt to accomplish it[.]' " *Jones v Flowers*, 547 US 220, 229; 126 S Ct 1708; 164 L Ed 2d 415 (2006), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 315; 70 S Ct 652; 94 L Ed 865 (1950). Actual notice need not necessarily be achieved, but due process requires notice " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Jones*, 547 US at 226, quoting *Mullane*, 339 US at 314.

In this case, Murdock Trust, while pointing out alleged deficiencies in the notice provided to affected landowners as this case originally got underway, does not suggest that its failure to intervene before ITC's proposed modification was due to a lack of notice. Further, as discussed later in this opinion, it appears that Murdock Trust had sufficient actual notice of ITC's intention to deviate 700 feet from the approved route over Murdock Trust's land to participate in eminent domain proceedings in the circuit court, and to intervene in this case. Normally, if timely actual notice has been achieved, defects in how it was served are rendered harmless. See *In re Forfeiture of $109,901*, 210 Mich App 191, 198; 533 NW2d 328 (1995), and *In re Lee*, 282 Mich App 90, 99-100; 761 NW2d 432 (2009). Because Murdock Trust has not asserted, let alone proved, that some failure of notice put it at some unfair disad-

vantage, Murdock Trust is in no position to seek a judicial determination that minimal compliance with the notice requirements of the applicable statute has nonetheless failed to satisfy the demands of due process. See *In re RFF*, 242 Mich App 188, 205; 617 NW2d 745 (2000) ("Statutes are presumed to be constitutional and must be construed as such unless it is clearly apparent that the statute is unconstitutional."), and *Rinaldi v Civil Serv Comm*, 69 Mich App 58, 69; 244 NW2d 609 (1976) ("We will not undertake a constitutional analysis when we can avoid it.").

III. JURISDICTIONAL CHALLENGES

Murdock Trust next argues that the PSC lacked subject-matter jurisdiction over the matter in controversy and that the PSC acted unreasonably in exercising its jurisdiction. We disagree.

A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, a party must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

The existence of subject-matter jurisdiction is a question of law that this Court reviews de novo. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). Likewise, the "applicability of a legal doctrine is a question of law," calling for review de novo. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001).

In the instant case, the Sanilac County Circuit Court issued an order staying the condemnation action before it because the PSC had primary jurisdiction over issues

concerning the route of the transmission line. Murdock Trust argues that the PSC lacked the subject-matter jurisdiction to revisit its previous order approving ITC's route and that the circuit court erred by deferring to the PSC under the doctrine of primary jurisdiction.

A. SUBJECT-MATTER JURISDICTION

The PSC possesses no authority beyond what the Legislature has granted it. *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 155; 596 NW2d 126 (1999). Authority must be granted by clear and unmistakable language. *Id*. at 155-156.

The February 25, 2011 order, in which the PSC approved ITC's proposed route and granted an expedited siting certificate for the Thumb Loop Project, included the statement, "The Commission reserves jurisdiction and may issue further orders as necessary." Then, in its order granting Murdock Trust's motion to intervene, and responding to the circuit court's "remand" in deference to its primary jurisdiction, the PSC invited briefing, affidavits, and exhibits in order that it might "determine whether the proposed route deviation is within ITC's authority under the February 25 order," and again announced that it was reserving jurisdiction and might issue further orders. However, the PSC cannot expand its jurisdiction through its own orders. See *York v Detroit (After Remand)*, 438 Mich 744, 767; 475 NW2d 346 (1991). Accordingly, although the PSC reserved jurisdiction in the two orders that preceded the one from which this appeal is taken, those reservations remain limited to the PSC's statutorily granted powers.

MCL 460.1149(2) states that "[a]n . . . independent transmission company may apply to the commission for an expedited siting certificate." MCL 460.1153(2) di-

rects the PSC to "conduct a proceeding on the application for an expedited siting certificate as a contested case[.]" MCL 460.1153(3) sets forth criteria for granting an expedited siting certificate, and MCL 460.1153(6) allows the PSC "a maximum of 180 days to grant or deny an expedited siting certificate under this section."[3] MCL 460.1159(2) states that "[i]n administering this part, the commission has only those powers and duties granted to the commission under this part."

It is undisputed that the PSC was empowered to decide ITC's application for an expedited siting certificate, including whether to approve a proposed route for the transmission line. Murdock Trust argued in its petition to intervene that the PSC had completed its statutory task when it issued the expedited siting certificate, and was thus "without jurisdiction to 'clarify' an Order where ITC's Application never requested the authority to make post-Order changes in the centerline . . . ." The issue thus becomes whether—more than two years after issuing an order approving a transmission line route for the Thumb Loop Project that was subsequently affirmed in the appellate process—the PSC had jurisdiction to adjudicate as

[3] Murdock Trust makes much ado about the statutory requirement to rule on a request for an expedited siting certificate within 180 days. This requirement reflects only the Legislature's desire for expeditious action on such requests, not an intention to cut off all authority in the matter once that period has expired. It would be anomalous if the PSC required 179 days to reach a decision but was then deemed stripped of authority to entertain a meritorious postdecision motion, e.g., one for rehearing, raised a few days later, given that, in general, the authority to decide such postdecision motions inheres in the authority to make the initial decision. See *Ewing v Bolden*, 194 Mich App 95, 101; 486 NW2d 96 (1992) ("Any subsequent action based on the original judgment, even if brought pursuant to a new complaint, is deemed to be a continuation of the original action so that jurisdiction is proper in the court that rendered the original judgment.").

it did the disagreement that arose between Murdock Trust and ITC concerning the latter's wish to deviate from the approved route by up to 700 feet in order to accommodate a wind turbine that had been placed in the path of the route as originally proposed and approved.

This Court has distinguished the question of the existence of the PSC's subject-matter jurisdiction over a controversy from the question whether the PSC properly exercised its subject-matter jurisdiction in a particular instance:

> Subject-matter jurisdiction concerns a body's abstract power to hear a case of the kind or character of the one pending, and is not dependent on the particular facts of the case. Subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint. If it is apparent from the allegations that the matter alleged is within the class of cases over which the body has power to act, then subject-matter jurisdiction exists. Any subsequent error in the proceedings amounts to error in the exercise of jurisdiction. The erroneous exercise of jurisdiction does not void a body's jurisdiction, but may be challenged . . . on direct appeal. [*In re Complaint of Pelland against Ameritech Mich*, 254 Mich App 675, 682-683; 658 NW2d 849 (2003) (citations omitted).]

In this case, Murdock Trust's challenge is not to the PSC's abstract authority to decide the particulars involved with an application for an expedited siting certificate, including what route the transmission line might cover, but instead is to the PSC's exercise of that jurisdiction by adjudicating a siting dispute between Murdock Trust and ITC by ostensibly clarifying its earlier final order in the matter after allowing Murdock Trust minimal procedural opportunities to make its case. We thus conclude that the PSC had subject-matter

jurisdiction over the dispute and that Murdock Trust's challenge relates to the proper *exercise* of that jurisdiction.

B. PRIMARY JURISDICTION

The doctrine of primary jurisdiction comes into play when a court and an administrative agency have concurrent original subject-matter jurisdiction regarding a disputed issue. *Attorney General v Blue Cross Blue Shield of Mich*, 291 Mich App 64, 85; 810 NW2d 603 (2010).

Primary jurisdiction "does not involve jurisdiction in the technical sense, but it is a doctrine predicated on an attitude of judicial self-restraint and is applied when the court feels that the dispute should be handled by an administrative agency created by the legislature to deal with such problems." *Black's Law Dictionary* (6th ed), p 1191.

> There is no fixed formula, but there are several factors to consider in determining whether an administrative agency has primary jurisdiction over a dispute: (1) whether the matter falls within the agency's specialized knowledge, (2) whether the court would interfere with the uniform resolution of similar issues, and (3) whether the court would upset the regulatory scheme of the agency. [*City of Taylor v Detroit Edison Co*, 475 Mich 109, 122; 715 NW2d 28 (2006).]

Murdock Trust cites no authority for the proposition that, when a court invites an administrative agency to exercise primary jurisdiction over a matter, the agency is not entitled to rely on the court's determination in that regard but must instead consider anew whether the doctrine applies. As appellees note, this appeal is not the proper avenue through which to attack the circuit court's decision to defer to the PSC on the basis

of primary jurisdiction. If Murdock Trust had wished for appellate vindication of such a challenge, it should have sought leave in this Court for an interlocutory appeal from the circuit court's decision in that regard. See MCR 7.203(B)(1). Given the circuit court's unchallenged determination that the PSC had primary jurisdiction in this case, at issue now is not *that* the PSC acted on that determination, but rather *how* it did so. Therefore, we decline to hold that the PSC lacked jurisdiction over the matter at issue, and proceed to Murdock Trust's challenge to the exercise of that jurisdiction.

IV. THE PSC'S DECISION

Murdock Trust argues that the PSC erred by failing to open a new contested case and to afford it "full contested case protections such as the right to conduct discovery," and therefore erred by modifying the approved route upon ITC's request for clarification of its previous order. Murdock Trust further argues that the PSC improperly delegated legislative siting authority to ITC by allowing ITC the power to deviate from the approved transmission line route. A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the party must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich at 427.

This Court reviews a trial court's interpretation of administrative rules de novo, as a question of law. *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 270; 597 NW2d 227 (1999). It reviews the interpretation of court rules under the same stan-

dard. *St George Greek Orthodox Church v Laupmanis Assoc, PC*, 204 Mich App 278, 282; 514 NW2d 516 (1994).

In arguing that the PSC decided this case in violation of applicable rules, Murdock Trust directs this Court to MCR 7.208(A) (staying trial proceedings while an appeal is pending), Mich Admin Code, R 460.17403 (authorizing motions for rehearing), and Mich Admin Code, R 460.17401 (authorizing motions to reopen proceedings for further evidence). We hold that none of these rules applies to invalidate the PSC's July 29, 2013 order.

Generally, the PSC "in any proceeding which may now be pending before it or which shall hereafter be brought before it, shall have full power and authority to grant rehearings and to alter, amend or modify its findings and orders." MCL 460.351. As discussed earlier, the PSC did not err by acting on the circuit court's request that it exercise its primary jurisdiction for purposes of clarifying whether the 700-foot deviation in the Thumb Loop Project's transmission line route fell within the implied expectation in the order approving the route that minor adjustments would be required. Of course, in exercising its jurisdiction, the PSC was still obliged to do so in accord with pertinent statutes and other authority, including its own rules. See *Bohannon v Sheraton-Cadillac Hotel, Inc*, 3 Mich App 81, 82; 141 NW2d 722 (1966) ("[w]hen an administrative agency promulgates a rule for the benefit of litigants and then deprives a litigant of this right, it is a violation of . . . due process"), citing Const 1963, art 1, § 17.

We accordingly address the rules that Murdock Trust argues are preclusive of the PSC's July 29, 2013 order. MCR 7.208(A) states that after a claim of appeal has been filed or leave to appeal has been granted, the

trial-level tribunal "may not set aside or amend the judgment or order appealed from" except by order of this Court, by stipulation of the parties, after the grant of a preliminary injunction, or as otherwise provided by law. Murdock Trust suggests that the beginning of the appeal process thus forever cuts off the original tribunal's authority to take action in the case, except as noted. We disagree, because MCR 7.208 only applies during the pendency of an appeal and does not bar postappellate action. See *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007) ("[F]iling a claim of appeal only prevents the trial court from amending its orders while the appeal is pending, not after remand."), in turn citing *Wilson v Gen Motors Corp*, 183 Mich App 21, 41-42; 454 NW2d 405 (1990); see also *Bass v Combs*, 238 Mich App 16, 24-25; 604 NW2d 727 (1999), overruled in part on other grounds *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008). We therefore hold that MCR 7.208 does not preclude the PSC from taking the actions set forth in its July 29, 2013 order.

Next, Rule 460.17403 authorizes a petition for rehearing after a decision or order of the PSC, but only "within 30 days after service of the decision or order . . . unless otherwise specified by statute." To the extent that this rule operates as a vehicle for the PSC to clarify one of its orders, it obviously could not do so here because the 30-day limitation was long expired before the instant controversy arose. However, the PSC did not rely on this rule in rendering its decision clarifying its original order. Moreover, the unavailability of this rule because of its time limitation does not itself deprive the PSC of authority where it otherwise may exist.

Finally, Rule 460.17401(1) states that a "proceeding may be reopened for the purpose of receiving further

evidence when a reopening is necessary for the development of a full and complete record or there has been a change in conditions of fact or law such that the public interest requires the reopening of the proceeding." According to subrule (2), such action may be taken by "the presiding officer, upon his or her own motion or upon motion of any party," but only "before the date for the filing of exceptions to a proposal for decision or, if provided for, replies to exceptions." After that date, "the commission may reopen a proceeding upon its own motion or motion of any party," but only "until the expiration of the statutory time period for filing a petition for rehearing[.]" *Id*. Thus, because the time for filing exceptions (or replies to exceptions) and petitioning for rehearing had passed, it appears that this rule was not available to permit the PSC to reopen the contested case.[4]

Indeed, no party invoked this rule or otherwise asked the PSC to reopen the previous proceeding concerning the siting certificate. ITC initially sought an ex parte clarification from the PSC of its February 25, 2011 order's provision for minor deviation in the transmission line route. Murdock Trust disputed the PSC's authority to address the issue short of opening a new contested case. Murdock Trust further contends that in the context of a new contested case it would have been

[4] We note that the PSC has interpreted this rule as barring motions for reopening a contested proceeding pursuant to Rule 460.17401(1) if they are untimely under Rule 460.17401(2). See, e.g., *In re Consumers Energy Co*, unpublished order of the Michigan Public Service Commission, entered October 24, 2006 (Case No. U-14150); *In re Application for a Certificate of Public Convenience and Necessity to Construct and Operate the DeWitt Tie-Line*, unpublished order of the Michigan Public Service Commission, entered May 20, 2008 (Case No. U-14421). While not binding on this Court, an administrative agency's interpretation of its own rule is entitled to deference. *In re Complaint of Consumers Energy Co*, 255 Mich App 496, 503-504; 660 NW2d 785 (2003).

subject to all the procedural protections, including discovery, applicable to an adversarial proceeding. Indeed, Murdock Trust served discovery demands on ITC in May 2013, to which ITC objected on the ground that the case remained closed. Murdock Trust then moved the PSC to suspend briefing to await discovery. The PSC in its July 29, 2013 order declared the motion to suspend briefing moot, thus signaling that it was satisfied to decide the controversy at hand without recourse to the additional procedure requested by Murdock Trust. Even assuming that a new contested case should have been opened, Murdock Trust has not specified to this Court how the lack of further discovery in this matter prejudiced its position before the PSC and constituted a denial of due process. We note that "[i]t is well settled that parties to judicial or quasi-judicial proceedings, including administrative proceedings, are not entitled to discovery as a matter of constitutional right." *In re Del Rio*, 400 Mich 665, 687 n 7; 256 NW2d 727 (1977) (emphasis omitted).

We further hold that the PSC was not obligated to open a new contested case. Rather, a contested case proceeding "shall be held when required by statute and may be held when the commission so directs." Mich Admin Code, R 460.17301(1). The PSC "shall conduct a proceeding on *the application for an expedited siting certificate as a contested case* . . . ." MCL 460.1153(2) (emphasis added). Thus, the PSC was not statutorily obligated to open a new contested case in response to a motion made in relation to its order in a previous contested case concerning a previously approved expedited siting certificate.

Giving due deference to the PSC, we therefore conclude that the PSC did not abuse its discretion in deciding the matter before it without opening a new

contested case. *In re MCI Telecom Complaint*, 460 Mich at 427. The PSC allowed the parties to submit briefs, affidavits, and exhibits. The PSC also stated in an order that it would allow oral arguments if it determined that further development of the record was necessary. Within its discretion, it subsequently determined that oral arguments were unnecessary. The above-cited rules do not divest the PSC of the authority to interpret its February 25, 2011 order. See, e.g., Mich Admin Code, R 460.17103(1) ("In areas not addressed by these rules, the presiding officer may rely on appropriate provisions of the currently effective Michigan court rules."); see also MCR 2.612(A)(1) ("Clerical mistakes in . . . orders . . . and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it."). Further, the PSC, "in any proceeding which may now be pending before it or which shall hereafter be brought before it, shall have full power and authority to grant rehearings and to alter, amend or modify its findings and orders." MCL 460.351.

On the record before this Court, we also find no abuse of discretion in the PSC's interpretation of its February 25, 2011 order, which noted the project manager's caveat that "descriptions of the proposed and alternate routes are expected to be subject to minor revisions as engineering, design economist surveys, utility locates, and land owner negotiations proceed." The PSC specifically ruled in its July 29, 2013 order that ITC's proposed modification of the easement was "within the scope of minor adjustments allowed for in the February 25, 2011 order in this proceeding." The PSC has thus determined that the adjustment is "minor" in the context of the overall 140-mile transmission route, within the meaning of the February 25, 2011

order. Murdock Trust does not contest the merits of the PSC's holding. We accordingly find no error.

Finally, we do not find persuasive Murdock Trust's argument that the PSC has impermissibly delegated legislative authority to ITC. Specifically, Murdock Trust argues that whereas the PSC's February 25, 2011 order "was not clear" about whether ITC could modify to the approved route, the PSC's July 29, 2013 order "unequivocally determined" that ITC could make modifications if ITC deemed them "minor," and thereby impermissibly delegated legislative authority to ITC. We conclude, to the contrary, that the PSC's February 25, 2011 order approving the proposed route expressly contemplated that it would be subject to "minor revisions." Moreover, the PSC's July 29, 2013 order does not authorize ITC to deviate whenever and to whatever extent it wishes; it merely approves ITC's proposed deviation in this instance. Nothing in the July 29, 2013 PSC order grants ITC authority beyond that which may be reflected in the PSC's February 25, 2011 order, nor does its approval of the particular deviation at issue in this case constitute a determination regarding any other or future deviation, nor does it preclude such a deviation from becoming the subject of future proceedings before the PSC or the circuit court.

V. CONCLUSION

We hold that Murdock Trust has failed to demonstrate that the notice provided to landowners (which Murdock Trust concedes satisfies the pertinent statutory requirements) denied it due process of law or otherwise caused it to suffer prejudice in the proceedings below. We further hold that the PSC had jurisdiction over the matter in controversy, and properly acted pursuant to the circuit court's request to exercise

primary jurisdiction in this case. Further, we hold that the PSC did not err in issuing its July 29, 2013 order, thereby modifying the previously approved transmission line route for the Thumb Loop Project as set forth therein. Finally, we hold that the PSC's July 29, 2013 order was not an impermissible delegation of legislative authority.

Affirmed.

SERVITTO, P.J., and SAWYER, J., concurred with BOONSTRA, J.

WELLS FARGO BANK v COUNTRY PLACE CONDOMINIUM ASSOCIATION

Docket No. 312733. Submitted February 12, 2014, at Detroit. Decided March 18, 2014, at 9:00 a.m.

Wells Fargo Bank brought an action against Country Place Condominium Association in the Oakland Circuit Court, asserting claims of common-law slander of title, statutory slander of title, and recording of documents with the intent to harass. Wells Fargo gained title to a condominium unit through foreclosure proceedings, obtaining a sheriff's deed on March 8, 2011. Wells Fargo's title to the unit vested after the close of the redemption period on September 8, 2011. On September 20, 2011, Country Place recorded an amended notice of a lien in the amount of $8,456.05 for nonpayment of condominium assessments. Wells Fargo asserted that under MCL 559.158 it was not responsible for association fees that accumulated before September 8, 2011. Country Place filed a countercomplaint asserting that Wells Fargo was required to pay the outstanding debt plus late fees, legal fees, and costs. The parties both filed motions for summary disposition. The court, James M. Alexander, J., held that Wells Fargo was not responsible for fees and costs that accumulated before it acquired title to the condominium and that Wells Fargo acquired title to the condominium when it purchased the property at the sheriff's sale. The court dismissed Wells Fargo's claims and entered judgment in favor of Country Place, requiring Wells Fargo to pay Country Place $15,597.90, an amount representing assessments and late fees that accumulated between March 8, 2011, and April 30, 2013, as well as attorney fees and costs. Wells Fargo appealed.

The Court of Appeals *held*:

Under MCL 559.158, if the mortgagee of a first mortgage of record obtains title to a condominium unit as a result of foreclosure, that mortgagee is not liable for the assessments that became due before the acquisition of title to the unit by that mortgagee. To acquire title means to come into possession or control of the legal evidence of a person's ownership of a certain parcel of land, usually denoted by a deed, or to come into possession of the legal right to control and dispose of property. After a sheriff's sale, the purchaser

comes into possession of an equitable title that is capable of being sold or assigned. The statutory language refers only to title, not absolute title. Because Wells Fargo obtained a sheriff's deed, which gave it equitable title, at the March 8, 2011 foreclosure sale, the circuit court properly ruled that Wells Fargo acquired title for purposes of MCL 559.158 on that date. Because Country Place possessed an honest belief in the validity of its claim for the unpaid association fees and advocated for a reasonable interpretation of the statutes, Wells Fargo's slander-of-title and intent-to-harass claims failed as a matter of law.

Affirmed.

CONDOMINIUMS — MORTGAGES — FORECLOSURE — SHERIFF'S SALE — ACQUISITION OF TITLE — LIABILITY FOR ASSESSMENTS.

Under MCL 559.158, if the mortgagee of a first mortgage of record obtains title to a condominium unit as a result of foreclosure, that mortgagee is not liable for the assessments that became due before the acquisition of title to the unit by that mortgagee; to acquire title means to come into possession or control of the legal evidence of a person's ownership of a certain parcel of land, usually denoted by a deed, or to come into possession of the legal right to control and dispose of property; the purchaser of a sheriff's deed at a foreclosure sale acquires equitable title on the date of the sale, and the mortgagee may be held liable for assessments that come due after the date of the foreclosure sale under MCL 559.158.

Trott & Trott PC (by *Charles L. Hahn*) for Wells Fargo Bank.

Zelmanski, Danner & Fioritto, PLLC (by *Tracy N. Danner*), for Country Place Condominium Association.

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

MURRAY, J. This appeal arises from litigation between plaintiff, Wells Fargo Bank, and defendant, Country Place Condominium Association, regarding unpaid condominium association fees. After considering the parties' competing motions for summary disposition, the circuit court entered a judgment ordering plaintiff to pay defendant $15,597.90, an amount representing con-

dominium assessments and late fees for one condominium unit between March 8, 2011, and April 30, 2013, as well as attorney fees and costs. For the reasons that follow, we affirm.

I. FACTS AND PROCEEDINGS

The legal dispute started when plaintiff filed a three-count complaint against defendant requesting the removal of a condominium lien that defendant had filed concerning a condominium unit in Northville.[1] According to the complaint, plaintiff had "acquired its title interest in the unit by virtue of foreclosing its first mortgage on the property" and obtaining a sheriff's sale deed "dated March 8, 2011," which plaintiff recorded on March 15, 2011. The complaint stated that plaintiff's interest in the condominium vested after the close of the redemption period on September 8, 2011. The complaint recounted that on September 20, 2011, defendant recorded an amended notice of a "lien for non-payment of condominium assessments" in the amount of $8,456.05, which identified plaintiff as the responsible owner of record. (Emphasis omitted.)

Plaintiff asserted that it was not responsible for association fees or attorney fees until after September 8, 2011, because under MCL 559.158 "the successors and assigns of the Sheriff Deed from a foreclosure of the first mortgage on a condominium unit, takes free and clear of all condominium liens and unpaid assessments as of the date of acquisition of title." Plaintiff further maintained that defendant had refused to discharge its recorded lien, which "constituted a cloud upon" plaintiff's title.

[1] The specific counts in the complaint were common-law slander of title, statutory slander of title, and recording of documents with intent to harass.

Defendant filed a countercomplaint alleging that it "duly levied assessments against" the condominium pursuant "to MCL 559.169 and the Condominium Bylaws . . . ." According to the countercomplaint, when plaintiff acquired its interest in the condominium, it neglected to seek from defendant a statement outlining any "unpaid assessments, interest, late charges, fines, costs, and attorney fees" that the condominium seller owed, as authorized by MCL 559.211(2). The countercomplaint added that plaintiff had defaulted on its duty to pay the outstanding assessments on the condominium of $10,840.80, $1,000 for late charges, and $4,086.71 in legal fees and costs. The countercomplaint requested the entry of a foreclosure judgment or money judgment against plaintiff for the unpaid assessments and an award of costs and attorney fees to defendant.

Because both pleadings raised purely legal issues, the parties filed competing motions for summary disposition. The parties agreed that plaintiff purchased the property at a March 8, 2011 sheriff's sale and recorded its sheriff's deed on March 15, 2011, and that defendant recorded its condominium lien against plaintiff on September 20, 2011. It was likewise undisputed that the prior owner of the condominium did not redeem the property.

After considering the parties' briefs and oral presentations, the court entered a thorough, well-written opinion and order deciding the motions. In its opinion, the court observed that the parties had premised their contentions on undisputed facts, and that the central issue of when the association fees were attributable to plaintiff was an issue of first impression. The court first held that plaintiff was not responsible for association fees assessed prior to when it acquired title to the condominium:

> We are left with an apparent conflict that both parties acknowledge is unresolved by any published caselaw. First,

> [MCL 559.158] specifically states that the foreclosing mortgagee (Plaintiff in this case) is not liable for fees "prior to the acquisition of title." On the other hand, under [MCL 559.211], Plaintiff, **if considered a purchaser in the "sale or conveyance of a condominium unit,"** is liable for "any unpaid assessments against the condominium unit together with interest, costs, fines, late charges, and attorney fees incurred in the collection thereof."
>
> Based on the plain language of the statutes, read in whole, the Court concludes that Section 158 controls for two reasons. First, the language of Section 158 is unconditional that the foreclosing mortgagee is not liable for any assessments prior to taking title. The statute does not state that this section applies except as provided in Section 211, nor is there any qualifying language. Had the legislature intended to except a Section 211 situation, it would have so provided. As a result, under the plain terms of the statute, Plaintiff, as the mortgagee of the first mortgage, is not liable to pay any fees or other costs that were chargeable prior to taking title.
>
> Second, Section 211 does not apply because the Court finds that . . . assignment of the mortgage to Plaintiff [by Mortgage Electronic Registration Systems, Inc. (MERS)] is not a "sale or conveyance of a condominium unit" as provided in MCL 559.211(1). MERS did not sell or convey "the condominium unit" to Plaintiff. Rather, MERS simply assigned its interest in the mortgage to Plaintiff. Michigan Courts have long held that "[a]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." [*First of America Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996)]. Just like MERS, Plaintiff possessed no right to sell or convey the condominium unit until after the foreclosure sale and redemption period expired. Only then, did Plaintiff have such right. Because MERS did not possess the right to sell the condominium unit, no such sale took place.

That conclusion did not end the inquiry, however. The court then moved on to a consideration of when plaintiff

acquired title to the condominium, ultimately holding that it was on March 8, 2011, the date it purchased the property at the sheriff's sale:

> The next issue is what date constitutes "acquisition of title" within the meaning of Section 158. Again, this term is not defined by the statute, and there appears to be no caselaw defining the same. Merriam-Webster defines "acquire" as "to get as one's own" or "to come into possession or control of often by unspecified means." On March 8, 2011, Plaintiff was the purchaser of said property at the Sheriff's Sale. On that date, Plaintiff came into possession or control of the unit.
>
> Defendant also argues that Plaintiff took possession on March 8, 2011. Citing *Gerasimos v Continental Bank*, 237 Mich 513, 519; 212 NW 71 (1927), Defendant argues that [the prior owner's] right to redeem the property was not an interest in the land. Rather, "the right of redemption is . . . a mere personal privilege given by statute to the mortgagor after the land has been sold under the mortgage." *Id*. at 518-519. As a result, [the prior owner's] right to redemption was not an actual, present interest in the land **unless and until** she exercised that right — which, she did not. As a result, the only party with an interest in the land was Plaintiff.
>
> In response, Plaintiff cites *Ruby & Assocs, PC v Shore Fin Servs*, 276 Mich App 110; 741 NW2d 72 (2007) [vacated in part on other grounds 480 Mich 1107 (2008)] for the notion that title vests upon expiration of the redemption period. Plaintiff's reliance on *Ruby*, however, is misplaced because it actually supports Defendant's argument. The *Ruby* Court reasoned:
>
> > The legal operation and effect of the sheriff's deed ultimately depends on the mortgagor's exercise of this right of redemption. "A purchaser's deed is void if the mortgagor . . . redeems" the premises by tendering amounts owing within the applicable statutory window. If not redeemed within this time frame, the deed becomes "opera-

> tive," vesting in the grantee "all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage . . . ." *Id*. at 117-118 (internal citation omitted).
>
> Under *Ruby*, because [the prior owner] did not exercise her right to redemption, Plaintiff's Sheriff's Deed dated March 8, 2011 was not voided, and Plaintiff's fee simple interest in the property relates back to that day. As a result, Plaintiff is the co-owner of the condominium unit and is responsible for paying the sums assessed by the owners' association under MCL 559.208(1).

As a result of these conclusions, the trial court dismissed plaintiff's claims of slander of title and recording of documents with intent to harass, and entered a final judgment in favor of defendant.

II. ANALYSIS

Plaintiff's main challenge to the trial court's holding is based on the premise that under Michigan law a sheriff's deed to a condominium purchased at a foreclosure sale does not convey full title to the property until the original purchaser's right of redemption expires. Under that theory, the prior condominium owner's right of redemption expired in September 2011, which then triggered plaintiff's fee obligations. As a result, plaintiff argues, the circuit court incorrectly held plaintiff responsible for association dues that accrued beginning on March 8, 2011. We conclude otherwise. The trial court's ruling was correct because under Michigan law the purchaser of a sheriff's deed acquires a particular title to the property: an equitable title. And, once the right to redemption is not exercised, that equitable title automatically becomes full legal title that is effective back to the date of the sheriff's sale.

A. STANDARDS OF REVIEW

This Court reviews de novo a circuit court's decision on cross-motions for summary disposition. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim and should only be granted if: (1) the pleadings fail to state a claim on which relief may be granted and (2) no factual development could justify the claim for relief. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion for summary disposition pursuant to MCR 2.116(C)(9) tests the sufficiency of the defendant's pleadings, and is appropriately granted where the defendant has failed to state a valid defense to a claim. A defense to a claim is invalid for the purposes of MCR 2.116(C)(9) when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. [*Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004) (quotation marks and citations omitted).]

Instead of challenging the pleadings themselves, a motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim," *Walsh*, 263 Mich App at 621, and should be granted if no genuine issue of material fact exists "and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record,

giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

The parties' competing motions for summary disposition involved underlying issues of statutory construction, which this Court considers de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). The *Whitman* Court reiterated the primary rules governing statutory construction:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [*Id*. at 311-312 (citations omitted).]

B. THE MERITS

The circuit court concluded that, pursuant to MCL 559.158, plaintiff's obligation for unpaid condominium assessments began when plaintiff acquired title to the condominium unit on March 8, 2011. The entirety of MCL 559.158 reads:

> *If the mortgagee of a first mortgage of record* or other purchaser of a condominium unit *obtains title to the condominium unit as a result of foreclosure of the first mortgage*, *that mortgagee* or purchaser *and his or her successors* and assigns *are not liable for the assessments by the administering body chargeable to the unit that became due*

> *prior to the acquisition of title to the unit* by that mortgagee or purchaser and his or her successors and assigns. [Emphasis added.]

The circuit court correctly observed that neither MCL 559.158, nor any other section of the Condominium Act, MCL 559.101 *et seq*., defines the phrase "acquisition of title" to the unit. Nor, as the trial court noted, is there any caselaw examining the meaning of that phrase.

Because there is no statutory definition of the phrase "acquisition of title" under MCL 559.158, the circuit court properly resorted to a dictionary, *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012), which defines "acquire" as "to come into possession or ownership of; get as one's own." *Random House Webster's College Dictionary* (1996). "Title" has a particular legal meaning,[2] and is defined in *Black's Law Dictionary* (7th ed) as "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself . . . ." It is also defined as the "[l]egal evidence of a person's ownership rights in property; an instrument (such as a deed) that constitutes such evidence." *Id*. The circuit court concluded that plaintiff had come "into possession or control of the unit" on March 8, 2011, when it obtained a sheriff's deed to the unit at the foreclosure sale. It was correct.

The circuit court's analysis and conclusion were consistent with the plain language of the statute, MCL 559.158, and caselaw from our Supreme Court that explains the nature of the title obtained at a sheriff's sale. First, the statute. As noted in the preceding

---

[2] See *Vodvarka v Grasmeyer*, 259 Mich App 499, 510; 675 NW2d 847 (2003) (courts may use legal dictionaries to define words that have a particular legal meaning).

paragraph, "acquire" means coming into possession or control of something, while "title" means the legal evidence of a person's ownership of a certain parcel of land, usually denoted by a deed. Therefore, as a result of the sale, plaintiff did come into "possession or control of" title to the unit, for it obtained and recorded a deed to the property that afforded it an ownership interest in that property.

Importantly, that ownership interest takes the form of an equitable title that is capable of being sold or assigned. For, according to the Court in *Dunitz v Woodford Apartments Co*, 236 Mich 45, 49; 209 NW 809 (1926), after the sheriff's sale "the purchaser becomes the owner of an equitable interest in the mortgaged premises," which is "an interest or title, equitable in character," that becomes absolute once the redemption period expires. Importantly, the *Dunitz* Court pointed out that the sheriff's deed purchaser can sell or assign the equitable title interest during the redemption period. *Id*. at 49-50. See also *Gerasimos v Continental Bank*, 237 Mich 513, 518-520; 212 NW 71 (1927). Thus, plaintiff did obtain an equitable title that conveyed an ownership interest in the property that was capable of being assigned or sold. See also *In re Young*, 48 BR 678, 681 (Bankr ED Mich, 1985) ("A foreclosure sale does effect a transfer of title: equitable title."). As we have previously stated, a "[f]oreclosure causes equitable title to vest in the purchaser, while legal title remains in the mortgagor until the redemption period expires." *Ruby*, 276 Mich App at 118.

It is true, as plaintiff points out, that the original mortgagor could physically remain in the condominium during the foreclosure period, as she still had legal title for the unit. *Ruby*, 276 Mich App at 118. But that fact does not alter our analysis of whether the sheriff's deed

purchaser acquires title prior to expiration of the redemption period, as the statute only speaks in terms of a "title," and "absolute title" is a separately defined term. See *Black's Law Dictionary* (7th ed), p 1493 (defining "absolute title" as "[a]n exclusive title to land; a title that excludes all others not compatible with it"). Thus, contrary to plaintiff's argument, the statute does not require that the purchaser have "absolute title," just a "title," and an equitable title is a form of title. *Dunitz*, 236 Mich at 49.[3]

Plaintiff contends that "the concept of relation back has nothing to do with the vesting date, but is merely a legal fiction/doctrine to show a continuity of title," and cites *Whipple v Farrar*, 3 Mich 436 (1855), and *Clark v Hall*, 19 Mich 356 (1869), in support of that proposition.[4] Our analysis of the statute is not reliant upon the relation-back doctrine. Nevertheless, it is true that the Supreme Court has repeatedly stated that once the redemption period expires, legal title to the property becomes "absolute" and relates back to the date of the purchase at the sheriff's sale. *Dunitz*, 236 Mich at 49; *Sanford v Cahoon*, 63 Mich 223, 226; 29 NW 840 (1886); *Stout v Keyes*, 2 Doug 184, 187 (Mich, 1845). Conse-

[3] We note that the Legislature has used the term "absolute title" in many different statutes, see MCL 124.759(3) and (12), MCL 211.78b, MCL 211.78c, MCL 211.78f through MCL 211.78h, MCL 211.78j, MCL 211.78k, MCL 211.78m, MCL 213.122, and MCL 322.551 as examples, but chose not to use that specific term in this statute. Thus, we interpret "title" to mean the broader definition of title as found in the dictionary, rather than the more specific type (absolute title) specified by the Legislature in other statutes. See *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167, 176; 775 NW2d 342 (2009).

[4] However, *Whipple*, 3 Mich at 447-448, actually contains no references to the relation-back doctrine. In *Clark*, 19 Mich at 372-373, the Court declined to apply the doctrine in the context of a title dispute partially dependent on a patent, but it did note the general principle as it relates to sheriff's deeds.

quently, the purchaser at the sheriff's sale is shown as the legal title owner on the day of the sale once the original mortgagor loses the opportunity to redeem. In other words, once the redemption period expires without any redemption, it is as if the purchaser had absolute legal title since the purchase date. Although we need not rely upon it, that general proposition supports our conclusion that plaintiff did obtain a "title" during the redemption period, though it was not an absolute legal title until after there was no redemption. Thus, when defendant filed a lien for unpaid assessments and fees after expiration of the redemption period, plaintiff was on record at that time as being the absolute title holder.

In light of the foregoing, we hold that plaintiff acquired title to the unit on March 8, 2011. Though that title was not absolute legal title until after expiration of the redemption period, plaintiff nonetheless had possession of a legal interest in the unit during the redemption period in the form of an equitable title.

Plaintiff also cites *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222-223; 821 NW2d 503 (2012), a recent decision interpreting MCL 600.3236, the current provision that "describes the legal effect of a sheriff's deed obtained at a foreclosure sale upon the expiration of the applicable redemption period":

> The first clause under this provision describes the legal effect and operation of a deed upon the mortgagor's failure to exercise its statutory right of redemption following foreclosure. The first clause of MCL 600.3236 makes plain that if property is not redeemed within the applicable statutory window, then the deed becomes "operative," vesting in the grantee "all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage[.]"

In re Receivership is not inconsistent with *Stout* or *Sanford*. Those decisions clarify that the title held by the purchaser of a sheriff's deed at a foreclosure sale is an equitable one that can be sold or assigned, and that once no redemption occurs, it becomes an absolute title (as stated above in *In re Receivership*) that relates back to the sale date. Because plaintiff undisputedly obtained a sheriff's deed at a March 8, 2011 foreclosure sale, the circuit court properly ruled as a matter of law that under these undisputed facts plaintiff acquired title for purposes of MCL 559.158 on that same date.

Turning now to the specific tort claims, plaintiff argues that defendant's maintenance of the condominium assessments lien even after plaintiff completed its foreclosure on the unit was unlawful and slanderous. According to plaintiff, defendant's September 2011 amendment of the lien, which sought association fees extinguished by plaintiff's mortgage foreclosure, qualified as another slander of plaintiff's title. We conclude, as did the circuit court, that because defendant possessed an honest belief in the validity of its claim for the unpaid condominium association fees and advocated for a reasonable interpretation of the statutes, plaintiff's slander of title claims fail as a matter of law.

A common-law slander of title claimant "must show falsity, malice, and [pecuniary damages or] special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). "The same three elements are required in slander of title actions brought under MCL 565.108." *Id*. The third count of plaintiff's complaint sought damages under MCL 600.2907a, which contemplates liability for a "person who violates . . . [MCL 565.25] . . . by encum-

bering property through the recording of a document without lawful cause with the intent to harass or intimidate any person . . . ."

"[T]he crucial element is malice." *Gehrke v Janowitz*, 55 Mich App 643, 648; 223 NW2d 107 (1974). A slander of title claimant must show some act of express malice, which "implies a desire or intention to injure." *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929). "Malice may not be inferred merely from the filing of an invalid lien; the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury." *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990). A plaintiff may not maintain a slander of title claim if the defendant's "claim under the mortgage [or lien] was asserted in good faith upon probable cause or was prompted by a reasonable belief that [the defendant] had rights in the real estate in question . . . ." *Glieberman*, 248 Mich at 12.

Defendant asserted its entitlement to summary disposition on its countercomplaint because plaintiff had not stated a valid defense and concededly had made no payments toward the outstanding assessments or related expenses and fees on plaintiff's unit. Defendant theorized that (1) plaintiff was responsible for all assessments arising after it obtained title to the unit on March 8, 2011, the date of the sheriff's deed; and (2) plaintiff was responsible for preforeclosure assessments pursuant to MCL 559.211 because the foreclosure sale qualified as a conveyance under MCL 559.211(1) and MCL 565.35, and MCL 559.211(1) obligated a condominium purchaser to pay all outstanding assessments and related expenses and fees due from the purchase date. Defendant also noted that plaintiff failed to seek a written statement of association-related amounts due under MCL 559.211(2), and that subsection (2) pro-

vided that when a condominium purchaser failed to make this request, the purchaser became liable for all unpaid assessments and related expenses and fees.

Prior to our opinion today, only one published decision had addressed MCL 559.211, *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 261-263; 827 NW2d 379 (2012). In that decision we rejected an argument nearly identical to one of defendant's theories in this case: the plaintiff's assertion "that under MCL 559.211, [the defendant] is liable to [the plaintiff] for all unpaid assessments, interest, late charges, fines, costs, and attorney fees because [the defendant] is a 'purchaser' under MCL 565.34." *Id*. at 261. Initially, this Court noted that while MCL 565.34 defined " 'purchaser' as including an assignee of a mortgage," that definition did not extend beyond the chapter containing MCL 565.34, and thus did not apply to the Condominium Act. *Id*. We then concluded:

> Plainly, MCL 559.211 addresses liability for unpaid assessments, interest, late charges, fines, costs, and attorney fees "[u]pon the sale or conveyance of a condominium unit[.]" MCL 559.211(1). The present case does not involve the sale or conveyance of a condominium unit; rather, it involves [the defendant's] obtainment of a security interest in a condominium unit through the assignment of a mortgage. MCL 559.211 does not apply to an assignment of a mortgage of a condominium unit because it deals with the conveyance of a coowner's interest and not a mortgagee's interest. [*Id*. at 262-263 (alterations in original).]

Although *Coventry Parkhomes Condo Ass'n* tends to undercut one theory that defendant espoused in the circuit court, this Court issued its decision in *Coventry Parkhomes Condo Ass'n* on October 25, 2012, which was *after* defendant filed its countercomplaint in December 2011, *after* defendant pursued summary dispo-

sition beginning in June 2012, and *after* the circuit court entered its summary disposition ruling in August 2012.

The circuit court properly dismissed plaintiff's complaint pursuant to MCR 2.116(C)(10) on the basis of plaintiff's failure to prove malice because (1) no binding authority undermined defendant's legal contentions in the circuit court, (2) defendant's proffered positions in the circuit court rested on arguably rational interpretations of the Condominium Act, and (3) no other evidence of malice as a basis for defendant's conduct in enforcing its lien exists in the record.[5] With respect to defendant's countercomplaint, because the parties do not dispute that plaintiff made no payments toward the unpaid assessments on its unit, the circuit court's grant of summary disposition was proper under MCR 2.116(C)(10).

Affirmed.

No costs to either party, a question of public importance being involved. MCR 7.219(A).

HOEKSTRA, P.J., and RIORDAN, J., concurred with MURRAY, J.

---

[5] Although the circuit court cited both MCR 2.116(C)(8) and (10) in granting defendant summary disposition of plaintiff's complaint, the citation of subrule (C)(8) was inappropriate because the court considered the parties' documentary evidence in ruling on the motion. MCR 2.116(G)(5) (providing that "[o]nly the pleadings may be considered when the motion is based on subrule (C)(8) or (9)").

NASH v DUNCAN PARK COMMISSION

NASH v DUNCAN PARK TRUST

Docket Nos. 309403 and 314017. Submitted December 10, 2013, at Grand Rapids. Decided March 20, 2014, at 9:00 a.m. Leave to appeal sought.

Martha Duncan executed a trust deed in 1913 concerning property in the city of Grand Haven that became Duncan Park. The trust deed either transferred the property to the city or conveyed legal ownership of the land to three trustees (the Duncan Park Commission). In November 2010, Diane Nash, personal representative of the estate of Chance A. Nash, deceased, brought a wrongful death action in the Ottawa Circuit Court against the Duncan Park Commission (the Commission), alleging that the decedent died as a result of injuries sustained in a sledding accident at Duncan Park and that the Commission negligently failed to maintain the sledding hill and failed to warn of its dangers. The Commission sought summary disposition, contending, in part, that the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., barred the claim. The court, Jon Hulsing, J., granted the motion, reasoning that because the Commission was created by an ordinance and was authorized by the city, the Commission was a political subdivision. Plaintiff's motions for reconsideration and to amend the complaint were thereafter denied. Plaintiff appealed (Docket No. 309403).

Plaintiff filed a second wrongful death suit in the Ottawa Circuit Court against the Duncan Park Trust and its three trustees, Edward Lystra, Rodney Griswold, and Jerry Scott, individually and as trustees of the Duncan Park Trust, asserting negligence and gross negligence claims. Plaintiff then moved to amend the complaint to add the park's groundskeeper, Robert DeHare, as a defendant, setting forth a vicarious liability claim against the individual defendants arising from DeHare's alleged negligence. The court, Jon Hulsing, J., granted summary disposition in favor of defendants. The court determined that the city holds title to the fee and owns Duncan Park and that the Commission has exclusive management authority over the land. The court granted summary disposition to the Duncan Park Trust

on the basis of its ruling that the Duncan Park Trust does not exist. The court granted summary disposition to the named trustee-defendants because "there can be no trustees for a non-existent trust." The court also granted the same individuals summary disposition with respect to their roles as commissioners of the Duncan Park Commission on the basis of the court's prior ruling that the Commission "is a political subdivision that was created by the City and immune from tort liability." The court explained that, pursuant to MCL 691.1407(5), the commissioners qualify as the highest appointive executive officials of the Duncan Park Commission, thereby shielding them with immunity from suit. The court thereafter denied plaintiff's motion to amend the complaint to add new theories of liability against the named Duncan Park commissioners and trustees. The court also ruled that plaintiff could file a new claim against Robert DeHare. Plaintiff appealed these rulings (Docket No. 314017). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The trust deed created a trust that conveyed legal ownership of the land to the three trustees rather than to the city. The trust holds fee simple title to the park. Because the Commission is a private organization empowered by the trust to manage the park without any governmental oversight, the Commission may not invoke governmental immunity.

2. The trust deed created an active charitable trust. The language of the deed is that of a trust designed to place fee ownership of the land in the trustees rather than in the beneficiary.

3. The purpose of the trust falls within the purposes for which a charitable trust may be created.

4. The circuit court, in concluding that no trust existed, emphasized that plaintiff had not identified a separate document naming a "Duncan Park Trust." The court failed to consider that the trust deed itself qualified as the trust document. The trust deed's language fulfills all the criteria necessary to create a trust.

5. The circuit court's use of a definition for the word "trustee" as "Members of a governing board" is not supported by caselaw. The first definition of "trustee" considered by the court, "A person (or institution) to whom legal title to property is entrusted to use for another's benefit," fits the circumstances of this case better.

6. Because Mrs. Duncan placed the land in an express trust, the trustees own the land.

7. The precatory language in the second paragraph of the trust deed does not alter the remainder of the document's unambiguously stated intent to create a trust granting the land to the trustees.

8. A common-law dedication did not vest fee simple title in the city of Grand Haven. The fee simple title remained in the trustees.

9. The trust deed supports a conclusion that Mrs. Duncan intended a common-law dedication of the land for use as a park, which required acceptance by the city. Formal acceptance of the dedication was accomplished through the city's enactment of the ordinance required pursuant to the trust deed. However, a common-law dedication did not vest fee simple title in the city; rather, fee simple title remained in the trustees. Although the land was dedicated to the city for public purposes, ownership remained in the trustees.

10. The Commission is not a "governmental agency" as that term is defined in the GTLA. Whether viewed as the Commission or as three individual trustees, defendants are not a "political subdivision" of the city and therefore may not invoke the defense of governmental immunity.

11. The circuit court erred by determining that the Commission qualifies as a "political subdivision" because it was authorized by a political subdivision of the state. The statutory definition of "political subdivision" does not include commissions or commissions authorized by a city.

12. The Commission is not an "authority authorized by law" for purposes of the definition of a "political subdivision" in MCL 691.1401(e). No statute or caselaw supports a holding that a city may create an authority by ordinance absent an enabling law passed by the Legislature. No statutory provision permits the city of Grand Haven to form an authority involving only one park.

13. Rather than serving as an instrumentality or political subdivision of the city, the Commission is an independent, autonomous, private body that administers privately held land. The Commission acts solely on its own behalf. Rather than serving as an adjunct in the administration of city government, the Commission conducts no public business and independently manages land outside the city's control.

14. The definition of "governmental agency" does not include arrangements between governmental agencies and private entities or any other combined state-private endeavors. A private agency's performance of a governmental function does not confer governmental-agency status on the private entity.

15. The Commission is a unique construct of Martha Duncan's trust that is officially connected to the city only in the sense that the mayor ratifies the Commission's choice of successor members. The Commission controls private property without governmental oversight. The commissioners act on behalf of the trust, not on behalf of the city. The Commission is not immune from suit as a political subdivision of the city. The orders granting summary disposition on the ground of governmental immunity are reversed and the matter is remanded to the trial court in each action for further proceedings.

Reversed and remanded.

1. TRUSTS — ACTIVE TRUSTS — PASSIVE TRUSTS.

Active trusts differ from passive trusts in that they assign affirmative powers and duties to the trustee; passive trusts have been abolished in Michigan since 1846 (1846 RS 63).

2. TRUSTS — CHARITABLE TRUSTS.

A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental or municipal purposes, or for other purposes the achievement of which is beneficial to the community (MCL 700.7405(1)).

3. TRUSTS — CREATION OF TRUSTS.

A trust is created when all of the following apply: the settlor has the capacity to create a trust, the settlor indicates an intention to create the trust, the trust has a definite beneficiary or is either a charitable trust or a trust for a noncharitable purpose or for the care of an animal, as provided in MCL 700.2722, the trustee has duties to perform, and the same person is not the sole trustee and sole beneficiary (MCL 700.7402(1)).

4. TRUSTS — CREATION OF TRUSTS.

No particular form of words is required to create a trust; to create a trust, there must be an assignment of designated property to a trustee with the intention of passing title thereto, to hold for the benefit of others; there must be a separation of the legal estate from the beneficial enjoyments to create a trust.

5. TRUSTS — CREATION OF TRUSTS.

A trust may be created by a deed, with a document called a trust deed.

6. REAL PROPERTY — DEDICATIONS OF LAND.

A dedication of land is an appropriation of land to some public use that is accepted for such use by or in behalf of the public; a dedication requires a clear intent to dedicate on the part of the property owner and acceptance of the offer to dedicate by the public; Michigan recognizes two types of dedications: statutory and common law; the fee does not pass by a common-law dedication, only an easement passes.

7. TORTS — GOVERNMENTAL IMMUNITY — WORDS AND PHRASES — POLITICAL SUBDIVISIONS.

The definition of "political subdivision" in the governmental tort liability act does not include commissions or commissions "authorized" by a city (MCL 691.1401(e)).

8. CONSTITUTIONAL LAW — CREATION OF AUTHORITIES.

The Michigan Constitution grants the Legislature the power to create "authorities"; a city may not create an authority absent an enabling law passed by the Legislature (Const 1963, art 7, § 27).

9. TORTS — GOVERNMENTAL IMMUNITY — WORDS AND PHRASES — GOVERNMENTAL AGENCIES — POLITICAL SUBDIVISIONS.

The governmental tort liability act defines "governmental agencies" as "this state or a political subdivision"; the definition does not include joint ventures, partnerships, arrangements between governmental agencies and private entities, or any other combined state-private endeavors; the act defines a "political subdivision" as a municipal corporation, county, county road commission, school or community college district, port district, metropolitan district, or transportation authority or a combination of two or more of these when acting jointly; the definition includes a district or authority authorized by the Legislature or formed by 1 or more political subdivisions or an agency, department, court, board, or council of a political subdivision (MCL 691.1404(a) and (e)).

10. TORTS — GOVERNMENTAL IMMUNITY — PRIVATE AGENCIES — GOVERNMENTAL FUNCTIONS.

A private agency's performance of a governmental function does not confer governmental agency status on the private entity.

John D. Tallman for plaintiffs in both appeals.

Merry, Farnen & Ryan, PC (by *John J. Schutza*), for defendants in both appeals.

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

GLEICHER, J. These wrongful death actions arise from a sledding accident that took the life of 11-year-old Chance Nash. The accident occurred at Duncan Park in Grand Haven. The questions presented in these consolidated appeals center on the ownership of Duncan Park and whether the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., bars plaintiff's claims.

To answer these questions we begin by interpreting a document drafted 100 years ago. The circuit court ruled that this instrument transferred the park property from Martha Duncan to the city of Grand Haven. We conclude that the document created a trust that conveyed legal ownership of the land to three trustees rather than to the city.

The more difficult issue is whether the Duncan Park Commission (the Commission), which was established pursuant to Martha Duncan's trust, constitutes a "political subdivision" of the city of Grand Haven. Political-subdivision status would cloak the trustees and the Commission with governmental immunity. Because the Commission is a private organization empowered by the trust to manage the park without any governmental oversight, we hold that it may not invoke governmental immunity to avoid liability for Chance's death. Accordingly, we reverse the circuit court's contrary decision and remand for further proceedings.

I. THE HISTORY OF DUNCAN PARK

The land comprising Duncan Park was originally owned by Martha and Robert Duncan. Martha Duncan inherited the land as her sole property after Robert's death. On October 22, 1913, Mrs. Duncan executed a trust

deed naming herself as the "Party of the First Part" and identifying as the "Parties of the Second Part" three individuals who would serve as "Trustees for and in behalf of the people of the city of Grand Haven."[1]

In the next paragraph, the trust deed states, in relevant part:

> [Mrs. Duncan], desiring to transfer the land hereinafter described to the PEOPLE OF THE CITY OF GRAND HAVEN, in order to perpetuate the name of her deceased husband . . . has GRANTED, BARGAINED, SOLD, REMISED, RELEASED, ALIENED AND CONFIRMED, and by these presents does sell, remise, release, alien, confirm and convey unto the Parties of the Second Part and to their successors in office forever, all that piece of land situated in the City of Grand Haven . . . known and described as follows . . . .

The third paragraph sets forth the legal description of the property. The fourth paragraph, the habendum clause, states that the property has been transferred "unto the said parties of the Second Part, and their Successors, forever in fee, upon the trusts, nevertheless, and to and for the uses, interests and purposes hereinafter limited, described and declared[.]"[2]

In the next several paragraphs, the trust deed conditions the land grant on: (1) the Grand Haven Common Council's acceptance of the dedication, (2) the Common Council's creation of a "Park Board" known as "The Duncan Park Commission," composed of the three named trustees granted full control and supervision of Duncan Park, and (3)

---

[1] The document's final paragraph refers to the writing as Mrs. Duncan's "Trust Deed and Deed of Gift." Accordingly, we refer to the document as a trust deed.

[2] A deed's habendum clause limits and defines the estate conveyed to the grantee. *Darnell v Smith*, 238 Mich 33, 37; 213 NW 59 (1927).

> The above-described premises shall be at all times known and described as "DUNCAN PARK" and said described parcel of land shall always be held and occupied by said grantees for and in behalf of the Citizens of the City of Grand Haven as a public park, for the use and enjoyment of the citizens or inhabitants of Grand Haven . . . .

The fourth condition outlawed liquor in the park, and the fifth required the city to "provide means for the care and improvement" of the park. Notably, this provision also states:

> But it shall be the right and duty of the said TRUSTEES to remove all dead, dying, or unsightly trees, to thin out the undergrowth, wherever necessary, to remove dead branches, noxious weeds, or other rubbish, and in short, keep said park in as neat and trim a condition as the means at their command will allow.

The assignment of active duties to the trustees signifies most tellingly that the drafter crafted a trust. As discussed in greater detail later in this opinion, the fifth provision insulated the trust from a legal challenge under the Michigan statute of uses; without it, the trust was subject to execution, i.e. nullification, as a purely passive device.

The sixth condition provided that "[n]o tax for improvements" on a portion of the park could be levied against Mrs. Duncan. The seventh appointed the "Trustees" as "The Duncan Park Commission," reiterating that the trustees and their successors would "have the exclusive supervision, management and control" of Duncan Park. The eighth provision states:

> This Deed is given on the express condition that the Common Council of the City of Grand Haven shall, on the acceptance thereof, pass an Ordinance satisfactory to the Grantor, creating a "DUNCAN PARK COMMISSION" as herein provided, and providing for its perpetuation in the manner herein specified; also providing for the care and maintenance of said

> DUNCAN PARK. The repeal of said Ordinance, or any part thereof, at any future time, shall render this Deed null and void and make the same of no effect.

The ninth and final provision states that if the Duncan Park Commission should "cease to exist," the Ottawa Circuit Court shall "take charge of this trust and appoint a suitable 'DUNCAN PARK COMMISSION' to fulfill and carry out the terms of the trust for the benefit of the Citizens of the City of Grand Haven[.]"

On October 20, 1913, the city enacted an ordinance creating "The Duncan Park Commission," consisting of the three trustees. Section 5 of the ordinance provided:

> It is the definite purpose of this ordinance to create and establish a permanent commission, which commission shall have the power and authority at all times to manage and control that plat of land deeded to the three trustees before mentioned for and in behalf of the citizens of the City of Grand Haven, by Mrs. Martha M. H. Duncan, for public park purposes, in accordance with the deed of gift of said park.

Since 1913, the trustees have selected their own successors and Grand Haven's mayor has duly appointed them to the Commission. The record substantiates that the city does not expend any funds to operate or maintain Duncan Park.

In 1994, the city's liability insurance carrier communicated to the mayor that "since the City and its residents were using the park, we could cover it for property and liability purposes." The insurance company declined to extend coverage to the Commission, however, without "some type of agreement." The city manager proposed that the city and the Commission enter into a "license agreement," which would require the city to provide general liability insurance coverage for the Commission and the park "in return for use of the park." "[A]s a

housekeeping matter," the city manager asked the city council to readopt the 1913 ordinance.

The license agreement was drawn between the Commission "acting as trustees for and in behalf of the people of the City of Grand Haven, Michigan" (the licensor) and the city of Grand Haven (the licensee). It states, in relevant part:

> A. The Licensor controls certain real property located in the City of Grand Haven . . . commonly known as "Duncan Park"[.]
>
> * * *
>
> 1. License. The Licensor grants to the Licensee, and the Licensee accepts from the Licensor, a non-exclusive, revocable, non-transferable license to use the Licensed Premises as a park solely for the benefit of the people of Grand Haven and for no other purposes. This is a license and Licensee understands and agrees that it is only permission to use the Licensed Premises and does not constitute any legal or possessory interest in the property.
>
> * * *
>
> 3. Insurance. The Licensee shall provide general liability insurance coverage for the Licensor and each of its three members with coverage for bodily injury (including death) and for property damage . . . .

Both parties signed the license and the city reenacted the 1913 ordinance. In particular, § 5 of the ordinance, quoted in its entirety earlier in this opinion, remained the same.

II. THE PROCEDURAL HISTORIES OF THE CONSOLIDATED APPEALS

A. THE INITIAL SUIT, DOCKET NO. 309403

In November 2010, plaintiff filed a lawsuit against the Commission, alleging that it negligently failed to

maintain the sledding hill and failed to warn of its dangers.[3] Following a one-year period of discovery, the Commission moved for summary disposition under MCR 2.116(C)(7) and (10), contending that the GTLA or, alternatively, the recreational use act (RUA), MCL 324.73301, barred plaintiff's suit. The gravamen of the Commission's GTLA argument was that the Commission constituted a "governmental agency" under then MCL 691.1401(d)[4] as a "political subdivision" of the state of Michigan.

The circuit court granted summary disposition to the Commission under MCR 2.116(C)(7), reasoning that because the Commission was created by ordinance and "authorized" by the city, the Commission constitutes a political subdivision. Further, the circuit court found, "Duncan Park is owned by a public entity," rendering the RUA inapposite.

Plaintiff then brought a motion for reconsideration and a motion to amend the complaint. Plaintiff's proposed amended complaint would have added as defendants the three Duncan Park commissioners and trustees (the same persons hold both positions) and the Duncan Park Trust.

The circuit court issued a written opinion and order summarizing its reasons for granting summary disposition and reaffirming its decision. "[F]or clarification" the court added that

> the actual ownership of Duncan Park does not affect the Court's decision. That is, even if a private entity is the fee owner of the real property that comprises the park, this does not affect the Court's decision to grant summary

[3] The complaint asserts that Chance died after his sled struck a dead tree covered in snow, causing a fatal abdominal injury.

[4] Following the enactment of 2012 PA 50, this definition was relocated to MCL 691.1401(a).

> disposition based on [the] GTLA, because under MCL 123.54, a governmental function may occur on private land.

The circuit court also denied plaintiff's motion to amend the complaint. Plaintiff claimed an appeal from both the summary disposition and the amendment rulings.

B. THE SECOND SUIT, DOCKET NO. 314017

In April 2012, plaintiff filed a second suit asserting negligence and gross negligence claims, naming as defendants the Duncan Park Trust and its three individual trustees, defendants Edward Lystra, Rodney Griswold, and Jerry Scott.

In lieu of filing an answer, defendants filed a motion for summary disposition under MCR 2.116(C)(7) and (10). Defendants contended that: (1) res judicata foreclosed plaintiff's claims; (2) the Commission and not the trust controlled the premises; (3) no actual trust exists, despite the donor's use of trust language in the document conveying the land; (4) the GTLA cloaks all defendants with immunity, and (5) the open and obvious danger doctrine barred the suit.

The circuit court permitted some discovery before considering whether summary disposition was warranted. Shortly after the circuit court entertained the parties' summary disposition arguments, plaintiff moved to amend the complaint to add Robert DeHare, the park's groundskeeper, as a party defendant. The proposed first amended complaint also set forth a vicarious liability claim against the individual defendants arising from DeHare's alleged negligence.

In a written opinion, the circuit court granted summary disposition to defendants. The circuit court first ruled that the "grantee" of Duncan Park was not

a trust but rather "the governmental unit[,] the City of Grand Haven—the entity that accepted the gift of land." The court specifically rejected that the deed "convey[ed] Duncan Park to any named trust." Rather, "it conveyed the land to 'trustees for and in behalf of the People of the City of Grand Haven' contingent upon the Common Council . . . accepting the premises." Further, the court pointed out, the trust deed made no mention of a "Duncan Park Trust" and plaintiff "cannot point to any document which names a 'Duncan Park Trust.' "

The court theorized that the document could also be deemed ambiguous, in which case "surrounding circumstances" would inform its construction. Those circumstances

> reveal that the City formally accepted the "gift" from Mrs. Duncan and created an ordinance which was acceptable to her. Contemporaneously, Mrs. Duncan conveyed the property. The actions of both grantor and the City reflect, and confirm, what is obvious from the language of the deed—that Duncan Park was conveyed to the City for the benefit of the People of Grand Haven.

Thus, the court held, the city "holds title to the fee."

The circuit court recognized that the licensing agreement tended to refute the court's conclusion that the city owned the park in fee.[5] It dispensed with this problem as follows:

> This latter agreement [the licensing agreement] was apparently prepared at the insistence of the insurance company for the City. Importantly, however, the City was not named as a party in this or the prior litigation. Therefore,

[5] "This is a license and Licensee understands and agrees that it is only permission to use the Licensed Premises any does not constitute and legal or possessory interest in the property."

> there are no party admissions regarding ownership of Duncan Park and there certainly is no stipulation between the parties on this issue.

The circuit court also addressed MCL 554.351, which provides:

> No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. *If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee.* If no such trustee shall be named in said instrument or if a vacancy occurs in the trusteeship, then the trust shall vest in the court of chancery for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and said court may make such orders or decrees as may be necessary to vest the title to said lands or property in the trustee so appointed. [Emphasis added.]

The court acknowledged that the emphasized language arguably supported plaintiff's position, but again looked to the circumstances to discern Mrs. Duncan's intent. "Because of this, this Court cannot fall prey to any 'gotcha' words or phrases which run counter to the intent—evidenced in the entire deed—of the settlor." Thus, the court ruled, the city owns Duncan Park and the Commission "has exclusive management authority over the land."

The court granted summary disposition to the trust based on its ruling that the Duncan Park *Trust* does not exist. And because "there can be no trustees for a non-existent trust," the court granted summary disposition to the named trustee-defendants. It also granted the same individuals summary disposition in their roles as commissioners based on the court's prior ruling that the Commission "is a political subdivision that was created by the City and immune from tort liability." The court explained that pursuant to MCL 691.1407(5), the commissioners qualify as the " 'highest appointive executive official[s]' " of the Duncan Park Commission, thereby shielding them with immunity from suit.

In a subsequent opinion dated December 18, 2012, the circuit court denied plaintiff's motion to amend the complaint to add new theories of liability against the named Duncan Park commissioners and trustees. The court ruled that "[p]laintiff may file a new claim against a prospective defendant, Mr. DeHare." Plaintiff claimed a timely appeal from these rulings and this Court consolidated the appeals.

III. ANALYSIS

A. OWNERSHIP OF DUNCAN PARK

We begin by addressing the bedrock question: who owns Duncan Park? We conclude that the trust deed did, in fact, create a trust, and that the trust holds fee simple title to the park. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). We also review de novo the interpretation of written instruments as a matter of law, *Woodbury v Res-Care Premier, Inc*, 295 Mich App 232, 243; 814 NW2d 308 (2012), and consider de novo issues of statutory inter-

pretation. *Lenawee Co v Wagley*, 301 Mich App 134, 167; 836 NW2d 193 (2013).

Our analysis begins in the year 1535, with England's adoption of the Statute of Uses. "The ancestor of the modern trust is the medieval *use* (from a corruption of the Latin word *opus*, meaning benefit)." Dukeminier, Sitkoff & Lindgren, Wills, Trusts, & Estates (8th ed, 2009), p 541 (emphases in original). Feudal landowners employed a use "to relieve tenants of the burdens of feudal landholding, to enable religious orders to have the benefit of land, and to effect greater freedom in the conveyancing of real property." Bogert, Trusts & Trustees (3d ed), § 4, p 26. The use conveyed land to third parties who would hold the land for the benefit of others, such as religious orders.[6]

Henry VIII sought to confiscate monastic property and to otherwise enrich his treasury by abolishing the use. At his behest, the English Parliament in 1535 enacted the Statute of Uses, 1535, 27 Henry VIII, c 10 (England). *Bogert* at 26-27. "The Statute of Uses provided that where any person should thereafter be seised of land 'to the use, confidence or trust' of any other person, the latter person shall be seised and possessed of the land in the same estate as that person would otherwise have in use." 1 Restatement Trusts, 3d, § 6, comment *a*, p 75. The statute thereby "extinguished the

[6] William Shakespeare referred to a use in *The Merchant of Venice*, near the end of the play (Act IV, Scene I). Shylock had been forced to forfeit half his property to the government and half to Antonio. Antonio offered to take the property in trust (use) for Shylock, with the principal going to Shylock's daughter and her husband upon Shylock's death:

> So please my lord the duke and all the court
> To quit the fine for one half of his goods,
> I am content; so he will let me have
> The other half in use, to render it,
> Upon his death, unto the gentleman
> That lately stole his daughter[.]

interest of the person who otherwise would hold title subject to the use" and vested the legal property interest in the beneficiary. *Id*.

Passive trusts are the modern day equivalents of uses.

> [A] trust declaration or a trust transfer 'to the use of' another, or 'in trust for' another, or 'for the benefit of' another, without describing any duties to be performed by the trustee in carrying out the use or trust, creates a trust that is clearly passive and that is executed by a transfer of the trustee's interest to the beneficiary, who thereafter holds as absolute owner. [Bogert, § 207, pp 40-41.]

Michigan's statute of uses, 1846 RS 63, abolished only passive trusts. *Saur v Rexford*, 369 Mich 338, 340; 119 NW2d 669 (1963).

Active trusts differ from passive trusts in that they assign affirmative powers and duties to the trustee. See 1 Restatement Trusts, 3d, § 6 (1) and (2), p 74; *Hunt v Hunt*, 124 Mich 502, 504; 83 NW 371 (1900). Professor Bogert distinguishes active trusts from passive trusts as follows: "At the other extreme are trusts that are clearly active because the settlor stated duties and powers that were substantial and important and not merely ministerial, mechanical, or nominal. Cases of this type include where the trustee is directed to manage the trust property[.]" Bogert, § 207, p 43. Professor Scott explains that active duties imposed on a trustee prevented the Statute of Uses from executing (i.e., legally eliminating) the trust. 1A Scott & Fratcher, Scott on Trusts (4th ed, 1987), § 69.1, p 406.

Michigan enacted a statute of uses abolishing passive trusts in 1846. 1846 RS 63. Our Legislature reenacted the same statute of uses in 1857, 1871, 1897, 1915, 1929, and 1948. The current version, found at MCL 555.1 *et seq*., is identical to the 1846 version except for minor formatting

and punctuation changes not relevant to our discussion. It provides: "Uses and trusts, except as authorized and modified in this chapter, are abolished, and every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this title." MCL 555.1. Pursuant to MCL 555.2, every estate that is now held as a use, executed under the laws of this state as they formerly existed, "is confirmed as a legal estate." MCL 555.3 expands on that concept by providing that the beneficiary of a use "shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions as his beneficial interest."

However, MCL 555.4 creates an exception for active trusts: "The last preceding section shall not divest the estate of any trustees, in any existing trust, where the title of such trustees is not merely nominal, but is connected with some power of actual disposition or management, in relation to the lands which are the subject of the trust." And MCL 555.11 sets forth specific objects for which "express trusts"[7] may be created:

> Express trusts may be created for any or either of the following purposes:
>
> First. To sell lands for the benefit of creditors:
>
> Second. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon:
>
> Third. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the last preceding chapter:
>
> Fourth. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married

[7] An "express trust" is a trust created by an instrument.

> woman, or for either of the purposes, and within the limits prescribed in the preceding chapter:
>
> Fifth. For the beneficial interest of any person or persons where such trust is fully expressed and clearly defined upon the face of the instrument creating it subject to the limitations as to time prescribed in this title.

MCL 555.16 states:

> Every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust was created, shall take no estate or interest in the lands, but may enforce the performance of the trust in equity.

In 1912, our Supreme Court applied the Michigan statute of uses to "execute" (legally eliminate) a use, in that case a conveyance of property that the Court determined to have been merely a passive trust: "It will thus be seen that in this State passive trusts have been entirely abolished, and where a deed creates them the title passes at once to the beneficiary." *Rothschild v Dickinson*, 169 Mich 200, 207; 134 NW 1035 (1912). The Court explained: "There is nothing indicating the terms of the trust; no duties whatever given to the alleged trustee." *Id*.[8] *Hunt*, 124 Mich at 504, describes the powers and duties required of an active trust:

---

[8] A case decided by the Supreme Court in 1919 lends still more clarity to the active/passive trust distinction. In *Woolfitt v Histed*, 208 Mich 308; 175 NW 286 (1919), the Supreme Court considered whether a deed created a lawful trust. The Court held that the deed did not, explaining:

> It is undisputed that the deed to John does not create an active trust. If a trust is created at all it is a naked or passive trust, which is defined to be "a trust in which the property is vested in one person upon trust for another, and the nature of the trust not being qualified by the settlor, is left to the construction of the law." Passive trusts are abolished by statute in this State, but where a deed is so worded as to create a passive or naked trust our statute

> The intention of the testatrix is entirely clear. She devised the real estate to her executors as trustees, with authority to sell, and to invest the proceeds in bond and mortgage, or such other ways as the said trustees should deem safe and advisable, the receipts therefrom to be paid over to her two sons during their lives. She empowered each of them to devise the property, whether it should be realty or personalty, but, should either fail to make a will, then it was to go to the heirs of each one. This intention of the testatrix must be carried out, unless to do so would be in direct violation of law. The trust was an active one[.]

We evaluate the trust deed against this legal backdrop. To survive the statute of uses the writing had to create an active trust.

The trust deed fulfills this requirement. Moreover, the language of the document is quintessentially that of a trust designed to place fee ownership of the land in the trustees rather than in the beneficiary.

1. THE ACTIVE, EXPRESS NATURE OF THE TRUST

The document's fifth paragraph provides, in relevant part:

> But it shall be the right and duty of the said TRUSTEES to remove all dead, dying, or unsightly trees, to thin out the undergrowth, wherever necessary, to remove dead branches, noxious weed, or other rubbish, and in short, keep said park in as neat and trim a condition as the means at their command will allow.

By vesting the trustees with well-defined duties, the drafter created an active trust that would survive a challenge brought under the statute of uses. The assignment of specific, active duties to the trustees forms the document's signature trust provision.

---

on uses and trusts executes it by forthwith passing the title to the beneficiary. [*Id*. at 314 (citations omitted).]

2. THE IMPACT OF EPIC

The Michigan Trust Code (MTC), MCL 700.7101 to 700.7913, forms a component of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. The MTC applies to trusts created before its enactment, but does not impair accrued rights or affect an act done before its effective date. MCL 700.8206(1)(a) and (2). However, if any provision of the MTC "conflicts with any provision of 1846 RS 63, MCL 555.1 to 555.27," the MTC prevails. MCL 700.8206(3).

A reporter's comment for this section of the MTC further explains the relationship between the old and the newer law:

> The Michigan Statute of Uses and Trusts, 1846 RS 63, MCL 555.1 *et seq*., has only limited application to modern trusts. It does not apply to trusts with personalty. . . . However, it continues to apply to trusts with direct interests in real estate. The Michigan Statute of Uses and Trusts has been largely unchanged since its enactment in 1846, and the act was based on a much older English statute that predates Michigan's statehood. Because many of the provisions of the Statute of Uses and Trusts have continuing utility, the Statute was not repealed in the course of enacting the MTC. For example, Statute § 1 through § 10 have continuing relevance in the area of real estate. However, § 11 through § 27 arguably conflict with aspects of the MTC. Because the MTC is the more comprehensive and modern statute, if there is a conflict between the two statutes, subsection (3) provides that the terms of the MTC will prevail. A similar amendment was made to the Statute of Uses and Trusts to add a new § 28 in the Statute of Uses and Trusts, effective April 1, 2010. [Martin, Estates & Protected Individuals Code: With Reporter's Commentary (February 2013 update) (Ann Arbor: Institute of Continuing Legal Education), p 507.]

EPIC lacks direct relevance to whether the indenture created a trust, because Mrs. Duncan's intent must be gleaned from the legal environment in 1913. However, even if EPIC and the MTC applied to this analysis, the provisions of the indenture permit it to be construed as a trust. MCL 700.7405(1) allows the creation of a charitable trust "for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes . . . or other purposes the achievement of which is beneficial to the community." Here, the trust deed provides that Mrs. Duncan created the Duncan Park Trust for the benefit of Grand Haven and its people. Thus, the purpose of this trust falls within the statutory definition.

MCL 700.7402(1) provides that a trust is created if all of the following apply:

> (a) The settlor has capacity to create a trust.
>
> (b) The settlor indicates an intention to create the trust.
>
> (c) The trust has a definite beneficiary or is either of the following:
>
> (*i*) A charitable trust.
>
> (*ii*) A trust for a noncharitable purpose or for the care of an animal, as provided in [MCL 700.2722].
>
> (d) The trustee has duties to perform.
>
> (e) The same person is not the sole trustee and sole beneficiary.

For the reasons already discussed, the Duncan Park Trust qualifies as charitable and active, thereby meeting the only pertinent statutory requirements. Application of this statute does not change the analysis, because the document's language signifies an intent to create a charitable trust vesting the trustees with specific duties.

3. THE INDENTURE'S USE OF TRUST LANGUAGE

Moreover, the document's language clearly contemplates the establishment of a trust. "[I]t requires no particular form of words to create a trust." *Brooks v Gillow*, 352 Mich 189, 199; 89 NW2d 457 (1958). " 'A person need use no particular form of words to create a trust or to make himself a trustee. It is enough if, having the property, he conveys it to another in trust[.]' " *Hamilton v Hall's Estate*, 111 Mich 291, 296; 69 NW 484 (1896), quoting *Ray v Simmons*, 11 RI 266, 268 (1875). The fundamental characteristics that distinguish a trust from other legal relationships are the existence of a fiduciary relationship and the holding of title to property by one person for the benefit of another. 1 Restatement Trusts, 2d, § 2, p 6. "To create a trust, there must be an assignment of designated property to a trustee with the intention of passing title thereto, to hold for the benefit of others. There must be a separation of the legal estate from the beneficial enjoyments." *Equitable Trust Co v Milton Realty Co*, 261 Mich 571, 577; 246 NW 500 (1933) (citation omitted).

> An express trust must be an explicit declaration of trust, accompanied by an intention to create such an estate and followed by an actual conveyance or transfer of definite property, or estate or interest made by a person capable of such a transfer and for a definite term, which vests the legal title in a person capable of holding as trustee for the benefit of a cestui que trust or purpose, to which the trust fund is to be applied or the retention of title by the owner under circumstances which clearly and unequivocally disclose intent to hold for use of another. [*Buhl v Kavanagh*, 118 F2d 315, 320 (CA 6, 1941).]

Nor do charitable trusts require formulaic words:

> "A charitable trust, like an express private trust, is created only if the settlor properly manifests an intention

> to create it. The settlor need not, however, use any particular language in showing his intention to create a charitable trust; he need not use the word 'trust' or 'trustee.' It is sufficient if he shows an intention that the property should be held subject to a legal obligation to devote it to purposes which are charitable." [*Knights of Equity Mem Scholarships Comm v Univ of Detroit*, 359 Mich 235, 242; 102 NW2d 463 (1960), quoting 4 Scott, Trusts (2d ed), § 351, p 2574.]

In concluding that no trust existed, the circuit court emphasized that plaintiff had not identified a separate document naming a "Duncan Park Trust." The circuit court failed to consider that the trust deed itself qualified as the trust document. The trust deed's language fulfills all the criteria necessary to create a trust.

Starting from the end, the document refers to itself as a "Trust Deed." Our caselaw recognizes that a trust may be created by a deed, with a document called a trust deed. *In re Sweetser's Estate*, 109 Mich 198, 204; 67 NW 130 (1896). See also *Thatcher v Wardens of St Andrew's Church of Ann Arbor*, 37 Mich 264, 273 (1877) ("Our statute, [1871 CL 3062] and How. Stat. § 4637 fully authorizes the conveyance in trust for the purpose mentioned in this deed and vests the title in perpetual succession in the trustees provided for by the statute in trust for the church. We are of opinion that the objections made to the validity of this trust deed are not valid, and that it is unnecessary to discuss the other questions raised.").

The ninth paragraph clearly sets forth Mrs. Duncan's intent to create a trust:

> If at any time in the future the "DUNCAN PARK COMMISSION" shall cease to exist, the Circuit Court for the County of Ottawa in Chancery, or such Court as shall succeed the same, shall, on the application of any Citizen of the City of Grand Haven, *take charge of this trust* and

> appoint a suitable "DUNCAN PARK COMMISSION" *to fulfill and carry out the terms of the trust for the benefit of the Citizens of the City of Grand Haven*; and the Commission so appointed shall thereafter choose its own successors in the same manner as herein provided.

The habendum clause transfers the property from Martha Duncan (the party of the first part) to the parties of the second part "TO HAVE AND TO HOLD . . . *forever in fee, upon the trusts*, nevertheless, and to and for the uses, interests and purposes hereinafter limited, described and declared[.]" (Emphasis added). This language, too, shows the creation of a trust.

The circuit court recognized that the trust deed's repetitive use of the term "trustees" suggested a trust. Citing *Webster's Online Dictionary*, the circuit court set forth three definitions of the word "trustee." The second, as quoted by the circuit court, is: "Members of a governing board." The circuit court accepted that definition rather than the other two, the first of which was: "A person (or institution) to whom legal title to property is entrusted to use for another's benefit."

The term "trustee" has been defined by our Supreme Court as follows: "A trustee, in the widest meaning of the term, may be defined to be a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." *Equitable Trust Co v Milton Realty Co*, 263 Mich 673, 676; 249 NW 30 (1933) (quotation marks and citation omitted). No Michigan case uses the term "trustee" in the manner proposed by the circuit court, and we decline to do so. Further, the first definition of "trustee" better fits the circumstances of this case, because Mrs. Duncan entrusted the property to the Duncan Park Trust for the use and benefit of the community.

In addition to the "trustee duties" clause included to avoid the statute of uses, the trust deed's reverter provision is entirely consistent with Mrs. Duncan's intent to place the property in trust rather than to grant it outright to the city. The third condition specifically provided that if the "Council or said Trustees shall neglect or refuse to carry out in good faith all of the terms and conditions herein specified," the premises

> shall revert to the first party herein, her heirs, executors or assigns and become again vested in her, or her heirs, as fully as if such dedication had never been made; and she, her heirs, or executors, may then enter upon and take possession of said premises and thenceforward hold the same as fully as if this dedication had never been made.

This language supports that Mrs. Duncan placed the land in trust to empower enforcers of her will that the land perpetually remain a park. By placing the land in a trust rather than conveying it to the city directly, Mrs. Duncan gained assurance that if the city breached any of the conditions set forth in the trust deed, the trust would sue to regain the city's compliance.

4. THE TRUSTEES OWN THE LAND

Because Mrs. Duncan placed the land in an express trust, the trustees own the land. 1897 CL 8844, provided:

> Every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust was created, shall take no estate or interest in the lands, but may enforce the performance of the trust in equity.

As described by our Supreme Court:

> The trusts contained in this will are express as well as active trusts, and, in so far as they are valid, vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust; and the persons for whose benefits the trust was created take no estate or interests in the lands, but they may enforce the performance of the trust in equity. [*Palms v Palms*, 68 Mich 355, 380; 36 NW 419 (1888) (opinion by CHAMPLIN, J.).]

Today, the same statutory language is found in MCL 555.16.

A second statute, MCL 554.351, lends additional support to this conclusion. The first sentence of the statute states:

> No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities.

The statute's second sentence, acknowledged but substantively ignored by the circuit court, states: "If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee." 1907 PA 122 included this same sentence.

Only the following sentence, found in the trust deed's second paragraph, lends any credence to the notion that

the instrument transferred the land directly to the city rather than to the trustees:

> WITNESSETH THAT the said Party of the First Part, desiring to transfer the land hereinafter described to the PEOPLE OF THE CITY OF GRAND HAVEN, in order to perpetuate the name of her deceased husband, ROBERT W. DUNCAN, for and in consideration of the sum of One Dollar ($1.00) to her in hand paid (receipt whereof is hereby acknowledged) has GRANTED, BARGAINED, SOLD, REMISED, RELEASED, ALIENED AND CONFIRMED, and by these presents does sell, remise, release, alien, confirm and convey unto the Parties of the Second Part and to their successors in office forever, all that piece of land situated in the City of Grand Haven in the County of Ottawa and the State of Michigan, known and described as follows[.]

Read in its entirety, this paragraph indicates that Mrs. Duncan "granted" and "convey[ed] unto the Parties of the Second Part" the park premises. The language that begins the sentence, "WITNESSETH THAT the said Party of the First Part, desiring to transfer the land hereinafter described to the PEOPLE OF THE CITY OF GRAND HAVEN," is precatory. "The mere use of the precatory words 'desire' and 'request' will not be sufficient to create an enforceable trust, or a power in the nature of a trust, when the context clearly shows that the testator's intention was the contrary." *Thomas v Ohio State Univ Bd of Trustees*, 70 Ohio St 92, 109; 70 NE 896 (1904). The habendum clause that followed unambiguously stated that the land was to be held by the trustees and their successor, "forever in fee, upon the trusts, nevertheless[.]"[9] In context, the precatory language does not alter the remainder of the docu-

[9] Were we to conclude that the granting and habendum clauses conflict, the habendum clause would control:

ment's unambiguously stated intent to create a trust granting the land to the trustees.

5. THE DEDICATION DID NOT VEST OWNERSHIP IN THE CITY

Although not raised in the circuit court, defendants now argue that the "Duncan Deed, by its explicit terms, constituted a common-law 'dedication' of property for a public use." Defendants are correct. The indenture likely did anticipate that the land would be dedicated by the city of Grand Haven for public use. However, a common-law dedication did not vest fee simple title in the city of Grand Haven; rather, fee simple title remained in the trustees.

"A 'dedication' of land is an 'appropriation of land to some public use, accepted for such use by or in behalf of the public.' " *2000 Baum Family Trust v Babel*, 488 Mich 136, 144; 793 NW2d 633 (2010), quoting *Clark v Grand Rapids*, 334 Mich 646, 656-657; 55 NW2d 137 (1952). A dedication requires "a clear intent to dedicate on the part of the" property owner, "as well as an acceptance by the public[.]" *Lee v Lake*, 14 Mich 12, 18 (1865). Acceptance of an offer to dedicate land to public use is essential to a completed dedication. *Field v Village of Manchester*, 32 Mich 279, 281 (1875). Two types of dedications are recognized in Michigan: statu-

---

[A] repugnancy between the granting clause and the habendum must be resolved, as a rule of construction, in favor of the former when "it cannot be determined from the whole instrument and the attendant circumstances" which the grantor intended to control; "but, where it appears from the whole conveyance and the attendant circumstances that the grantor intended the habendum to enlarge, restrict, or repugn the granting clause, the habendum must control, for the reason that it is the last expression of the grantor's wish as to the conveyance." [*Thompson v Thompson*, 330 Mich 1, 5; 46 NW2d 437 (1951), quoting *Powers v Hibbard*, 114 Mich 533, 553; 72 NW 339 (1897).]

tory and common law. *Gunn v Delhi Twp*, 8 Mich App 278, 282; 154 NW2d 598 (1967). "[B]y a common-law dedication the fee does not pass, but only an easement." *Badeaux v Ryerson*, 213 Mich 642, 647; 182 NW 22 (1921).

The trust deed supports that Mrs. Duncan intended a common-law dedication of the land for use as a park, which required acceptance by the city. Formal acceptance of the dedication was accomplished through the enactment of the ordinance required pursuant to the trust deed. See *West Mich Park Ass'n v Dep't of Conservation*, 2 Mich App 254, 265; 139 NW2d 758 (1966), quoting 23 Am Jur 2d, Dedication, § 50 (" 'Formal acceptance may consist of a formal ratification by the proper official board of the municipality, a formal resolution or order by any other proper official body, the adoption of a municipal ordinance, the vote of a town council, the signing of a written instrument by the proper authorities, the execution of an official map by a city showing the street offered to be dedicated as such, or an act of the legislature incorporating a town, or adopting a map showing its limits.' ") (emphasis omitted). See 23 Am Jur 2d, Dedication, § 47 (2013). It bears emphasis that the ordinance specifically acknowledged that the "plat of land" comprising the park was "deeded to the three trustees[.]"

In 1913, the leading case concerning common-law dedications was *Patrick v Young Men's Christian Ass'n of Kalamazoo*, 120 Mich 185; 79 NW 208 (1899). The land at issue in *Patrick* was platted by Stephen H. Richardson in 1831. *Id*. at 186-187. Pursuant to the plat map, a portion of the land was " 'appropriated to the four first religious denominations who may form societies in the foregoing town, and erect buildings thereon; one-fourth to the benefit of each society.' " *Id*. at 187.

This area was known as "Church Square." *Id*. In 1838, Richardson and his wife owned the land surrounding Church Square, and quitclaimed it to Johnson Patrick "without any exception of streets or squares[.]" *Id*.

Over the next several decades the land was conveyed to different people, including Patrick's heirs. In 1837, St. Luke's Protestant Episcopal Society "erected a church building on the premises, and occupied the lot until March 18, 1887, when it deeded the property by quitclaim deed to Senator Stockbridge[.]" *Id*. at 188. Stockbridge deeded the property to the Young Men's Christian Association, which erected a building on it. *Id*. The plaintiffs, heirs at law of Johnson Patrick, contended that "Church Square" belonged to them rather than to the YMCA. *Id*. at 186.

The Supreme Court began its analysis by examining the plat: "If the plat was valid, and conveyed an absolute fee to the religious society, it is manifestly the end of the plaintiffs' claim, because Richardson then parted with his entire title." *Id*. at 189. The Court continued, "If it was valid, but did not convey the fee, the plaintiffs must show that they own the reversionary interest." *Id*. The Court determined that the original platters accomplished a common-law dedication of the land to a public use, rather than a statutory dedication, and that the fee ownership had remained in Richardson until he conveyed it to Patrick. The Court explained, "Common-law dedications do not ordinarily convey the fee. In fact, under the strict rule they never do." *Id*. at 192.

Patrick has withstood the test of time. In *2000 Baum Family Trust*, 488 Mich at 148, the Supreme Court reiterated that under the common law, fee ownership of dedicated property remains in the original owner. Accordingly, defendants' late-raised dedication argument

is unavailing. Although the land was dedicated to the city of Grand Haven for public purposes, ownership remained in the trustees.

B. GOVERNMENTAL IMMUNITY

We next consider whether governmental immunity bars plaintiff's suit against the trustees and the Commission. The circuit court dismissed both cases under MCR 2.116(C)(7), immunity granted by law. A summary disposition motion brought under subrule (C)(7) "does not test the merits of a claim but rather certain defenses" that may eliminate the need for a trial. *DMI Design & Mfg, Inc v Adac Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). (2010). When reviewing a grant of summary disposition under subrule (C)(7), this Court accepts as true the plaintiff's well-pleaded allegations and construes them in the light most favorable to the plaintiff. *Id*. at 208-209. "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts," whether immunity bars the claim is a question of law for the court. Under this subrule, summary disposition may be granted when a claim is barred because of immunity granted by law. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010).

We hold that the Commission is not a "governmental agency" as that term is defined in the GTLA. The Commission is a private body accountable only to itself, not to the city of Grand Haven. The Commission manages Duncan Park without oversight, direction, or financial contribution from the city. Its sole connection with the city derives from the ordinance's requirement that the mayor ratify the Commission's choice of its own commissioners. Whether viewed as the Commission or as three individual trustees, defendants are not

a "political subdivision" of the city of Grand Haven and therefore may not invoke the defense of governmental immunity.

Except for certain limited statutory exceptions, MCL 691.1407(1) grants tort immunity to governmental agencies "engaged in the exercise or discharge of a governmental function." The parties agree that maintaining a park is an exercise of a governmental function. The parties' disagreement centers on whether the Commission is a "governmental agency" entitled to immunity. The GTLA affords immunity to "governmental agencies," which the statute defines as "this state or a political subdivision." MCL 691.1401(a).[10] A "political subdivision" is

> a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or *authority authorized by law* or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision. [MCL 691.1401(e) (emphasis added).][11]

The circuit court ruled that the Commission "was authorized by a political subdivision of the State," and therefore qualified as a "political subdivision." Defendants argue that the Commission falls within the statutory definition of a "political subdivision" because it "is an 'authority authorized by law,' namely, as created by City of Grand Haven ordinance." The statutory language governs our analysis.

When the Legislature defines a term used in a statute, the Court must accept the statutory definition.

---

[10] Before the enactment of 2012 PA 50, this definition was located in subdivision (d).

[11] This definition was formerly located in subdivision (b).

Erlandson v Genesee Co Employees' Retirement Comm, 337 Mich 195, 204; 59 NW2d 389 (1953). "Where, as here, a statute supplies its own glossary, courts may not import any other interpretation, but must apply the meaning of the terms as expressly defined." *Detroit v Muzzin & Vincenti, Inc*, 74 Mich App 634, 639; 254 NW2d 599 (1977). " '[W]hen a statute specifically defines a given term, that definition alone controls. Therefore, a statutory definition supersedes a commonly accepted dictionary or judicial definition of a term.' " *People v Williams*, 288 Mich App 67, 74; 792 NW2d 384 (2010), quoting 22 Michigan Civil Jurisprudence (2005 revision), § 202, p 731.

The Commission's entitlement to governmental immunity depends on whether it falls within the definition of "political subdivision" set forth in MCL 691.1401(e). We reject the circuit court's determination that the Commission qualifies as a "political subdivision" because it "was authorized by a political subdivision of the State." The statutory definition of "political subdivision" does not include "commissions," nor does it include commissions "authorized" by a city.

Defendants contend that the Commission is an "authority authorized by law." Neither the trust nor the ordinance refers to the Commission as an "authority." Furthermore, a city lacks the power to unilaterally create an "authority"; only the Legislature may do so.

Const 1963, art 7, § 27 states:

> Notwithstanding any other provision of this constitution the legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide. Wherever possible, such additional forms of government or authorities shall be designed to perform multipurpose functions rather than a single function.

Thus, the Constitution grants to the *Legislature* the power to create "additional forms of government or authorities." No statute or caselaw supports that a city may create an "authority" by ordinance absent an enabling "law" passed by the Legislature. Rather, the term "authority authorized by law" refers to authorization by the Legislature. And defendants have not identified any statutory provision permitting the city of Grand Haven to form an "authority" involving only one park. Accordingly, the Commission is not an "authority authorized by law."

Although not argued by defendants, we have considered whether the Commission is a "board," thereby qualifying as immune under MCL 691.1401(e). The trust deed mandated that the city enact an ordinance creating the Commission. The ordinance was drafted by Mrs. Duncan and her counsel and enacted exactly as specified. The ordinance states in the first paragraph:

> That thereby and hereby is, created in the City of Grand Haven, a Park Board, to be known as "The Duncan Park Commission," to consist of three members, who shall be appointed by the mayor of the City of Grand Haven, in accordance with the deed of gift of "Duncan Park," wherein and whereby the plat of land known as "Duncan Park" was transferred to three (3) trustees for and in behalf of the citizens of the City of Grand Haven, Michigan.

Although nominally a "Park Board" pursuant to the ordinance, Grand Haven's charter does not recognize the "Duncan Park Board" as one of the city's "citizen boards." Grand Haven Charter § 7.14(a) provides:

> To afford citizen participation in the affairs of the city government for the purpose of determining community

> needs and means of meeting such needs through the government of the city, the following citizen boards are established:
>
> (1) An airport board;
>
> (2) A cemetery board;
>
> (3) A Community Center board;
>
> (4) A harbor board;
>
> (5) A library board;
>
> (6) A parks and recreation board.

The boards consist of five Grand Haven citizens appointed by the mayor "subject to confirmation by the council . . . ." Section 7.14(b). The boards meet at least monthly, and their minutes are "public record." Section 7.14(c). The boards report to the city council, which may remove a board member for "malfeasance, misfeasance, or nonfeasance." *Id*.

Whether labeled a board or an authority, the Commission and its trustees exercise their powers without municipal oversight. The trustees do not report to any elected official, take no guidance from the city of Grand Haven, and are not accountable for their actions to the city. The ordinance provides:

> [S]aid commission shall make its own rules and regulations and shall be governed thereby and shall have the entire control and supervision of said "Duncan Park." . . . Said commission shall also have power to adopt rules and regulations governing the duties of its members and each of its officers and employees, and shall have the authority to engage and discharge its own employees.

Aside from appointing the original three trustees to the Commission, the city plays no part in the ongoing management of Duncan Park. Rather than serving as an instrumentality or "political subdivision" of Grand Haven, the Commission is an independent, autono-

mous, private body that administers privately held land.[12] While agencies, boards, or authorities act on behalf of cities or towns, the Commission acts solely on its own behalf. Rather than serving as an adjunct in the administration of city government, the Commission conducts no public business; it independently manages land outside the city's control. Designating the Commission a "board" does not transform a private group into a political subdivision.

Further, "the definition of 'governmental agency' does not include, or remotely contemplate, joint ventures, partnerships, *arrangements between governmental agencies and private entities*, or any other combined state-private endeavors." *Vargo v Sauer*, 457 Mich 49, 68; 576 NW2d 656 (1998) (emphasis added). Nor does a private agency's performance of a governmental function confer governmental-agency status on the private entity. *Jackson v New Ctr Community Mental Health Servs*, 158 Mich App 25, 35; 404 NW2d 688 (1987). In *O'Neill v Emma L Bixby Hosp*, 182 Mich App 252, 257; 451 NW2d 594 (1990), this Court held that Bixby Hospital, "a nonprofit, nonstock Michigan corporation which was incorporated by individuals" did not qualify as a hospital " 'formed by 1 or more political subdivisions.' " The Court explained: "Bixby Hospital retains a separate, nongovernmental, corporate identity. Its em-

[12] Grand Haven City Manager Pat McGinnis testified as follows at his deposition:

> *Q*. . . . It's my understanding that those documents create the Duncan Park Commission as an autonomous body that has the sole supervisory control of Duncan Park. Is that your understanding, too?
>
> MS. MERRY [defense counsel]: Objection, form. Go ahead and answer.
>
> THE WITNESS: Essentially I agree with your statement.

ployees are not municipal employees. Defendant is not operated by the city, but by a board of trustees which is quasi-independent from the city." *Id*. The city of Adrian's "indirect control of the hospital through the appointment of the members of the hospital commission/board of trustees" did not sway this Court. *Id*. "Despite the substantial connections with the City of Adrian," this Court held that Bixby Hospital was not a governmental agency entitled to immunity. *Id*. at 257-258.

The Commission is a unique construct of Martha Duncan's trust that is officially connected with the city of Grand Haven only in the sense that the mayor ratifies the Commission's choice of successor members. Otherwise, the city has undertaken no official activities relative to Duncan Park. It does not make the rules for the park, supervise the park, maintain the park, direct the park's use, or expend any funds to maintain the park. Rather, the Commission, a privately appointed group of three trustees, controls private property without governmental oversight. The commissioners act on behalf of the trust, not on behalf of the city. Accordingly, the Commission is not immune from suit as a political subdivision of the city of Grand Haven.

We reverse the circuit court's grants of summary disposition on the ground of governmental immunity and remand for further proceedings. We do no retain jurisdiction.

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

MYERS v CITY OF PORTAGE

LOUIS v CITY OF PORTAGE

Docket Nos. 313287 and 313288. Submitted March 4, 2014, at Lansing. Decided March 27, 2014, at 9:00 a.m.

James Myers and Douglas Louis brought separate actions against the city of Portage and the Portage Director of Public Safety, Richard White, in the Kalamazoo Circuit Court. Plaintiffs, former Portage police officers, alleged that White had disclosed involuntary statements they had made during the course of internal-affairs investigations in violation of MCL 15.395. Defendants moved for summary disposition. The court, Pamela L. Lightvoet, J., granted summary disposition in favor of defendants in both actions, holding that MCL 15.395 did not create a private cause of action for monetary damages and that defendants were entitled to immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The court further held that a breach of contract claim brought by Louis was without merit. Plaintiffs appealed, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

During internal-affairs investigations, a law-enforcement agency may compel its officers, on penalty of discharge, to give statements on the subject of the investigation. But those statements may not be used against the officers in later criminal proceedings because that use of the statements would violate the constitutional right against self-incrimination. Under MCL 15.395, an involuntary statement made by a law enforcement officer is also a confidential communication that is not open to public inspection except in limited circumstances. MCL 15.395, however, establishes no cause of action and confers no remedy. A cause of action may not be inferred against a governmental entity such as a police department. Accordingly, the trial court properly dismissed plaintiffs' claims based on defendants' alleged violation of MCL 15.395. Both plaintiffs also failed to identify the statements made by White that allegedly violated the statute, and Louis failed to explain how defendant's conduct breached his alleged

resignation agreement. These failures were also fatal to plaintiffs' claims, as was the GTLA, which provided defendants with blanket immunity from tort actions.

Affirmed.

STATUTES — INVOLUNTARY STATEMENTS BY LAW ENFORCEMENT OFFICERS — CONFIDENTIAL COMMUNICATIONS — DISCLOSURE — NO CAUSE OF ACTION.

Under MCL 15.395, an involuntary statement made by a law enforcement officer is a confidential communication that is not open to public inspection except in limited circumstances, but the statute establishes no cause of action and confers no remedy if the bar against disclosure is violated; a cause of action may not be inferred against a governmental entity that violates the bar against disclosure.

Fixel Law Offices (by *Joni M. Fixel*) for James Myers and Douglas Louis.

Johnson, Rosati, Schultz & Joppich, PC (by *Marcelyn A. Stepanski*), for the city of Portage and Richard White.

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

SAAD, J.

I. NATURE OF THE CASE

In these consolidated cases that raise identical issues of first impression, two former police officers, who had been the subject of or involved in internal-affairs investigations, say that defendants violated a Michigan statute that prohibits the disclosure of "involuntary statements" made during such investigations. Though defendants made statements to the press about plaintiffs' termination from employment, plaintiffs fail to identify any confidential, "involuntary statements" defendants disclosed in those statements. Further, and dispositive of their claims, the statute on which they rely does not expressly create a cause of action for damages, nor does Michigan law

permit a court to infer a cause of action against a governmental defendant. Accordingly, the trial court properly dismissed plaintiffs' claims on summary disposition. For the reasons explained in this opinion, we affirm the trial court's rulings dismissing plaintiffs' suits.

II. FACTS AND PROCEDURAL HISTORY

Plaintiffs Douglas Louis and James Myers, former police officers of defendant city of Portage, were involved in internal-affairs investigations, and allege that they gave compelled and involuntary statements in the course of those investigations.[1] Soon after, the city terminated both officers' employment.[2] Defendant Richard White, who serves as Portage's director of public safety,[3] commented on plaintiffs' dismissal to local media after a television station made a Freedom of Information Act (FOIA), MCL 15.231 *et seq*., request.[4]

Plaintiffs brought suit against defendants and alleged that (1) White disclosed "involuntary statements" they made in the course of the internal-affairs investigations when he discussed plaintiffs' dismissal

[1] As noted in the trial court's written opinions, Louis was the *subject* of an internal-affairs investigation; Myers was merely questioned as part of an unrelated internal-affairs investigation.

[2] Louis allegedly resigned his employment.

[3] The director of public safety position combines the jobs of the police chief and fire chief.

[4] In response to a FOIA request from a local television station, White stated that Louis was dismissed because he "changed his story several times" during the investigation, "bringing his character into question." The *Kalamazoo Gazette* subsequently printed the following statement from White: "[I] initially terminated Louis after the internal investigation was completed and [Louis] was later allowed to resign as part of the settlement of a grievance filed by the command officers' union." A similar statement was repeated on a local television station.

with the media, and (2) defendants' conduct was ultra vires and thus not protected under the governmental tort liability act (GTLA), MCL 691.1401, *et seq*. However, plaintiffs did not point to the specific "involuntary statements" that White allegedly disclosed in his statements to the *Gazette* and local television stations. Instead, plaintiffs merely asserted that his general references to their dismissal violated MCL 15.395. Plaintiff Louis also claimed that he and defendants made an agreement with regard to his resignation, and that defendants breached that agreement when White discussed the circumstances of his dismissal with the media. Defendants moved for summary disposition as to all plaintiffs' claims under MCR 2.116(C)(7) and (10).

In two written opinions, the trial court dismissed plaintiffs' suits and held that (1) MCL 15.395 does not create a private cause of action for monetary damages, and (2) the GTLA applied to both defendants and granted them immunity from suit. It also noted that Louis's breach of contract claim lacked merit, given that he provided no evidence that his resignation agreement contained any of the nondisclosure provisions he claimed it did, or that any such agreement actually existed. Accordingly, the trial court granted defendants' motion for summary disposition.[5]

Plaintiffs appealed the decision on all counts in November 2012, and our Court consolidated plaintiffs' appeals in January 2013.

III. STANDARD OF REVIEW

A trial court's decision on a motion for summary

[5] The trial court did not indicate under which court rule it granted summary disposition.

disposition is reviewed de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). MCR 2.116(C)(7) allows a party to move for dismissal if a claim is barred by immunity granted by law. "In reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations and offers supporting documentation." *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006).

A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, "leaves open an issue upon which reasonable minds might differ." *Id*. This case involves statutory interpretation, which is an issue of law that is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). We look to the "the plain language of the statute in question" to ascertain the Legislature's intent, and if that language is "unambiguous, it must be enforced as written." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 560; 837 NW2d 244 (2013).

IV. ANALYSIS OF MCL 15.395

During internal-affairs investigations, a law-enforcement agency may compel its officers, on penalty of discharge, to give statements on the subject of the investigation. However, these forced statements cannot be used against the officers in later criminal proceedings brought against them. See *Garrity v New Jersey*, 385 US 493, 500; 87 S Ct 616; 17 L Ed 2d 562 (1967). Michigan's Legislature

codified this constitutional right against self-incrimination,[6] and gave further protection to the confidentiality of these involuntary statements by precluding their disclosure, except in circumstances not relevant here.[7]

Using the nondisclosure provision in MCL 15.395 as the basis for their suit,[8] plaintiffs assert the right to damages for defendants' comments to the press about their termination from employment. But, strangely, as the statute's protection extends only to very specific "involuntary statements," plaintiffs inexplicably fail to identify these very statements, a failing that the trial court correctly found to be fatal to their claim. Though the trial court did not dismiss plaintiffs' action on this basis, it would have been justified in doing so. This approach is common sense: if a plaintiff sues a defendant for allegedly disclosing confidential statements to the public, the plaintiff needs to tell the court exactly what disclosed statements are at issue.[9] If plaintiffs fail to do so, they have, quite literally, failed to state a claim upon which relief can be granted. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

---

[6] See MCL 15.393 ("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.").

[7] See MCL 15.395 (stating that "[a]n involuntary statement made by a law enforcement officer is a confidential communication that is not open to public inspection," and listing four specific exceptions to this general rule, which, as noted, are not applicable to this case).

[8] Plaintiff Louis also alleges that defendants' comments to the media breached a resignation agreement under which his employment was terminated. But just as Louis fails to identify any involuntary statements that defendants disclosed to the media, he also inexplicably fails to explain how defendants' conduct breached the alleged agreement's specific terms, and he has not offered any evidence to show that the agreement actually exists.

[9] We understand that a plaintiff might not want to publicly republish the confidential statement(s) involved, but there are other methods a plaintiff could use to inform a court (such as an in camera proceeding) of the content of the allegedly released confidential statements at issue.

Moreover, even if plaintiffs had specifically identified the precise involuntary statements of which they complain, MCL 15.395 establishes no cause of action and confers no remedy. And Michigan caselaw holds that no cause of action can be inferred against a governmental defendant.[10] The trial court therefore properly dismissed plaintiffs' claims for violation of MCL 15.395.[11] *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007) (holding that courts may not infer the availability of "a private cause of action for money damages . . . *against a governmental entity*").[12] See also *Mack v Detroit*, 467 Mich 186, 196; 649 NW2d 47 (2002).

---

[10] By definition, a city's police department is a "governmental entity." MCL 15.391(b) defines "law enforcement agency" as "the department of state police, the department of natural resources, or a law enforcement agency of a county, township, city, village, airport authority, community college, or university, that is responsible for the prevention and detection of crime and enforcement of the criminal laws of this state."

[11] Plaintiffs, confusingly, also claim that defendants' commenting on their dismissal was an ultra vires act that somehow allows them to bring suit against defendants. As noted, plaintiffs do not have any cause of action related to these statements because MCL 15.395 does not provide one. If their discussion of defendants' supposedly ultra vires action is based on some other common-law claim, plaintiffs do not specify what claim they attempt to bring. See *DeGeorge v Warheit*, 276 Mich App 587, 594; 741 NW2d 384 (2007) ("It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims . . . ."). And, in any event, any common-law claim they assert against defendants for making the statements at issue is barred by the GTLA, which provides defendants with blanket immunity from tort actions, except in circumstances not applicable to this case. See *Mack v Detroit*, 467 Mich 186, 195-197; 649 NW2d 47 (2002), and *Petipren v Jaskowski*, 494 Mich 190, 204; 833 NW2d 247 (2013).

[12] In very limited circumstances a court may infer a private cause of action when the defendant is not a governmental entity. See *Pompey v Gen Motors Corp*, 385 Mich 537, 551-560; 189 NW2d 243 (1971), and *Gardner v Wood*, 429 Mich 290, 301-304; 414 NW2d 706 (1987). These cases took a freewheeling approach to implying a cause of action when one was not explicitly mentioned in the statute: *Pompey* stated that implication was possible if the statutory remedy was "plainly inadequate"; *Gardner* promulgated a detailed (if vague) four-part test for

Plaintiffs make the facially appealing, but unavailing, argument that it is unfair for the Legislature to grant a right under MCL 15.395 without providing an effective remedy to enforce that right. But making public policy is the province of the Legislature, not the courts. *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012) (holding that "[o]ur judicial role precludes imposing different policy choices than those selected by the Legislature") (quotation marks and citations omitted). We say this without denigrating the importance of this right to confidentiality, but only as a clear statement of law regarding the limits of our authority and the extent of the Legislature's.[13]

V. CONCLUSION

We hold that (1) MCL 15.395 does not permit a private cause of action for monetary damages, and (2) defendants city of Portage and Richard White are immune from plaintiffs' claims under the GTLA. Accordingly, we affirm the trial court's rulings granting summary disposition in favor of defendants.

DONOFRIO, P.J., and METER, J., concurred with SAAD, J.

---

infering a cause of action, and stressed the importance of legislative intent. *Pompey*, 385 Mich at 552 n 14; *Gardner*, 429 Mich at 302-304. The Michigan Supreme Court recently suggested that the cause-of-action-implication methodology specified in both these cases is disfavored, and that courts now "focus exclusively on evidence of legislative intent 'to create, either expressly or by implication, a private cause of action.' " *Lash*, 479 Mich at 193 n 24, quoting *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 498; 697 NW2d 871 (2005) (quotation marks omitted).

[13] As a practical matter, police officers embroiled in internal-affairs investigations typically receive legal representation from their unions. These lawyers can make use of the statutory right in MCL 15.395 in settlement negotiations, and therefore the statute should not be seen as ineffective, despite its lack of a cause of action for damages.

DUSKIN v DEPARTMENT OF HUMAN SERVICES

Docket No. 310353. Submitted March 11, 2014, at Lansing. Decided April 1, 2014, at 9:00 a.m. Leave to appeal sought.

Rodney Duskin and other racial and ethnic minority males employed by the Department of Human Services brought an action against the department in the Ingham Circuit Court, alleging discrimination based on race, ethnicity, and gender with respect to promotions to supervisory and managerial positions. The court, Beverley Nettles-Nickerson, J., granted plaintiffs' motion for certification of a class of plaintiffs comprised of all minority male employees of the department. The department appealed by leave granted. The Court of Appeals, SAAD, C.J., and FITZGERALD and BECKERING, JJ., reversed. 284 Mich App 400 (2009). In lieu of granting leave to appeal, the Michigan Supreme Court vacated the Court of Appeals decision and remanded the case to the trial court for reconsideration. 485 Mich 1064 (2010). On remand, the trial court, Rosemarie E. Aquilina, J., again certified the class. The Court of Appeals granted the department's application for leave to appeal.

The Court of Appeals *held*:

1. Members of a class may only sue or be sued as representatives of all class members if they meet the requirements of MCR 3.501(A)(1), which are (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately assert and protect the interests of the class, and (5) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority.

2. The proponent of class certification need not show a particular number of members to establish numerosity, but must adequately define the class so potential members can be identified and must establish by reasonable estimate the number of class members. The proponent must also establish that a sizeable number of the class

members have suffered an actual injury. In this case, the proposed class of 586 individuals consisted of all minority males employed by the department with the exception of those who opted out. But plaintiffs presented no evidence that a sizeable number of the class members suffered an actual injury. Not all of the proposed class members applied for the promotions that the minority males asserted the department denied them. Employees who did not apply for promotions out of fear of discrimination were not properly included in the class because class membership must be based on objective criteria. The trial court clearly erred by finding that plaintiffs established numerosity.

3. To establish commonality, it is not sufficient to raise common questions; the common contention must be of such a nature that it is capable of classwide resolution. In this case, plaintiffs' claims included an inextricable mix of racial discrimination, ethnic discrimination, and gender discrimination claims against not only the department as a whole, but against individual supervisors and managers as well. Because there was no allegation of a single type or method of discrimination, or even an allegation that a single actor engaged in discrimination, the trial court clearly erred when it determined that the members of the proposed class established commonality.

4. Typicality is concerned with whether the claims of the named representatives have the same essential characteristics as the claims of the class at large. In this case, the trial court erred when it determined that plaintiffs had established typicality when there was no indication in the record that the named representatives had the same essential characteristics with regard to all the claims concerning all the different types and methods of discrimination by the various actors that the class definition and plaintiffs' allegations encompassed.

5. To establish adequacy, the proponents of class certification must show that counsel is qualified to pursue the class action and the members of the proposed class do not have antagonistic or conflicting interests. In this case, plaintiffs' generalized statement regarding their goal of ending discriminatory policies and practices failed to support either counsel's qualifications or a lack of conflicting interests among the representative parties and the class members. Accordingly, the trial court erred when it found that plaintiffs had supported the adequacy prerequisite to certification.

6. The superiority and commonality prerequisites are related because if individual questions of fact predominate over common questions, the case will be unmanageable as a class action. In this case, the trial court erred when it concluded that plaintiffs had established commonality because the members of the proposed

class did not present common questions of fact and law. Therefore, the trial court also erred when it determined that plaintiffs had established superiority because the case would be unmanageable as a class action given that individual questions of law and fact would predominate over common questions.

Reversed.

RONAYNE KRAUSE, P.J., concurring, would have reversed the class certification on the basis that plaintiffs failed to prove that each member of the proposed class individually had an objective basis for being defined as a member of the class. Judge RONAYNE KRAUSE declined to consider the other issues addressed by the majority because doing so was unnecessary.

Daryle Salisbury for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Ann M. Sherman* and *Jeanmarie Miller*, Assistant Attorneys General, for defendant.

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

PER CURIAM. Defendant, Department of Human Services (the Department or the DHS), appeals by leave granted the trial court's order denying its motion for summary disposition and certifying a class of plaintiffs who are males of African-American, Hispanic, Arab, and Asian racial and ethnic backgrounds who work for the Department (the minority males). Because the minority males have not established the requirements of class certification, we reverse.

I. FACTS

A. FACTUAL BACKGROUND

This Court summarized the background facts of this case in our previous opinion:

In this disparate treatment, employment discrimination suit, plaintiffs allege discrimination based on race, ethnicity, and gender in promotions to supervisory and management positions. The proposed class is comprised of all "minority" male employees of the DHS, including 616 African-American, Hispanic, Arab, and Asian males in various departments and offices throughout the state.[1] Plaintiffs maintain that, since 2003, fewer minority males have been promoted within the DHS to the positions of program manager, district manager, county director, and first line supervisor because of "department wide cultural deficiencies regarding minority males." According to plaintiffs, these deficiencies include: ineffective communication with minority males; a failure to neutrally and consistently apply promotional policies, criteria, and procedures; a real or perceived preference for the promotion of nonminority male or female candidates; a failure to recruit or appoint minority males to the DHS leadership academy [an employee training program] and supervisory positions; and a failure to hold accountable and train managers about promoting and working with minority males. Plaintiffs assert that some of the plaintiffs applied for and were denied promotions or training opportunities for which they were qualified and some of the plaintiffs were "too discouraged to apply" for promotions "due to [their] frustration with some of [the Department's] supervisory and management employees' discriminatory attitudes and practices involving racial and gender bias directed against minority males . . . ."

On the basis of the above grounds, plaintiffs allege that the DHS violated the equal protection and antidiscrimination clause of Const 1963, art 1, § 2, and the Civil Rights Act, MCL 37.2101 *et seq*. Plaintiffs asked the trial court to enter a permanent injunction to stop discrimination against minority male employees, to order the DHS to promote minority male employees to positions that were denied them, and to provide monetary compensation for promotional opportunities withheld from class members.

---

[1] Because class members have opted out of this lawsuit, there are now 586 members of the proposed class.

In support of their claims, plaintiffs largely rely on an internal memo authored by DHS Chief Deputy Director Laura Champagne, dated January 5, 2006. The memo provides, in part:

> The Office of Equal Opportunity and Diversity Programs (EODP) is currently undertaking a series of case studies. These case studies will look at identifying barriers that specific groups of employees may have in either applying for or being successful in being promoted into District Manager, County Director, Section Manager, and first line FIM or Services supervisor positions. The first part of the study will focus on the impact on minority males in the department for the above named positions.

On the basis of data collected from the DHS leadership academy, hiring data, and information gathered through a focus group, the memo cites its "major finding" as follows: "A disparity exists in minority males being promoted into upper management positions, more specifically program manager, district manager, county director and first line supervisory positions throughout the Department." The recommendations to correct the problem include: providing applicants with more information about screening criteria and job requirements; facilitating access to position postings; expanding interview training; requiring department-wide consistency in application submission requirements, screening criteria, and hiring policies; preventing "working out of class" candidates from competing for positions; requiring diversity on interviewing panels; and implementing targeted recruiting for the leadership academy.[2]

B. PROCEDURAL HISTORY

The minority males filed their complaint on May 24, 2006, and moved to certify their class on January 8, 2007. The Department responded that the minority males had failed to satisfy requirements for class certi-

---

[2] *Duskin v Dep't of Human Servs*, 284 Mich App 400, 405-407; 775 NW2d 801 (2009).

fication under MCR 3.501(A)(1). The trial court granted the minority males' motion for class certification.

Applying a "rigorous analysis" standard, a panel of this Court reversed the trial court's certification decision on the basis that the minority males had not established the numerosity, commonality, typicality, adequacy, or superiority requirements of MCL 3.501(A)(1).[3] The minority males applied for leave to appeal this Court's decision in the Michigan Supreme Court.[4] After this Court's decision, the Michigan Supreme Court in *Henry v Dow Chem Co* specifically rejected the rigorous-analysis standard.[5] In lieu of granting leave to appeal, the Michigan Supreme Court vacated this Court's decision and remanded this case to the trial court for reconsideration in light of its decision in *Henry*.[6]

After remand, the Department moved for summary disposition. The minority males moved for class certification. The trial court denied the Department's motion for summary disposition and certified the minority males' class in a detailed opinion.

In support of its decision to certify, the trial court found that the minority males established numerosity because, while not all class members had applied for promotions, all class members had "an interest in making sure that they are not discriminated against if they do." The trial court found that the minority males had established commonality because the Department's culture of discrimination was the predominant question of fact and law. It found that the minority males established typicality because, while some members

---

[3] *Id*. at 409-426.

[4] *Duskin v Dep't of Human Servs*, 485 Mich 1064 (2010).

[5] *Henry v Dow Chem Co*, 484 Mich 483, 498-504; 772 NW2d 301 (2009).

[6] *Duskin*, 485 Mich at 1064.

may have applied for the same promotions, all class members "allegedly share the same fear of being discriminated against." The trial court also found that, while the named plaintiffs had different levels of training and education, they were all denied potential advancement when the Department denied their Leadership Academy selection. The trial court determined that the minority males had established adequacy on the basis that any potential conflict between the named plaintiffs and other class members were mitigated by their common interest in ending discrimination. The trial court found that the minority males established superiority because "the consolidations of numerous similar claims and the resulting consistent adjudications" was superior to individual determinations.

II. CLASS CERTIFICATION

A. STANDARD OF REVIEW

We review de novo the proper interpretation and application of a court rule.[7] We review for clear error the trial court's factual findings regarding class certification, and review for an abuse of discretion the trial court's discretionary decisions.[8] A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.[9]

B. LEGAL STANDARDS

Members of a class may only sue or be sued as representatives of all class members if they meet the

[7] *Henry*, 484 Mich at 495.

[8] *Id*. at 495-496.

[9] *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

requirements of MCR 3.501(A)(1).[10] MCR 3.501(A)(1) allows a suit to proceed as a class action if all the following circumstances exist:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.[11]

"These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority."[12]

Michigan requires the party seeking class certification to establish each prerequisite for class certification.[13] The party's pleadings will only be sufficient to support certification if the facts are "uncontested or admitted by the opposing party."[14] The court should not question the actual merits of the case.[15] However, the proponent of certification must make "an adequate statement of basic facts to indicate that each prerequisite is fulfilled."[16]

---

[10] *Henry*, 484 Mich at 496.

[11] MCR 3.501(A)(1). See also *Henry*, 484 Mich at 496-497.

[12] *Henry*, 484 Mich at 488.

[13] *Id*. at 500.

[14] *Id*. at 502-503.

[15] *Id*. at 504.

[16] *Id*. at 505.

C. APPLYING THE STANDARDS

1. NUMEROSITY

The Department contends that the trial court erred by finding that the plaintiffs had met the requirements of numerosity. We agree.

A plaintiff need not show a particular number of members to establish numerosity.[17] But the plaintiff "must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members."[18] The proponent must establish that a sizeable number of class members have suffered an actual injury.[19]

In this case, the trial court found that the minority males established numerosity because their class included 586 individuals. The trial court recognized that "class members may or may not have applied for promotions," but determined that "all members of the class have an interest in making sure that they are not discriminated against if they do."

The minority males' proposed class consists of all minority males employed by the Department, except those who have opted out. However, the minority males presented no evidence—and the trial court did not find—that a sizeable number of these class members suffered an actual injury. Indeed, the trial court recognized that not all class members even applied for the promotions that the minority males assert the Department denied them. Employees who did not apply for promotions out of fear of discrimination are not properly included in a class because class membership must

[17] *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999).

[18] *Id*. at 288.

[19] *Id*. at 288-289

be based on objective criteria.[20] Therefore, while the minority males established an estimate of the number of class members, they did not provide an adequate statement of basic facts to support that a sizeable number of those class members suffered an actual injury.

We are definitely and firmly convinced that the trial court made a mistake because the minority males did not provide basic facts regarding whether a sizeable number of class members suffered an actual injury. We conclude that the trial court clearly erred by finding that the minority males established numerosity.

2. COMMONALITY

The Department contends that the trial court erred when it found that the minority males established commonality. We agree.

To establish commonality, the proponent of certification must establish that issues of fact and law common to the class "predominate over those issues subject only to individualized proof."[21] However, it is not sufficient to merely raise common questions.[22] The "common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[23]

In other words, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered

---

[20] *Mich Ass'n of Chiropractors v Blue Care Network of Mich, Inc*, 300 Mich App 577, 590; 834 NW2d 138 (2013).

[21] *Zine*, 236 Mich App at 289 (quotation marks and citation omitted).

[22] *Mich Ass'n of Chiropractors*, 300 Mich App at 592; *Wal-Mart Stores, Inc v Dukes*, 564 US ___; 131 S Ct 2541, 2551; 190 L Ed 2d 374 (2011).

[23] *Wal-Mart*, 564 US at___; 131 S Ct at 2551.

the same injury[.]' "[24] For the purpose of the commonality inquiry, intentional discrimination, disparate-impact hiring or promotion criteria, and deliberate discrimination by individual supervisors are different things.[25] In this case, the trial court found that the minority males established common questions of law and fact regarding the Department's "culture of discrimination," finding that "[m]embers of the proposed class experienced what they perceived to be a culture of discrimination both from their own positions, as well as in capacities outside their class—on a statewide level."

The trial court's finding did not support its conclusion regarding commonality. The minority males asserted that (1) some plaintiffs applied for but were denied promotions, and (2) others were too disheartened to apply for promotions. The minority males asserted that supervisory and management employees had discriminatory attitudes and practices demonstrating racial and gender bias. The minority males also asserted that there were "department[-]wide cultural deficiencies regarding minority males." In support of these assertions, the minority males offered (1) a Departmental memo, which stated in part that departmental units had engaged in inconsistent policy application, and (2) statistical data showing an underrepresentation of minority males in the Leadership Academy.

The minority males' assertions, as well as their proffered facts, show that commonality does not exist in their expansive class definition. The minority males' claims include an inextricable mix of racial discrimination, ethnic discrimination, and gender discrimination claims against not only the Department as a whole, but against individual supervisors and managers as well. The supporting

---

[24] *Id*. at ___; 131 S Ct at 2551, quoting *Gen Tel Co of Southwest v Falcon*, 457 US 147, 157; 102 S Ct 2364; 72 L Ed 2d 740 (1982).

[25] See *Wal-Mart*, 564 US at ___; 131 S Ct at 2551.

materials offered by the minority males do not specifically concern racial or gender discrimination. Nor do these materials show a method of discrimination by a single actor: the statistical data regarding the Leadership Academy may show Department-wide disparate-impact regarding promotion criteria, while the memo indicates that individual supervisors and managers deliberately applied discriminatory policies out of bias.

The minority males' combined suit would require proofs regarding different types of discrimination (racial or ethnic, and gender) and different methods of discrimination (disparate impact, and deliberate discrimination) against different actors (the Department as a whole, and an undetermined number of supervisors in individual departmental units). Because there is no allegation of a single type or method of discrimination, or even an allegation that a single actor engaged in discrimination, we are definitely and firmly convinced that the trial court made a mistake when it found that the minority males raised common questions of law or fact. We conclude that the trial court clearly erred when it found that the minority males established commonality.

3. TYPICALITY

The Department contends that the trial court erred when it found that the minority males established typicality. We agree.

Typicality is concerned with whether the claims of the named representatives "have the same essential characteristics of the claims of the class at large."[26] As

[26] *Neal v James*, 252 Mich App 12, 21; 651 NW2d 181 (2002) (quotation marks and citation omitted), overruled in part on other grounds by *Henry*, 484 Mich 505 n 39.

does commonality, typicality requires that the class representatives share a common core of allegations with the class as a whole.[27]

In this case, the trial court found that the named plaintiffs "have different levels of training and education" but "were all denied Leadership Academy selection" and thus were typical of the class as a whole. However, as stated earlier, the statistical disparity regarding minority males in the Leadership Academy was just one of the theories on which the minority males based their claims. There is no indication in the record before us that the named representatives have the same essential characteristics regarding *all* the claims concerning *all* the different types and methods of discrimination by the various actors that the class definition and the minority males' allegations encompass. We conclude that the trial court clearly erred when it found that the minority males established typicality.

4. ADEQUACY

The Department contends that the trial court erred when it determined that the minority males established adequacy. We agree.

Proponents of class certification establish adequacy by showing that "class representatives can fairly and adequately represent the interests of the class as a whole."[28] To show adequacy, the proponents must show that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests.[29]

---

[27] *Neal*, 252 Mich App at 21.

[28] *Id*. at 22.

[29] *Id*.

In this case, the trial court failed to address whether the minority males' counsel was qualified to pursue the class action. The trial court did find that the named representatives adequately represented the class because "all members of the class allegedly share the same fear of being discriminated against."

We caution trial courts against relying on a proponent's bare allegations. The trial court "may not simply accept as true a party's bare statement that a prerequisite is met unless the court independently determines that the plaintiff has at least alleged a statement of basic facts and law that are adequate to support the prerequisite."[30] In this case, the minority males stated that they had remained in the case for at least seven years and have the united goal of ending discriminatory policies and practices. The minority males' generalized statement regarding their goals fails to support either (1) counsel's qualifications or (2) a lack of conflicting interests among the representative parties and class members.

We conclude that the trial court clearly erred when it found that the minority males supported the element of adequacy.

5. SUPERIORITY

The Department contends that the trial court erred when it found that the minority males established superiority. We agree.

The superiority and commonality requirements are related because "if individual questions of fact predominate over common questions, the case will be unmanageable as a class action."[31] In this case, the trial court

[30] *Henry*, 484 Mich at 505.

[31] *Zine*, 236 Mich App at 289 n 14. See *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 601-603; 654 NW2d 572 (2002).

erred when it determined that the minority males established commonality; as we outlined earlier in this opinion, the minority males do not present common questions of fact and law. Therefore, the trial court erred when it determined that the minority males established superiority. Individual questions of law and fact will predominate over any common questions, making this case unmanageable as a class action.

III. CONCLUSION

We conclude that the trial court clearly erred when it found that the minority males established numerosity, commonality, typicality, adequacy, and superiority under MCR 3.501(A)(1). Therefore, we conclude that the trial court erred by certifying this matter as a class action.

We reverse.

FITZGERALD and WHITBECK, JJ., concurred.

RONAYNE KRAUSE, P.J. (*concurring*) I concur in reversing the class certification because the proposed class has not established objective criteria for certification. I believe that a poisonous working environment can be harmful, and I am not persuaded that it would be impossible to certify a class similar to the proposed class here. However, plaintiffs simply fail to undertake the simple and elementary prerequisite of proving that each member of the proposed class individually has an objective basis for being defined as a member therein.

This Court has previously addressed a proposed certification of a class consisting of "chiropractors who have not sought membership with BCN [Blue Care Network] because doing so would be futile given BCN's open practice of not allowing chiropractors to become

members of BCN." *Mich Ass'n of Chiropractors v Blue Care Network of Mich*, *Inc*, 300 Mich App 577, 583; 834 NW2d 138 (2013). I cannot distinguish between that proposed class and the instant proposed class of male minority employees who have not sought career advancement with defendant because doing so would allegedly be futile given defendant's alleged practice of not promoting male minority employees.

This Court held that class uncertifiable "because membership cannot be established without knowing the subjective reason why each chiropractor gave up on the quest to affiliate with BCN." *Id*. at 590. The instant proposed class is therefore likewise uncertifiable. The trial court's class certification must, as the majority holds, therefore be reversed. I concur in the result reached by the majority on that basis, but I decline to consider any of the other issues discussed because I find doing so unnecessary.

FLOWERS v BEDFORD TOWNSHIP

Docket No. 314125. Submitted April 2, 2014, at Lansing. Decided April 8, 2014, at 9:00 a.m.

Helen Flowers' husband died, leaving a will providing her a life estate in the home he owned before their marriage and providing a future interest in the home to his children. Helen (petitioner) then sought a principal residence exemption for the property under MCL 211.7cc. The Township of Bedford (respondent) denied the request. Petitioner appealed in the Tax Tribunal. A hearing referee held that petitioner was an "owner" of the property entitled to claim the exemption. Respondent filed exceptions, and the Tax Tribunal reversed the determination of the referee, holding that petitioner was not an owner entitled to the exemption. Petitioner appealed.

The Court of Appeals *held*:

1. The Tax Tribunal properly determined that petitioner was not an owner under MCL 211.7dd(a)(*v*) because her life estate was not preceded by a sale or transfer of the property to another.

2. A life estate gives the holder the right to possess, control, and enjoy the property during the holder's lifetime. The holder of a life estate has an interest in the property and is considered an owner. Petitioner is entitled to the exemption because she is a partial owner, along with her husband's children, under MCL 211.7dd(a)(*ii*). Petitioner also is an owner under MCL 211.7dd(a)(*iii*) because she owns the property as a result of being a beneficiary of a will or trust or as a result of intestate succession.

Reversed and remanded.

TAXATION — PRINCIPAL RESIDENCE EXEMPTIONS — LIFE ESTATES — WORDS AND PHRASES — OWNERS.

A life estate gives the holder the right to possess, control, and enjoy the property during the holder's lifetime; the holder of a life estate is an "owner" of the property for purposes of determining entitlement to a principal residence exemption for the property (MCL 211.7cc; MCL 211.7dd(a)(*ii*)).

Look, Makowski and Look, PC (by *Steven R. Makowski*), for petitioner.

Lennard Graham & Goldsmith, PLC (by *Jahn F. Landis*), for respondent.

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

PER CURIAM. Petitioner appeals as of right a final opinion and judgment of the Michigan Tax Tribunal in which the tribunal determined that petitioner is not entitled to a principal residence exemption (PRE) under MCL 211.7cc. We reverse and remand.

Petitioner's husband, Richard, owned a home before he and petitioner married. Richard passed away in August 2011. His will provided petitioner a life estate in the home, and provided his children a future interest in the home. A deed granting petitioner's life estate was drafted on January 16, 2012. Respondent denied petitioner's request for a PRE for the property. Petitioner appealed, and a hearing referee determined that petitioner is an "owner" of the property under MCL 211.7dd(a)(*v*) and therefore entitled to the exemption. Respondent filed exceptions to the referee's findings. The tribunal determined that petitioner is not an owner under MCL 211.7dd(a)(*v*) because she was not a prior owner before the transfer and, therefore, that she is not entitled to the exemption.

The only issue presented is whether petitioner is an owner of the property for purposes of the PRE under MCL 211.7cc. "In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Mich Bell*

Tel Co v Dep't of Treasury, 445 Mich 470, 476; 518 NW2d 808 (1994). Resolution of this appeal also involves a matter of statutory interpretation, which is reviewed de novo as a question of law. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011).

The primary goal in statutory interpretation is to give effect to the Legislature's intent. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). When interpreting a statute, the statute must be considered as a whole and the words used are to be given their plain meaning. *Klooster*, 488 Mich at 296. "When the plain and ordinary language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007). However, "[w]here a statute sets forth its own definitions, the terms must be applied as expressly defined." *Cherry Growers, Inc v Agricultural Mktg & Bargaining Bd*, 240 Mich App 153, 169; 610 NW2d 613 (2000).

In pertinent part, MCL 211.7cc(1) states that "[a] principal residence is exempt from the tax levied by a local school district for school operating purposes to the extent provided under section 1211 of the revised school code, 1976 PA 451, MCL 380.1211, if an owner of that principal residence claims an exemption as provided in this section." MCL 211.7dd(a) defines "owner" to mean any one of the following:

> (*i*) A person who owns property or who is purchasing property under a land contract.
>
> (*ii*) A person who is a partial owner of property.
>
> (*iii*) A person who owns property as a result of being a beneficiary of a will or trust or as a result of intestate succession.

> (*iv*) A person who owns or is purchasing a dwelling on leased land.
>
> (*v*) A person holding a life lease in property previously sold or transferred to another.
>
> (*vi*) A grantor who has placed the property in a revocable trust or a qualified personal residence trust.
>
> (*vii*) The sole present beneficiary of a trust if the trust purchased or acquired the property as a principal residence for the sole present beneficiary of the trust, and the sole present beneficiary of the trust is totally and permanently disabled. As used in this subparagraph, "totally and permanently disabled" means disability as defined in section 216 of title II of the social security act, 42 USC 416, without regard as to whether the sole present beneficiary of the trust has reached the age of retirement.
>
> (*viii*) A cooperative housing corporation.
>
> (*ix*) A facility registered under the living care disclosure act, 1976 PA 440, MCL 554.801 to 554.844.

Petitioner maintains that she qualifies as an "owner" under MCL 211.7dd(a)(*ii*), (*iii*), or (*v*).

The tribunal concluded that petitioner is not an owner under MCL 211.7dd(a)(*v*):

> MCL 211.7dd(a)(*v*) defines "owner" as "[a] person holding a life lease in property previously sold or transferred to another." Here, Petitioner is not the owner of the subject property. Although the Tribunal finds that Petitioner has a valid life lease in the property, Petitioner did not previously own the subject property prior to the creation of the life lease and the clause "previously sold or transferred to another" implies prior ownership. Otherwise, the clause would not have been added to interpret owner to include the holder of a life lease.

The tribunal's reasoning in regard to MCL 211.7dd(a)(*v*) is sound because petitioner's life estate was not preceded by a sale or transfer of the property to another.

MCL 211.7dd(a)(*ii*) defines owner as a "person who is a partial owner of property." This definition is ambiguous because it is circular, i.e., the term to be defined—"owner"—is included as part of the definition. Thus, we can consult dictionary definitions to provide meaning. *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). "Owner" is the derived, undefined noun form of "own." *Random House Webster's College Dictionary* (1997), p 933; see *id*. at xvi. "Own" is defined, in part, as "something that belongs to oneself" or "to have or hold as one's own; possess." *Id*. at 933. And "ownership" is defined as "the state or fact of being an owner" or "legal right of possession; proprietorship." *Id*.

And, looking to caselaw, in *Barnes v Detroit*, 379 Mich 169, 177; 150 NW2d 740 (1967), a case involving an exemption with respect to real estate owned and used as a homestead by a disabled veteran, the Court stated:

> This Court has many times held that a person does not have to own property in fee simple to claim a homestead. The word "owner" as used in the law has generally been treated as including all parties who had a claim or interest in the property, although the same might be an undivided one or fall short of an absolute ownership, and possession alone has frequently been held, in reference to personal property, as prima facie evidence of ownership.

A life estate gives the holder the right to possess, control, and enjoy the property during the holder's lifetime. *Wengel v Wengel*, 270 Mich App 86, 99; 714 NW2d 371 (2006). Accordingly, we conclude that the holder of a life estate has an interest in the property and is considered an "owner." Therefore, petitioner is entitled to the PRE because she is a partial owner, along with Richard's children, under MCL 211.7dd(a)(*ii*). Further, petitioner is also an owner under MCL 211.7dd(a)(*iii*) because she "owns property as a result of

being a beneficiary of a will or trust or as a result of intestate succession." The tax tribunal erred by applying the law or adopted a wrong principle when it determined petitioner was not an owner under MCL 211.7dd(a). *Mich Bell*, 445 Mich at 476.

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

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

PEOPLE v PAYNE

Docket No. 314816. Submitted April 2, 2014, at Detroit. Decided April 8, 2014, at 9:05 a.m. Leave to appeal sought.

Jarrud R. Payne was convicted in the Van Buren Circuit Court of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (victim less than 13 years old). Defendant was 17½ years old at the time of the offense. The court, Arthur H. Clarke, J., sentenced him to 30 to 50 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. MCL 769.34(2)(a) provides that if a statute mandates a minimum sentence, the sentencing court must impose sentence in accordance with that statute and that imposing a mandatory minimum sentence is not a departure from the sentencing guidelines. Under MCL 750.520b(2)(b), when a defendant who was 17 years of age or older is convicted of CSC-I against a victim who was less than 13 years of age, the defendant shall be punished by imprisonment for life or any term of years, but not less than 25 years. The mandatory minimum in MCL 750.520b(2)(b) is 25 years. Although the statute permits a minimum sentence of greater than 25 years if supported by substantial and compelling reasons, only the flat 25-year minimum term is exempt from the substantial-and-compelling-reasons departure requirement of MCL 769.34(3). In this case, because the upper limit of defendant's minimum-sentence guidelines range was less than the 25-year mandatory minimum, the circuit court had two options: (1) impose a flat 25-year minimum, or (2) impose a minimum sentence of greater than 25 years if supported by substantial and compelling reasons. The circuit court erred by imposing a minimum sentence greater than 25 years without articulating any reasons for the upward departure.

2. The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishments, while Article 1, § 16 of Michigan's 1963 Constitution prohibits cruel or unusual punishment. An offender's age is relevant to the determination whether a sentence constitutes cruel or unusual punishment. Because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments. A

state is not required, however, to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the state must do is give juvenile defendants a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. The 25-year mandatory minimum allows for review of a juvenile's progress toward rehabilitation and provides a meaningful opportunity for release on parole. The 25-year mandatory minimum prescribed by MCL 750.520b(2)(b) is not cruel or unusual when applied to a juvenile offender such as defendant.

Sentence vacated; case remanded for resentencing.

1. SENTENCES — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — VICTIM LESS THAN 13 YEARS OF AGE — SENTENCING GUIDELINES — MANDATORY MINIMUM — DEPARTURES FROM GUIDELINES RECOMMENDATIONS.

Under MCL 750.520b(2)(b), when a defendant who was 17 years of age or older is convicted of first-degree criminal sexual conduct against a victim who was less than 13 years of age, the defendant shall be punished by imprisonment for life or any term of years, but not less than 25 years; although the statute permits a minimum sentence of greater than 25 years if supported by substantial and compelling reasons, only the flat 25-year minimum term is exempt from the substantial-and-compelling-reasons departure requirement of MCL 769.34(3).

2. CONSTITUTIONAL LAW — SENTENCES — CRUEL OR UNUSUAL PUNISHMENT — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — JUVENILE OFFENDERS.

The 25-year mandatory minimum sentence prescribed by MCL 750.520b(2)(b) when a defendant who was 17 years of age or older is convicted of first-degree criminal sexual conduct against a victim who was less than 13 years of age is not cruel or unusual when applied to an offender who was 17½ years old at the time of the offense.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Bedford*, Prosecuting Attorney, and *Michael E. Robie*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

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

PER CURIAM. A jury convicted defendant of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (victim less than 13 years old), for which he was sentenced to 30 to 50 years in prison. Defendant appeals by right, challenging his sentence on two separate grounds. We vacate defendant's sentence and remand for resentencing consistent with this opinion.

I

Defendant, aged 17½ years at the time of the offense, was charged with CSC-I arising from the alleged penile-anal penetration of the five-year-old victim on June 3, 2012. Although defendant initially denied the allegations against him, he later admitted to officers from the Van Buren County Sheriff's Department that "the five-year-old boy pulled his pants down and that he stuck his penis in the child's butt . . . ."

At trial, the young victim testified that defendant "put his pee-pee in my butt" and "[i]t hurt." The victim testified that, after the incident, he ran away and told his mother and grandmother what had happened. Paul Wahby, M.D., an emergency room physician, testified that his examination of the victim showed "trauma to the peri-anal area and it was fresh." Dr. Wahby further testified, "[T]he degree of trauma I saw was consistent with penetration."

Defense counsel argued that defendant was not guilty by reason of insanity or, in the alternative, guilty but mentally ill. Defense counsel stressed defendant's premature birth, intellectual difficulties, and ongoing treatment for various mental-health disorders. The jurors heard the testimony of defense witness Robert Dempsey, M.D., a psychiatrist with Van Buren County Community Mental Health.

Dr. Dempsey testified that defendant had received treatment for bipolar disorder, oppositional defiant disorder, attention deficit hyperactivity disorder, personality disorder, and Tourette syndrome. Dr. Dempsey agreed with defense counsel that defendant had a "substantial mental illness," and testified that defendant's conditions could cause him to behave impulsively. Dr. Dempsey opined that some of defendant's disorders were inherited and that others were likely caused or exacerbated by his premature birth. On cross-examination, however, Dr. Dempsey admitted that defendant was "able to conform his conduct to the requirements of the law" and "[t]here was nothing to lead me to believe that [defendant] didn't understand his conduct."

As a rebuttal witness, the prosecution called Susan Tremonti, Ph.D., a psychologist from the State Center for Forensic Psychiatry. Dr. Tremonti testified that she had examined defendant prior to trial and had concluded that "[defendant] did not meet the legal criteria for insanity as defined by statute." Dr. Tremonti also concluded that, although defendant appeared to suffer from borderline intellectual functioning, there was no evidence to suggest that he was mentally retarded. With respect to the issue of mental illness, Dr. Tremonti acknowledged defendant's prior diagnoses of bipolar disorder and oppositional defiant disorder. However, she opined that these conditions did not cause defendant to "lack . . . a substantial capacity to appreciate the nature and quality of his behavior" at the time of the offense.

The jury convicted defendant of CSC-I as charged. The jury specifically rejected defendant's arguments that he was not guilty by reason of insanity or guilty but

mentally ill. As noted previously, the circuit court sentenced defendant to 30 to 50 years in prison.

II

Defendant first argues that the circuit court erred by exceeding the mandatory minimum sentence of 25 years without articulating any substantial and compelling reasons for doing so. Therefore, he asserts, he is entitled to resentencing. We agree.

The Legislature has provided that, when a defendant who is 17 years of age or older is convicted of CSC-I against a victim who is less than 13 years of age, the defendant shall be punished "by imprisonment for life or any term of years, but not less than 25 years." MCL 750.520b(2)(b). Defendant argues that this provision establishes a flat 25-year mandatory minimum sentence and that the circuit court was therefore required to articulate substantial and compelling reasons to justify its upward departure in this case. In contrast, the prosecution argues that the statutory provision establishes a mandatory minimum sentence of "not less than 25 years" and that the circuit court was consequently entitled to set defendant's minimum sentence at 30 years without articulating any substantial and compelling reasons.

The prosecution's argument in this regard was implicitly rejected by our Supreme Court in *People v Wilcox*, 486 Mich 60; 781 NW2d 784 (2010). In *Wilcox*, 486 Mich at 62, our Supreme Court examined MCL 750.520f(1), which requires the circuit court to impose "a mandatory minimum sentence of at least 5 years" when a defendant is convicted of a second or subsequent criminal sexual conduct felony offense. The defendant contended that the statute prescribed a mandatory minimum sentence of 5 years and that the circuit court

was required to articulate substantial and compelling reasons before upwardly departing and imposing a minimum sentence of 10 years. *Wilcox*, 486 Mich at 62. In contrast, the prosecution contended that because the defendant's minimum sentence of 10 years was "at least 5 years" within the meaning of the statute, the circuit court was entitled to impose the 10-year minimum without providing any substantial and compelling reasons. *Id*.

Our Supreme Court agreed with the defendant, holding that "the guidelines apply to defendant's sentence and . . . the 'mandatory minimum' sentence in MCL 750.520f(1) is a flat 5-year term." *Wilcox*, 486 Mich at 62. The *Wilcox* Court explained that although the words "at least 5 years" in MCL 750.520f(1) permitted a minimum sentence of greater than 5 years *if supported by substantial and compelling reasons*, only a flat 5-year term qualified as a "mandatory minimum" within the meaning of MCL 769.34(2)(a).[1] *Wilcox*, 486 Mich at 69-70. Therefore, only a flat 5-year minimum was exempt from the substantial-and-compelling-reasons departure requirement of MCL 769.34(3). *Wilcox*, 486 Mich at 70; see also MCL 769.34(2)(a).

Under the reasoning of *Wilcox*, it is clear that the "mandatory minimum" sentence in MCL 750.520b(2)(b) is a flat 25-year term for purposes of MCL 769.34(2)(a), and that any upward departure from this 25-year mandatory minimum must be supported by substantial and compelling reasons. See *Wilcox*, 486 Mich at 62; see also MCL 769.34(3).

---

[1] MCL 769.34(2)(a) provides in relevant part: "If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section."

In the present case, defendant fell within cell C-III on the sentencing grid for Class A felonies, providing for a minimum guidelines range of 81 to 135 months. MCL 777.62. Nonetheless, because defendant was 17 years of age or older and committed CSC-I against a victim less than 13 years of age, the circuit court was required to impose a minimum sentence of at least 25 years. MCL 750.520b(2)(b). Because the upper limit of defendant's minimum- sentence guidelines range (135 months) was less than the 25-year statutory minimum, the circuit court had two options. First, the court could have imposed a flat 25-year minimum without articulating any substantial and compelling reasons. MCL 769.34(2)(a); *Wilcox*, 486 Mich at 70. Alternatively, the court could have imposed a minimum sentence of greater than 25 years if supported by sufficient substantial and compelling reasons. *Id*. But the court chose neither of these two options. Instead, it imposed a minimum sentence of 30 years without articulating any reasons whatsoever for its upward departure. This was error.

We vacate defendant's sentence and remand for resentencing. On remand, the circuit court shall either (1) impose a flat 25-year minimum, or (2) if it again decides to upwardly depart from the 25-year mandatory minimum, articulate substantial and compelling reasons sufficient to justify its departure and the extent thereof. *Wilcox*, 486 Mich at 72. After resentencing, the circuit court shall prepare a new judgment of sentence and transmit a copy to the department of corrections.

III

Because we are remanding this case for resentencing, we must address defendant's second issue on appeal. Defendant argues that the 25-year mandatory mini-

mum of MCL 750.520b(2)(b) constitutes cruel or unusual punishment as applied to an offender who was less than 18 years old at the time of his CSC-I offense. Relying in part on *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), he asserts that "[r]equiring juveniles to serve a 25-year mandatory minimum without any sort of individualized consideration violates the Eighth Amendment . . . ." We disagree.

In *People v Benton*, 294 Mich App 191, 203-207; 817 NW2d 599 (2011), this Court determined that the 25-year mandatory minimum prescribed by MCL 750.520b(2)(b) is neither cruel nor unusual when imposed for an adult offender.[2] The *Benton* Court observed that the offense of CSC-I against a child victim is particularly reprehensible and that the 25-year mandatory minimum is not disproportionately harsh when compared to sentences for similar sexual offenses in Michigan and other states. *Benton*, 294 Mich App at 205-207.

We acknowledge that "[a]n offender's age is relevant to the Eighth Amendment," *Graham v Florida*, 560 US 48, 76; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and that "a sentencing rule permissible for adults may not be so for children," *Miller*, 567 US at ___; 132 S Ct at 2470. "[C]hildren are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe

[2] Whereas the Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishments," US Const, Am VIII, the Michigan Constitution prohibits "cruel or unusual punishment," Const 1963, art 1, § 16. See *Benton*, 294 Mich App at 204. "If a punishment 'passes muster under the state constitution, then it necessarily passes muster under the federal constitution.' " *Id*., quoting *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000).

punishments.' " *Id*. at ___; 132 S Ct at 2464, quoting *Graham*, 560 US at 68. A 17-year-old offender is considered a juvenile for purposes of the Eighth Amendment, even if he or she is classified as an adult by state law. See, e.g., *Miller*, 567 US at ___; 132 S Ct at 2460; *Roper v Simmons*, 543 US 551, 570-571; 125 S Ct 1183; 161 L Ed 2d 1 (2005); *United States v Marshall*, 736 F3d 492, 498 (CA 6, 2013).

We cannot conclude that the 25-year mandatory minimum prescribed by MCL 750.520b(2)(b) is cruel or unusual when applied to a juvenile offender such as defendant. Although a minimum sentence of 25 years is unquestionably substantial, it is simply not comparable to the sentences of death and life without parole found unconstitutional when applied to juveniles in *Miller*, *Graham*, and *Roper*. Sentences of death and life without parole are the harshest criminal penalties in American law. See *Miller*, 567 US at ___; 132 S Ct at 2466, 2468. Such penalties violate the Eighth Amendment when applied to juvenile offenders because, by their very nature, they preclude any meaningful opportunity for release based on demonstrated maturity or rehabilitation. See *id*. at ___; 132 S Ct at 2466-2469.

By contrast, the 25-year mandatory minimum sentence at issue in this case does allow for review of an individual defendant's progress toward rehabilitation and provides a meaningful opportunity for release on parole. It is simply not the type of mandatory sentence found objectionable in *Miller*. See *Commonwealth v Brown*, 466 Mass 676, 686; 1 NE3d 259 (2013) (noting that "the reasoning of *Miller* does not necessarily extend to mandatory sentences that afford the possibility of release"). For example, a 17-year-old offender who is convicted one year after the offense and sentenced to the mandatory minimum of 25 years will be either 43 or 44 years old at the time of his first parole

eligibility date. See MCL 791.234(1) (noting that, in general, "a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years . . . is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted"). "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [juvenile] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75. See also *Miller*, 567 US at ___; 132 S Ct at 2469.

The 25-year mandatory minimum sentence prescribed by MCL 750.520b(2)(b) provides "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for juvenile offenders. *Graham*, 560 US at 75. Therefore, the 25-year mandatory minimum sentence does not violate the Eighth Amendment, US Const, Am VIII, or constitute "cruel or unusual punishment" under the Michigan Constitution, Const 1963, art 1, § 16. See *Miller*, 567 US at ___; 132 S Ct at 2469. See also *Benton*, 294 Mich App at 204.[3]

We vacate defendant's sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

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

---

[3] Defendant contends that although his chronological age was 17½ years at the time of the offense, he lacked the mental maturity of a 17½-year-old because of his developmental delays, intellectual difficulties, and premature birth. Nevertheless, "[u]nder the Supreme Court's jurisprudence concerning juveniles and the Eighth Amendment, the only type of 'age' that matters is chronological age." *Marshall*, 736 F3d at 498.

FURR v McLEOD

Docket No. 310652. Submitted February 10, 2014, at Lansing. Decided April 10, 2014, at 9:00 a.m. Leave to appeal sought.

Susan and William Furr brought an action in the Kalamazoo Circuit Court against Michael McLeod, M.D., Tara B. Mancl, M.D., and others, alleging medical malpractice. Plaintiffs served the health-care providers with a notice of intent to sue, but filed their complaint one day before the end of the applicable notice waiting period in MCL 600.2912b(1). Defendants moved for summary disposition, contending that the statutory limitations period was not tolled and barred the complaint. Plaintiffs contended that pursuant to *Zwiers v Growney*, 286 Mich App 38 (2009), the trial court could invoke MCL 600.2301 to ignore the defect, as long as doing so did not prejudice a substantial right of a party. The trial court, Alexander Lipsey, J., denied the motion for summary disposition on the basis that *Zwiers* applied. While the application was pending, the Michigan Supreme Court, in *Driver v Naini*, 490 Mich 239 (2011), then clarified the role of *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005), in medical malpractice disputes. In lieu of granting leave to appeal, the Court of Appeals remanded for the trial court to reconsider defendants' motion for summary disposition in light of the Supreme Court's decisions in *Burton* and *Driver*. On remand, the trial court concluded that both *Driver* and *Burton* were distinguishable and, on the basis of *Zwiers*, again denied defendants' motion for summary disposition. Defendants' application for leave to appeal was then granted by the Court of Appeals. The lead opinion by Presiding Judge WHITBECK, released October 24, 2013, concluded that the Supreme Court's opinion in *Driver* overruled the Court of Appeals' interpretation of the effects of *Bush v Shabahang*, 484 Mich 156 (2009), in *Zwiers* and that *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208 (2013), was incorrectly decided to the extent that it concluded that *Zwiers* continued to be valid law. Presiding Judge WHITBECK stated that *Zwiers* was applicable only because MCR 7.215(J) required the Court to follow *Tyra* and affirm the denial of summary disposition pursuant to *Zwiers*. Noting the conflict, the convening of a special panel to resolve the conflict was requested. Judge OWENS, concurring, agreed that the case was controlled by *Tyra*

and that the trial court's decision must be affirmed. He stated, however, that because *Tyra* was correctly decided, a conflict panel should not be convened. Judge M. J. KELLY, concurring, stated that *Tyra* was controlling and that, while not joining the analysis of the majority, he concurred with the result. Finally, he agreed that a conflict panel should be convened. The Court of Appeals then ordered that a special panel be convened to resolve the conflict with *Tyra* and that the opinions in this case released October 24, 2013, be vacated. *Furr v McLeod*, 303 Mich App 801 (2013).

After consideration by the special panel the Court of Appeals *held*:

There is a lack of clarity in the language of *Driver* to the degree that it cannot be held, with any level of confidence, that *Driver* overruled *Zwiers*. It is unclear whether the Supreme Court intended to preclude the application of MCL 600.2301 under any circumstances entailing a *Burton*-type situation in which a complaint is prematurely filed in relation to the statutory notice waiting period of MCL 600.2912b. Given the absence of a reference to *Zwiers* in *Driver*, the significant distinctions in the fact patterns, *Driver*'s lack of a precise assessment of the role of MCL 600.2301 when a complaint is prematurely filed under MCL 600.2912b, the plain and unambiguous text of MCL 600.2301 favoring application, especially in regard to a complaint filed one day early, and considering the language in *Driver* suggesting the appropriateness of examining and evaluating the particular facts of a case under MCL 600.2301, it cannot be held that *Driver* overruled *Zwiers* by implication. The order of the trial court denying defendants' motion for summary disposition is affirmed.

Affirmed.

Judge O'CONNELL joined by Judge TALBOT, dissenting, stated that the order of the trial court denying defendants' motion for summary disposition should be reversed for the reasons stated in the vacated lead opinion in *Furr* and the dissenting opinion of Presiding Judge WILDER in *Tyra*.

Judge METER, dissenting, joined Judge O'CONNELL's dissenting opinion, but wrote separately to point out that, while he was a member of the *Zwiers* panel and believes that *Zwiers* was a well-reasoned opinion, it must be acknowledged that *Driver* subsequently and implicitly overruled *Zwiers*.

PLEADINGS — AMENDMENTS — MEDICAL MALPRACTICE ACTIONS — DISREGARDING ERRORS AND DEFECTS.

The two sentences that comprise MCL 600.2301 can stand on their own; the first sentence addresses the amendment of any process, pleading, or proceeding during the pendency of an action or

proceeding; the second sentence mandates the outright disregard of any error or defect if to do so would not affect the substantial rights of the parties; the two sentences are not intended to be read coextensively; the language requiring a court to disregard any errors or defects if no substantial rights are affected reaches both content and noncontent errors or defects and necessarily includes statutory errors or defects; filing a medical malpractice complaint prematurely under MCL 600.2912b constitutes a statutory, procedural defect or error falling under the broad umbrella of "any error or defect in the proceedings" as provided in the second sentence of MCL 600.2301; the determination whether the filing of a medical malpractice complaint prematurely under MCL 600.2912b affected a defendant's substantial rights is a case-specific determination.

Mark Granzotto, PC (by *Mark Granzotto*), and *McKeen & Associates, PC* (by *Ramona C. Howard* and *Brian J. McKeen*), for plaintiffs.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg*, *Paul M. Oleniczak*, and *Stephanie C. Hoffer*) for defendants.

Before: MURPHY, C.J., and MARKEY, O'CONNELL, TALBOT, METER, BORRELLO, and BECKERING, JJ.

MURPHY, C.J. This Court convened a special panel pursuant to MCR 7.215(J) in order to resolve the conflict between the previous opinion issued in this case[1] and *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 840 NW2d 730 (2013). The conflict concerns whether our Supreme Court's opinion in *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), effectively overruled this Court's opinion in *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), despite no express mention of *Zwiers*. The trial court

[1] The previous opinion in this case was vacated in its entirety pursuant to MCR 7.215(J)(5) in the order that convened this special panel. *Furr v McLeod*, 303 Mich App 801 (2013).

relied on *Zwiers* in denying defendants' motion for summary disposition, in this case where plaintiffs' medical malpractice complaint was filed one day before the end of the mandatory notice waiting period under MCL 600.2912b associated with the service of a notice of intent to file a claim (NOI). We conclude that there is a lack of clarity in the language of *Driver* to the degree that we simply cannot hold, with any level of confidence, that our Supreme Court overruled *Zwiers* or that it implicitly intended to do so. Indeed, there is language in *Driver* that can reasonably be interpreted as supporting the analytical framework set forth in *Zwiers*. Therefore, we are not prepared to rule that *Driver* effectively overruled *Zwiers* and leave the issue for a future definitive decision by the Michigan Supreme Court, should the Court have the opportunity and inclination to tackle the issue. Accordingly, we affirm the trial court's order denying summary disposition.

I. OVERVIEW

The underlying substantive issue at the heart of the conflict concerns whether MCL 600.2301[2] can serve as the basis for a court to reject dismissal of a medical malpractice action that would otherwise result from the filing of a complaint before the expiration of the mandatory notice waiting period in MCL 600.2912b. In the context of that issue, the *Zwiers* panel held that if the criteria in MCL 600.2301 are satisfied, the statute can indeed be invoked to prevent the medical malpractice action from being summarily dismissed, whether by amendment of the complaint's filing date or the simple disregard of the defect. *Zwiers*, 286 Mich App at 52-53.

[2] MCL 600.2301 permits a court in the furtherance of justice to amend any proceeding or process and to disregard defects or errors when substantial rights are not affected.

In *Driver*, the Michigan Supreme Court held "that a plaintiff is not entitled [under MCL 600.2301] to amend an original NOI to add nonparty defendants so that the amended NOI relates back to the original filing for purposes of tolling the statute of limitations[.]" *Driver*, 490 Mich at 243. The majority in *Tyra* continued to recognize *Zwiers* as controlling precedent after the opinion in *Driver* was issued. *Tyra*, 302 Mich App at 223-227. In the lead opinion in the earlier *Furr* decision, it was expressed that *Driver* had effectively overruled *Zwiers*, that the Court was nevertheless bound by *Tyra*'s construction of *Driver* and its affect on *Zwiers*, that *Zwiers* therefore remained applicable, requiring affirmance of the trial court's ruling, and that *Tyra* was wrongly decided. *Furr v McLeod*, 303 Mich App 801 (2013).

For multiple reasons, we cannot confidently or with any measure of certainty conclude that *Driver* effectively overruled *Zwiers*. First, the *Driver* opinion, which was extremely thorough and detailed, never expressly mentioned *Zwiers*, despite the fact that *Zwiers*, a binding decision from this Court, specifically analyzed the interplay between *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), and MCL 600.2301—a topic discussed at length in *Driver*. Second, *Zwiers*, *Tyra*, and *Furr* addressed a fact pattern significantly different from that in *Driver*, because those cases merely involved a timely served NOI and a prematurely filed complaint and did not concern, as did *Driver*, service of an NOI on a nonparty defendant beyond the limitations period and an attempt to amend an earlier timely NOI to add the nonparty defendant. Indeed, *Driver* couched much of its discussion and analysis in the context of a plaintiff's seeking to add a nonparty defendant. See, e.g., *Driver*, 490 Mich at 255 ("In

addition, allowing a claimant to amend an original NOI to add nonparty defendants conflicts with . . . ."). Third, the *Driver* Court never *expressly* stated that MCL 600.2301 can never be applied to disregard or reject the dismissal of a prematurely filed medical malpractice complaint. Fourth, the Court in *Driver* actually applied the criteria in MCL 600.2301 to the facts presented and found that, under the circumstances, the statute would not support allowing an amendment. Fifth, to the extent that *Driver* might be construed to support the proposition that MCL 600.2301 only permits an amendment of a document's "content," which the lead opinion in *Furr* concluded, such a construction seems doubtful, given that MCL 600.2301 expressly authorizes a court to "amend any process, pleading or proceeding . . . , *either in form or substance*[.]" (Emphasis added.) Finally, in our view, the plain and unambiguous language of MCL 600.2301 would appear to mandate a court to disregard a premature filing under MCL 600.2912b if a defendant's substantial rights are unaffected.

In summation, we hold that the trial court did not err by applying *Zwiers* in denying defendants' motion for summary disposition.

II. APPLICABLE STATUTORY PROVISIONS

To provide some context for our discussion, we begin by reviewing the statutory provisions implicated in this matter. MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

The notice period is shortened to 154 days or to 91 days in certain circumstances that are unnecessary to discuss for purposes of this opinion. MCL 600.2912b(3) and (8). The factual setting in *Zwiers*, *Tyra*, and in this case, *Furr*,[3] involved the filing of medical malpractice complaints before the NOI waiting period in MCL 600.2912b had expired. *Furr*, 303 Mich App at 808; *Tyra*, 302 Mich App at 211; *Zwiers*, 286 Mich App at 40-41. In each instance, there were prematurely filed complaints.

In general, a medical malpractice action must be commenced within two years of when the claim accrued or within six months after the plaintiff discovered or should have discovered the claim's existence, whichever is later. MCL 600.5838a(2); MCL 600.5805(1) and (6); *Driver*, 490 Mich at 249-250. MCL 600.5856(a) provides that a statute of limitations is tolled "[a]t the time the complaint is filed," assuming timely service of the summons and complaint under the court rules. Pursuant to MCL 600.5856(c), a statute of limitations is also tolled under the following circumstance:

> At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

"When a claimant files an NOI with time remaining on the applicable statute of limitations, that NOI tolls the statute of limitations for up to 182 days[.]" *Driver*, 490 Mich at 249. Finally, MCL 600.2301 provides:

---

[3] Hereafter, when we make reference to "Furr," it shall pertain to the lead opinion by Presiding Judge WHITBECK and the statements and rulings therein.

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

The panels in *Zwiers*, *Tyra*, and *Furr* addressed the application of MCL 600.2301 relative to the prematurely filed complaints and the subsequent expiration of the period of limitations.

III. EVOLUTION OF THE PERTINENT CASELAW

In *Burton*, 471 Mich 745, the plaintiff filed a medical malpractice complaint, along with an affidavit of merit, before the expiration of the notice waiting period in MCL 600.2912b(1). The Michigan Supreme Court identified the issue as being "whether a complaint alleging medical malpractice that is filed before the expiration of the notice period provided by MCL 600.2912b tolls the period of limitations." *Id*. at 747. The Court held that a medical malpractice complaint filed before the expiration of the applicable notice period does not toll the period of limitations. *Id*. The *Burton* Court explained:

> The directive in § 2912b(1) that a person "shall not" commence a medical malpractice action until the expiration of the notice period is similar to the directive in [MCL 600.2912d(1)] that a plaintiff's attorney "shall file with the complaint an affidavit of merit . . . ." Each statute sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit. The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit. In each instance, the failure to comply with the statutory

> requirement renders the complaint insufficient to commence the action. [*Id*. at 753-754 (omission in original).]

"[D]ismissal is an appropriate remedy for noncompliance with the notice provisions of MCL 600.2912b and . . . when a case is dismissed, the plaintiff must still comply with the applicable statute of limitations." *Id*. at 753. We emphasize that our Supreme Court in *Burton* did not indicate that the plaintiff presented an argument under MCL 600.2301, and the statute was not addressed by the Court in any form or fashion.

In *Bush*, the Supreme Court addressed the question whether a substantive defect in a timely served NOI "precludes the tolling of the statute of limitations on a plaintiff's medical malpractice claim." *Bush*, 484 Mich at 160. The *Bush* Court ruled:

> We hold that pursuant to MCL 600.5856(c), as amended by 2004 PA 87, effective April 22, 2004, when an NOI is timely, the statute of limitations is tolled despite defects contained therein. Moreover, in light of the legislative clarification of § 5856(c), we hold that the purpose of the NOI statute is better served by allowing for defects in NOIs to be addressed in light of § 2301, which permits "amendment" or "disregard" of "any error or defect" where the substantial rights of the parties are not affected, as long as the cure is in the furtherance of justice and on terms that are just. A cure is in the furtherance of justice when a party makes a good-faith attempt to comply with the content requirements of § 2912b. [*Id*. at 185.]

The *Bush* Court, in discussing MCL 600.2301 and the statute's references to the terms "process" and "proceeding," observed that "[s]ervice of an NOI is clearly part of a medical malpractice 'process' or 'proceeding' in Michigan." *Id*. at 176. The Court further explained that because "an NOI must be given before a medical malpractice claim can be filed, the service of an NOI is a part of a medical malpractice 'proceeding' " and

therefore MCL 600.2301 "applies to the NOI 'process.' " *Id*. at 176-177. According to the Court, "the language of § 2301 goes beyond the limited concept of amendment of 'pleadings' and allows for curing of certain defects in any 'process, pleading or proceeding.' " *Id*. at 176. The Court "h[e]ld that § 2301 may be employed to cure defects in an NOI," as long as a plaintiff makes a good-faith attempt to comply with the content requirements of MCL 600.2912b(4). *Id*. at 177-178.

In *Zwiers*, 286 Mich App at 39-40, this Court, referring to MCL 600.2301, *Burton*, and *Bush*, summed up the nature of the case and its holding as follows:

> In this medical malpractice lawsuit, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7). At issue is whether plaintiff's case was properly dismissed when she mistakenly filed her complaint and affidavit of merit 181 days after serving her . . . (NOI) on defendants, instead of commencing her action one day later or at least 182 days following service of the notice, as required by MCL 600.2912b(1). The trial court dismissed the action, ruling that the premature filing of the complaint and affidavit was ineffective to commence the action and that the period of limitations had subsequently expired. While *Burton* . . . , standing alone, would compel us to affirm, *Burton* did not address or consider MCL 600.2301, which, in the furtherance of justice, permits a court to amend any process or proceeding and to disregard any error or defect in the proceedings if substantial rights are not affected. In *Bush* . . . , our Supreme Court interpreted MCL 600.2301, determining that it was implicated and applicable with respect to compliance failures under the NOI statute, MCL 600.2912b. On the strength of MCL 600.2301 and *Bush*, and given plaintiff's good-faith effort to comply with the NOI statute, a failure to show that the legislative purpose behind enactment of the NOI statute was harmed or defeated, and given that defendants' substantial rights were not affected, we reverse and remand in the "furtherance of justice."

The *Zwiers* panel acknowledged "that *Bush* dealt with a violation or defect in regard to the NOI content requirements of § 2912b(4) and not a violation or defect in the proceedings arising out of § 2912b(1)." *Zwiers*, 286 Mich App at 49. This Court concluded, however, that the distinction did not preclude application of MCL 600.2301, reasoning as follows:

> *Bush* makes it abundantly clear that MCL 600.2301 is applicable to the entire NOI process and any compliance failures under the NOI statute. *Bush*, *supra* at 176-177 (service of an NOI is part of a medical malpractice proceeding and as a result "§ 2301 applies to the NOI 'process' "). The *Bush* Court stated that § 2301 goes beyond the amendment of pleadings and reaches defects in any process, pleading, or proceeding. *Id*. at 176. MCL 600.2301 expressly speaks of errors or defects in the proceedings, and it cannot reasonably be disputed that the premature filing of a complaint under § 2912b(1) constitutes an error or defect in the proceedings. MCL 600.2301 also addresses the power of amendment relative to process, pleadings, and proceedings, and the concept of "process" clearly encompasses the issuance of a summons, the filing of a complaint, service of the summons and complaint on a defendant, and the overall commencement of an action that compels a defendant to respond. See MCR 2.101 *et seq.* [*Id*. at 49-50.]

The *Zwiers* panel did not hold that *Burton* was no longer good law after *Bush* was issued.[4] After reciting the facts and holding in *Burton*, this Court stated in *Zwiers* that, on the basis of *Burton*, "when plaintiff here filed suit one day premature in violation of MCL 600.2912b(1), . . . she did not technically commence the medical malpractice action for purposes of the statute of limitations." *Zwiers*, 286 Mich App at 45.

---

[4] We disagree with the assessment in the lead opinion in Furr that the Zwiers panel "believed that the Michigan Supreme Court's unequivocal holding in Burton was no longer controlling law." Furr, 303 Mich App at 810.

And because the plaintiff did not effectively commence the action, "the clock on the two-year period of limitations resumed running and then expired." *Id*. at 45-46. However, because *Burton* did not address an argument under MCL 600.2301, the *Zwiers* panel engaged in an analysis of the statute, as guided by the *Bush* opinion. *Id*. at 46-52. In sum, the analysis in *Zwiers* first required a determination whether the medical malpractice action was indeed subject to summary dismissal under *Burton*. If *Burton* called for dismissal of the action, the analysis moved to contemplation of MCL 600.2301 in order to determine whether the action could nonetheless be resurrected through amendment or disregard of the underlying defect. And only upon satisfaction of the criteria in MCL 600.2301, as analyzed under the particular facts of a case, could the medical malpractice action continue, otherwise *Burton* compelled dismissal. *Zwiers*, 286 Mich App at 44-53.

Two years later, the Michigan Supreme Court issued the *Driver* decision, addressing the issue "whether a plaintiff is entitled to amend an original . . . (NOI) when adding a nonparty defendant to a pending action pursuant to this Court's holding in *Bush* . . . and MCL 600.2301 so that the amended NOI relates back to the original filing for purposes of tolling the statute of limitations." *Driver*, 490 Mich at 242-243. In *Driver*, the plaintiff filed a medical malpractice action against Dr. Mansoor Naini and Michigan Cardiology Associates, PC (MCA), alleging that Dr. Naini had failed to properly screen the plaintiff for colon cancer and that MCA was vicariously liable for Dr. Naini's malpractice. There was no dispute that the plaintiff sent an NOI to Dr. Naini and MCA in compliance with MCL 600.2912b(1) and that the plaintiff properly and timely filed suit after the expiration of the notice waiting period. *Id*. at 243-244. After Dr. Naini and MCA served a notice of nonparty at

fault on the plaintiff naming Cardiovascular Clinical Associates, PC (CCA), as a potential defendant, the plaintiff sent an NOI to CCA and filed a motion seeking leave to file an amended complaint to add CCA as a party defendant. The trial court granted the motion, and an amended complaint was filed that added CCA as a defendant. In regard to CCA, the 91-day notice waiting period under MCL 600.2912b(3) applied, but the amended complaint was filed only 49 days after CCA was sent its NOI. *Id*. at 244. In *Driver*, "the six-month discovery rule provide[d] the applicable limitations period." *Id*. at 250. The plaintiff sent the NOI to CCA *after* the six-month period of limitations had already expired, making the NOI and the amended complaint untimely with respect to the statute of limitations period. *Id*. at 251. In part, the plaintiff argued "that he should be permitted to amend his original NOI pursuant to this Court's holding in *Bush* and MCL 600.2301 so that the NOI he sent to CCA relate[d] back in time to his original NOI" that had been served on Dr. Naini and MCA. *Id*. at 251-252.

The *Driver* Court stated that "the facts at issue do not trigger application of MCL 600.2301." *Id*. at 253. The Court quoted MCL 600.2301, emphasizing the introductory language providing that it applies to courts " '*in which any action or proceeding is pending*.' " *Driver*, 490 Mich at 253. The *Driver* Court ruled:

> By its plain language, MCL 600.2301 only applies to actions or proceedings that are *pending*. Here, plaintiff failed to commence an action against CCA before the six-month discovery period expired, and his claim was therefore barred by the statute of limitations. An action is not pending if it cannot be commenced . . . . In *Bush*, however, this Court explained that an NOI is part of a medical malpractice "proceeding." The Court explained that, "[*s*]*ince an NOI must be given before a medical*

> *malpractice claim can be filed*, the service of an NOI is a part of a medical malpractice 'proceeding.' As a result, [MCL 600.2301] applies to the NOI 'process.' " Although plaintiff gave CCA an NOI, he could not file a medical malpractice claim against CCA because the six-month discovery period had already expired. Service of the NOI on CCA could not, then, have been part of any "proceeding" against CCA because plaintiff's claim was already time-barred when he sent the NOI. A proceeding cannot be pending if it was time-barred at the outset. Therefore, MCL 600.2301 is inapplicable because there was no action or proceeding pending against CCA in this case. [*Id*. at 254 (citations and some quotation marks omitted; alteration and emphasis in original).]

Our Supreme Court did not stop at this point in explaining why MCL 600.2301 was inapplicable; rather, it proceeded to provide myriad additional reasons. At this stage, we shall briefly summarize the Supreme Court's additional reasoning and discussion. First, the Court analyzed the particular facts of the case under MCL 600.2301 and found that allowing amendment of the original NOI so that the plaintiff could add CCA would affect CCA's substantial rights and would not further justice. *Driver*, 490 Mich at 254-255. Next, the Court explained that "allowing a claimant to amend an original NOI to add nonparty defendants conflicts" with the NOI and NOI-waiting-period requirements of MCL 600.2912b. *Id.* at 255-256. The Court then reviewed the facts and ruling in *Burton*, concluding that "[n]othing in *Bush* altered our holding in *Burton*." *Id*. at 256-257. The Court observed that *Bush* addressed the issue of an NOI's failing "to comply with the *content* requirements of MCL 600.2912b(4)[,]" whereas *Burton* concerned the issue of a "failure to comply with . . . *notice-waiting-period* requirements[.]" *Id*. at 257-258. The *Driver* Court finally maintained that a plaintiff should not be allowed to amend an original NOI to add a nonparty

defendant because "it would create a situation permitting endless joinder of nonparty defendants" and "defeat the very principles underlying limitations periods." *Id*. at 258-259. We shall examine the Court's reasoning in greater detail in the analysis section of this opinion.

Subsequently, this Court issued its opinion in *Tyra*, which concerned the filing of a medical malpractice complaint 112 days after notices of intent were sent to the defendants "instead of . . . 182 days or more as required by statute, MCL 600.2912b(1)." *Tyra*, 302 Mich App at 210. After addressing a waiver issue, the opinion of the Court in *Tyra* discussed *Burton*, and although it expressed some criticism of the analysis in *Burton*, the Court acknowledged that *Burton* was binding precedent, especially considering the reaffirmance of *Burton* in *Driver*. *Id*. at 222-223. The opinion of the Court in *Tyra* then moved to a discussion of *Zwiers*, followed by an examination of *Driver*'s affect on the application of MCL 600.2301. *Id*. at 223-224. The opinion of the Court observed:

> In *Driver*, 490 Mich at 254, our Supreme Court explained that "MCL 600.2301 only applies to actions or proceedings that are *pending*." Although an untimely complaint cannot commence an *action*, the *proceedings* here are underway. In *Driver*, the plaintiffs were barred from the initial step of the proceedings of filing the notice of intent, whereas here, there is no dispute that the notice of intent was proper. The dissent apparently concludes that MCL 600.2301 cannot apply because no *action* was underway. We disagree: MCL 600.2301 cannot be used to create a filing out of whole cloth, but no such bootstrapping would occur here, where all the requisite documents actually exist. In any event, MCL 600.2301 merely affords plaintiff the opportunity to make an argument. We see no value in attempting, on this record, to determine whether defendants' substantial rights would truly be invaded if they are ultimately required to address the merits of the claim

> instead of relying on legal technicalities to avoid doing so. As we discuss, whether amendment would further the interests of justice or prejudice defendants is a question to be put to the trial court's discretion on remand. [*Tyra*, 302 Mich App at 224-225.]

The Court then engaged in an examination of the criteria in MCL 600.2301, concluding "that on the basis of both *Zwiers* and the purpose behind MCL 600.2301, the trial court erred by failing to at least consider the possibility of allowing plaintiff to amend her complaint and afford plaintiff the opportunity to present an argument." *Id*. at 225-226. Accordingly, the Court in *Tyra* was of the view that the decision in *Zwiers* remained good law following *Driver*.

Finally, the *Furr* opinion was issued. The facts in *Furr* indicated that while undergoing a recommended total thyroidectomy, Susan "Furr's left recurrent laryngeal nerve was transected[,]" and the following day it was "discovered that she had 'bilateral true vocal cord paralysis.' " *Furr*, 303 Mich App at 802. The plaintiffs, Susan and William Furr, served the defendant healthcare providers with a notice of intent and, as in *Zwiers*, the Furrs "filed their complaint one day before the end of the applicable 182-day notice waiting period." *Id*. at 808. The trial court denied the healthcare providers' motion for summary disposition on the basis of *Zwiers*. *Id*. at 803. The lead opinion in *Furr* set forth the conclusion that *Driver* had overruled *Zwiers* and that *Tyra* was therefore incorrectly decided. *Id*. at 808-809. Citing *Driver*, 490 Mich at 252, the lead opinion further indicated that "a plaintiff may only invoke MCL 600.2301 to correct a defective *content* requirement in the notice of intent." *Id*. at 809. Additionally, it was asserted in the *Furr* lead opinion that the *Zwiers* panel "believed that the Michigan Supreme Court's unequivocal holding in *Burton* was no longer controlling law[;]"

however, *Driver* clearly established that *Burton* remained good law and that nothing in *Bush* altered *Burton*. *Id*. at 810. Nevertheless, given *Tyra*'s interpretation of *Driver* and *Zwiers*, the *Furr* panel determined that it was compelled under MCR 7.215(J) to affirm the trial court's denial of summary disposition pursuant to *Zwiers*. *Id*. at 801-802. This Court requested the convening of a special panel to resolve the conflict. *Id*. at 802.

IV. ANALYSIS

We are called upon to determine whether our Supreme Court's decision in *Driver* effectively overruled this Court's decision in *Zwiers*. Resolving the issue requires examination of whether the discussion in *Driver* was sufficiently broad so as to definitively preclude the application of MCL 600.2301 under any circumstances entailing a *Burton*-type situation in which a complaint is prematurely filed in regard to the statutory notice waiting period of MCL 600.2912b.

In *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653, 664; 633 NW2d 1 (2001), this Court, quoting *Black's Law Dictionary* (6th ed), p 1104, explained the concept of overruling a decision:

> "A judicial decision is said to be overruled when a later decision, rendered by the same court or by a superior court in the same system, expresses a judgment upon the same question of law directly opposite to that which was before given, thereby depriving the earlier opinion of all authority as a precedent." [Emphasis omitted.]

The first reason offered by the Court in *Driver* not to extend MCL 600.2301 to allow the amendment of an original NOI to add a nonparty defendant was the absence of a pending proceeding or action as required by § 2301. *Driver*, 490 Mich at 253-254. As quoted

earlier in this opinion, and relative to the language the *Tyra* Court seized upon as a basis to continue honoring *Zwiers*, the *Driver* Court observed:

> By its plain language, MCL 600.2301 only applies to actions or proceedings that are *pending*. Here, plaintiff failed to commence an action against CCA before the six-month discovery period expired, and his claim was therefore barred by the statute of limitations. An action is not pending if it cannot be commenced . . . . In *Bush*, however, this Court explained that an NOI is part of a medical malpractice "proceeding." The Court explained that, "[*s*]*ince an NOI must be given before a medical malpractice claim can be filed*, the service of an NOI is a part of a medical malpractice 'proceeding.' As a result, [MCL 600.2301] applies to the NOI 'process.' " Although plaintiff gave CCA an NOI, he could not file a medical malpractice claim against CCA because the six-month discovery period had already expired. Service of the NOI on CCA could not, then, have been part of any "proceeding" against CCA because plaintiff's claim was already time-barred when he sent the NOI. A proceeding cannot be pending if it was time-barred at the outset. Therefore, MCL 600.2301 is inapplicable because there was no action or proceeding pending against CCA in this case. [*Driver*, 490 Mich at 254 (citations and some quotation marks omitted; alteration in original).]

In *Zwiers*, *Tyra*, and *Furr*, however, the NOIs were timely served on the defendants, so while *actions* had not been commenced because of the premature filing of complaints and no *actions* were therefore pending for purposes of MCL 600.2301, *proceedings* had been commenced given the timely NOIs and *proceedings* were therefore pending. *Furr*, 303 Mich App at 802-803; *Tyra*, 302 Mich App at 211; *Zwiers*, 286 Mich App at 40. MCL 600.2301 speaks of a pending "action *or* proceeding." (Emphasis added.) Given the timely served NOIs, *Zwiers*, *Tyra*, and *Furr* were not time-barred by the statute of limitations at the outset, as in *Driver*. It

appears that the majority in *Tyra* relied exclusively on the distinction between a pending action and a pending proceeding in determining that MCL 600.2301 remained potentially applicable despite *Driver*. *Tyra*, 302 Mich App at 224-225.

The *Driver* Court next provided the following argument with respect to why MCL 600.2301 could not save the plaintiff's action:

> Moreover, amendment of the original NOI to allow plaintiff to add CCA would not be for the furtherance of justice and would affect CCA's substantial rights. Every defendant in a medical malpractice suit is entitled to a timely NOI. The legislative purpose behind the notice requirement was to provide a mechanism for promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs[.] Applying MCL 600.2301 in the present case would deprive CCA of its statutory right to a timely NOI followed by the appropriate notice waiting period, and CCA would be denied an opportunity to consider settlement. CCA would also be denied its right to a statute-of-limitations defense. These outcomes are plainly contrary to, and would not be in furtherance of, the Legislature's intent in enacting MCL 600.2912b. [*Driver*, 490 Mich at 254-255 (quotation marks and citations omitted).]

This particular paragraph is quite interesting and belies a conclusion that *Zwiers* was effectively overruled by *Driver*. It reflects the Supreme Court's *actually engaging in an examination and evaluation of the criteria in MCL 600.2301*, finding that, in regard to possible amendment of the original NOI to add CCA, justice would not be furthered and CCA's substantial rights would be affected, especially considering the expiration of the statute of limitations period before the NOI was served on CCA. The *Zwiers* panel also exam-

ined and evaluated the criteria in MCL 600.2301, merely coming to a different conclusion concerning the furtherance of justice and substantial rights. *Zwiers*, 286 Mich App at 51-53. Again, *Zwiers* addressed a much different fact pattern, where the NOI was served and the complaint was filed within the applicable statute of limitations period, and where the complaint was only one day premature. The *Zwiers* panel did not rule that MCL 600.2301 was always applicable to save a case from a *Burton*-based dismissal; the issue was instead fact-sensitive. The above-quoted paragraph from *Driver* does indicate that if MCL 600.2301 were applied, CCA would be deprived of a statute of limitations defense. There is, however, a significant difference between a plaintiff's attempting by way of MCL 600.2301 to bring a defendant into a medical malpractice suit for the first time after failing to file a complaint or to even serve the NOI itself before expiration of the applicable limitations period, as in *Driver*, and a plaintiff's using MCL 600.2301 to preserve an action where the NOI was served and the complaint was filed *within the statute of limitations period*, as in *Zwiers*, thereby negating concerns of a defendant losing the protections afforded by the statute of limitations. In the latter situation, it is the defendant's own strategic decision to surreptitiously await the expiration of the statute of limitations period as caused by the absence of tolling, unbeknownst to the plaintiff, before moving for dismissal.

The *Driver* Court, in its continuing analysis and explanation of the shortcomings of allowing application of MCL 600.2301 to save the medical malpractice action against CCA, further stated:

> In addition, allowing a claimant to amend an original NOI to add nonparty defendants conflicts with the statu-

> tory requirements that govern the commencement of a medical malpractice action and tolling of the statute of limitations. . . .
>
> We have construed [MCL 600.2912b(1)] as containing a dual requirement: A plaintiff must (1) submit an NOI to *every* health professional or health facility before filing a complaint and (2) wait the applicable notice waiting period with respect to each defendant before he or she can commence an action. A plaintiff has the burden of ensuring compliance with these mandates. With regard to the requirement that a plaintiff provide every defendant an NOI during the applicable limitations period before filing a complaint, nothing in *Bush* eliminates this requirement. Permitting amendment to add time-barred nonparty defendants to an original NOI on the basis of *Bush* would render the NOI requirement meaningless and the provision pertaining to nonparty defendants, MCL 600.2912b(3), nugatory. [*Driver*, 490 Mich at 255-256 (citations omitted).]

This passage is couched in terms of the prospect of allowing amendment of an original NOI to add a time-barred nonparty defendant, which, again, does not fit the fact pattern in *Zwiers*, *Tyra*, and *Furr*, where the NOIs were timely served in relation to the statute of limitations and the actions were not time-barred at the outset. The *Driver* Court next stated:

> Nor does *Bush* compel the conclusion that a plaintiff can add a nonparty defendant and avoid compliance with the notice waiting period by simply amending the original NOI. As we explained in *Burton*, when a plaintiff fails to strictly comply with the notice waiting period under MCL 600.2912b, his or her prematurely filed complaint fails to commence an action that tolls the statute of limitations . . . . [T]he significance of *Burton* is that a plaintiff cannot commence an action that tolls the statute of limitations against a particular defendant until the plaintiff complies with the notice-waiting-period requirements of MCL 600.2912b.

> Nothing in *Bush* altered our holding in *Burton*. The central issue in *Bush* involved the effect an NOI had on tolling when the NOI failed to comply with the *content* requirements of MCL 600.2912b(4). The central issue in *Burton* involved the effect the plaintiff's failure to comply with the *notice-waiting-period* requirements had on tolling. Indeed, the *Bush* Court repeatedly emphasized that the focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b. In contrast to placing doubt on the viability of *Burton*, this aspect of *Bush* aligned with *Burton*'s holding that a plaintiff must comply with the notice waiting period to ensure the complaint tolls the statute of limitations. [*Driver*, 490 Mich at 256-258 (citations omitted).]

Comparable to the other aspects of the reasoning in *Driver*, this passage, addressing the notice waiting period, is again framed in the context of a plaintiff's seeking to amend an original NOI to add a nonparty defendant, which, as we have emphasized, is easily distinguishable from the circumstances in *Zwiers*, *Tyra*, and *Furr*. It is important to accurately grasp what the plaintiff was attempting to accomplish in *Driver*. After a lawsuit against CCA had become time-barred, the plaintiff served an NOI for the first time on CCA and then prematurely filed an amended complaint adding CCA, with the plaintiff then seeking, under MCL 600.2301, to tie CCA to an earlier, timely NOI that only identified and had been solely served on defendants other than CCA. *Driver*, 490 Mich at 243-252. Had the Court allowed the plaintiff to so apply MCL 600.2301, the door would have been opened to plaintiffs in litigation to endlessly add defendants, otherwise protected by the statute of limitations from the outset, and to deprive those defendants of not only a timely served NOI, but to also *entirely* deprive them of any notice waiting period *whatsoever*. The focus of *Driver* was not on the fact that the amended complaint adding CCA was filed only 49

days after the untimely NOI; rather, the focus was on the fact that the NOI was untimely to begin with, falling outside the statute of limitations period. The *Driver* Court's emphasis on distinguishing *Bush* must be read in that context. The concern in *Driver*, i.e., time-barred NOIs and an unending parade of wholly unprotected potential defendants, was simply not a problem in *Zwiers*, *Tyra*, and *Furr*.

Moreover, nowhere in the *Driver* opinion did the Court expressly state that MCL 600.2301 can never be applied in a *Burton* situation where a complaint was prematurely filed under MCL 600.2912b. And the *Driver* Court made no mention of *Zwiers*, even though the *Zwiers* panel engaged in a discussion regarding the interplay between *Burton*, *Bush*, and MCL 600.2301. Furthermore, *Zwiers* did not hold that *Burton* was overruled or altered by *Bush*, nor that *Burton* was no longer good law.

The last-quoted passage from *Driver* was interpreted in *Furr*'s lead opinion to mean that only content-based amendments are permitted under MCL 600.2301. *Furr*, 303 Mich App at 809. However, the *Driver* Court did not so state, and it clearly was still engaged in simply distinguishing *Bush* itself, not unraveling the parameters of MCL 600.2301. Moreover, and importantly, to reach such a conclusion, one would have to believe that the Supreme Court was wholly unaware of or failed to appreciate the plain and unambiguous language in MCL 600.2301, which empowers a court to amend any process, pleading, or proceeding "either in form *or* substance[.]" (Emphasis added.) It cannot reasonably be disputed that substance equates to content. *Random House Webster's College Dictionary* (2001), p 289 (definition of "content" includes "substantive information"). And an amendment with regard to "form" is not

an amendment of "content." It would appear to defy logic, therefore, to construe *Driver* as indicating that only content-based amendments are permissible under MCL 600.2301.

Under these circumstances, in which more questions than answers arise in contemplating whether the language in *Driver* effectively overruled *Zwiers*, we are simply not prepared to conclude that the *Driver* Court implicitly intended to overrule *Zwiers*, nor that it effectively did overrule *Zwiers*. There is an absence of clarity on the issue, and binding precedent from this Court, such as *Zwiers*, should not be relegated to the scrapheap of overruled opinions on the basis of speculation regarding our Supreme Court's intent with respect to whether the precedent was overruled.

Finally, in our view, the plain and unambiguous language of MCL 600.2301 would appear to mandate a court to disregard a premature filing under MCL 600.2912b if a defendant's substantial rights are unaffected.

In *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), our Supreme Court recited the well-established principles of statutory interpretation:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [Citations omitted.]

The language in MCL 600.2301 is plain and unambiguous, providing, once again, as follows:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. *The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties*. [Emphasis added.]

In our opinion, each of the two sentences comprising MCL 600.2301 can stand on its own. The first sentence addresses the *amendment* of any process, pleading, or proceeding during the pendency of an action or proceeding. The second sentence of the statute does not speak of amending an error or defect; rather, it mandates the outright *disregard* of any error or defect if to do so would not affect the substantial rights of the parties. See *Burton*, 471 Mich at 752 ("use of the word 'shall' indicates a mandatory and imperative directive"). Indeed, the two sentences in § 2301 were clearly never intended to be read coextensively, given that the amendment power described in the first sentence can only be invoked "before judgment [is] rendered[,]" while the authority to disregard an error or defect described in the second sentence can be invoked "at every stage of the action or proceeding," which would necessarily include judgment and postjudgment stages. If, for example, there was an error or defect in postjudgment proceedings that did not affect substantial rights, the second sentence of MCL 600.2301 would, beyond question, require a court to disregard the error or defect; the criteria in the first sentence of § 2301, including the furtherance-of-justice provision, *could not* be taken into consideration. And even if a court was prepared to disregard an error or defect occurring during a phase of

the proceedings covered by both sentences in MCL 600.2301, imposing any requirements or restrictions found in the first sentence before allowing the court to disregard the error or defect would entirely circumvent and undermine the plain and unambiguous language of the second sentence of § 2301. By way of further example, if an inconsequential error or defect did not pertain to "form or substance," which quoted language is found in the first sentence of the statute, a court's refusal to disregard the error or defect because it did not concern "form or substance" would negate the plain and unambiguous mandate of sentence two. Accordingly, the second sentence of MCL 600.2301 necessarily stands on its own. It reflects a legislative mandate to the courts of this state to essentially employ equity by disregarding harmless errors or defects.[5]

Our construction of MCL 600.2301 is consistent with earlier Supreme Court precedent, which emphasized that the statute " 'aims to abolish technical errors in proceedings and to have cases disposed of as nearly as possible in accordance with the substantial rights of the parties.' " *Gratiot Lumber & Coal Co v Lubinski*, 309 Mich 662, 668-669; 16 NW2d 112 (1944), quoting *M M Gantz Co v Alexander*, 258 Mich 695, 697; 242 NW 813 (1932).

The language in MCL 600.2301 requiring a court to disregard "any" errors or defects if no substantial rights are affected plainly and unambiguously reaches both

[5] The fact that the catch line heading of MCL 600.2301 only alludes to "Amendment of process or pleadings before judgment" does not alter our conclusion. The catch line heading of a statutory section "shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate, but shall be deemed to be inserted for purposes of convenience to persons using publications of the statutes." MCL 8.4b; see Robinson v City of Lansing, 486 Mich 1, 10 n 8; 782 NW2d 171 (2010).

content and noncontent errors or defects, as the term "any" is all-inclusive. See *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004) (Use of the term "any" by the Legislature "casts a wide net and encompasses a wide range of things."). There is nothing in the language of the second sentence of § 2301 even hinting at restricting the error or defect to only those errors or defects that relate to content. And any such limitation or restriction placed on the construction of MCL 600.2301 would entail grafting language to the statute that simply does not exist; "any" means "any." See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) ("[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."). For that very same reason, the spectrum of errors or defects enveloped by MCL 600.2301 necessarily includes *statutory* errors or defects. Filing a medical malpractice complaint prematurely under MCL 600.2912b falls under the broad umbrella of "any error or defect in the proceedings"—it constitutes a statutory, procedural defect or error. Concluding otherwise would reflect a wholesale failure to recognize, appreciate, and honor the plain and unambiguous language of MCL 600.2301. And with a timely served NOI, a court's act of invoking MCL 600.2301 to disregard the § 2912b error or defect would occur during a "stage of the . . . proceeding."[6]

The only other pertinent question that arises under the second sentence of MCL 600.2301 is whether the

[6] Both the Bush and the Driver Courts accepted that the "service of an NOI is a part of a medical malpractice proceeding." Driver, 490 Mich at 254, quoting Bush, 484 Mich at 176-177 (emphasis added; quotation marks omitted). Moreover, in our view, it would strain the English language to find that there were no ongoing proceedings in Zwiers, Tyra, and Furr.

failure to comply with the notice-waiting-period provisions in MCL 600.2912b will always affect a medical malpractice defendant's substantial rights, so that § 2301 can never be employed to disregard the error or defect. Generally speaking, an error or defect affects substantial rights when a party incurs prejudice. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); see also *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008); *Black's Law Dictionary* (7th ed), p 1324 (A "substantial right" is "[a]n essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right."); *DeCosta v Gossage*, 486 Mich 116, 138; 782 NW2d 734 (2010) (MARKMAN, J., dissenting) (applying *Carines* and the definition in *Black's Law Dictionary* in defining "substantial rights" as used in MCL 600.2301). The second sentence in MCL 600.2301 requires a court to ask whether the error or defect affects substantial rights. The issue boils down to whether the party was deprived of any consequential legal benefit or opportunity or was otherwise harmed because of the error or defect.

"The legislative purpose behind the notice requirement was to provide a mechanism for promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . . ." *Driver*, 490 Mich at 254-255 (quotation marks and citations omitted). We fail to see how every premature filing under MCL 600.2912b would affect a defendant's substantial rights with respect to attempts at settlement and keeping costs at bay, especially in a situation where, as in *Zwiers* and *Furr*, the mistaken filing occurred one day short of

the applicable 182-day period and there were no ongoing settlement negotiations. *Furr*, 303 Mich App at 808; *Zwiers*, 286 Mich App at 50-51. Indeed, the lead opinion in *Furr* conceded that, under the facts presented, application of MCL 600.2301 and *Zwiers* supported the trial court's ruling denying defendants' motion for summary disposition, and we agree with that assessment. *Furr*, 303 Mich App at 808. The issue whether substantial rights are affected in relationship to the purpose behind NOIs can only be case-specific.

Additionally, in the context of the second sentence of MCL 600.2301 and the fact pattern in *Zwiers*, a defendant is not truly deprived of a statute of limitations defense because of the error or defect, i.e., the premature filing of a medical malpractice complaint, given that the period of limitations would not yet have elapsed at the time of the defect or error. Further, it cannot reasonably be maintained that every statutory error or defect necessarily affects a party's *substantial* rights; some statutory errors or defects will simply not result in any prejudice. It is necessary to examine the nature of a statutory error or defect and the legislative goal of a statute in order to determine whether a particular statutory violation affects a party's substantial rights. MCL 600.2301 does not state that it precludes a court from disregarding errors or defects that affect *statutory* rights, and to conclude otherwise requires reading language into the statute that does not exist. Moreover, such a construction would conflict with the language in MCL 600.2301 allowing a court to disregard "any" errors or defects, which would encompass statutory errors or defects, where the only errors or defects that cannot be disregarded are those that result in prejudice to a party. In sum, the plain and unambiguous language of MCL 600.2301 would strongly suggest that *Zwiers* was correctly decided.

V. CONCLUSION

We cannot discern with any certitude whether the *Driver* Court effectively overruled *Zwiers*. It is simply unclear whether our Supreme Court intended to preclude the application of MCL 600.2301 under any circumstances entailing a *Burton*-type situation in which a complaint is prematurely filed in relation to the statutory notice waiting period of MCL 600.2912b. Had that been the Court's intent, it would have been rather easy to make that pronouncement in definitive fashion. Given the absence of a reference to *Zwiers* in *Driver*, the significant distinctions in the fact patterns, *Driver*'s lack of a precise assessment of the role of MCL 600.2301 when a complaint is prematurely filed under MCL 600.2912b, the plain and unambiguous text of MCL 600.2301 favoring application, especially in regard to a complaint filed *one day early*, and considering the language in *Driver* suggesting the appropriateness of examining and evaluating the particular facts of a case under MCL 600.2301, we are not prepared to hold that *Driver* overruled *Zwiers* by implication. Instead, the sound legal course for this Court is to leave the issue for a future definitive decision by the Michigan Supreme Court, should the Court have the opportunity and inclination to address the matter. Accordingly, we affirm the trial court's order denying summary disposition.

Affirmed. We decline to award taxable costs pursuant to our discretion under MCR 7.219.

MARKEY, BORRELLO, and BECKERING, JJ., concurred with MURPHY, C.J.

O'CONNELL, J. (*dissenting*). We respectfully dissent. We would reverse the trial court's order, for the reasons

stated in the vacated lead opinion in *Furr v McLeod*, 303 Mich App 801, 810-811 (2013), and the reasons similarly stated in the dissenting opinion in *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 230-231; 840 NW2d 730 (2013) (WILDER, P.J., dissenting).

TALBOT, J., concurred with O'CONNELL, J.

METER, J. (*dissenting*). I join in Judge O'CONNELL's dissenting opinion but write separately to point out that while I was a member of the panel that decided *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), and I believe that *Zwiers* was a well-reasoned opinion, I acknowledge that *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), subsequently and implicitly overruled it.

BRYAN v JPMORGAN CHASE BANK

Docket No. 313279. Submitted April 8, 2014, at Detroit. Decided April 10, 2014, at 9:05 a.m. Leave to appeal sought.

Glenna Bryan brought an action in the Oakland Circuit Court against JPMorgan Chase Bank (Chase), seeking to set aside a sheriff's sale of her home. Bryan obtained a home loan from Washington Mutual Bank (WaMu) that was secured by a mortgage interest given to WaMu. WaMu was subsequently closed by a federal agency, the Office of Thrift Supervision, which appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Chase acquired Bryan's loan from the FDIC. Bryan then defaulted on her mortgage payments. Chase foreclosed by advertisement and purchased the property at the sheriff's sale. After the redemption period expired, Chase brought an eviction action against Bryan in the 48th District Court, which granted judgment in favor of Chase. Bryan filed a claim of appeal in the circuit court and a bankruptcy petition in the Eastern District of Michigan. The initial bankruptcy petition was dismissed, but Bryan filed a second bankruptcy petition. Several months later, the bankruptcy court entered an order of discharge. Bryan's appeal in the eviction case was then reopened, and the circuit court granted Chase's motion to permit immediate execution of the eviction order. Bryan subsequently filed this action alleging that Chase was neither the owner of the indebtedness secured by the mortgage nor the servicing agent of the mortgage and, therefore, the sheriff's sale was void *ab initio*. Both parties moved for summary disposition. The circuit court granted summary disposition in favor of Chase. Bryan appealed.

The Court of Appeals *held*:

1. Under MCL 600.3236, unless the property is redeemed within the period provided, the sheriff's deed becomes operative and vests in the grantee all the right, title, and interest that the mortgagor had at the time of execution of the mortgage or at any time thereafter. If the mortgagor fails to avail him or herself of the right of redemption, all the mortgagor's rights in and to the property are extinguished. By failing to redeem the property within the applicable period, Bryan lost standing to bring her claim.

2. Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. In this case, the eviction action involved the same parties, was decided on the merits, and Bryan raised the argument that the foreclosure was void *ab initio*. Therefore, res judicata and collateral estoppel precluded Bryan from bringing this action.

3. Under MCL 600.3204(3), if the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist before the date of sale showing the assignment of the mortgage to the party foreclosing the mortgage. Defects or irregularities in a foreclosure proceeding, however, result in a foreclosure that is voidable not void *ab initio*. To set aside a foreclosure sale a plaintiff must show that he or she was prejudiced by the defendant's failure to comply with MCL 600.3204 by demonstrating that the plaintiff would have been in a better position to preserve his or her interest in the property absent the defendant's noncompliance with the statute. In this case, Bryan made no argument that she was prejudiced by Chase's failure to record its interest in the property and, therefore, Bryan was not entitled to relief. Accordingly, even if Bryan had standing to sue and even if the principles of res judicata and collateral estoppel did not prevent plaintiff from bringing her claim, Chase was entitled to summary disposition because Bryan failed to demonstrate prejudice resulting from the foreclosure irregularity.

Affirmed.

1. PROPERTY — MORTGAGES — FORECLOSURE — EXPIRATION OF THE REDEMPTION PERIOD — STANDING TO CHALLENGE THE FORECLOSURE.

Under MCL 600.3236, after foreclosure by advertisement and a sheriff's sale, unless property is redeemed within the period provided, the sheriff's deed becomes operative and vests in the grantee all the right, title, and interest that the mortgagor had at the time of execution of the mortgage or at any time thereafter; if the mortgagor fails to avail him or herself of the right of redemption, all the mortgagor's rights in and to the property are extin-

guished; by failing to redeem the property within the redemption period, the mortgagor loses standing to bring a quiet title action.

2. PROPERTY — MORTGAGES — FORECLOSURE — DEFECTS OR IRREGULARITIES IN THE FORECLOSURE PROCEEDING — VOIDABLE.

Under MCL 600.3204(3), if the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist before the date of sale showing the assignment of the mortgage to the party foreclosing the mortgage; defects or irregularities in a foreclosure proceeding, however, result in a foreclosure that is voidable not void *ab initio*; to set aside a foreclosure sale a plaintiff must show that he or she was prejudiced by the defendant's failure to comply MCL 600.3204 by demonstrating that the plaintiff would have been in a better position to preserve his or her interest in the property absent the defendant's noncompliance with the statute.

Darwyn P. Fair & Associates, PC (by *Darwyn P. Fair*), for Glenna Bryan.

Dykema Gossett PLLC (by *Joseph H. Hickey*, *Jill M. Wheaton*, *Laura C. Baucus*, and *Jong-Ju Chang*) for JPMorgan Chase Bank.

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM. Plaintiff, Glenna Bryan, appeals as of right an order granting summary disposition in favor of defendant, JPMorgan Chase Bank, in this quiet title action. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

The trial court's order granting summary disposition for defendant set forth the background facts of this case, none of which is in dispute:

> This lawsuit arises from the foreclosure of a house located in Bloomfield Hills. Plaintiff defaulted on her mortgage payments and Defendant foreclosed by advertisement. On

> January 26, 2010, the property was sold at a Sheriff's Sale. Defendant was the purchaser and the Sheriff's Deed was recorded on February 2, 2010. The redemption period expired on June 26, 2010. A Judgment of Possession was entered by the District Court on August 11, 2010. On August 31, 2010, Plaintiff filed a Claim of Appeal and a Chapter 7 Bankruptcy Petition. The Bankruptcy case was dismissed on November 29, 2010. On April 11, 2011, Plaintiff filed a second Chapter 7 Bankruptcy Petition. On August 23, 2011, the Bankruptcy Court entered an Order discharging Plaintiff. The Appeal case was reopened on February 7, 2012 and this Court granted the motion to allow immediate execution of the Order of Eviction. The District Court denied Plaintiff's motion to set aside the Judgment of Possession on February 14, 2012. A Delayed Application for Leave to Appeal was filed and dismissed by this Court on March 8, 2012. Plaintiff filed this lawsuit on January 31, 2012, seeking to quiet title and alleging unjust enrichment, deceptive/unfair practice and wrongful foreclosure.

Plaintiff's complaint alleged, *inter alia*, that defendant was not the owner of the indebtedness secured by the mortgage nor the servicing agent of the mortgage as required in MCL 600.3204(1)(d). Specifically, plaintiff alleged that defendant acquired its interest in the property from the Federal Deposit Insurance Corporation (FDIC) as receiver when the original mortgagee, Washington Mutual Bank, was closed. However, defendant failed to record its interest in the property before the sheriff's sale. Plaintiff alleged that the sheriff's sale was, therefore, void *ab initio*.

The parties filed competing motions for summary disposition. Plaintiff admitted that the redemption period had expired, but argued that she still had standing to sue because of "fraud or irregularity" in the foreclosure process, specifically defendant's failure to record its mortgage interest before the sale, as required by MCL 600.3204(3) and *Kim v JPMorgan*

Chase Bank, NA, 295 Mich App 200; 813 NW2d 778 (2012).[1] Plaintiff did not believe that her claim was barred by res judicata or collateral estoppel because, although the district court had determined that defendant was entitled to possession, that decision was being appealed. Additionally, *Kim* was not decided until January 2012 and, therefore, the issue of whether the foreclosure was void *ab initio* was never fully addressed or resolved.

Defendant argued that plaintiff's claim was barred by the doctrines of res judicata and collateral estoppel. Defendant further argued that, even if res judicata and collateral estoppel did not apply, plaintiff had no standing to challenge the foreclosure when the redemption period had expired and plaintiff had failed to redeem the property.

The trial court issued a written order granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition:

> The Court finds that Defendant is entitled to summary disposition. *Res Judicata* and collateral estoppel bar Plaintiff from challenging the foreclosure proceedings. There is no legal support for Plaintiff's argument that *Kim v JP Morgan Chase*, 295 Mich App 200 (2012) has retroactive effect that exempts Plaintiff from *res judicata* and collateral estoppel. Because the redemption period has expired, Plaintiff does not have standing to assert any interest in the subject property. The Court finds that Plaintiff has failed to state any claims upon which relief can be granted.

Plaintiff's motion for reconsideration was denied on October 19, 2012. She now appeals as of right.

---

[1] As discussed later in this opinion, *Kim* was subsequently reversed in part.

II. ANALYSIS

The trial court granted defendant summary disposition pursuant to MCR 2.116(C)(8). "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. The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). "The applicability of res judicata is a question of law that is reviewed de novo on appeal." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

Defendant argues that plaintiff lacked standing to bring this action because the statutory period of redemption had expired and plaintiff made no effort to redeem the property. We agree.

Pursuant to MCL 600.3240, after a sheriff's sale is completed, a mortgagor may redeem the property by paying the requisite amount within the prescribed time limit, which here was six months. "Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter . . . ." MCL 600.3236. If a mortgagor fails to avail him or herself of the right of redemption, all the mortgagor's rights in and to the property are extinguished. *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942).

We have reached this conclusion in a number of

unpublished cases and, while unpublished cases are not precedentially binding, MCR 7.215(C)(1), we find the analysis and reasoning in each of the following cases to be compelling. Accordingly, we adopt their reasoning as our own. See *Overton v Mtg Electronic Registration Sys*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2009 (Docket No. 284950), p 2 ("The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity. Once the redemption period expired, all of plaintiff's rights in and title to the property were extinguished.") (citation and quotation marks omitted); *Hardwick v HSBC Bank USA*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2013 (Docket No. 310191), p 2 ("Plaintiffs lost all interest in the subject property when the redemption period expired . . . . Moreover, it does not matter that plaintiffs actually filed this action one week before the redemption period ended. The filing of this action was insufficient to toll the redemption period. . . . Once the redemption period expired, all plaintiffs' rights in the subject property were extinguished."); *BAC Home Loans Servicing, LP v Lundin*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2013 (Docket No. 309048), p 4 ("[O]nce the redemption period expired, [plaintiff's] rights in and to the property were extinguished. . . . Because [plaintiff] had no interest in the subject matter of the controversy [by virtue of MCL 600.3236], he lacked standing to assert his claims challenging the foreclosure sale."); *Awad v Gen Motors Acceptance Corp*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 302692), pp 5-6 ("Although she filed suit before expiration of the

redemption period, [plaintiff] made no attempt to stay or otherwise challenge the foreclosure and redemption sale. Upon the expiration of the redemption period, all of [plaintiff's] rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing."). We hold that by failing to redeem the property within the applicable time, plaintiff lost standing to bring her claim.

Plaintiff's claims were also barred by the principles of res judicata and collateral estoppel.

"The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009), overruled on other grounds by *Admire v Auto-Owners Ins, Co*, 494 Mich 10 (2013).

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.
>
> Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (citations omitted).]

Similarly,

> Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. The doctrine bars

> relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action. A decision is final when all appeals have been exhausted or when the time available for an appeal has passed. [*Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006) (citations omitted).]

In this case, the prior eviction involved the same parties as the present case, the case was decided on its merits, and plaintiff raised the argument that the foreclosure was void *ab initio*; therefore, res judicata and collateral estoppel precluded plaintiff from bringing this quiet title action.

Moreover, even if plaintiff had standing to sue and even if the principles of res judicata and collateral estoppel did not prevent plaintiff from bringing her claim, defendant was nevertheless entitled to summary disposition because plaintiff failed to demonstrate prejudice as a result of the foreclosure irregularity.

MCL 600.3204(3) provides that "[i]f 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." In *Kim*, 295 Mich App 200, the defendant was not the original mortgagee and, like defendant here, acquired its interest in the mortgage by assignment from the FDIC, who was the receiver for the failed bank. The defendant argued that it was relieved of recording its interest in the mortgage because it acquired that interest "by operation of law." *Id.* at 202-203, 205. This Court disagreed and held:

> [P]ursuant to the plain language of MCL 600.3204(3), defendant was required to record its mortgage interest before the sheriff's sale. Because defendant failed to do so, it was not statutorily authorized to proceed with the sale. See MCL 600.3204(3) ("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 . . . ."[)] (emphasis added); see also *Davenport v HSBC Bank USA*, 275 Mich App 344, 347-348; 739 NW2d 383 (2007) ("Because defendant lacked the statutory authority to foreclose, the foreclosure proceedings were void *ab initio*."). Accordingly, the trial court erred by granting summary disposition for defendant and denying summary disposition for plaintiffs when they were entitled to set aside the sheriff's deed. [*Kim*, 295 Mich App at 208.]

In the trial court, plaintiff's counsel argued that "[t]he only issue that's really before the Court is whether res judicata and collateral estoppel is a defense to the Kim case." Counsel further argued: "So, if Kim says what happened in this case is void ab initio, then does that apply retroactively to res judicata and to collateral estoppel? And, we say of course it does, because . . . if it's void ab initio, that means it didn't happen. And if it didn't happen, then you can't say, well, res judicata applies." Plaintiff's counsel went on to state: "The question is does it apply to the District Court. And, what I would state to the Court [is] that on January the 30th of this year in the District Court . . . we specifically raised Kim versus JP Morgan. So, without question it has been preserved, it should be given retroactive effect, and collateral estoppel and res judicata should not be a defense to the Kim case."

However, our Supreme Court subsequently reversed that portion of the *Kim* case that held an irregularity in recording a mortgage interest rendered a foreclosure void *ab initio*. In *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 115-116; 825 NW 329 (2012), our Supreme Court explained:

> [W]e hold that defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*. Because the Court of Appeals erred by holding to

> the contrary, we reverse that portion of its decision. We leave to the trial court the determination of whether, under the facts presented, the foreclosure sale of plaintiffs' property is voidable. In this regard, to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant's failure to comply with MCL 600.3204. To demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute.

Plaintiff fails to acknowledge our Supreme Court's decision and does not even cite it on appeal. Additionally, plaintiff makes no argument that she was prejudiced as a result of defendant's failure to record its interest. As such, she is not entitled to relief.

Plaintiff's remaining argument—that defendant's conduct resulted in a "deceptive act and/or an unfair practice"—is deemed abandoned. Although plaintiff complains that there was robo-signing, she submits no evidence to support her claim. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) (stating that when a party fails to brief the merits of an issue or cite supporting authority, the issue is deemed abandoned).

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219.

BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ., concurred.

YOUNKIN v ZIMMER

Docket No. 313813. Submitted March 11, 2014, at Detroit. Decided April 15, 2014, at 9:00 a.m. Leave to appeal sought.

Lawrence Younkin brought an action in the Genesee Circuit Court against Michael Zimmer, Executive Director of the Michigan Administrative Hearing System (MAHS), and Steven Hilfinger, Director of the Michigan Department of Licensing and Regulatory Affairs (LARA), seeking a writ of mandamus ordering defendants to cause their agencies to hold hearings on workers' compensation claims arising out of injuries occurring in Genesee County within that same locality. Plaintiff injured his back while working in Flint and sought workers' compensation benefits. In September 2012, Zimmer announced new efforts to reorganize the MAHS, including closing the Flint office that had previously handled workers' compensation claims in that area and the transfer of those claims to an office in Dimondale. The court, Geoffrey L. Neithercut, J., granted the writ, ordering defendants to comply with MCL 418.851 and to ensure that hearings in cases arising out of injuries occurring in Genesee County be held in the locality of the injury. Defendants appealed.

The Court of Appeals *held*:

In order to warrant mandamus, the plaintiff must establish that he or she has a clear legal right to performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform the act. Under MCL 418.851, a hearing concerning a disputed claim for workers' compensation benefits must be held at the locality where the injury occurred. The term "locality" generally refers to the surroundings of a particular place or district where a person or thing happens to be situated. As used in MCL 418.851, the term "locality" refers to a specific geographic region: the municipality or region where the employee suffered the injury giving rise to the workers' compensation claim. Younkin sustained his injury in Flint. Consequently, any hearings held to resolve the dispute concerning his claim had to be resolved in the locality that includes Flint. Dimondale was not sufficiently close to qualify as the locality where the injury occurred. The Legislature made a policy choice in favor of local hearings for the benefit of the

parties and their witnesses. Although the failure to hold workers' compensation hearings in the locality where the injury occurred will not void the result, that fact does not give magistrates unfettered discretion to ignore the legislative directive to hold hearings in the locality where the injury occurred. When MCL 418.851 is read in conjunction with MCL 418.841 and MCL 418.847, it is clear that the locality requirement applies to all hearings to resolve disputes concerning a claim for workers' compensation benefits. The trial court properly limited its ruling to the clear statutory mandate and did not interfere with defendants' discretion to centralize the administration of hearings or determine the manner by which the magistrates might comply with MCL 418.851. To the extent that magistrates who conduct workers' compensation hearings are violating the statutory provisions governing those hearings, defendants had a clear legal duty to rectify the violations because, as the chief executives in charge of the MAHS and LARA, they had ultimate responsibility for ensuring the proper conduct of administrative hearings held under the Worker's Disability Compensation Act, MCL 418.101 *et seq*.

Affirmed.

CAVANAGH, J., dissenting, would have held that the trial court's interpretation of MCL 418.851 was erroneous and, therefore, that the trial court's issuance of a writ of mandamus constituted an abuse of discretion. Defendants interpreted the word "locality" to include "district" and "definite region." That interpretation was entitled to respectful consideration. The establishment of reasonably located hearing districts throughout the state comported with the fair and natural import of the word "locality" in light of the subject matter of the statute and was consistent with the entire statutory scheme. Under MCL 418.851, the Dimondale district office, which was located approximately 70 miles from the Genesee County line, was a proper venue for hearings on workers' compensation claims arising in Genesee County. Because plaintiff failed to establish that he had a clear legal right to have his claim heard at the Flint district office or in Genesee County, he was not entitled to a writ of mandamus.

WORKERS' COMPENSATION — HEARINGS — VENUE — LOCALITY WHERE THE INJURY OCCURRED.

Under MCL 418.851, a hearing concerning a disputed claim for workers' compensation benefits must be held at the locality where the injury occurred; as used in MCL 418.851, the term "locality"

> refers to a specific geographic region: the municipality or region where the employee suffered the injury giving rise to the workers' compensation claim.

MacDonald & MacDonald, PLLC (by *Robert J. MacDonald*), for Lawrence Younkin.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Thomas D. Warren*, Assistant Attorney General, for Michael Zimmer and Steven Hilfinger.

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

M. J. KELLY, P.J. In this suit for mandamus, defendants, the Executive Director of the Michigan Administrative Hearing System (the Hearing System), Michael Zimmer, and the Director of the Michigan Department of Licensing and Regulatory Affairs (LARA), Steven Hilfinger, appeal by right the trial court's writ of mandamus compelling them to cause their agencies to hold hearings on workers' compensation claims arising out of injuries occurring in Genesee County within that same locality. The primary issue on appeal is whether the trial court properly interpreted MCL 418.851 to preclude Zimmer and Hilfinger from transferring all hearings on workers' compensation claims arising in Genesee County to Dimondale, Michigan. We conclude that the trial court did not err when it determined that the Legislature limited the geographic area within which a hearing on workers' compensation claims may be held and that the transfer of the hearings to Dimondale exceeded that limitation. Because Zimmer and Hilfinger lacked the authority to order the hearings be held in a locality other than the locality where the injury occurred, the trial court did not abuse

its discretion when it issued a writ of mandamus compelling Zimmer and Hilfinger to order their agencies to comply with the geographic limitations stated in MCL 418.851. For these reasons, we affirm.

I. BASIC FACTS

Plaintiff Lawrence Younkin worked for General Motors at its assembly plant in Flint. At some point, Younkin injured his back while working and was determined to be totally and permanently disabled. Younkin then filed a claim for workers' compensation benefits with the workers' compensation office in Flint.

In September 2012, Zimmer circulated a notice outlining new efforts to streamline and reorganize the Hearing System, which included the offices that handle workers' compensation claims. Zimmer stated that he was closing the Flint office that handles workers' compensation claims and transferring those claims to the office located in Dimondale. It was his goal, he wrote, "to have the transfer complete with hearings beginning in the new locations in December 2012." Thus, after the transfer, both the administrative handling of claims arising in Flint and the hearings on those claims would be conducted at the office in Dimondale.

In October 2012, Younkin sued Zimmer and Hilfinger over the decision to close the Flint office and transfer the proceedings to Dimondale. Younkin alleged that his injuries made it difficult for him to attend hearings in Dimondale. Then, citing MCL 418.851, he alleged that the Legislature had for more than 100 years required all hearings on workers' compensation claims be held in the locality where the injury occurred. Because Dimondale was not the locality where his injury occurred, he contended that Zimmer and Hilfinger had no authority to order his hearing held in Dimondale. Younkin also

alleged that there were numerous other similarly situated individuals who would be harmed in the same way by the unlawful decision to order all hearings on workers' compensation claims arising in Genesee County to be held in Dimondale. For these reasons, Younkin asked the trial court to issue a writ of mandamus ordering Zimmer and Hilfinger to "comply with MCL 418.851 and perform their ministerial duties to ensure that hearings in cases arising out of injuries occurring in Genesee County shall be held in the locality of injury as statutorily required."

On October 22, 2012, the trial court entered an order compelling Zimmer and Hilfinger to appear and show cause why the court should not issue a writ of mandamus.

In answer to Younkin's complaint, Zimmer and Hilfinger argued that MCL 418.851 cannot be read literally. Rather, relying on the decision in *Crane v Leonard, Crossette & Riley*, 214 Mich 218; 183 NW 204 (1921), they maintained that the trial court should interpret the statute to merely require that the hearing be held in a place that is convenient for the parties and their witnesses. They also argued that they were under no legal duty to refrain from closing unnecessary facilities and reassigning magistrates. Because they had the discretion to make these changes, they concluded that their decision was outside the scope of a writ of mandamus. Finally, they argued that Younkin's core complaint is that it is not convenient for him to attend a hearing in Dimondale, which implicates equity rather than law and, therefore, cannot be the subject of a writ of mandamus.

The trial court held a hearing on Younkin's request for a writ of mandamus in November 2012. After hearing the parties' arguments, the trial court exam-

ined MCL 418.851 and noted that it provided "that hearings shall be held 'at the locality where the injury occurred.' " From this, it determined that the statute imposed a clear legal duty to hold all hearings on workers' compensation claims in the locality where the injury occurred: "shall means shall, and does not provide discretion." It then concluded that the term "locality" did not include a place that was "four counties away" from the place of injury. Indeed, it found that Dimondale would not constitute a locality for any claim arising in Genesee County. Accordingly, the trial court granted Younkin's request for a writ of mandamus, but initially indicated that it would limit the writ to Younkin's own hearing. The trial court, however, recognized that Younkin had requested a writ that applied to all claims arising in Genesee County and invited the parties to brief whether it had the authority to issue such a writ on the basis of Younkin's complaint.

Zimmer and Hilfinger submitted a brief on the scope of the trial court's order of mandamus later that same month. In their brief, they argued that the trial court's order should be limited. They maintained that the trial court could not use the order to compel them to hold every ancillary proceeding in the locality, could not compel them to keep the Flint office open, and, because Younkin did not plead his complaint as a class action, the trial court could not extend the order to all hearings concerning claims arising in Genesee County.

In an opinion addressing the scope of its order, the trial court agreed that it would not "direct or participate in [Zimmer's and Hilfinger's] discretionary judgment concerning how [they] will comply with the requirements of MCL 418.851" because that was a matter "within their discretion." It therefore indicated that its order would not affect "decisions about the allocation of

resources to provide services such as scheduling of hearings, assignment of staff, file organization and storage and location of offices." However, it concluded that it had the discretion to issue a writ that applied to all claims arising in Genesee County, which would be subject to the transfer to Dimondale. The court explained that Zimmer and Hilfinger's request to have the order apply only to Younkin amounted to a request for the "court's permission to ignore the statute and break the law" as to the other claimants. Because it was not in the habit of "directing parties to ignore the laws of this state," the trial court concluded that it would order Zimmer and Hilfinger to "rescind the directive that cases arising out of Genesee County be transferred to a hearing site in Dimondale."

The trial court entered its writ of mandamus on November 20, 2012. The trial court ordered Zimmer and Hilfinger, in their official capacities, to "comply with MCL 418.851 and to perform their ministerial duties to ensure that hearings in cases arising out of injuries occurring in Genesee County shall be held in the locality of injury, regardless of the type of hearing." The court also ordered them to "rescind their directive that workers' compensation cases arising out of injuries occurring in Genesee County be transferred to a hearing site in Dimondale, Michigan."

Zimmer and Hilfinger now appeal in this Court.

II. WRIT OF MANDAMUS

A. STANDARDS OF REVIEW

Zimmer and Hilfinger argue on appeal that the trial court erred when it determined that Younkin established the right to relief in the form of a writ of mandamus and also erred by granting relief beyond

ordering Younkin's hearing to be held in the locality. This Court reviews a trial court's decision to enter a writ of mandamus for an abuse of discretion. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). This Court reviews de novo whether the "trial court correctly selected, interpreted, and applied the relevant statutes." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

B. MANDAMUS

Mandamus is an extraordinary remedy that courts will use to enforce duties created by law "where the law has established no specific remedy and where, in justice and good government, there should be one." *State Bd of Educ v Houghton Lake Community Sch*, 430 Mich 658, 666-667; 425 NW2d 80 (1988). The decision to grant mandamus is one of grace and is governed by equitable principles. *Franchise Realty Interstate Corp v Detroit*, 368 Mich 276, 279; 118 NW2d 258 (1962). In order to warrant mandamus, the plaintiff must establish that he or she has a " 'clear legal right to performance of the specific duty sought to be compelled' and that the defendant has a 'clear legal duty to perform such act. . . .' " *In re MCI Telecom Complaint*, 460 Mich 396, 442-443; 596 NW2d 164 (1999), quoting *Toan v McGinn*, 271 Mich 28, 34; 260 NW 108 (1935).

Here, the trial court determined that Younkin had established grounds for mandamus. It concluded that he had a clear statutory right to have a hearing on his claim for workers' compensation benefits, which hearing must be held in the locality where the injury occurred. It similarly determined that Zimmer and Hilfinger had a concomitant clear legal duty to ensure that the magistrates acting under their authority held

the workers' compensation hearings in the locality where the injuries occurred.

Zimmer is the Executive Director for the Hearing System and Hilfinger is the Director of LARA. The Hearing System is an independent and autonomous agency within LARA, which coordinates and manages the policies and procedures for conducting administrative hearings. MCL 445.2030(IX)(A)(1) and (5); MCL 418.213. The Hearing System is responsible for regulating the services provided by administrative law judges, magistrates, boards, and commissioners that have been assigned to the Hearing System, which includes the board of magistrates for the workers' compensation system. MCL 445.2030(IX)(A)(6) and (G); MCL 418.213. As such, Zimmer and Hilfinger, as the chief executives in charge of the Hearing System and LARA, have the ultimate responsibility for ensuring the proper conduct of any administrative hearings held under the authority of the Worker's Disability Compensation Act, MCL 418.101 *et seq*. See MCL 418.213(8) and (10). Accordingly, to the extent that magistrates who conduct workers' compensation hearings are violating the statutory provisions governing those hearings, Zimmer and Hilfinger would have a clear legal duty to rectify the violations.

C. WORKERS' COMPENSATION HEARINGS

The Legislature established the workers' compensation scheme to remedy perceived problems with the common-law tort system for compensating injured workers. See *McAvoy v H B Sherman Co*, 401 Mich 419, 448; 258 NW2d 414 (1977). In exchange for providing prompt—albeit limited—compensation to employees without the need to prove fault, employers are generally granted immunity from tort liability for injuries that

their employees sustain during the course of employment. *Id.*; *Lahti v Fosterling*, 357 Mich 578, 585; 99 NW2d 490 (1959). See also MCL 418.131(1).

Chapter 8 of the Worker's Disability Compensation Act governs the procedures for resolving workers' compensation claims. See MCL 418.801 *et seq*. Generally, a workers' compensation claim must be paid promptly to the injured employee after notice of a qualifying injury with weekly payments due thereafter. See MCL 418.801(1). However, in the event that there is a dispute concerning whether or to what extent an employee is entitled to workers' compensation benefits, the parties are generally entitled to have the dispute resolved after a hearing by a magistrate. See MCL 418.841; MCL 418.847.

In every hearing to resolve a dispute over workers' compensation benefits, the claimant—the employee or his or her beneficiary—has the burden to prove by a preponderance of the evidence that he or she is entitled to compensation under the act. MCL 418.851. The Legislature further provided that the magistrate has the authority to "make such inquiries and investigations" at the hearing "as he or she considers necessary." *Id*. Finally, the Legislature instructed the magistrate to hold the hearings within a defined geographic area: "The hearing shall be held at the locality where the injury occurred . . . ." *Id*. The dispute in this case turns on the proper interpretation of this geographic limitation.

None of the words or phrases used in this statute has acquired a peculiar meaning at law. Therefore, we must give the words and phrases their ordinary meaning. See *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 325; 725 NW2d 80 (2006), citing MCL 8.3a. There can be no reasonable dispute that the Legislature's use of

the word "shall" in the phrase "shall be held" plainly and unequivocally requires the magistrate to hold the hearing to resolve the dispute "at the locality where the injury occurred." See *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008) (stating that the word "shall" generally denotes "mandatory" conduct). The clause describing the locality ("where the injury occurred") is similarly unambiguous and limits the place where the hearing may be held to those places that are within the locality where the claimant suffered the qualifying injury. The term "locality" is also susceptible to ordinary understanding and limits the specific geographic area within which the hearings may be held. The term "locality" generally refers to the surroundings of a particular place or district where a person or thing happens to be situated. See *The Oxford English Dictionary* (2d ed, 1991), p 1080 (defining "locality" as "being local, in the sense of belonging to a particular spot"; the "features or surroundings of a particular place"; and "[a] place or district, of undefined extent, considered as the site occupied by certain persons or things"). In ordinary English, a locality is often understood to be a city, town, or similarly sized district or region within a state, as distinct from the state as a whole. *The Oxford English Dictionary* (2d ed, 1991), p 1078 (defining "local" to mean "[b]elonging to a town or some comparatively small district, as distinct from the state or country as a whole"). See also *Tribbett v Village of Marcellus*, 294 Mich 607, 618-619; 293 NW 872 (1940) (discussing the constitutional limitation on local laws and citing authority explaining that a local law generally affects only one locality, which means a municipality, city, or village). Moreover, it bears emphasizing that the Legislature did not refer to a hearing district or region when it imposed this geographic limitation. Rather, it commanded that the hearing be held in a specific locality:

the one "where the injury occurred." This limitation on the term "locality" is most naturally understood to refer to an existing community—the community within which the employee was working at the time of his or her injury. A plain reading of this geographic limitation simply does not support the notion that the Legislature intended the phrase "locality where the injury occurred" to mean any district or region delineated by the executive for the purpose of administrative convenience.

As used in MCL 418.851, the term "locality" refers to a specific geographic region: the municipality or region where the employee suffered the injury giving rise to the workers' compensation claim. Because the Hearing System and LARA's preferred reading is contrary to the plain language of the statute, that construction is entitled to no deference. *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 224-225, 229-230; 771 NW2d 423 (2009) (stating that the judiciary is the final authority on issues of statutory construction and providing that this Court will not defer to an agency construction that is contrary to the Legislature's plainly expressed intent). The statute is clear and unambiguous. For that reason, this Court must enforce it as written. *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013). And we will do so without regard to whether we believe the Legislature's policy choice is unjust, inconvenient, or unnecessary. *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012).

It is undisputed that Younkin sustained the injury giving rise to his workers' compensation claim in Flint. Consequently, under MCL 418.851, the magistrate assigned to resolve any disputes concerning Younkin's claim for workers' compensation benefits must hold the

hearings to resolve the disputes in the locality that includes Flint. While reasonable people might disagree as to whether the relevant locality is Flint itself, greater Flint (i.e., Flint and its surrounding communities), or even Genesee County, we agree with the trial court that Dimondale is not sufficiently close to qualify as the "locality where the injury occurred." MCL 418.851. Indeed, as the trial court correctly stated, Dimondale would not qualify as the appropriate "locality" for any injury that occurred in Genesee County.

Notwithstanding the fact that the Legislature unambiguously provided that hearings concerning disputes over workers' compensation claims must be held in the locality where the injury occurred, Zimmer and Hilfinger argue that this Court should not read this statute "literally." Instead, relying on our Supreme Court's decision in *Crane*, they maintain that this Court should construe the statute merely to require that the hearing be held at the site designated by the Hearing System for claims arising in a particular district. That is, they contend that we should read the term "locality" to mean whatever region they happen to designate for purposes of establishing hearing districts, subject only to the limitation that the districts be reasonably convenient for the parties and witnesses involved in the dispute. We do not agree that our Supreme Court's decision in *Crane* eviscerated the Legislature's command that hearings on workers' compensation claims be held in the "locality where the injury occurred" by equating "locality" with any location selected by the Hearing System so long as the site is reasonably convenient for the parties and witnesses.

In *Crane*, the wife of George M. Crane sought and obtained workers' compensation benefits from Crane's employer after Crane died in an accident. *Crane*, 214

Mich at 219-220. Crane worked for his employer in Greenville, Michigan, but accompanied a shipment of produce sent to Chicago. *Id.* at 219. Although it was unclear when he suffered the accident that killed him, Crane apparently died after he left the state. *Id.* at 219-220. On appeal, the employer argued that Michigan's workers' compensation scheme did not apply to accidents occurring out of state. Our Supreme Court, therefore, had to determine—and it emphasized that this was "the only question in this case"—whether the Worker's Disability Compensation Act applied under those circumstances. *Id.* at 220.

The Supreme Court first surveyed the authorities concerning similar compensation schemes and the grounds for concluding that a state's scheme will apply even when the injury giving rise to the claim occurred outside the state. *Id.* at 220-228. From these authorities, the Court concluded that the better understanding is that the provisions of Michigan's workers' compensation scheme apply to accidents occurring out of state as long as the contract for employment arose within this state. *Id.* at 228. Having determined that Michigan's workers' compensation scheme could apply to the employment contract at issue, the Court next considered the argument that the Legislature included provisions within the act, which demonstrated "a legislative intent that it shall not apply to accidents occurring outside the State." *Id.* at 229. One such provision, the employer argued, was the Legislature's requirement that the magistrate hold the hearing to resolve any dispute arising from the claim " 'at the locality where the injury occurred . . . .' " *Id.* at 230, quoting 1915 CL 5461.

In rejecting the employer's contention that this provision suggested that the Legislature intended the Worker's Disability Compensation Act to apply only to

claims involving injuries occurring in this state, our Supreme Court stated that the "provision for the hearings . . . need not be literally followed, the hearing need not be held at the very spot the accident occurred." *Crane*, 214 Mich at 230. The requirement, the Court explained, was "designed that it should be held at a convenient place for parties and their witnesses and does not make void a result reached at some other place in the absence of rights being prejudicially affected." *Id.* Thus, the Court concluded, compensation should not be refused "where it is impracticable to hold the hearing on the very place of the accident." *Id.*

As the Court in *Crane* clarified, the Legislature enacted the geographic limitation for the convenience of the parties and their witnesses, not to express its intent that the act apply only to accidents occurring within this state. *Id.* But this acknowledgment was itself a recognition that the Legislature had made a policy choice in favor of local hearings and that it did so for the benefit of the parties and their witnesses—not for the benefit of magistrates or a more streamlined and efficient administrative system. Moreover, although the Court did state that the geographic limitation should not be read "literally," it did so in the context of determining whether the magistrate's inability to hold the hearing on "the very place" of the accident rendered the result "void." *Id.* And, examining that narrow issue, it opined that, when it is "impracticable" to hold the hearing on "the very place" of the accident, the failure to hold the hearing there will not warrant refusing the claim in the absence of prejudice. *Id.* Consequently, reading the Court's discussion in context, it is evident that our Supreme Court did not hold that the magistrate may ignore the Legislature's command that the hearing be held in the locality where the injury occurred. Rather, it explained that, even when the mag-

istrate cannot follow the Legislature's command because it is impracticable to do so, the failure to hold the hearing at the required location will not be sufficient by itself to refuse the claim—that is, the failure to hold the hearing at the proper place will not "void" the result.[1] *Id.*

We also do not agree with Zimmer and Hilfinger's contention that the trial court erred by giving MCL 418.851 an overly broad interpretation. The statute refers to "the hearing of the claim", but the use of the definite article does not mean that the statute applies only to a single type of hearing. Likewise, the reference to "the claim" does not limit application to only those hearings considering the validity of the initial claim. When MCL 418.851 is read in conjunction with MCL 418.841 and MCL 418.847, there is no doubt that the locality requirement applies to all hearings to resolve disputes concerning a claimant's claim for workers' compensation benefits. While MCL 418.851 does not apply to mere administrative recordkeeping and the processing of a claim, once a party disputes whether and to what extent a claimant is entitled to benefits, the parties have the right to have the dispute resolved by a magistrate at a hearing, which must be held in the "locality where the injury occurred."[2] MCL 418.851. Moreover, while nothing precludes a magistrate from taking evidence, considering arguments, and hearing testimony over multiple hearing dates, MCL 418.851 would apply to each appearance by the magistrate that serves as part of the hearing to resolve the dispute.

---

[1] For that reason, a magistrate's past failure to comply with MCL 418.851 would not warrant relief in the absence of prejudice.

[2] We express no opinion as to whether the parties may waive the statutory right to a hearing in the locality where the injury occurred.

Also, contrary to Zimmer and Hilfinger's contention on appeal, the trial court's order does not require "all events and activity associated with a claimant's file" be held in the locality. Consistently with our construction of MCL 418.851, the trial court's order requires magistrates to hold any and all *hearings* to resolve disputes over workers' compensation claims in the proper locality. The trial court properly limited its writ of mandamus to the clear statutory mandate and did not interfere with Zimmer and Hilfinger's discretion to centralize the administration of hearings or determine the manner by which the magistrates might comply with MCL 418.851. See *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-412; 355 NW2d 75 (1984) (stating that mandamus will not lie "for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies", but clarifying that the writ will lie to compel compliance with a clear legal duty to act, even though it may involve some measure of discretion). Indeed, there is nothing in the trial court's order to prevent Zimmer and Hilfinger from moving all aspects of the administration of claims for workers' compensation benefits to Marquette, Michigan, as long as the magistrates who resolve disputes over those claims travel to the locality where the injury occurred when holding hearings involving those claims.[3] Because the trial court's order does not interfere with Zimmer and Hilfinger's exercise of discretion, beyond those limits that the Legislature imposed, the trial court's decision to grant mandamus did not amount to an improper interference with executive discretion. See *Id.*

[3] By way of example, a magistrate operating out of an office in Dimondale could comply with the statutory mandate by traveling to Flint to hear disputes on scheduled dates.

III. CONCLUSION

With MCL 418.851, the Legislature made a clear policy choice in favor of local hearings; it required magistrates to resolve disputes over workers' compensation claims by holding a hearing "at the locality where the injury occurred." MCL 418.851. Although the failure to hold such hearings at the locality will not "void" the result, see *Crane*, 214 Mich at 230, that fact does not give magistrates the unfettered discretion to ignore the Legislature's directive that the hearings be held in the locality where the injury occurred. Claimants whose injuries occurred within Genesee County have a clear legal right to have disputes over their claims resolved at hearings held within that locality. Similarly, Zimmer and Hilfinger had and have a clear legal duty to ensure that the magistrates who fall under their authority comply with MCL 418.851 and hold the hearings to resolve those disputes in the locality where the injury occurred. Because the trial court properly construed MCL 418.851 as granting claimants a clear legal right to hearings in the locality where the injury occurred and as imposing a clear legal duty on Zimmer and Hilfinger to ensure that the hearings occur in such localities, it did not abuse its discretion when it chose to grant Younkin's request for a writ of mandamus compelling Zimmer and Hilfinger to ensure that the magistrates complied with MCL 418.851. See *In re MCI Telecom Complaint*, 460 Mich at 442-443.

Zimmer and Hilfinger's efforts to streamline the hearing process and conserve the state's resources are without a doubt laudable. And some might readily conclude that the locality requirement stated in MCL 418.851 is unwise, inefficient, and out of date given modern advancements in technology. But those contentions are insufficient to permit this Court to rewrite the

statute under the guise of judicial interpretation. Such arguments are best directed to the branch of our government that the people empowered to make the desired change: the Legislature. See *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 42-43; 732 NW2d 56 (2007), overruled in part on other grounds by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455 (2010).

There were no errors warranting relief.

Affirmed. Because this appeal involved an important question on a public matter, none of the parties may tax their costs. MCR 7.219(A).

FORT HOOD, J., concurred with M. J. KELLY, P.J.

CAVANAGH, J. (*dissenting*). I respectfully dissent. I would hold that the trial court's interpretation of MCL 418.851 was erroneous and, therefore, the trial court's issuance of the writ of mandamus constituted an abuse of discretion.

The statute regarding appropriate venue for workers' compensation claims is MCL 418.851, which provides, in relevant part, that the "hearing shall be held at the locality where the injury occurred . . . ." The dispositive issue here is the meaning of the word "locality." Because the Worker's Disability Compensation Act (WDCA) does not define the word "locality," a dictionary may be consulted to determine the ordinary meaning of the word. See *Cairns v East Lansing*, 275 Mich App 102, 107; 738 NW2d 246 (2007). *Webster's New World Dictionary* (2d college ed, 1974) defines the word "locality" as "a place; district; neighborhood[.]" Similarly, *Random House Webster's Unabridged Dictionary* (1998) defines "locality" as "a place, spot, or district, with or without reference to things or persons in it or to

occurrences there" and "the state or fact of being local or having a location[.]" The word "local" means "pertaining to or characterized by place or position in space; spatial" and "pertaining to a city, town, or small district rather than an entire state or country[.]" *Id*. Because the word "locality" is used in the context of the venue provision of the WDCA, I also note that *Black's Law Dictionary* (7th ed) defines "locality" as "[a] definite region; vicinity; neighborhood; community."

Plaintiff argued, and the majority appears to agree, that the correct definition of "locality" in the context of workers' compensation claims is community, vicinity, or neighborhood. I do not agree. "Statutory language should be construed reasonably, keeping in mind the purpose of the act." *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 43; 672 NW2d 884 (2003). Clearly, it would not be reasonable or feasible for a hearing to be held in every neighborhood or community in which an employee is injured. And in designating the appropriate venue for hearings in workers' compensation cases, the Legislature did not specifically state that the hearing must be held in the "city" or "county" where the injury occurred. If that was the Legislature's intention, it could have used those terms. See, e.g., MCL 600.1621 and 600.1629. "A court must not judicially legislate by adding into a statute provisions that the Legislature did not include." *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998).

In this case, defendants clearly interpreted the meaning of the word "locality" to include "district" and "definite region." Consequently, defendants divided the state into several reasonably located hearing districts, and workers' compensation claims are assigned from definite regions of the state to particular hearing-district offices. While the majority concedes that a

locality is commonly understood to mean a region, the majority concludes that the region must be the municipality where the injury occurred. But an agency's interpretation of a statute, although not binding on the courts, is entitled to "respectful consideration" and, if persuasive, should not be overruled without "cogent reasons." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103, 108; 754 NW2d 259 (2008) (citation and quotation marks omitted). I would conclude that defendants' interpretation of MCL 418.851, and their establishment of reasonably located hearing district offices throughout the state that service definite regions of the state, comports with the fair and natural import of the word "locality" in view of the subject matter of the statute—workers' compensation claims. See *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). Defendants' interpretation does not conflict with the Legislature's intent as expressed in the language of MCL 418.851. See *In re Complaint of Rovas Against SBC Mich*, 482 Mich at 103.

I am also cognizant of the fact that a "strong rationale" for the WDCA is to provide injured employees with "expeditious" relief. See *Maiuri v Sinacola Constr Co*, 12 Mich App 22, 27; 162 NW2d 344 (1968). Considering the realities of budgetary constraints and the limited number of magistrates, as well as the summary nature of workers' compensation proceedings, requiring hearing locations in every community, neighborhood, or municipality would not only be extremely costly and unnecessary, but would defeat a significant purpose of the WDCA, which is to provide expeditious relief to claimants. I agree with plaintiff's argument that defendants cannot disregard their statutory duty because of a reduction in state funding. However, I would conclude that defendants fulfilled their duty under MCL 418.851 by establishing reasonably located

hearing district offices throughout the state that service definite regions of the state.

Further, when interpreting a statute, the purpose of the statute should be harmonized with the entire statutory scheme. *Petersen v Magna Corp*, 484 Mich 300, 340; 773 NW2d 564 (2009) (opinion by HATHWAY, J.). In that regard I note that Executive Order No. 2011-4, compiled at MCL 445.2030, states that the Michigan Administrative Hearing System (MAHS) is to provide efficient, fair, and responsive services. Specifically, the executive order provides that it was designed to (1) "reorganize functions among state departments to ensure efficient administration," (2) ensure the most efficient use of taxpayer dollars by providing more "streamlined" services, (3) centralize "administrative hearing functions" so as to "eliminate unnecessary duplication and streamline the delivery of necessary services," and (4) "achieve greater efficiency by abolishing harmful, redundant, or obsolete government agencies[.]" "Once an executive order survives potential legislative disapproval, and achieves the force of law, there is no basis on which to distinguish between it and a statute; each has passed the scrutiny of the Legislature and deserves to be enforced as such." *Soap & Detergent Ass'n v Natural Resources Comm*, 103 Mich App 717, 729; 304 NW2d 267 (1981). As discussed earlier in this opinion, I conclude that interpreting the word "locality" to recognize the use of several hearing districts reasonably located throughout the state to process and adjudicate workers' compensation claims that are assigned from definite regions of the state is consistent with the entire statutory scheme.

In this case, defendants sought to close the Flint district office and transfer all workers' compensation claims arising in Genesee County, including plaintiff's

claim, from the Flint district office to the Dimondale district office, which is located within 70 miles of Genesee County. I would hold that defendants' actions were permissible under MCL 418.851. Although plaintiff argues that defendants' interpretation of the venue statute would allow them to transfer workers' compensation claims to remote places or even to a single location in the name of efficiency, that scenario simply is not present in this case. At issue here is whether the Dimondale district office is a proper venue for workers' compensation claims that arose in Genesee County and I would conclude that it is an appropriate venue under MCL 418.851.

In summary, I would hold that plaintiff failed to establish that he had a clear legal right to have his workers' compensation claim adjudicated at the Flint district office or in Genesee County; therefore, plaintiff was not entitled to a writ of mandamus. Accordingly, I would reverse the trial court's order granting plaintiff's request for a writ of mandamus.

In re NAPIERAJ

Docket No. 314305. Submitted April 9, 2014, at Detroit. Decided April 15, 2014, at 9:05 a.m.

The Oakland County Prosecutor's Office filed a petition in the Oakland Circuit Court, Family Division, alleging that respondent, Arek Napieraj, a minor, was guilty of truancy as a result of his unexcused absences from school. A referee determined that respondent was guilty of truancy. The trial court, Elizabeth Pezzetti, J., agreed and adopted the referee's conclusion. Respondent appealed.

The Court of Appeals *held*:

The trial court should have granted respondent's motion for a directed verdict at the close of petitioner's proofs on the basis that there was insufficient evidence to support the resulting adjudication of guilt under MCL 712A.2(a)(4). The statute provides that a trial court may exercise jurisdiction over a juvenile when the juvenile "willfully and repeatedly absents himself or herself from school." The statute does not define "willfully," but a legal dictionary defines "willful" as voluntary and intentional, but not necessarily malicious. Michigan caselaw provides that willful involves design and purpose and means intentional. The caselaw also provides that a thing may be done willfully without bad faith and that when a statute prohibits the willful doing of an act, the act must be done with the specific intent to bring about the particular result that the statute seeks to prohibit. The referee failed to discuss the willfulness of respondent's conduct and assumed jurisdiction on the basis of her experience as a former teacher, not on the basis of the facts and the law presented. The record indicates that respondent's conduct was not willful as contemplated under MCL 712A.2(a)(4). Under the facts of this case, respondent's mother exercised reasonable parental discretion in requesting that the absences be excused. The order of the trial court is reversed and the case is remanded for the entry of an order of dismissal by the trial court.

Reversed and remanded.

Jessica R. Cooper, Prosecuting Attorney, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for petitioner.

Tomala Legal Group, PLLC (by *Wayne T. Tomala*), for respondent.

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM. Respondent, Arek Napieraj, appeals as of right an order of disposition following his adjudication of guilt on one count of school truancy, MCL 712A.2(a)(4). Finding insufficient evidence that respondent's absences were "willful," we reverse.

I. BASIC FACTS

Respondent had a history of frequent absences from school and in September 2011, school officials met with respondent's mother and respondent to discuss the fact that respondent had already missed four days of school and the school year was just underway. Respondent's mother explained "I told them that it was an ongoing problem . . . from bullying, he felt he was being bullied in school and he would actually be physically ill in the morning for several hours. He would get up to start his day at like 6:00 a.m. and he would get sick." School officials responded that "[i]t wasn't an excuse and that he needed to come to school and tell them if he was being bullied and they would take care of it."

Respondent and his mother were called for another meeting in February 2012 to discuss respondent's continued absences. They discussed the parameters of legitimate, excused absences. Respondent's mother was advised that respondent needed to improve his atten-

dance and that there was "zero tolerance" for unexcused absences. School officials told respondent's mother that a doctor's note was required for all absences. Respondent missed three days of school following the February meeting, prompting school officials to request the prosecutor's office to send its standard warning letter, and ultimately, file a formal petition.

At the hearing on the petition, school officials testified that respondent's absences persisted and were deemed unexcused because they were not explained by a doctor's note. Respondent's mother testified that respondent's attendance had improved and that he only missed two days in March 2012 because he was competing at a dog show in Kentucky—an activity recommended by respondent's therapist. Respondent missed two or three days after that because of "a stomach bug" and when he had a migraine headache, a symptom of his Asperger's syndrome. Respondent's mother testified that she was hesitant to take him to the doctor's office because it cost between $50 and $200 per visit. She believed that only "cluster absences"—those greater than two days—needed a doctor's note.

The trial court adopted the referee's conclusion that respondent was guilty of truancy.[1] Respondent now appeals as of right.

II. ANALYSIS

On appeal, respondent argues that the trial court should have granted his motion for a directed verdict at the close of petitioner's proofs and that there was

[1] When the dispositional hearing was held, the referee, noting respondent's improved grades, placed respondent on probation. Respondent ultimately moved to Texas and the trial court terminated jurisdiction in April 2013.

insufficient evidence to support the resulting adjudication of guilt under MCL 712A.2(a)(4). We agree.

"In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (citation and quotation marks omitted). Similarly, a defendant's challenge to the sufficiency of the evidence is reviewed de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). Finally, issues of statutory interpretation are likewise reviewed de novo on appeal. *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006).

The truancy statute, MCL 712A.2(a)(4), provides that a trial court may exercise jurisdiction over a juvenile when the juvenile "willfully and repeatedly absents himself or herself from school . . . ." Respondent argues that his absences were not "willful" because they should have been deemed excused.

"Willful" is not defined in the statute. "The fundamental rule of statutory construction is to discern and give effect to the intent of the Legislature. If statutory language is clear and unambiguous, the Legislature must have intended the meaning it expressed, and the statute must be enforced as written." *People v Venticinque*, 459 Mich 90, 99-100; 586 NW2d 732 (1998) (citation omitted). "Undefined words are to be given meaning as understood in common language, considering the text and the subject matter in which they are

used." *People v Lanzo Constr Co*, 272 Mich App 470, 474; 726 NW2d 746 (2006). However,

> The Legislature has instructed that any "technical words and phrases" that "have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." [MCL 8.3a; see also Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.").] And in the criminal-law context, common-law doctrine informs the meaning of a statute when the Legislature uses common-law terms. [*People v Smith-Anthony*, 494 Mich 669, 676-677; 837 NW2d 415 (2013).]

Black's Law Dictionary (9th ed) defines "willful" as "[v]oluntary and intentional, but not necessarily malicious." "[W]ilful involves design and purpose" and "means intentional." *Jennings v Southwood*, 446 Mich 125; 139–140; 521 NW2d 230 (1994) (citation and quotation marks omitted). However, "[a] thing may be done wilfully without bad faith." *Peters v Gunnell, Inc*, 253 Mich App 211, 220 n 8; 655 NW2d 582 (2002). Importantly, "when a statute prohibits the willful doing of an act, the act must be done with the specific intent to bring about the particular result the statute seeks to prohibit." *People v Janes*, 302 Mich App 34, 41; 836 NW2d 883 (2013) (quotation marks and citation omitted).

At the conclusion of respondent's case and in the face of the evidence presented by each side, the referee announced her verdict:

> *The Court*: Okay, I taught for ten years, you're found guilty.
>
> *Mr. Tomala* [respondent's counsel]: I'm sorry?
>
> *The Court*: He's guilty.

> *Mr. Tomala*: No, what—
>
> *The Court*: He was—he's found guilty, he had more than one unexcused absence. There was a petition filed, I don't have any re—just because his attendance improved is—get me a case that says if his attendance improved I don't take jurisdiction. There is none cause that's not the law. They may have wanted his attendance to improve but I wanted him to be in school all the time. He didn't do it, he is guilty of school truancy.
>
> *Mr. Tomala*: Just so I'm clear then, your—your statement is that any absence, we're talking strict liability, any absence results—
>
> *The Court*: Any absence—
>
> *Mr. Tomala*: —in a truancy?
>
> *The Court*: —without a doctor's excuse is school truancy.

This was clear error. Clear legal error occurs "when a court incorrectly chooses, interprets, or applies the law." *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011). Here, the referee distorted truancy from an act requiring repeated, willful conduct to one of strict liability. "A strict-liability crime is one for which the prosecutor need only prove that the defendant performed the act, regardless of intent or knowledge." *People v Adams*, 262 Mich App 89, 91; 683 NW2d 729 (2004). However, "Michigan courts must infer a criminal intent for every offense in the absence of an express or implied Legislative intent to dispense with criminal intent." *Janes*, 302 Mich App at 53. MCL 712A.2(a)(4) specifies that a juvenile must have *willfully* absented himself or herself from school. The referee's cryptic statement fails to discuss the willfulness of respondent's conduct. In addition, the referee's assumption of jurisdiction appears predicated merely on her experience as a former teacher, rather than on the facts and the law presented in this case. Respondent was entitled to individual consideration based upon the law and facts

applicable to his case, not on anecdotal experiences of the hearing officer. See *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009).

Our review of the record compels a finding that respondent's conduct in this case was not willful as contemplated under MCL 712A.2(a)(4). Petitioner's own witnesses admitted that certain of respondent's absences were attributable to illness and fear of bullying. Moreover, petitioner's own attendance record categorized many of respondent's absences as "excused," although the school official testified, in essence, that "excused" did not mean "excused" for purposes of the allegations made in the petition against respondent. The official testified that the designation "E-P" on the attendance record indicated "excused, parent called [in]," and the notation "E-IL" designated "excused for illness," a circumstance where a parent called to report that the student was home sick. The official was unsure what the "E-PC" designation indicated—he speculated that it was a parent call-in—and that "R" indicated an absence due to a school-related function, which absence would not be considered as truant. When asked about the use of the word "excused" on the attendance record in light of the school's position that, instead, the referenced absences were in fact "unexcused," the official said, "[y]ou know, I—excused is an interesting term. It just means a parent called." Thus, it appears that respondent's attendance record says one thing but means another and that certain "excused" absences were in reality "unexcused."

Respondent's mother provided the reasons for respondent's absences. Respondent was being bullied in school and he would periodically become physically ill and vomit in the morning for several hours; again, petitioner conceded it had received reports of bullying. Respondent's mother also provided a doctor's note to

the school excusing certain of the disputed absences, and excused two days in March 2012 because respondent was competing at a dog show in Kentucky—an activity recommended by respondent's therapist. Respondent missed two or three days after that because of "a stomach bug" and when he had a migraine headache, a symptom of his Asperger's syndrome. Finally, respondent's mother explained that she was hesitant to take her son to the doctor's office because it cost between $50 and $200 per visit. This evidence was not disputed, except by testimony stating the school's position that the absences noted as excused on the attendance sheet were, in fact, apparently secretly unexcused, and that any absence required a doctor's note. We conclude that, under these facts, respondent's mother exercised reasonable parental discretion and that the absences should have been deemed excused at her request.

On this record, and contrary to the notion that respondent's absences were "voluntary or intentional," the evidence militates against a conclusion that respondent's absences were "willful" within the meaning of MCL 712A.2(a)(4). The referee failed to address the evidence presented on the record or make any reference to the "willful" element of the statute under which respondent was charged. Indeed, the referee made no findings of fact or conclusions of law of any kind and does not appear to have applied the law to the facts of the case in any way. It appears rather that the referee substituted her personal experience and bias and failed to apply the law to the facts; such a position is untenable.

Reversed and remanded for entry of an order of dismissal.

BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ., concurred.

MACOMB COUNTY DEPARTMENT OF HUMAN SERVICES v ANDERSON

Docket No. 313951. Submitted April 9, 2014, at Detroit. Decided April 15, 2014, at 9:10 a.m.

The Macomb County Department of Human Services (DHS) and Jessica Glambin filed a complaint in the Macomb Circuit Court, Family Division, against Keith Anderson, seeking child support for Glambin's minor child. The complaint alleged that Anderson did not live with the child but had acknowledged that he was the father. The complaint also alleged that Anderson had the ability to provide support for the child. A default was entered against Anderson for his failure to respond to the summons and complaint. The DHS and Glambin filed a motion for a default judgment. At the hearing on the motion, an assistant prosecuting attorney was present on behalf of the DHS but Glambin and Anderson failed to appear. The trial court, Tracey A. Yokich, J., noting Glambin's failure to appear at the hearing, declined the request to order child support and dismissed the matter without prejudice. The court thereafter denied a motion for reconsideration by the DHS and Glambin. The DHS and Glambin appealed.

The Court of Appeals *held*:

1. The trial court abused its discretion when it denied the motion for reconsideration. There was no dispute regarding custody of the child at the time of the default hearing. Because Anderson failed to respond to the allegations in the verified complaint by the DHS and Glambin, the allegations contained therein, including that custody was not in dispute, are considered true. Even if there was a custody dispute, MCL 552.452(4) provides for the issuance of a support order even if there is a custody dispute.

2. MCL 552.452(1) does not require a custodial parent to appear at a hearing on a complaint for support in order for a trial court to enter an order of support. The trial court erred when it dismissed the complaint on the basis of Glambin's failure to appear at the hearing on the motion for a default judgment. The order dismissing the claim is vacated and the case is remanded to the trial court for further proceedings.

Vacated and remanded.

1. PARENT AND CHILD — FAMILY SUPPORT ACT — CHILD SUPPORT — ACTIONS.

The Family Support Act permits actions for child support against a noncustodial parent by either a custodial parent or the appropriate county department of social services if the child is supported by public assistance; the prosecuting attorney shall act as the attorney for the petitioner in such actions (MCL 552.451b; MCL 552.454(1)).

2. PARENT AND CHILD — FAMILY SUPPORT ACT — CHILD SUPPORT — CUSTODY DISPUTES.

Section 2(4) of the Family Support Act provides for the issuance of a child support order even if there is a custody dispute (MCL 552.452(4)).

3. PARENT AND CHILD — FAMILY SUPPORT ACT — CHILD SUPPORT — HEARINGS — PRESENCE OF CUSTODIAL PARENT.

Nothing in the plain language of § 2(1) of the Family Support Act requires a custodial parent to appear at a hearing on a complaint for child support under the act (MCL 552.452(1)).

Eric J. Smith, Prosecuting Attorney, *Kathleen Quigley*, Chief of Federal Division, and *Beth Naftaly Kirshner*, Assistant Prosecuting Attorney, for the Macomb County Department of Human Services and Jessica Glambin.

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM. Plaintiffs, Macomb County Department of Human Services (DHS) and Jessica Glambin (Glambin), appeal as of right an order dismissing plaintiffs' claim against defendant, Keith Anderson, in this child support enforcement action brought under the Family Support Act, MCL 552.451 *et seq*. Finding that the trial court erred by dismissing the action for Glambin's failure to appear at the evidentiary hearing on plaintiffs' motion for a default judgment of support, we vacate the order of dismissal and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs filed a verified complaint for support against defendant. The complaint alleged that defendant did not live with the minor child but had acknowledged that he was the father. It further alleged that defendant had the ability to provide support for the child.

A default was entered against defendant for his failure to respond to the summons and complaint and thereafter plaintiffs filed a motion for a default judgment. At the hearing on plaintiffs' motion, the assistant prosecuting attorney was present on behalf of DHS; however, Glambin and defendant failed to appear. The following exchange took place:

> *The Court*: Is Jessica Glambin in the courtroom, please.
>
> *Ms. Kirschner*: Beth Naftaly Kirshner, assistant prosecuting attorney on behalf of plaintiff.
>
> This is circuit court file number 2012-1202-DS. Excuse me. We're asking that you enter a default judgement [sic] of support in this matter.
>
> The defendant was personally served by our investigator on March 23rd of 2012. He failed to appear for a support interview in June. A default was entered on June 14th, notice of this hearing, along with a copy of the proposed judgement [sic] were mailed to him on July 27th of 2012. Because he failed to appear, on behalf of DHS and the plaintiff, we're asking that you enter an order in the amount of $403, effective February 27, 2012.
>
> *The Court*: This matter was set for 9:00 a.m. Plaintiff, Jessica Glambin, having failed to appear, as well as the respondent, defendant, Keith Anderson, the Court's going to decline the request to enter the support order today, dismiss the matter without prejudice.
>
> *Ms. Kirshner*: Again, for the record, I would indicate that we contract with DHS for [Title IV-D] services and we

> would ask that you enter on behalf of DHS, whether the plaintiff is cooperative or not.
>
> *The Court*: Thank you. Your request is respectfully denied.

Plaintiffs filed a motion for reconsideration, arguing that the court erred by dismissing plaintiffs' case on the basis of Glambin's failure to appear. Plaintiffs argued that, pursuant to MCL 552.452, Glambin was not required to be present at the hearing. Plaintiffs requested that the case be reinstated and that a default judgment of support be entered as originally requested.

The trial court denied the motion for reconsideration, finding no palpable error. The trial court explained its ruling:

> The Prosecutor relies on MCL 552.452, which provides in part that:
>
> > (1) Upon the hearing of the complaint, in the manner of a motion, the court may enter an order as it determines proper for the support of the petitioner and the minor child . . . [.]
>
> While Glambin's presence at the hearing was not technically required under the statute, the Court still had the discretion to deny the Prosecutor's motion to enter the default Judgment of Support for her failure to appear inasmuch as the statute uses the permissive term "may" with respect to the Court's obligation to enter a support order. . . . The Court points out that Glambin failed to appear despite having been given notice that the hearing was set for September 24, 2012 at 9:00 A.M.
>
> MCL 552.452 also provides that:
>
> > (4) If there is no dispute regarding a child's custody, the court shall include in an order for support issued under this act specific provisions governing custody of and parenting time for the child in accordance with the child custody act of 1970, 1970 PA 91, MCL 722.21 to 722.31. . . [.]

> The proposed Judgment of Support contained specific provisions awarding sole custody to Glambin and reasonable parenting time to Anderson. In that both parties failed to appear at the hearing, the Court was unable to determine whether there was a dispute with regard to the child's custody.

Therefore, the verified complaint for support remained dismissed without prejudice. Plaintiffs now appeal as of right.

II. ANALYSIS

On appeal, plaintiffs argue that the trial court erred when it denied their motion for reconsideration. We agree. We review for an abuse of discretion a trial court's decision on a motion for reconsideration. *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011). An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008).

MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The rule does not categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled on; in fact, it allows considerable discretion to correct mistakes. *In re Moukalled Estate*, 269 Mich App 708, 714; 714 NW2d 400 (2006). We conclude that the trial

court abused its discretion when it denied plaintiffs' motion for reconsideration. In so doing, the trial court failed to correct its original error in dismissing the complaint on the basis of Glambin's failure to appear at the hearing on plaintiffs' motion for a default judgment.

Resolution of this case rests on our interpretation of provisions in the Family Support Act. We review de novo issues of statutory interpretation. *Lenawee Co v Wagley*, 301 Mich App 134, 167; 836 NW2d 193 (2013). "A court's primary purpose in interpreting a statute is to ascertain and effectuate legislative intent." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). "The words contained in a statute provide us with the most reliable evidence of the Legislature's intent." *Green v Ziegelman*, 282 Mich App 292, 301; 767 NW2d 660 (2009). For that reason, "[i]f the language is clear and unambiguous, the statute must be enforced as written without judicial construction." *Petipren v Jaskowski*, 494 Mich 190, 201-202; 833 NW2d 247 (2013).

"Child support is not imposed for the benefit of the custodial parent, but rather to satisfy the present needs of the child." *Pellar v Pellar*, 178 Mich App 29, 35; 443 NW2d 427 (1989). "The Family Support Act . . . attempts to keep the public from having to support children whose parents are able to provide some financial support." *Witt v Seabrook*, 210 Mich App 299, 302; 533 NW2d 22 (1995). MCL 552.451b specifically provides:

> The director of social services or his or her designated representative or the director of the county department of social services of the county where the custodial parent or minor child or children or child or children who have reached 18 years of age reside or the director's designated representative may proceed in the same manner and under the same circumstances as provided in sections 1 and 1a [MCL 552.451 and MCL 552.451a] against the noncusto-

> dial parent for the support of the custodial parent and minor child or children or child or children who have reached 18 years of age if the custodial parent and minor child or children or child or children who have reached 18 years of age or any of them are being supported, in whole or in part, by public assistance under the social welfare act, Act No. 280 of the Public Acts of 1939, as amended, being sections 400.1 to 400.121 of the Michigan Compiled Laws. The burden of proof shall be the same as provided in section 2 [MCL 552.452].

Thus, the statutory scheme "permits actions for child support against a noncustodial parent by *either* a custodial parent *or* the director of social services (now the director of the Family Independence Agency) if the child is supported by public assistance." *LME v ARS*, 261 Mich App 273, 279-280; 680 NW2d 902 (2004), citing MCL 552.451a and MCL 552.451b (original emphasis omitted; new emphasis added). In such actions, "the prosecuting attorney shall act as the attorney for the petitioner." MCL 552.454(1).

At issue in this case is the trial court's interpretation of MCL 552.452(1) and (4), which provide, in relevant part:

> (1) Upon the hearing of the complaint, in the manner of a motion, the court may enter an order as it determines proper for the support of the petitioner and the minor child or children of the parties as prescribed in section 5 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605. The order shall provide that payment shall be made to the friend of the court or the state disbursement unit. If the parent complained of opposes the entry of the order upon the ground that he or she is without sufficient financial ability to provide necessary shelter, food, care, clothing, and other support for his or her spouse and child or children, the burden of proving this lack of ability is on the parent against whom the complaint is made. . . .
>
> * * *

> (4) If there is no dispute regarding a child's custody, the court shall include in an order for support issued under this act specific provisions governing custody of and parenting time for the child in accordance with the child custody act of 1970, 1970 PA 91, MCL 722.21 to 722. 31. If there is a dispute regarding custody of and parenting time for the child, the court shall include in an order for support issued under this act specific temporary provisions governing custody of and parenting time for the child. Pending a hearing on or other resolution of the dispute, the court may refer the matter to the office of the friend of the court for a written report and recommendation as provided in section 5 of the friend of the court act, 1982 PA 294, MCL 552.505. In a dispute regarding custody of and parenting time for a child, the prosecuting attorney is not required to represent either party regarding the dispute.

In denying plaintiffs' motion for reconsideration, the trial court explained that it was "unable to determine whether there was a dispute with regard to the child's custody," referring to MCL 552.452(4). However, defendant failed to respond to the allegations in plaintiffs' verified complaint, rendering the allegations true. "It is an established principle of Michigan law that a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). Therefore, custody was not "in dispute" at the time of the default hearing; in fact, the record reflects that custody was completely uncontested.[1] Moreover, MCL 552.452(4)

[1] We also note that defendant established paternity by way of an affidavit of parentage. In such situations, "[t]he mother has initial custody of the child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time." (Department of Community Health Form DCH-0682.) Defendant has made no attempt to challenge the parties' custody arrangement.

specifically provides for the issuance of a support order even if there *is* a custody dispute.

The trial court further cited the permissive use of the phrase "may enter an order" in MCL 552.452(1) as justification for refusing to enter a support order. However, there is nothing in the plain language of the statute requiring the custodial parent to appear at the hearing. In fact, MCL 552.454(1) specifically provides that "the prosecuting attorney shall act as the attorney for the petitioner," lending further support to the idea that a custodial parent's presence is unnecessary. And while the prosecuting attorney admits that he does not represent individuals as plaintiffs in support actions, it certainly represents the interests of both the DHS and the public in ensuring that non-custodial parents with the ability to provide financial support do so if their children are receiving public assistance. Requiring the custodial parent's presence at a hearing under MCL 552.452 could potentially impede the DHS's statutory right to seek support from a noncustodial parent if the custodial parent is uncooperative.

We find instructive the case of *Arnett v Arnett*, 98 Mich App 313; 296 NW2d 609 (1980), wherein the plaintiff, the child's custodial parent, filed an action for support against the defendant, who was the noncustodial parent. As here, "[t]he complaint [was] a form, presumably prepared by the prosecutor's staff or the Jackson County Department of Social Services, with blanks filled in by a typewriter, except for the signatures of the plaintiff, an assistant prosecuting attorney, and a notary public." *Id.* at 314. The defendant did not file an answer to the complaint, but appeared at the evidentiary hearing. "The record [was] silent as to whether or not the plaintiff appeared at the hearing." *Id.* At the hearing, the prosecutor intended to question

the defendant about his ability to pay, but the trial court insisted that the prosecutor first adduce proof of the marriage and paternity. When the prosecutor declined to do so, the trial court dismissed the action, finding that without information regarding marriage and paternity it lacked jurisdiction to grant relief. *Id.* at 314-315. This Court expressed its confusion:

> Although the [trial court's] order [of dismissal] seems to telegraph a *Serafin*[2] issue by the words "establish a right to support from the defendant by questioning of the defendant", it would be clear error to preclude the plaintiff herself from giving such testimony. So we are left with a bundle of surmises. Was the plaintiff uncooperative and/or unavailable? Was the defendant, though in default, unlettered, unrepresented? Was the defendant denying paternity? Were court and counsel involved in a procedural contest? Were court and counsel desirous of an appellate court precedent on the matter?
>
> It is such a tempest in a teapot that we are engaged in what amounts to a declaratory proceeding, but we will declare. [*Id.* at 315-316.]

This Court then cited MCL 552.451 and MCL 552.452 and noted that "[t]he fact that the [Family Support] [A]ct requires filing of a verified complaint rather than a complaint accompanied by a supporting affidavit of facts, and that the complaint be heard in the manner of a motion demonstrates a legislative intent to provide an expeditious procedure for obtaining child support orders." *Arnett*, 98 Mich App at 317. And, because the defendant offered no responsive pleading, "the claim or demand of the opposing party stands admitted, and judgment by default may be entered upon proof of damages . . . . Because plaintiff's allegations were ad-

---

[2] *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977) (permitting husband and wife to rebut the presumption that a child born during the marriage was an issue of the marriage).

mitted, and, therefore, not at issue before the court, the court certainly could have accepted as fact the marriage and paternity information submitted under oath in her verified complaint." *Id.* (citations omitted). Nevertheless, "examination into defendant's financial status was necessary, despite his failure to respond to the complaint." *Id.* This Court concluded that the prosecutor should have been permitted to cross-examine the defendant on his ability to pay without first proving the existence of a marriage or paternity. *Id.* at 317-318.

Similarly here, given defendant's failure to respond to plaintiffs' complaint, the allegations therein were deemed admitted, including Glambin's claim that custody was not in dispute. Had defendant appeared at the evidentiary hearing, he may have been permitted to present evidence that he did not have the ability to pay and it would have been his burden to do so. Absent such a claim, his ability to pay was likewise deemed admitted and otherwise uncontested. Moreover, as seen in *Arnett*, the custodial parent need not attend the hearing in order for the trial court to enter an order of support. The *Arnett* Court had no trouble resolving the issue before it, even absent proof that the custodial parent attended the hearing. The trial court erred when it dismissed the complaint on the basis of Glambin's failure to appear at the hearing on plaintiff's motion for a default judgment. Consequently, the trial court abused its discretion by denying the motion for reconsideration.

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

BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ., concurred.