MICHIGAN APPEALS REPORTS

CASES DECIDED

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COURT OF APPEALS

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COURT OF APPEALS CASES

DUCHARME v DUCHARME

Docket No. 314736. Submitted April 1, 2014, at Lansing. Decided April 17, 2014, at 9:00 a.m. Leave to appeal sought.

Donn R. Ducharme brought an action in the Eaton Probate Court against his sister Michelle K. Ducharme, alleging that defendant violated her fiduciary duties as trustee of two trusts established by their parents. Defendant moved for summary disposition under MCR 2.116(C)(7), asserting that the action was barred by the applicable statute of limitations. Plaintiff argued that the one-year period of limitations set forth in MCL 700.7905(1)(a) did not bar his action because his claims sounded in tort, the complaint was filed within one year of the supplement to the final accounts, and because the trusts were not finalized. The court, Thomas K. Byerley, J., granted the motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 700.7901(1) of the Michigan Trust Code (MTC), MCL 700.7101 *et seq*., defines "breach of trust" as a violation by a trustee of a duty the trustee owes to a trust beneficiary. Plaintiff's claims of (1) breach of fiduciary duty, (2) conversion of assets, (3) abuse of authority and commingling of trust and personal assets, (4) breach of the duty of impartiality, and (5) fraud and misrepresentation all involved allegations that defendant breached her duties as trustee in her administration of the trusts. And plaintiff claimed he had standing to bring suit given his interests in the trusts as a trust beneficiary. Thus, plaintiff alleged in each count of his complaint a violation by a trustee of a duty the trustee owed to a trust beneficiary. Therefore, the statute of limitations set forth in the MTC, MCL 700.7905, applied.

2. Under MCL 700.7905(1)(a), a trust beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding. The statute does not require that the trust be terminated or that a final report have been issued in order for the one-year period to begin running. Under MCL 700.7104(1), a person

has knowledge of a fact if (1) the person has actual knowledge of it, (2) the person has received a notice or notification of it, or (3) from all the facts and circumstances known to the person at the time in question, the person has reason to know it. In this case, the trust accounting reports provided to plaintiff disclosed the one-year period for commencing a proceeding alleging breach of trust. Those reports also disclosed the issues that provided the basis for plaintiff's complaint, and plaintiff's own communications demonstrated his knowledge of potential claims in light of disclosures made in the reports. Because the reports adequately disclosed the existence of a potential claim for breach of trust and informed plaintiff of the time allowed for bring a claim, the trial court properly granted summary disposition on the ground that the claims were barred under MCL 700.7905(1)(a).

Affirmed.

1. TRUSTS — BREACH OF TRUST — DEFINITION.

MCL 700.7901(1) of the Michigan Trust Code (MTC), MCL 700.7101 *et seq*., defines "breach of trust" as a violation by a trustee of a duty the trustee owes to a trust beneficiary; claims involving a breach of trust fall under the MTC and are subject to the period of limitations set forth in the MTC, MCL 700.7905, even if the claims are not labelled as breach-of-trust claims.

2. TRUSTS — BREACH OF TRUST — STATUTE OF LIMITATIONS.

Under MCL 700.7905(1)(a), a trust beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding; the statute does not require that the trust be terminated or that a final report have been issued in order for the one-year period to begin running.

McCoy Law, PLLC (by *Sheila K. McCoy*), for plaintiff.

Foster, Swift, Collins & Smith, PC (by *David R. Russell* and *Joseph J. Viviano*), for defendant.

Amicus Curiae:

Warner Norcross & Judd LLP (by *Matthew T. Nelson* and *Julie Lam*) for the Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan.

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

PER CURIAM. Plaintiff and defendant are siblings and beneficiaries of two trusts established by their parents. Defendant is the appointed successor trustee of the trusts. Plaintiff alleges that defendant violated her fiduciary duties as trustee. In lieu of an answer to plaintiff's complaint, defendant filed a motion for summary disposition, which was granted by the probate court pursuant to MCR 2.116(C)(7) (statute of limitations). Plaintiff appeals as of right. We affirm.

I. FACTS

Donald Ducharme and Marlene Ducharme established trusts in their names on December 23, 1997. Plaintiff and defendant were the beneficiaries of the trusts. Each parent was the initial trustee of their own nominal trust. Marlene passed away in 2005 and the Marlene R. Ducharme Family Trust (the Family Trust) was created. The Family Trust contained funds in excess of the federal estate tax exemption. Donald passed away March 11, 2009. Defendant was appointed successor trustee to both the Family Trust and the Donald R. Ducharme Trust (the Donald Trust) on March 18, 2009. She administered the trusts and issued annual reports from 2009 through 2011.

On June 10, 2010, defendant provided to plaintiff a copy of the amended first annual account of the Donald Trust. On June 16, 2011, defendant provided to plaintiff a copy of the final account of the Donald Trust through June 15, 2011. Also on June 16, 2011, defendant provided to plaintiff the final account of the Family Trust through June 15, 2011. On June 21, 2011, defendant provided to plaintiff amended final accounts for both the Donald Trust and the Family Trust that reflected

past due legal fees and account advisor fees that had been overlooked. On July 14, 2011, plaintiff replied and indicated that he wished distributions to continue, but that he had several remaining unanswered questions. On November 2, 2011, defendant sent to plaintiff supplements to the final account for both the Donald Trust and the Family Trust, "indicating minor adjustments since June 15, 2011," and including checks reflecting "full satisfaction of Donn R. Ducharme's interest" in both the Donald Trust and the Family Trust. The annual accounts for both the Donald Trust and the Family Trust included a notice that a beneficiary may not bring an action against a trustee for breach of trust if more than a year has elapsed since the sending of a report. Neither the amended report nor the supplement to the final account for either the Donald Trust or Family Trust contained such a disclaimer.

Plaintiff filed a five-count complaint against defendant on October 31, 2012, alleging claims for breach of fiduciary duty, conversion of assets, commingling of assets of companies and trusts, violation of impartiality as trustee, and fraud and misrepresentation. In lieu of an answer, defendant filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). The probate court found that reports provided to plaintiff no later than June 22, 2011, disclosed each of these potential claims. The court held that the claims were properly categorized as breaches of trust and were, therefore, time-barred by the applicable one-year statute of limitations set forth in MCL 700.7905(1)(a).

II. DISCUSSION

Plaintiff argues on appeal that summary disposition was inappropriate because the claims sounded in tort, because plaintiff objected to the accountings and the

complaint was filed within one year of the supplement to the final accounts, and because the trusts still contained property and were not finalized.

We review de novo both a grant of summary disposition under MCR 2.116(C)(7), *Bint v Doe*, 274 Mich App 232, 233; 732 NW2d 156 (2007), and the interpretation and application of a statute, *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). The foremost rule of statutory construction or interpretation is to discern and give effect to the intent of the Legislature. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). "An appeal of a decision of the probate court, however, is on the record; it is not reviewed de novo. This Court reviews the probate court's factual findings for clear error and its dispositional rulings for an abuse of discretion." *In re Lundy Estate*, 291 Mich App 347, 352; 804 NW2d 773 (2011) (citations omitted).

The Michigan Trust Code (MTC), MCL 700.7101, *et seq*., defines "breach of trust" as a "violation by a trustee of a duty the trustee owes to a trust beneficiary . . . ." MCL 700.7901(1). Plaintiff does not dispute that he is a trust beneficiary, but he does dispute whether the allegations in his complaint constitute a breach of trust.

Plaintiff alleged breach of fiduciary duty in Count I. Specifically, plaintiff argued that defendant had the "legal duty to act in a manner to protect the Trust assets" and the interests of the beneficiaries, and that defendant "did breach that fiduciary duty in several ways . . . ." By alleging a breach of duty to the trust beneficiaries, plaintiff necessarily alleged a breach of trust. Count II alleged conversion of assets, including "personal property, rent income, real estate, annuities and other funds" from trust assets to defendant's own

use. The MTC requires that a "trustee shall keep trust property separate from the trustee's own property." MCL 700.7811(2). Because the trustee must administer the trust in the interests of the trust beneficiaries, a commingling of assets would be a "violation by a trustee of a duty the trustee owes to a trust beneficiary . . . ." MCL 700.7901(1). Count III similarly alleged that defendant abused her authority over "the company M & D to gain funds from rents of properties that she commingled with her own assets by claiming those funds as her own." Further, plaintiff asserted that "[a]ccountings were not forthcoming from the management of the Trust companies" and that "[r]eports were requested on numerous occasions regarding the management of M & D, without any being provided." However, plaintiff earlier claimed that the Donald Trust only held a 2 % stake in M & D with remaining ownership of the limited liability company held by individuals. Assets of the company, therefore, are only minimally tied to the trust and M & D is not a "trust company" as alleged by plaintiff. A cause of action for misuse of company funds or assets should be pursued by plaintiff as a member of the limited liability company and not as a beneficiary of the trust. Count IV alleged that defendant had "a legal duty to exercise impartiality" regarding trust assets and that defendant "specifically violated that duty, claiming excessive property for herself from the Trust." By alleging a breach of duty to the trust beneficiaries, plaintiff necessarily alleged a breach of trust. Count V alleged fraud and misrepresentation. A trustee must administer the trust in the interests of the trust beneficiaries; misevaluating trust property and inappropriately taking trust property would be a violation of this duty.

Plaintiff's allegations clearly involve claims that defendant breached her duty as trustee in her adminis-

tration of the trusts. Indeed, plaintiff claimed he had standing to bring this suit given his interest in the trusts as a trust beneficiary. Thus, plaintiff alleged in each count a "violation by a trustee of a duty the trustee owes to a trust beneficiary . . . ." MCL 700.7901(1).[1]

To the extent these claims were disclosed on an accounting, they are subject to the exclusive one-year statute of limitations set forth in MCL 700.7905(1)(a):

> A trust beneficiary shall not commence a proceeding against a trustee for breach of trust more than 1 year after the date the trust beneficiary or a representative of the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.

Contrary to plaintiff's contention, the statute does not require that the trust be terminated or that a final report be issued in order for the one-year period of limitations to begin running. Rather, the statute clearly articulates two requirements: (1) the trust beneficiary was sent a report that disclosed the existence of a potential claim and (2) the report informed the trust beneficiary of the timeframe for filing the claim. The record reflects, and plaintiff does not dispute, that the reports for both the Donald Trust and the Family Trust disclosed the one-year period for filing claims alleging

[1] The existence of a cause of action outside the trust context does not allow that action to supersede the trust action. When two statutes have a common purpose, "the specific statute rather than the general statute controls." *Sutton v Cadillac Area Pub Sch*, 117 Mich App 38, 44; 323 NW2d 582 (1982). Both the breach-of-trust statute, MCL 700.7901, and the breach-of-fiduciary-duty statutes, see, e.g., MCL 700.1212, MCL 700.1214, and MCL 700.1506, seek to protect beneficiaries from misdeeds by their trustees. Because the breach-of-trust statute specifically applies in the trust context, the MTC statute of limitations, MCL 700.7905, also applies in the trust context.

breach of trust. Therefore, the remaining element is whether the report adequately disclosed the existence of a potential claim.

Under the MTC,

> a person has knowledge of a fact if 1 or more of the following apply:
>
> (a) The person has actual knowledge of it.
>
> (b) The person has received a notice or notification of it.
>
> (c) From all the facts and circumstances known to the person at the time in question, the person has reason to know it. [MCL 700.7104(1).]

Regarding the Donald Trust, the first amended annual accounting contained several items that form the basis of plaintiff's complaint. Those include the listing of cottages at items 16 and 17, the trust share of M & D at item 33, several annuities listed at items 35 through 38, and bank account activity at item 40. The second annual accounting disclosed income from a land contract and note receivable at items 8 and 9, cottages and their contents at items 1, 4, and 5, and bank account activity at items 15 and 17. The final account also disclosed the cottages, their contents, and other banking activity. The amended final account was simply the ledger of action without the cover page carrying the one-year limitations-period disclosure. However, because the claims were disclosed on the final account issued June 16, 2011, which did include the disclosure, plaintiff remained aware of any potential claims and was advised of the limitations period. The supplemental final account listed three assets, all bank accounts, and disclosed gross income of only $541. It also did not contain a notice of the one-year limitations period, but it also did not contain any new information upon which plaintiff based his claims.

Regarding the Family Trust, the March 11, 2009 to November 8, 2010 account disclosed the 7800 Legend Woods property at item 1, two time shares at item 4, a 2 % interest in M & D at item 5, the Oxford Trust account at item 6, and various other bank accounts. The final account of the Family Trust listed five items including bank accounts, the timeshares, and the Legend Woods property.

Further, plaintiff's own communications and affidavit disclose knowledge of the claims. In a July 14, 2011 letter plaintiff, through his counsel, asserted that several questions remained unanswered but that he wanted the distributions to continue. The letter noted specifically the removal of items from the cottages, an issue with the Oxford Trust, an error with the M & D distribution attributable to defendant, and the specifics regarding legal and accounting fees. Several of these issues form the basis of plaintiff's alleged claims. Further, in his affidavit dated January 17, 2013, plaintiff noted that he objected to every accounting, which indicates that the accountings provided sufficient detail to form the basis of an objection. Further, he asserts that the Legend Woods property was distributed at a $170,000 valuation, but that the final account disclosed Michelle Ducharme was disbursed the appraised value of $336,000. Because the reports adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding, the trial court properly granted summary disposition pursuant to MCR 2.116(C)(7) on the ground that the claims were time-barred under MCL 700.7905(1)(a).

Affirmed.

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

PEOPLE v GARY

Docket No. 314878. Submitted April 1, 2014, at Grand Rapids. Decided April 17, 2014, at 9:05 a.m.

David K. Gary pleaded guilty in the Hillsdale Circuit Court of operating or maintaining a methamphetamine laboratory. The court, Michael R. Smith, J., sentenced him to 38 to 120 months in prison. The evidence indicated that defendant had, at the request of Michael Shearer, purchased supplies for the production of methamphetamine and gave them to Shearer with the intention that Shearer would make methamphetamine and give some to defendant. After defendant left, Shearer started making methamphetamine. An explosion occurred and Shearer was seriously injured. The Court of Appeals granted defendant's delayed application for leave to appeal, which alleged that the trial court erroneously scored Offense Variables (OVs) 1 and 2.

The Court of Appeals *held*:

1. OV 1, MCL 777.31, addresses the aggravated use of a weapon and provides, in part, that 20 points are to be assessed if the victim was subjected or exposed to a harmful chemical substance or an explosive device. The harmful chemical substance or explosive device must be used as a weapon in order to justify assessing 20 points for OV 1. Although the lithium batteries and the Coleman fuel that defendant provided could constitute harmful chemical substances and their employment in a methamphetamine lab could constitute part of an explosive device, there is no indication that defendant used the batteries or the fuel as a weapon. There is also no evidence that defendant used the methamphetamine lab as a weapon. Involvement in, or exposure to, a methamphetamine lab or its constituent parts, even if an explosion occurs, without more, does not constitute the use of a weapon under OV 1. The trial court erred by assessing 20 points for OV 1.

2. OV 2, MCL 777.32, concerns the lethal potential of the weapon possessed or used. Because defendant's crime did not involve the use of a weapon, the trial court erred by assessing 15 points for OV 2.

3. Although defendant did not object to the scoring of OVs 1 and 2, the proper rescoring of OVs 1 and 2 would alter defendant's

applicable recommended minimum sentencing range under the legislative guidelines. The improper scoring constituted plain error affecting defendant's substantial rights.

Conviction affirmed, sentence vacated, and remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 1 — WORDS AND PHRASES — WEAPONS.

Offense Variable 1 addresses the aggravated use of a weapon and provides, in part, that 20 points are to be assessed if the victim was subjected or exposed to a harmful chemical substance or an explosive device; the harmful chemical substance or explosive device must be used as a weapon in order to justify assessing 20 points for OV 1; a "weapon" is any instrument or device used for attack or defense in a fight or in combat, anything used against an opponent, adversary, or victim, or any part or organ serving for attack or defense (MCL 777.31).

Bart R. Frith for defendant.

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

PER CURIAM. Defendant appeals by delayed application for leave to appeal granted[1] from his plea-based conviction of operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(a). He was sentenced to 38 to 120 months in prison. Because the trial court erred when scoring Offense Variables (OVs) 1 and 2, we affirm defendant's conviction, vacate defendant's sentence, and remand for resentencing consistent with this opinion.

In conjunction with his plea, defendant testified that on April 5, 2012, Michael Shearer asked him to purchase supplies for the production of methamphetamine. He testified that, in return for purchasing the supplies, he would get some of the methamphetamine that he knew Shearer was going to make. Defendant said that

[1] *People v Gary*, unpublished order of the Court of Appeals, entered October 11, 2013 (Docket No. 314878).

he purchased two packs of lithium batteries, tubing, coffee filters, and Coleman fuel. He added that Shearer then asked if he would help make the methamphetamine, but defendant told him he did not want to participate. Defendant then left before the methamphetamine was made. He explained that Shearer later told him that he started making the methamphetamine and it exploded, injuring Shearer as a result.

Defendant argues that OVs 1 and 2 were misscored because there was insufficient evidence on the record to support a finding that either methamphetamine or a methamphetamine lab was used as a weapon. Because defendant did not object to the scoring of the two OVs, we review this claim for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

OV 1, codified as MCL 777.31, addresses the "aggravated use of a weapon." MCL 777.31(1). MCL 777.31(1)(b) provides that 20 points shall be assessed if "[t]he victim was subjected or exposed to a . . . harmful chemical substance . . . or explosive device."

In *People v Ball*, 297 Mich App 121, 122; 823 NW2d 150 (2012), we were "asked to determine whether the delivery of heroin in a drug transaction constitutes the aggravated use of a weapon under offense variable (OV) 1 of the sentencing guidelines." In *Ball*, the defendant sold heroin to the victim, who later overdosed on the heroin and died. *Id*. The defendant pleaded guilty to manslaughter, MCL 750.321, and unlawful delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*). *Ball*, 297 Mich App at 122. The trial court assessed 20 points for OV 1, finding that the defendant had subjected the victim to heroin, a "harmful substance." *Id*. at 123. Despite our agreement that heroin constituted a "harmful substance," we found that it must be used as

a "weapon" in order to justify assessing 20 points for OV 1. *Id*. at 124-125. We stated:

> The statute does not define "weapon." But *Random House Webster's College Dictionary* (2001) defines it as "1. any instrument or device used for attack or defense in a fight or in combat. 2. anything used against an opponent, adversary, or victim . . . . 3. any part or organ serving for attack or defense, as claws, horns, teeth, or stings." [*Ball*, 297 Mich App at 125.]

Applying this definition, we found that the trial court erred by assessing 20 points for OV 1 because there was no evidence that the heroin was "used as a weapon." *Id*. at 124-125. We stated:

> There is no evidence that defendant forced the victim to ingest the heroin against his will. This was an ordinary, albeit illegal, consensual drug transaction. Defendant traded the heroin to the victim for something of value, and thereafter the victim voluntarily ingested the heroin with tragic results. But defendant did not attack the victim with the heroin and, the heroin was not used as a weapon. Therefore, it is not appropriate to score OV 1 as if it had been. [*Id*. at 126.]

In this case, the evidence in the record indicates that defendant never possessed methamphetamine at any point during the relevant period. Nonetheless, the lithium batteries and the Coleman fuel could constitute "harmful chemical substances" and their employment in a methamphetamine lab could constitute part of an "explosive device," as demonstrated by the fact that Shearer's lab exploded, causing him serious injury.

However, as in *Ball*, there is no indication that defendant used the lithium batteries or Coleman fuel as a weapon. He did not attack Shearer or anyone else with either item nor is there any evidence that he tampered with the items in an attempt to trigger the

methamphetamine lab explosion. Indeed, the evidence suggests the opposite; defendant desired the methamphetamine to be safely and successfully made so he could be compensated for the items he gave Shearer. Similarly, there is no evidence that defendant used the methamphetamine lab as a weapon. Defendant did not force Shearer to make the methamphetamine nor did he intentionally cause the explosion. Involvement in, or exposure to, a methamphetamine lab or its constituent parts, even if an explosion occurs, without more, does not constitute the use of a weapon under OV 1.

Our ruling is supported by our Supreme Court's order in *People v Lutz*, 495 Mich 857 (2013). In that case, the defendant was manufacturing methamphetamine in his apartment when his lab caught fire and significantly damaged the apartment building. The trial court assessed 20 points for OV 1. Our Supreme Court vacated the defendant's sentence, citing *Ball* and ruling that "zero points should have been scored for Offense Variables 1 and 2 because the methamphetamine in this case was not used or possessed as a weapon." *Lutz*, 495 Mich at 857. The relevant facts in *Lutz* are nearly identical to those in the instant case.

OV 2, codified as MCL 777.32, concerns the "lethal potential of the weapon possessed or used." MCL 777.32(1). Because we have already determined that defendant's crime did not involve the use of a weapon, the trial court erred by assessing 15 points for OV 2.

Properly rescoring OVs 1 and 2 would alter defendant's applicable recommended minimum sentencing range under the legislative guidelines. Thus, the improper scoring of those variables constituted plain error affecting defendant's substantial rights and we remand for resentencing. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

Defendant's conviction is affirmed. We vacate his sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

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

WHITMAN v CITY OF BURTON (ON REMAND)

Docket No. 294703. Submitted June 5, 2013, at Lansing. Decided April 24, 2014, at 9:00 a.m. Vacated and remanded to Court of Appeals, 497 Mich ___.

Bruce Whitman brought an action in the Genesee Circuit Court against the city of Burton and the mayor of the city, Charles Smiley, alleging that defendants violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., when the mayor declined to reappoint plaintiff as police chief for the city in November 2007. Plaintiff alleged that he was not reappointed because, in early 2004, he had threatened to pursue criminal charges against the mayor if the city did not comply with a city ordinance and pay plaintiff for the unused sick, personal, and vacation leave time he had accumulated in 2003. Defendants maintained that plaintiff, along with other city administrators, had agreed to forgo any payout for accumulated leave in order to avoid a severe budgetary shortfall and that plaintiff was not reappointed because the mayor was dissatisfied with many aspects of plaintiff's performance as chief of police. A jury returned a verdict in favor of plaintiff. The court, Geoffrey L. Neithercut, J., entered a judgment consistent with the verdict and thereafter denied defendants' motion for judgment notwithstanding the verdict (JNOV) or a new trial. Defendants appealed. The Court of Appeals, O'CONNELL, P.J., and SAAD, J. (BECKERING, J., dissenting), reversed the circuit court's denial of defendants' motion for JNOV and remanded the case for further proceedings, concluding that plaintiff's claim was not actionable under the WPA because, in threatening to pursue criminal charges, plaintiff had acted to advance his own financial interests and not out of an altruistic motive of protecting the public. 293 Mich App 220 (2011). The Supreme Court granted plaintiff's application for leave to appeal, ordering the parties to brief whether *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604 (1997), correctly held that the primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern, as opposed to personal vindictiveness. 491 Mich 913 (2012). The Supreme Court then reversed the judgment of the Court of Appeals and remanded to the Court of Appeals, holding that the language of the WPA does not address an employee's primary motivation, nor does it imply or suggest that any motivation must be proved as a prerequisite to bringing a claim. The Court held that

Shallal did not hold that an employee's motivation is a factor in determining whether the employee engaged in protected activity and that, to the extent that *Shallal* has been interpreted as requiring a specific motive, any language to that effect must be disavowed as dicta. The Court held that plaintiff engaged in conduct protected under the WPA when he reported the mayor's violation of the ordinance to the mayor himself, a city administrator, and the city attorney. The Court stated that to recover under the WPA, plaintiff had to establish a causal connection between this protected conduct and the adverse employment decision by demonstrating that defendants took the adverse employment action because of plaintiff's protected activity. The Supreme Court stated that, because the Court of Appeals did not address the issue of causation when it held that plaintiff's WPA claim failed as a matter of law, the question had to be resolved on remand. The Court reversed and remanded the matter to the Court of Appeals "for consideration of all remaining issues on which that [C]ourt did not formally rule, including whether the causation element of MCL 15.362 has been met." 493 Mich 303 (2013).

On remand, the Court of Appeals *held*:

1. Because the WPA protects those who protect the public interest by blowing the whistle on illegality, and laws in general are an expression of public policy for the benefit of the public, there is typically no question that reporting a violation of law advances the public interest. But this is not always true, and is certainly not true in this matter. In this case, plaintiff's actions are unquestionably and objectively contrary to the public interest. Regardless of plaintiff's personal motivations, his whistleblowing effort sought enforcement of a law that harmed, not advanced, the public interest. The ordinance in question is not a law that protects the public interest, but rather an ordinance that reads much like a standard, garden-variety collective-bargaining provision for wages and benefits.

2. The administrative team's waiver of the perks contained in the ordinance was an illustration of shared sacrifice by the department heads to advance the public interest of the residents of Burton at their own expense.

3. When an ordinance, as here, is not an ordinance intended to protect the public interest, but rather is a simple listing of wages, benefits, and various perks—and the very public servants who benefit financially from the ordinance make a personal sacrifice and waive their right to these perks to save the public badly needed funds and to prevent layoffs and reduced public services—then any action

contrary to the waiver is contrary to the public interest. Waiver of the perks advances the public interest, opposition to that waiver harms the public interest.

4. Whistleblowing assumes that an employee takes a risk of retaliation for uncovering the public employer's misconduct. There was no misconduct or illegality in this case. This case involves an insistence by an employee on getting his perks, not an uncovering of corruption or illegality. The disagreement about the legal effects of the waiver was satisfied in plaintiff's favor. Accordingly, plaintiff's citation of the ordinance was not whistleblowing. The disagreement concerned the proper interpretation of the city's labor laws, whether the administrative team could waive the perks provided by the ordinance, and whether plaintiff was bound by the team's waiver. It has nothing to do with whistleblowing.

5. Plaintiff's actions, as an objective matter, were undoubtedly against the public interest.

6. The city did not violate any law in the sense that "violations of law" have been traditionally understood in whistleblowing lawsuits, i.e., revealing public corruption or malfeasance. The city simply refused to grant plaintiff a monetary perk that he demanded. Plaintiff may or may not have been entitled to his perks, but he most certainly is not entitled to claim the protection of the WPA when his conduct objectively serves his interest, but harms the public interest.

7. Because plaintiff is not a whistleblower under the WPA, no juror could legally find in favor of plaintiff on his WPA retaliation claim. The trial court's denial of defendant's motion for JNOV is reversed and the case is remanded to the trial court for further proceedings.

8. Plaintiff's alleged whistleblowing activity does not have a causal link to the mayor's decision to not reappoint plaintiff for the following four reasons. First, the mayor viewed plaintiff's complaints as presenting an issue of trust, not in the context of whistleblowing or anger at plaintiff's supposed whistleblowing. Second, there is an enormous temporal gap between plaintiff's alleged whistleblowing and the supposed retaliation, which belies any causal connection between the two. It strains credibility to the breaking point to suggest that the mayor, who had the power to dismiss plaintiff at any time and for any or no reason, was so upset with plaintiff's alleged whistleblowing in late 2003 and early 2004 that he allowed plaintiff to continue as police chief until late 2007 and only then decided to retaliate against plaintiff. Third, there were numerous breaks in the causal chain. Fourth, plaintiff provided no evidence to refute the mayor's stated and compelling reasons for not reappointing him—that plaintiff engaged in seri-

ous misconduct and misused his office. It is simply fanciful to suggest that a mayor, whose chief of police works at his pleasure, would make a reappointment decision on the basis of an old, stale issue instead of very recent, more disturbing revelations. The evidence is overwhelming that plaintiff's so-called whistleblowing had no connection to the mayor's decision to not reappoint plaintiff.

Reversed and remanded.

O'CONNELL, P.J., concurring, fully concurred with the majority opinion and wrote separately to state that plaintiff's breach of contract precludes him from maintaining this action under the WPA. If there is any causal connection between plaintiff's whistleblowing conduct and the decision not to reappoint him, plaintiff severed that connection by breaching the agreement to forgo wage benefits. To allow plaintiff to benefit from his breach is to ignore the substance and purpose of basic contract law and of the WPA.

BECKERING, J., dissenting, stated that the majority's holding that plaintiff is not a whistleblower under the WPA directly conflicts with the Supreme Court's conclusion that plaintiff engaged in protected activity under the WPA, which is the law of the case that the Court of Appeals must follow. The Supreme Court's conclusion that plaintiff engaged in protected activity under the WPA necessarily encompasses consideration of any issue that would be dispositive of whether plaintiff engaged in protected activity under the WPA. Assuming that plaintiff's actions must have objectively advanced the public interest to be protected under the WPA, this issue was necessary to the Supreme Court's determination that plaintiff engaged in protected activity under the WPA. The law of the case doctrine applies to questions actually decided in the prior decision and to those questions necessary to the court's prior determination. Nothing in the plain language of the WPA requires either that the law that is the subject of a report must objectively advance the public interest or that the employee's report must objectively advance the public interest. Application of the plain language of MCL 15.362 dictates that plaintiff is a whistleblower. It is undisputed that plaintiff falls into the category of whistleblowers that encompasses those who report, or are about to report, violations of laws, regulations, or rules to a public body. The majority's conclusion that plaintiff is not a whistleblower conflicts with the binding precedent of the Court of Appeals providing that if a plaintiff falls under one of the categories of whistleblowers under the WPA, the plaintiff is engaged in a protected activity for purposes of presenting a prima facie case. Even if plaintiff's actions must have objectively furthered the public interest for him to be a whistleblower under the WPA, this requirement is satisfied because the public

interest is served when a violation of the law by a public official is reported. Plaintiff's report to a public body of the mayor's violation of the ordinance was in the public's interest. Plaintiff is a whistleblower. There was sufficient evidence for a reasonable juror to conclude that plaintiff's reporting of the mayor's violation of the ordinance was a motivating factor in the mayor's decision not to reappoint plaintiff. None of the reasons offered by the majority to show the absence of a causal connection between the reporting of the ordinance violation and the decision not to reappoint plaintiff justifies the conclusion that there is no causal connection as a matter of law. While there was evidence that there may have been a variety of reasons for the mayor's decision not to reappoint plaintiff, there was ample evidence that plaintiff's reporting of the ordinance violation was a motivating factor for the adverse employment action. The trial court's denial of defendants' motion for JNOV should be affirmed because plaintiff engaged in protected activity and there was sufficient evidence of a causal connection between the protected activity and the decision not to reappoint plaintiff to create a question of fact for the jury.

Tom R. Pabst, *Michael A. Kowalko*, and *Jarrett M. Pabst* for plaintiff.

Plunkett Cooney (by *Ernest R. Bazzana*) for defendant.

ON REMAND

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

SAAD, J.

I. PLAINTIFF IS NOT ENTITLED TO WPA PROTECTION[1]

In this Whistleblowers' Protection Act (WPA)[2] claim,

[1] A trial court's ruling on a motion for judgment notwithstanding the verdict (JNOV) is reviewed de novo on appeal. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 272; 696 NW2d 646 (2005). "When reviewing the denial of a motion for JNOV, the appellate court views the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine if a party was entitled to judgment as a matter of law." *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009).

[2] MCL 15.361 *et seq*.

our 2011 opinion[3] reversed the jury award in plaintiff's favor. We held that the Michigan Supreme Court's decision in *Shallal v Catholic Social Servs of Wayne Co*[4] barred plaintiff from claiming protection under the WPA, because he admitted that his motivation for asserting entitlement to accumulated, unused sick-leave pay under a city ordinance was entirely personal and selfish.[5] We reasoned that, under *Shallal*, plaintiff's private motivations for asserting defendants' noncompliance with the city ordinance disqualified him from WPA protections, because he did not act as a "whistle-blower" under the meaning of the WPA.

The Michigan Supreme Court reversed, and "disavowed" what we thought was the principle articulated in *Shallal* on the relevance of plaintiff's private motivations.[6] Instead, it held that plaintiff's private motivations for "blowing the whistle" are irrelevant,[7] and stated that plaintiff's conduct constituted protected activity under the WPA.[8] What we and the Michigan Supreme Court did not address—and what we must now analyze[9]—is whether plaintiff's actions or conduct,

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[3] *Whitman v City of Burton*, 293 Mich App 220; 810 NW2d 71 (2011).

[4] *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997).

[5] Specifically, plaintiff first voiced his opposition to the city ordinance at issue by stating that " '[m]y current life style revolves around these very things [i.e., additional payments] that have been negotiated for me . . . .' " See *Whitman*, 293 Mich App at 225.

[6] *Whitman v City of Burton*, 493 Mich 303, 306; 831 NW2d 223 (2013). A summary of the facts relevant to this opinion can be found in *Whitman*, 493 Mich at 306-311, and *Whitman*, 293 Mich App at 222-228.

[7] *Whitman*, 493 Mich at 306.

[8] *Id*. at 320.

[9] Our understanding of the Supreme Court's statement that plaintiff "engaged in conduct protected under the WPA," *id*., is that it is predicated on a narrow reading of the WPA: namely, one that only analyzes the relevancy of a plaintiff's personal motivations for "blowing

as an objective matter, must advance the public interest in order to entitle plaintiff to the protection of the WPA.[10] Because the WPA protects those who protect the public interest by blowing the whistle on illegality, and laws in general are an expression of public policy for the benefit of the public, there is typically no question that reporting a violation of law advances the public interest. But this is not always true, and is certainly not true here.

In this case, plaintiff's actions are unquestionably and objectively contrary to the public interest. That is, regardless of his personal motivations (now irrelevant), his "whistleblowing" effort sought enforcement of a law that harmed, not advanced, the public interest.

The law in question, Burton Ordinances 68-C, is not a law that protects the public interest, but rather an ordinance that reads much like a standard, garden-variety collective-bargaining provision for wages and benefits.[11] It is simply a recitation that sets forth the

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the whistle." Our earlier, reversed opinion only addressed this discrete aspect of the WPA. Because we did not analyze the overriding issue in our earlier opinion—namely, whether the WPA only protects conduct that *objectively* advances the public interest—the Supreme Court did not address this issue on appeal. Because the Supreme Court instructed us to consider on remand "all remaining issues on which [we] did not formally rule," we will now discuss this aspect of the WPA. *Id*. at 321.

[10] Our Court has noted the distinction between an employee's personal motives for reporting legal violations and whether that reporting actually advanced the public interest. See *Phinney v Perlmutter*, 222 Mich App 513, 554; 564 NW2d 532 (1997) ("[i]n addition, whether plaintiff sought personal gain in making her reports, rather than the public good, is legally irrelevant and need not be addressed *except to note that the reporting of misconduct in an agency receiving public money is in the public interest*") (emphasis added). *Phinney*'s holdings on unrelated matters have likely been abrogated by *Garg*, 472 Mich at 290.

[11] See Burton Ordinances 68-25C, § 8(I) ("68-C"). As noted by the Supreme Court, Burton's ordinance numbering and policy regarding unused leave time have changed since the time of trial. *Whitman*, 493

wages and benefits for administrative, nonunionized employees of the city of Burton. Normally, an employee must use sick days or vacation days, or lose them. But under some collective-bargaining agreements and employment policies, employees may "accumulate" these days and then get paid for all such days not used. This perk is generally found in collective-bargaining agreements for unionized employees. But here, this benefit—along with a statement of wages and matters like dental insurance—were codified in 68-C.

The waiver of the benefits contained in 68-C—which plaintiff characterizes as a "violation of law"—has its origins in a severe financial crisis that afflicted the city of Burton in the earlier 2000s.[12] During this period, the city's department heads—who obviously benefited from 68-C—voted as a group, not only to take a wage freeze, but to forgo the perks contained in the ordinance to avoid harmful layoffs and reduced services to the public.[13] In other words, the administrative team's waiver of the perks contained in the ordinance was an illustration of shared sacrifice by the nonunionized department heads to advance the public interest of the residents of Burton at their own expense.[14]

Only one department head objected to this waiver of perks: plaintiff, who was then the chief of police.[15] He

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Mich at 306, n 3. "Because those changes are not relevant to our analysis, this opinion refers to the ordinance numbering and language as it was introduced during trial." *Id*.

[12] *Whitman*, 293 Mich App at 224.

[13] *Whitman*, 493 Mich at 307.

[14] The dissent cynically refers to this action as a "cost-saving method in the guise of a 'gentleman's agreement.' "

[15] *Whitman*, 493 Mich at 307. It appears that plaintiff attended the March 2003 meeting when the department heads decided to waive the perks in 68-C, but it is unclear whether plaintiff voiced an opinion on the waiver at the meeting.

demanded his money as provided for in the ordinance,[16] which he received after the mayor acted on the advice of outside legal counsel. This is the "law" plaintiff uses to assert a claim under the WPA.

The WPA is designed to ferret out violations of the law that injure the public, especially when applied to public-sector defendants.[17] If government officials, who are bound to serve the public, violate laws designed to protect the public from corruption, pollution, and the like, then employees who, at their own risk, blow the whistle on such illegality necessarily serve the public interest—which is precisely why the WPA grants such employees protection from reprisal. Yet, where the ordinance in question, as here, is not an ordinance intended to protect the public, but rather is a simple listing of wages, benefits, and various perks—and the very public servants who benefit financially from the ordinance make a personal sacrifice and waive their right to these perks to save the public badly needed funds and to prevent layoffs and reduced public services—then any action contrary to the waiver is contrary to the public interest. Again: the waiver of the perks set forth in the ordinance at issue advances the public interest. Opposition to that waiver—on which plaintiff bases his suit—harms the public interest.

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[16] *Id*.

[17] "[The WPA encourages employees to assist in law enforcement] with an eye toward promoting public health and safety. *The underlying purpose of the [WPA] is protection of the public*. The act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997) (emphasis added).

In addition, whistleblowing assumes that an employee takes a risk of retaliation for uncovering the public employer's misconduct. Here, there simply was no misconduct or illegality. The only conduct of the city employees that implicated 68-C was the department heads' decision to waive the perks contained in the ordinance, and plaintiff's refusal to honor that waiver. This is an insistence by an employee, plain and simple, to get his perks—not an uncovering of corruption or illegality. And this disagreement about the legal effects of the waiver was satisfied, in plaintiff's favor, after the city sought legal counsel. Accordingly, plaintiff's citation of the ordinance was not whistleblowing. It simply involved a disagreement regarding the proper interpretation of the city's labor laws: whether the administrative team could waive the perks under 68-C, and whether plaintiff was bound by the group's waiver. It has nothing to do with whistleblowing whatsoever.

This is why this is not the usual case, where a report of a violation of law normally constitutes conduct in the public interest.[18] Here, to the contrary, plaintiff's actions—as an objective matter—were undoubtedly against the public interest. And the city did not actually "violate" any law in the sense that "violations of law"

[18] Cases from our sister states interpreting their whistleblower statutes and jurisprudence recognize the distinction between reported legal violations that affect the public interest (which are protected) and reported legal violations that affect solely private interests (which are not). Though these cases involve internal corporate disputes—as opposed to reports of violated municipal ordinances—we think that the reasoning is equally relevant to this case, where the violated ordinance did not advance the public interest. See *Garrity v Overland Sheepskin Co of Taos*, 1996-NMSC-032, ¶ 18; 121 NM 710, 715; 917 P2d 1382 (1996) ("[w]hen an employee is discharged for whistleblowing, the employee must also demonstrate that his or her actions furthered the public interest rather than served primarily a private interest"), and *Darrow v Integris Health, Inc*, 2008 Okla 1, ¶ 16; 176 P3d 1204 (2008) ("to distinguish whistleblowing claims that would support a viable common-law tort claim from those that would not, the public policy breached must truly impact public rather than the employer's private or

have been traditionally understood in whistleblowing lawsuits—i.e., revealing public corruption or malfeasance. It simply refused (at first) to grant plaintiff a monetary perk that he demanded. Plaintiff may or may not have been entitled to his perks, but he most certainly is not entitled to claim the protection of the WPA, when his conduct objectively serves his interest, but harms the public's.

Because he is not a "whistleblower" under the WPA, no juror could legally find in favor of plaintiff on his WPA retaliation claim. The trial court's denial of defendants' request for JNOV is accordingly reversed.

II. CAUSATION[19]

We also held in our earlier opinion that plaintiff's

simply proprietary interests"). Cases from foreign jurisdictions are not binding, but can be persuasive authority. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

[19] To prevail under the WPA, plaintiff must "establish a causal connection between [the] protected conduct and the adverse employment decision by demonstrating that his employer took adverse employment action *because of* his protected activity." *Whitman*, 493 Mich at 320. In the absence of direct evidence of retaliation (which plaintiff does not present), he must present indirect evidence to "show that a causal link exists between the whistleblowing act and the employer's adverse employment action." *Debano-Griffin v Lake Co*, 493 Mich 167, 176; 828 NW2d 634 (2013). A plaintiff's presentation of indirect evidence is analyzed under "the burden-shifting framework set forth in *McDonnell Douglas* [*Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)]." *Id*. Applying this standard to retaliation claims, a plaintiff must show that his "protected activity" under the WPA was "one of the reasons *which made a difference* in determining whether or not to [discharge] the plaintiff." *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986) (emphasis added; quotation marks and citation omitted). In other words, " '[t]o establish causation, the plaintiff must show that his participation in [protected activity] was a "significant factor" in the employer's adverse employment action, not just that there was a causal link between the two.' " *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004) (citation omitted). Because *Debano-Griffin* uses the *McDonnell Douglas* framework, originally designed for employment-discrimination

alleged whistleblower activity from late 2003 to early 2004 was not the legal cause of the mayor's decision to not reappoint plaintiff as police chief in late 2007.[20] Upon closer examination of the facts pertinent to the causation issue, we are even more convinced that plaintiff's alleged whistleblower activity lacks a causal link to the mayor's decision. We so hold for several reasons.

A. TRUST, NOT WHISTLEBLOWING

As noted, in 2003, the mayor's administrative team voted to voluntarily take a wage freeze and forgo the perk of payment for accumulated sick days to save taxpayers' money and avoid layoffs and reduced services.[21] This sacrifice spoke well of the mayor and his department heads. Plaintiff's refusal to abide by the department heads' agreement, and subject himself to the same sacrifice, raised issues of trust and caused the mayor to rightly be disappointed in plaintiff. Indeed, plaintiff's "evidence" of a causal connection between his "whistleblowing" and the mayor's decision to not reappoint him, many years later, frames the issue in exactly this context.

A third party who attended plaintiff's June 2004 meeting with the mayor made handwritten notes of the discussion, which state: " 'Mayor = No Trust—68-C (vacation)—lack of communication[.]' "[22] And the mayor's alleged December 2007 statement to other senior police officers that he and plaintiff " 'got off on the

claims, it is appropriate for the Court to use federal cases interpreting *McDonnell Douglas* as persuasive authority. See *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993) (stating that Michigan courts " 'turn to federal precedent for guidance in reaching [their] decision' " on whether a plaintiff has established a valid discrimination claim) (citation omitted).

[20] *Whitman*, 293 Mich App at 232, n 1.

[21] *Id.* at 230.

[22] *Whitman*, 493 Mich at 309.

wrong foot' "[23]—a statement that, if made, occurred *after* the mayor decided not to reappoint plaintiff[24]—supposedly showed that he considered plaintiff's 68-C complaints as presenting an issue of trust, in that plaintiff's failure to adhere to a voluntary agreement with his colleagues showed a betrayal of trust. In sum, it appears the mayor viewed the 68-C issue not in the context of whistleblowing, or anger at plaintiff's supposed whistleblowing, but instead as presenting an example of how plaintiff was untrustworthy. As noted, this is not a case where a "violation of law" was even remotely an issue. And it is, at best, extremely unlikely that even this "lack of trust" over plaintiff's failure to honor an agreement on this specific occasion had anything to do with the subsequent decision to not reappoint him, for the numerous reasons discussed later in this opinion.

B. THE ALLEGED RETALIATION IS TEMPORALLY REMOTE FROM ALLEGED WHISTLEBLOWING

Plaintiff's claim has a serious temporal problem: he alleges that he was not reappointed in late 2007 for events that took place in late 2003 and early 2004. Our courts have taken pains to stress that the length of time between an alleged whistleblowing and an adverse employment action is not dispositive of retaliation—when those two events are *close in time* (i.e., days, weeks, or a few months apart).[25] If whistleblowing and

[23] *Id*.

[24] It is difficult to see how a statement the mayor allegedly made *after* he had already declined to reappoint plaintiff would influence his decision not to reappoint him.

[25] See, for example, *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003) (to satisfy causation requirement under the WPA, a plaintiff must show "something more than merely a coincidence in time between protected activity and adverse employment action"); *Tuttle v*

retaliation that occur close in time are not sufficient to find causation under the WPA, whistleblowing and retaliation that occur *far apart* in time are certainly not sufficient to support causation—and, in fact, weigh against finding causation. See *Fuhr v Hazel Park Sch Dist*, 710 F3d 668, 675-676 (CA 6, 2013) (holding in the context of a Title VII retaliation claim that a two-year gap between the plaintiff's protected activity and the claimed retaliatory act "proves fatal to [plaintiff's] assertion that there is a causal connection").[26]

Here, there is an enormous temporal gap between plaintiff's alleged whistleblowing and the supposed retaliation, which belies any causal connection between the two. As noted, plaintiff's demands to receive compensation under 68-C took place in 2003 and early 2004. The mayor declined to reappoint him police chief in November 2007—almost four years after the supposed whistleblowing. Of course, the mayor, as the top execu-

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Metro Gov't of Nashville & Davidson Co, Tenn, 474 F3d 307, 321 (CA 6, 2007) ("[t]he law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim"); *Shaw v Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009) ("[a] temporal connection between protected activity and an adverse employment action does not, in and of itself, establish a casual connection").

[26] In its opinion, the United States Court of Appeals for the Sixth Circuit noted that "[o]ur review of the law shows that multiyear gaps between the protected conduct and the first retaliatory act have been insufficient to establish the requisite causal connection." *Fuhr*, 710 F3d at 676. This observation is correct; interpretations of our sister states' whistleblower laws and jurisprudence have made similar observations on how a long time span between the alleged whistleblowing and supposed retaliation weigh against finding causation. See *Blake v United American Ins Co*, 37 F Supp 2d 997, 1002 (SD Ohio, 1998) (holding that alleged whistleblowing action that took place five years before the plaintiff's termination was not "close enough in time . . . to support a claim of retaliation"); *Anderson v Meyer Broadcasting Co*, 2001 ND 125, ¶ 35; 630 NW2d 46 (2001) (holding that a "lengthy" delay of approximately a year "between [plaintiff's] reports and her termination does not support an inference she was fired because of the protected activity").

tive officer of the city of Burton, *could terminate plaintiff at any time*.[27] He could have done so in March 2003, when plaintiff first voiced opposition to the waiver of 68-C, or in early 2004, when plaintiff insisted on his compensation pursuant to the ordinance. In fact, the evidence demonstrates that the mayor was not concerned about plaintiff's 68-C demands at all: he reappointed plaintiff as police chief in November 2003—six months after plaintiff's initial complaint regarding 68-C. And, again, the expiration of plaintiff's term took place in November 2007, almost *four years* after those complaints. It strains credulity to the breaking point to suggest, as plaintiff and the dissent do, that the mayor—who had the power to dismiss plaintiff at any time, for any reason or no reason—was so upset with plaintiff's alleged "whistleblowing" in late 2003 and early 2004 that he allowed plaintiff to continue as police chief for all of 2004, 2005, 2006, and into late 2007, and only then decided to "retaliate" against plaintiff. Indeed, when viewed in the context of the typically close working relationship between a mayor and a chief of police, and the fact that in Burton the chief of police, as a member of the mayor's executive team, serves at the *pleasure of the mayor*, plaintiff's allegations take leave of reality and enter the theatre of the absurd.

C. BREAKS IN PLAINTIFF'S SUPPOSED CAUSAL CHAIN

The long period of time between plaintiff's supposed whistleblowing and the mayor's decision not to reappoint him involves another aspect that is fatal to plaintiff's claim: numerous breaks in the causal chain. Plaintiff's first complaints regarding the administrative team's waiver of 68-C perks in March 2003 clearly did not cause the mayor to retaliate. Indeed, the mayor

[27] Burton Ordinances 6.2(b) states that the chief of police serves "at the pleasure of the Mayor."

reappointed him chief of police in November of that same year. His further attempts to secure compensation in January 2004 were addressed by the mayor—who sought the advice of city counsel and then outside labor counsel and complied with that legal advice by paying him almost $7,000 in additional compensation. And his 2004 dispute with the mayor ended amicably—he remained chief of police for over three years following that meeting, and, by his own admission, plaintiff never heard any mention of the 68-C dispute from the mayor and was not retaliated against during that time. These intervening events—all positive developments for plaintiff—raise serious doubts that his 68-C whistleblowing was a "determining factor" or " 'caus[e] in fact' " of the mayor's decision to not reappoint him. *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986) (citation omitted).

D. PLAINTIFF'S MISCONDUCT LED TO ADVERSE EMPLOYMENT ACTION

In any event, plaintiff has provided no evidence to refute the mayor's stated and compelling reasons for not reappointing him: plaintiff engaged in serious misconduct and misused his office. After his reelection in November 2007, the mayor reevaluated his entire administrative team. During this period, he was advised of allegations of plaintiff's serious misconduct in office by officers in plaintiff's department. Among other things, these included allegations that plaintiff: (1) meted out inadequate discipline to subordinates who abused their power, (2) misused a city computer to exchange sexually explicit e-mail messages with a woman who is not his wife, (3) discriminated against a female officer, and (4)

forged a signature on a budget memo.[28] Command officers within the police department warned the mayor of serious morale problems created by plaintiff's abuse of power.[29] In the face of these troubling revelations, the mayor understandably did not reappoint plaintiff to this important position of public trust—and these are the reasons the mayor gave for declining to reappoint plaintiff as police chief in November 2007. To suggest that a mayor, whose chief of police works at his pleasure, would make a reappointment decision on the basis of an old, stale issue instead of very recent, more disturbing revelations, is simply fanciful.

Plaintiff made no specific effort before this Court to deny these allegations against him, other than to state, self-servingly and without support, that they are "merely a pretext," and to assert "that his personnel file demonstrates that his performance as a police chief was good, that he had received numerous awards, and that there were never any disciplinary actions against him."[30] His only proffered "evidence" of a causal connection between his supposed "whistleblowing" and the mayor's decision to not reappoint him is the aforementioned statement made by the mayor in December 2007—after the mayor already made his decision, but before its public announcement—in which the mayor supposedly told senior police officers that he lacked trust in plaintiff and cited as one example plaintiff's refusal to keep his word, along with the entire administrative team, and waive his unused sick-day compensation under 68-C.

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[28] See *Whitman*, 493 Mich at 309. Plaintiff admitted at trial that he used a city computer to exchange sexually explicit messages with a woman who is not his wife. Plaintiff makes no specific effort to deny the other allegations, but states that they are "merely a pretext." *Id*. at 310.

[29] *Whitman*, 293 Mich App at 227.

[30] *Whitman*, 493 Mich at 309-310.

When this assertion is weighed against the other factors in this case—(1) the mayor's view of plaintiff's 68-C demands as a trust, not retaliation, (and certainly not "whistleblowing") issue, (2) the almost four-year interval between plaintiff's alleged whistleblowing and the purported retaliation, (3) the causal breaks in plaintiff's claim, and (4) allegations of plaintiff's extensive misconduct—the evidence is overwhelming that plaintiff's so-called "whistleblowing" had no connection to the mayor's decision to not reappoint him as police chief. There is simply no way that a reasonable fact-finder, even when viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party, could find that retaliation was " 'one of the reasons *which made a difference* in determining whether or not to [reappoint] the plaintiff.' " *Matras*, 424 Mich at 682 (emphasis added; citation omitted).

III. REPLY TO THE DISSENT

A. INTRODUCTION

While we respect and join in the dissent's insistence on adhering to the strict letter of the law, we strongly disagree with the dissent's interpretations and conclusions. In our judgment, the dissent ignores the reality that plaintiff's conduct has nothing to do with "whistleblowing" in the sense envisioned by MCL 15.361 *et seq*. Indeed, plaintiff's conduct represents the antithesis of the WPA's purpose.

As an objective reality, plaintiff's conduct harmed, not helped, the public interest, just the opposite of what the WPA was intended to do. Any observer of the economic crisis must conclude that the administrative team's waiver of the benefits contained in 68-C advanced the interest of the taxpayers in the financially

distressed city of Burton. It is not possible to both accept this reality and yet conclude that one who opposed the waiver and demanded his perk somehow serves the public interest—the two concepts are polar opposites of one another. To do so turns the WPA and reality upside down, and makes a mockery of the law and the context in which this case arises.

The same lack of realism permeates the dissent's causation analysis. Despite the fact that in the city of Burton, as in most cities, the chief of police, by law, serves "at the pleasure" of the mayor, the dissent suspends common sense and actually claims that the mayor, who was upset with what he regarded as plaintiff's untrustworthiness in 2003 and 2004, would wait almost four full years before not reappointing plaintiff because of these old disputes. Reaching this conclusion ignores the reality that the mayor reappointed plaintiff in 2003, after this disagreement surfaced, and worked closely with him for almost four subsequent years. It also ignores the admission of plaintiff himself that the mayor never retaliated against him after the 2004 disagreement, and that even after heated words in June 2004, they patched up their differences and worked together for almost four years without any incident. And it ignores numerous revelations of alleged serious misconduct that the mayor learned of in November 2007—the month that the mayor decided not to reappoint plaintiff.

What is the evidence that a stale, minor incident from early 2004 allegedly loomed so large after all these years in late 2007? Not any direct evidence, and indeed no evidence of any kind, oral or written, that this was even a factor at the time the mayor made his decision. Rather, we are supposed to believe that during a discussion by the mayor with the commanders of the police

department—a discussion that took place after the decision was made, but before the public announcement of the appointment of a new chief—comments were made that trust is an important quality in a chief and that the chief and the mayor had got off on the wrong foot because of a lack of trust in 2003 and 2004.

This is a fact, but a fact that has nothing to do with "whistleblowing," and nothing to do with the reasons for nonreappointment. It is a fact of life that when an entire administrative team shares in financial sacrifice in times of economic crisis, and one key member of that team either backs out of the agreement or breaks ranks with those who make the sacrifice, that there will be issues of trust and disappointment. But to elevate this incident to be the cause of a nonreappointment four years later, in the face of new revelations of alleged serious misconduct and the reality that the chief serves at the pleasure of the mayor, simply defies logic, common sense, and the reality of city management.

B. LAW OF THE CASE AND OBJECTIVE ADVANCEMENT OF THE PUBLIC INTEREST

We and the dissent both cite the law of the case doctrine, but disagree on the interpretation of the Supreme Court's remand instructions.

As we noted, there is a distinction between a plaintiff's private motivations (now irrelevant) for reporting a violation of the law and the more fundamental question of whether the alleged reporting objectively advances the public interest. Though the Supreme Court addressed (and disavowed) the former analysis in its opinion, it said nothing and thus obviously did not rule on the latter, nor did we in our reversed opinion. Because the Supreme Court instructed us to address "all remaining issues on which [we] did not formally

rule,"[31] we see it as a correct application of the law of the case for our opinion to analyze whether plaintiff's conduct objectively advances the public interest, and thus determine whether he is entitled to the protections of the WPA. Such analysis, heretofore unaddressed, is essential because the WPA, at its core, is intended to advance the public interest by protecting individuals who report violations of law, where those violations of law harm the public interest.[32] Had the Michigan Supreme Court ruled on this important issue, we think it would have analyzed the matter as our holding does, because there are rare instances where reporting a violation of the law will not advance or harm the public interest.

We fundamentally disagree with the dissent's assertion that reporting a violation of *any* law advances the public interest, because this observation is inaccurate and ignores the reality of this case. In rare instances—such as this one—reporting violation of a law will not advance the public interest, and will in fact be contrary to the public interest.[33] Again, the law in question, 68-C,

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[31] *Whitman*, 493 Mich at 321.

[32] See *Dolan*, 454 Mich at 378-379.

[33] See, for example, MCL 287.277 (mandating that upon receiving notice of the presence of unlicensed dogs in the county from the county treasurer, the prosecuting attorney "shall at once commence the necessary proceedings against the owner[s] of the dog[s]"); MCL 750.542 (barring bands from playing the national anthem "as a part or selection of a medley of any kind" or with any "embellishments of national or other melodies" and the anthem's use "for dancing or as an exit march"); and MCL 750.102 (stating that "[a]ny person who shall wilfully blaspheme the holy name of God, by cursing or contumeliously reproaching God" is guilty of a misdemeanor).

We cite these examples not to mock these laws or the sentiments they express, but to demonstrate that not all individuals who report violations of laws are whistleblowers, because reporting a violation of law in and of itself does not always objectively advance the public interest. For instance, many

involved a monetary perk for a small number of senior administrative personnel. When Burton faced a financial crisis, the city's department heads admirably tried to advance the public interest by refusing to accept this perk—in other words, by waiving the financial benefits of the ordinance—benefits which were theirs to waive. And it is his disagreement with the waiver of this perk by which plaintiff claims his whistleblower status—disagreement with an ordinance that, if enforced (as it was with regard to him), benefited only plaintiff, and actually harmed the broader public.

For these reasons, we disagree with the dissent's observations on the law of the case, and think that we have an obligation, under the WPA, to hold that not all reports of legal violations are whistleblowing, because not all reports of legal violations objectively advance the public interest.

C. CAUSATION

We also take issue with the dissent's causation analysis because it again ignores the reality of this public-sector setting.

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dog-owning Michiganders do not get licenses for their pets. Under the dissent's definition of "whistleblowing" and interpretation of the WPA, an individual who complains that the local prosecuting attorney is not enforcing MCL 287.277 because he is not "commenc[ing] the necessary proceedings against" the owners of "all unlicensed dogs" is a "whistleblower" worthy of WPA protections—that individual has reported a violation of the law and is hence a whistleblower. We think such a result would be absurd because it plainly does not advance the public interest, which, as noted, is the WPA's raison d'être. See *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 675; 760 NW2d 565 (2008) ("[t]herefore, to paraphrase Justice MARKMAN in *Cameron* [*v Auto Club Ins Ass'n*, 476 Mich 55, 80; 718 NW2d 784 (2006)], a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result"). Again: not all individuals who report violations of law are whistleblowers worthy of WPA protection, because enforcement of some laws can be detrimental to the public interest. The fact that these instances are rare does not make this distinction any less vital.

Plaintiff admitted at trial that he used a city computer to exchange sexually explicit e-mails with a woman who is not his wife, which violated city policy. In addition, as noted, the trial court heard extensive testimony that plaintiff allegedly (1) meted out inadequate discipline to subordinates who abused their power, (2) discriminated against a female officer, and (3) forged a signature on a budget memo. Again, plaintiff makes no specific effort to deny these allegations against him, other than to state that they were "merely a pretext" to not reappoint him and provide a recitation of awards and positive performance reviews.

These stated reasons for declining to reappoint plaintiff, of which the mayor learned in November 2007, undermine plaintiff's claim that he was not reappointed for whistleblowing when two additional factors are added as context. As noted, the mayor could terminate plaintiff's employment at any time. Despite plaintiff's consistent demands that he receive compensation under 68-C in 2003 and 2004 (which he did) the mayor only declined to reappoint him in late 2007—again, an almost four year gap between the alleged whistleblowing activity and the adverse employment action.

The dissent wrongly implies that we give this temporal gap undue weight in our analysis and that it is the sole factor motivating our holding. Rather, the temporal gap is of enormous importance when viewed in conjunction with the other aspects of this case, namely: (1) the mayor's ability to terminate plaintiff's employment at any time, (2) the numerous other, valid reasons the mayor gave to not reappoint plaintiff, and (3) the fact that the mayor did not reappoint plaintiff almost *immediately* after learning about these numerous, other valid reasons in late 2007.

The ultimate problem with the dissent's analysis of causation is that it ignores this context. Its would-be holding is based on a supposedly acrimonious 2004 meeting (which took place well over three years before the adverse employment action, and which, by plaintiff's own account, ended amicably), and an alleged statement made by the mayor in December 2007 (after he had decided to not reappoint plaintiff) that mentioned plaintiff's demands for additional compensation under 68-C in the context of not trusting plaintiff to keep his word. As noted, when these assertions are weighed against the other factors in this case, there is simply no way that a reasonable fact-finder could conclude that retaliation was " 'one of the reasons *which made a difference* in determining whether or not to [reappoint] the plaintiff.' " *Matras*, 424 Mich at 682 (emphasis added; citation omitted).

IV. CONCLUSION

Because no reasonable fact-finder could legally find in favor of plaintiff on his claim under the WPA, we reverse the trial court's denial of defendants' motion for JNOV and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, P.J. (*concurring*). I concur fully with Judge SAAD's majority opinion. I write separately to urge our Supreme Court to grant leave to appeal in the event of an application for leave to appeal and to consider the whistleblower claim in the context of plaintiff's breach of the agreement to forgo wage benefits. The record establishes that plaintiff attended the meeting at which city administrators agreed to forgo wage benefits. By doing so, plaintiff bound himself to a contractual agreement, which he later breached by

demanding the forgone benefits. In my view, if there is any causal connection between plaintiff's whistleblower conduct and the decision not to reappoint him, plaintiff severed that connection by breaching the agreement to forgo wage benefits. To allow plaintiff to benefit from his breach is to ignore the substance and purpose of basic contract law and of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.

In contract law, "[o]ne who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform." *Sentry Ins v Lardner Elevator Co*, 153 Mich App 317, 323; 395 NW2d 31 (1986). In this case, plaintiff and his similarly situated colleagues reached an agreement with defendants to forgo certain benefits. This agreement clearly benefitted the city and all of its residents, including plaintiff in his capacity as a resident of the city of Burton. Plaintiff then breached the agreement by demanding the forgone benefits. Plaintiff now attempts to benefit from his breach by conjuring an action under the WPA.

In my opinion, plaintiff's breach of contract precludes him from maintaining this specious action under the WPA.

BECKERING, J. (*dissenting*). I respectfully dissent. The appeal of defendants, the city of Burton and former mayor Charles Smiley, returns to this Court from the Michigan Supreme Court after the Supreme Court held that plaintiff, Bruce Whitman, engaged in conduct protected under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and remanded to this Court to consider all remaining issues on which this Court did not formally rule, including the issue of causation. *Whitman v City of Burton*, 493 Mich 303, 319-321; 831

NW2d 223 (2013). On remand, the majority concludes that plaintiff is not a "whistleblower" under the WPA and that there was insufficient evidence at trial of causation to withstand defendants' motion for judgment notwithstanding the verdict (JNOV). I disagree and would affirm the trial court's denial of defendants' motion for JNOV.

I. PROTECTED ACTIVITY

When this case was appealed to the Michigan Supreme Court, the Court held that plaintiff engaged in protected activity under the WPA:

> [I]t is undisputed that the Mayor decided to withhold payment of unused sick, personal, and vacation time in violation of Ordinance 68C, a decision to which Whitman objected. It is also undisputed that Whitman reported the Mayor's violation of Ordinance 68C to the Mayor himself, city administrator [Dennis] Lowthian, and the city attorney, and that following Whitman's reporting of this violation, he was discharged. Finally, Whitman did not knowingly make a false report given that the evidence reveals that the Mayor did in fact violate Ordinance 68C, nor is there any indication that a public body requested that Whitman participate in an investigation. *Accordingly, Whitman engaged in conduct protected under the WPA*. [*Whitman*, 493 Mich at 319-320 (emphasis added).]

Despite our Supreme Court's conclusion, the majority holds that plaintiff "is not a 'whistleblower' under the WPA . . . ." The majority reaches this conclusion by finding that "plaintiff's actions—as an objective matter—were undoubtedly against the public interest" because Ordinance 68C "harmed, not advanced, the public interest."[1] Aside from the fact that defendants did not

[1] To the extent that the majority argues that plaintiff's reporting of the ordinance violation was not whistleblowing because the issue at hand

raise this as an argument—it is instead the brainchild of the majority on remand—the majority's holding is erroneous for several reasons.

First, our Supreme Court's express conclusion that plaintiff engaged in protected activity under the WPA is the law of the case; this Court is bound by this conclusion. See *Lenawee Co v Wagley*, 301 Mich App 134, 149; 836 NW2d 193 (2013) ("The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue.") (quotation marks and citations omitted). The majority's holding that plaintiff is not a whistleblower under the WPA directly conflicts with the Supreme Court's conclusion that plaintiff engaged in protected activity under the WPA. See, generally, *Henry v Detroit*, 234 Mich App 405, 409-410;

"simply involved a disagreement regarding the proper interpretation of the city's labor laws," the majority ignores the evidence in this case. It was clear to all parties that plaintiff was pursuing the ordinance violation as a violation of the law. As noted in my previous dissent, on January 9, 2004, plaintiff sent a letter to Smiley indicating that "[t]o ignore issues specified in that ordinance would be a *direct overt violation of that ordinance* and I fully intend to address the *violation* should it occur." (Emphasis added.) In his January 15, 2004 letter to Dennis Lowthian, an administrative officer for the city who had been acting as a spokesperson for all of the administrative officers, plaintiff stated: "I cannot allow them to violate the ordinance by 'forcing waivers' of ordinance[-]given rights. *I believe it is my job as a police officer to point the violation out* and I will pursue it as far as it needs to go." (Emphasis added.) In his January 23, 2004, letter to city attorney Richard Hamilton, plaintiff made clear as well: "My position is this, *this is a violation of the ordinance [and] I told the mayor on the 12th it was an ordinance violation* . . . . I will be forced to pursue this as a *violation of the law and will address it as such*." (Emphasis added.) Smiley himself testified that when he conferred with the city's labor and employment attorney, Dennis Dubay, about the issue, Dubay said, "Chuck, you can't make a gentlemen's agreement to drive 55 [miles per hour] when the speed limit is posted at 45 . . . ." The parties were not debating "the proper interpretation" of labor laws; they were at odds over whether Ordinance 68C should be enforced.

594 NW2d 107 (1999) (stating that a person who engages in "protected activity" under the WPA is a "whistleblower"); see also *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 379 n 10; 563 NW2d 23 (1997) (identifying various types of whistleblowers).

The majority attempts to sidestep the law of the case doctrine, opining that the Supreme Court remanded for consideration of " 'all remaining issues on which [the Court of Appeals] did not formally rule' " and that this Court did not previously consider whether plaintiff's actions must have objectively advanced the public interest to be protected under the WPA. However, "[t]he law of the case doctrine applies . . . to questions actually decided in the prior decision *and to those questions necessary to the court's prior determination*." *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998) (emphasis added). Although neither this Court in its prior opinion nor our Supreme Court addressed whether plaintiff's actions must have objectively advanced the public interest to be protected under the WPA, the Supreme Court's conclusion that plaintiff engaged in protected activity under the WPA necessarily encompasses consideration of any issue that would be dispositive of whether plaintiff engaged in protected activity under the WPA. Assuming that plaintiff's actions must have objectively advanced the public interest to be protected under the WPA, this issue was necessary to the Supreme Court's determination that plaintiff engaged in protected activity under the WPA.

Second, the majority's conclusion is contrary to the plain language of the WPA. As our Supreme Court emphasized, "the plain language of MCL 15.362 controls" in this case. *Whitman*, 493 Mich at 321. Nothing

in the plain language of MCL 15.362 can be taken as a requirement that the law that is the subject of a report must objectively advance the public interest. Further, nothing in its plain language provides that the employee's report must objectively advance the public interest. MCL 15.362 provides as follows:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Neither the terms "public interest" nor any like terms are found in the statute. "It is a well-established rule of statutory construction that this Court will not read words into a statute." *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002). "If the statutory language is clear and unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed, and *further judicial construction is not permitted*." *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493; 711 NW2d 795 (2006)(emphasis added).

As the basis for its holding that plaintiff's actions must have objectively furthered the public interest for plaintiff to be a whistleblower, the majority explains that the purpose of the WPA is the protection of the public. Although the majority correctly identifies the underlying purpose of the WPA, see *Dolan*, 454 Mich at 378-379, " 'the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a

particular case.' " *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999) (citation omitted). Here, application of the plain language of MCL 15.362 dictates that plaintiff is a whistleblower; the majority reads words into MCL 15.362 to reach a result that they believe is more consistent with the purpose of the WPA.

Third, the majority's conclusion is contrary to binding precedent. This Court has explained that "[t]he plain language of the [WPA] provides protection for two types of 'whistleblowers': (1) those who report, or are about to report, violations of law, regulation, or rule to a public body, and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action."[2] *Henry*, 234 Mich App at 409. "If a plaintiff falls under either category, then that plaintiff is engaged in a 'protected activity' for

[2] Without referring to any previous interpretations of the WPA, our Supreme Court in *Whitman* stated that "MCL 15.362 makes plain that *protected conduct does not include* reports made by an employee that the employee knows are false, *or reports given because the employee is requested to participate in an investigation by a public body*." *Whitman*, 493 Mich at 313 (emphasis added), see also *id*. at 320 ("nor is there any indication that a public body requested that Whitman participate in an investigation"). This interpretation of MCL 15.362 by the Supreme Court is contrary to previous interpretations of the statute by both the Supreme Court and this Court. See *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998), *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011), *Truel v Dearborn*, 291 Mich App 125, 138-139; 804 NW2d 744 (2010), *Shaw v Ecorse*, 283 Mich App 1, 10-11; 770 NW2d 31 (2009), *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007), *Manzo v Petrella and Petrella & Associates, PC*, 261 Mich App 705, 712-713; 683 NW2d 699 (2004), *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002), and *Henry*, 234 Mich App at 410-411. I believe this to be an inadvertent misstatement of the law, because it was not relevant to the analysis in *Whitman*. I urge the Supreme Court to clarify whether a proper interpretation of MCL 15.362 includes as protected activity a person's participation in an investigation as requested by a public body, including reports given in the process.

purposes of presenting a prima facie case." *Id.* at 410. It is undisputed that plaintiff falls into the first category of "whistleblowers." The majority's conclusion that plaintiff is not a whistleblower conflicts with this Court's interpretation of the WPA.

Finally, even if plaintiff's actions must have objectively furthered the public interest for him to be a whistleblower under the WPA, I would conclude that this requirement is satisfied. The public interest is served when a violation of the law by a public official is reported. See *Dolan*, 454 Mich at 378 n 9 ("Violations of the law . . . by governments and by the men and women who have the power to manage them are among the greatest threats to the *public welfare.*") (quotation marks and citation omitted); see also *Gray v Galesburg*, 71 Mich App 161, 163; 247 NW2d 338 (1976) ("On the part of the city there has been conceded the right to prosecute the Grays for an alleged violation of a city ordinance, clearly a public interest."). In this case, it is undisputed that plaintiff reported Smiley's violation of Ordinance 68C to a public body. Although it may have been necessary for the city to adjust its budget to preserve essential public services and avoid terminating the employment of its employees, balancing the budget through a "gentlemen's agreement"[3] in violation of one of its own ordinances hardly seems to serve the public interest. The public certainly has an interest in whether the city is

[3] In footnote 14 of the majority opinion, the majority describes as "cynical" my use of the phrase "gentlemen's agreement," as if it is my own derogatory spin on the facts. Meanwhile, the majority avoids the phrase like the plague, describing the agreement instead as a "decision to waive the ordinance." But the description, "gentlemen's agreement," was coined by Smiley himself. It was used extensively throughout the trial by the parties and the witnesses. Even our Supreme Court used it. *Whitman*, 493 Mich at 307. Smiley testified that when plaintiff raised the issue of payment for vacation days, Smiley responded "we had a gentlemen's agreement." An example of a spin on the facts might include the majority's description of plaintiff's acts as "selfish," or its effort to

conducting its business within the parameters of the law.[4] Plaintiff's report to a public body of Smiley's violation of the ordinance was in the public's interest.

Accordingly, I would conclude—as our Supreme Court did—that plaintiff engaged in protected activity under the WPA. In other words, plaintiff is a whistleblower.[5]

II. CAUSAL CONNECTION

The majority also holds that "the evidence is overwhelming that plaintiff's so-called 'whistleblowing' had

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characterize Ordinance 68C as a "standard, garden-variety collective-bargaining provision for wages and benefits," a "perk," and "not a law that protects the public interest."

[4] I also take issue with the majority's conclusion that seeking to enforce Ordinance 68C—which defendants never amended during the relevant period—"harms the public interest." The public interest *is* furthered when a police chief chooses to work every day to protect and serve the public rather than taking unneeded sick, personal, and vacation time. The majority concludes that a public servant's "personal sacrifice" in waiving his or her rights under Ordinance 68C advances the public interest. While the city may save expenses that way, the public will literally not be served on the days those servants are absent from work, taking their allotted sick, personal, and vacation time, because here, they were repeatedly warned by the mayor that they had better "use it or lose it" after he foisted upon them a cost-saving method in the guise of a "gentleman's agreement." Saving taxpayer money is in the public interest, but it can be accomplished legally. Plaintiff undertook to enforce an ordinance, and as a result, nine employees were compensated for their unused vacation time pursuant to the ordinance, for a total cost of $17,762.93—not a vast, make-it-or-break-it amount of money in the city's budget.

[5] In brief response to Judge O'CONNELL's rather creative concurring opinion, this is not a contract action. The plain language of the WPA does not allow for Judge O'CONNELL's proposed injection of an extraneous theory of defense. And even if one considered a "gentlemen's agreement" foisted upon the city's nonunion employees a contract, there was no consideration. Furthermore, a contractual provision to violate the law is not enforceable. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005).

no connection to the mayor's decision to not reappoint him as police chief," and thus, defendants are entitled to JNOV. I disagree.

With its repeated references to plaintiff's other alleged misdeeds, as "weighed against" his retaliation evidence, the majority opinion reads much like a factfinder's conclusions. But the task before us is not to weigh the evidence and decide who we believe after reviewing a cold transcript. We are not jurors, and we were not at the trial. When determining whether the trial court should have granted a directed verdict or a motion for JNOV, our task is to "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted."[6] *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Here, plaintiff presented competent evidence to support his theory of the case.

In its opinion, the Supreme Court appears to suggest, without deciding, that a question of fact exists concerning causation:

> To recover under the WPA, Whitman must therefore establish a causal connection between this protected conduct and the adverse employment decision by demonstrating that his employer took adverse employment action *because of* his protected activity. *At trial, Whitman presented evidence that his reporting of the Ordinance 68C*

[6] We review de novo a trial court's denial of a motion for directed verdict or JNOV. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000).

> *violation made a difference in the Mayor's decision not to reappoint him and the Mayor, in turn, presented evidence to the contrary.* However, because the Court of Appeals did not address the issue of causation when it held that Whitman's WPA claim failed as a matter of law, this question must be resolved on remand for the purpose of determining whether the circuit court's denial of defendants' motion for JNOV was proper. [*Whitman*, 493 Mich at 320 (second emphasis added).]

Under the WPA, a plaintiff must establish that "a causal connection exists between the protected activity and the adverse employment action." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (quotation marks and citation omitted). "A plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence. Direct evidence is that which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions." *Shaw v Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009).

> Absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link exists between the whistleblowing act and the employer's adverse employment action. A plaintiff may " 'present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful [retaliation].' " Once a plaintiff establishes a prima facie case, "a presumption of [retaliation] arises" because an employer's adverse action is "more likely than not based on the consideration of impermissible factors" . . . .
>
> The employer, however, may be entitled to summary disposition if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable fact-finder could still conclude that the plaintiff's protected activity was a "motivating factor" for the employer's adverse action. "[A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but

> that it was a pretext for [unlawful retaliation]." [*Debano-Griffin*, 493 Mich at 176 (citations and quotation marks omitted).]

Viewing the evidence presented at trial in the light most favorable to plaintiff, there was sufficient evidence for a reasonable juror to conclude that plaintiff's reporting of Smiley's violation of Ordinance 68C was a motivating factor in Smiley's decision not to reappoint plaintiff. See *id.*; see also *Shaw*, 283 Mich App at 14. As discussed in my previous dissenting opinion in this case, the following evidence of causation was presented at trial:

> First, there was evidence that Smiley was aware that plaintiff reported the ordinance violation. In his January 9, 2004, letter to Smiley, plaintiff stated: "I do not feel that issuing a confidential memo that affects ones [sic] wages and benefits that are set by ordinance can supersede that very ordinance. To ignore issues specified in that ordinance would be a direct overt violation of that ordinance and I fully intend to address the violation should it occur." At the January 12, 2004, staff meeting, plaintiff told Smiley that he had talked to the city attorney about the payout issue, that refusing to pay employees for unused days was an ordinance violation, and that he expected the violation to be addressed. There was also testimony that Smiley was aware of plaintiff's January 23, 2004, letter to Hamilton, wherein plaintiff reported the violation. Although Smiley testified that he did not discuss the letter with Hamilton, Hamilton testified that he did, in fact, tell Smiley about the letter. It is the fact-finder's responsibility to determine the credibility and weight of the testimony. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).
>
> Further, although there was evidence that there may have been a variety of reasons for Smiley's decision not to reappoint plaintiff, such as plaintiff's allegedly inadequate discipline of the officers who stopped Smiley after his visit to the local bar, sexually explicit e-mails sent by plaintiff,

and other reasons described by the majority, there was also evidence that plaintiff's reporting of the ordinance violation was another reason that made a difference in Smiley's decision. On June 7, 2004, Smiley sent plaintiff a letter stating that he was considering removing plaintiff as police chief. Plaintiff testified that at their meeting later that day, Smiley angrily pointed at his face and yelled, "You threatened to have me prosecuted over the 68C vacation pay issue." [Mark] Udell's meeting notes stated: "Mayor—no trust—68-C (vacation)—lack of communication . . . ." While Smiley did not immediately fire plaintiff as threatened, and plaintiff remained police chief through November 2007, a reasonable juror could have concluded that the Ordinance 68C issue was still on Smiley's mind when he decided not to reappoint plaintiff. The incident when plaintiff allegedly failed to adequately discipline the police officers who had stopped Smiley's vehicle after he left the bar, which was one of Smiley's purported reasons for not reappointing plaintiff, occurred in March 2004. Thus, by Smiley's own admission, there were incidents going back as far as 2004 that made a difference in his decision-making in 2007.[7] Moreover, at the December 2007 meeting of city police lieutenants and sergeants, just after plaintiff's discharge, Smiley mentioned that he and plaintiff "got off on the wrong foot" because of the Ordinance 68C issue. Plaintiff testified that after the meeting, which he had not attended, he asked two sergeants and a lieutenant whether the reason for his discharge had been discussed. They all said that the reason had been discussed and that "it all goes back to" the Ordinance 68C issue. Sergeant Odette testified that Smiley said that he had not been happy with plaintiff since early after his appointment, citing the pay-

[7] The majority contends that Smiley did not reappoint plaintiff "almost *immediately* after learning about these numerous, other valid reasons in late 2007." This was Smiley's testimony, but there was substantial evidence to the contrary, casting doubt on his credibility. For example, Smiley himself testified that he learned about the e-mail issue a year earlier in the fall of 2006, and there was evidence that he knew years earlier (the spring of 2004) about plaintiff's discipline of the officers who pulled Smiley's car over after he left a bar.

out issue. [*Whitman v City of Burton*, 293 Mich App 220, 240-242; 810 NW2d 71 (2011) (BECKERING, J., dissenting).]

The majority lists a variety of reasons why there is no causal connection between plaintiff's reporting of the ordinance violation and Smiley's decision not to reappoint him. However, none of the reasons offered by the majority justifies the conclusion that there is no causal connection as a matter of law.

First, the majority opines that there is no causal connection because Smiley "viewed the 68-C issue . . . as presenting an example of how plaintiff was untrustworthy." The majority references the notes that Udell took at the June 2004 meeting, which state, "Mayor—no trust—68-C (vacation)—lack of communication . . . ." According to the majority, this evidence establishes that Smiley decided not to reappoint plaintiff because he did not trust plaintiff, not because plaintiff was a whistleblower. The majority views the evidence of the June 2004 meeting in a light most favorable to defendants, the moving parties, which is improper when reviewing a motion for JNOV. See *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009). There was evidence presented that at the June 2004 meeting, Smiley yelled at plaintiff, "You threatened to have me prosecuted over the 68C vacation pay issue." Even assuming on the basis of this evidence that Smiley decided not to reappoint plaintiff because he did not trust plaintiff, it can be reasonably inferred that Smiley's distrust of plaintiff was predicated on plaintiff's reporting of Smiley's violation of Ordinance 68C. Thus, even when the matter is framed in terms of trust as opposed to whistleblowing, it remains that Smiley decided not to reappoint plaintiff "because of his protected activity." *Whitman*, 493 Mich at 320 (emphasis omitted).

Second, the majority concludes that the temporal gap between plaintiff's reporting of the ordinance violation and Smiley's decision not to reappoint him "belies any causal connection between the two." In support of their conclusion, the majority cites cases from other jurisdictions for the proposition that large temporal gaps between protected activity and alleged retaliatory acts have been fatal to retaliation claims. However, it is well established in many jurisdictions that "[t]he mere passage of time is not legally conclusive proof against retaliation." *Robinson v Southeastern Pennsylvania Transp Auth, Red Arrow Div*, 982 F2d 892, 894 (CA 3, 1993); see also, e.g., *Shirley v Chrysler First, Inc*, 970 F2d 39, 44 (CA 5, 1992) (stating that temporal proximity "is part of our analysis, but not in itself conclusive of our determinations of retaliation"); *Castillo v Dominguez*, 120 Fed Appx 54, 57 (CA 9, 2005) (stating that a lack of temporal proximity may make it more difficult to show causation, but circumstantial evidence of a pattern of antagonism following the protected conduct can also give rise to the inference of causation). Indeed, the United States Court of Appeals for the Sixth Circuit has stated, "We have never suggested that a lack of temporal proximity dooms a retaliation claim." *Gibson v Shelly Co*, 314 Fed Appx 760, 772 (CA 6, 2008). "Temporal proximity is but one method of proving retaliation." *Che v Massachusetts Bay Transp Auth*, 342 F3d 31, 38 (CA 1, 2003). For example, where there is a lack of temporal proximity between protected activity and the adverse employment action, "circumstantial evidence of a 'pattern of antagonism' following the protected conduct can also give rise to the inference" of causation. *Kachmar v SunGard Data Sys, Inc*, 109 F3d 173, 177 (CA 3, 1997) (citation omitted). Some courts have found causation to exist where years have passed

between the protected activity and the adverse employment action. See, e.g., *Robinson*, 982 F2d at 894.

In this case, the lack of temporal proximity between plaintiff's reporting of the ordinance violation and Smiley's decision not to reappoint him is but one factor to consider when determining whether a causal connection exists. It is not conclusive. As previously discussed, although Smiley did not immediately fire plaintiff as threatened and plaintiff remained the police chief through November 2007, a reasonable juror could conclude that the Ordinance 68C issue was still on Smiley's mind when he decided not to reappoint plaintiff. By Smiley's own admission, there were incidents going back as far as 2004 that made a difference in his decision-making in 2007. And there was evidence in this case illustrating that Smiley's antagonism toward plaintiff arising from the ordinance issue continued through the date when Smiley declined to reappoint plaintiff and was a motivating factor in Smiley's decision.

Finally, the majority cites various "breaks in the causal chain" and alleged misconduct committed by plaintiff that they believe is fatal to plaintiff's claim. Particularly, in addition to referring to the temporal gap during which plaintiff remained the police chief, the majority opines that plaintiff's initial complaints about the ordinance did not upset Smiley and that Smiley enforced the ordinance after plaintiff complained. The majority also opines that plaintiff inadequately disciplined subordinates, sent sexually explicit e-mail messages on a city computer, discriminated against a female officer, and forged a signature on a budget memorandum.[8] By citing these facts, the majority attempts to

[8] The majority contends that "plaintiff has provided no evidence to refute the mayor's stated and compelling reasons for not reappointing

paint a picture of a situation where Smiley simply addressed plaintiff's objection to the vacation-payout issue without harboring any animosity toward plaintiff concerning the issue and, thus, could not have refused to reappoint plaintiff as the chief of police for any reason other than plaintiff's alleged misconduct. However, the evidence at trial, when properly viewed in a light most favorable to plaintiff, paints a different picture.

While there was evidence that there may have been a variety of reasons for Smiley's decision not to reappoint plaintiff, there was ample evidence that plaintiff's reporting of the ordinance violation was a motivating factor for the adverse employment action. Although plaintiff initially objected in March 2003 to the lack of vacation payout, plaintiff did not couch his objection in terms of an ordinance violation until January 2004; therefore, the absence of any animosity by Smiley toward plaintiff in 2003 is understandable. There was certainly evidence at trial that Smiley was upset with plaintiff over the ordinance issue after plaintiff reported Smiley's violation of the ordinance and threatened to "pursue [it] as a violation of the law" in January 2004. In particular, there was evidence that within a few months, Smiley was demonstrating an antipathetic attitude toward plaintiff. On June 7, Smiley issued a memorandum to plaintiff that requested a meeting with him the same day; in the memorandum, Smiley stated

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him[.]" In fact, plaintiff testified at trial regarding the alleged incidents and either explained or defended his conduct, and plaintiff's counsel cross-examined defendants' witnesses regarding the issues and their significance. It was up to the jury to weigh the credibility of the witnesses and determine whether, in light of everything, the ordinance issue was a motivating factor in Smiley's termination decision. As the trial court aptly told the defense when denying their motion for a directed verdict, "when it comes to those credibility issues, that gets taken care of by that jury over there, so your motion's denied."

that plaintiff would either have to resign or be fired. Significantly, plaintiff testified that when he met with Smiley that day, Smiley angrily pointed his finger in plaintiff's face and yelled, "You threatened to have me prosecuted over the 68C vacation pay issue." Udell's notes of the meeting reference "68-C (vacation)." And, as previously discussed, evidence was admitted at trial of statements that Smiley made to various lieutenants and sergeants after plaintiff was not reappointed; the lieutenants and sergeants testified that Smiley explained that he had been unhappy with plaintiff because plaintiff had threatened to have him brought up on charges of violating a city ordinance, and that the reason for not reappointing plaintiff "all goes back to" the Ordinance 68C issue.[9] Portions of Smiley's own deposition testimony were admitted at trial, wherein he admitted that he was "very upset," "extremely upset," and "wasn't happy at all" with plaintiff's conduct concerning the ordinance issue. On the basis of this evidence, a reasonable juror could certainly find that plaintiff's complaints about the violation of Ordinance 68C displeased Smiley, Smiley continued to be displeased about plaintiff's complaints even when plaintiff remained the police chief, and plaintiff's protected activity was *a motivating factor* in Smiley's decision not to reappoint plaintiff as the police chief. See *Debano-Griffin*, 493 Mich at 176.

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[9] The majority downplays the evidence of these statements by Smiley, opining that "[i]t is difficult to see how a statement the mayor allegedly made *after* he had already declined to reappoint plaintiff would influence his decision not to reappoint him." But the majority is familiar with the concept of a confession or admission. The statements that Smiley made to the lieutenants and sergeants obviously shed light on the reason why he declined to reappoint plaintiff as the police chief. Reasonable minds could (and did) find that the ordinance issue was *one of the reasons that made a difference* in Smiley's decision not to reappoint plaintiff. Notably, the jury found in plaintiff's favor even after hearing all of defendants' evidence about plaintiff that the majority found so disturbing.

Accordingly, because plaintiff engaged in a protected activity and there was sufficient evidence of a causal connection between the protected activity and the subsequent decision not to reappoint plaintiff to create a question of fact for the jury, I would affirm the trial court's denial of defendants' motion for JNOV.

PEOPLE v CHELMICKI

Docket No. 313708. Submitted February 4, 2014, at Detroit. Decided April 24, 2014, at 9:05 a.m. Leave to appeal sought.

Eric M. Chelmicki was convicted following a jury trial in the Macomb Circuit Court, Edward A. Servitto, Jr., J., of domestic assault, MCL 750.81(2), and unlawful imprisonment, MCL 750.349b, after an altercation with his girlfriend. Defendant appealed. In the Court of Appeals, defendant moved to remand the case to the trial court for reconsideration of the scoring of Offense Variable (OV) 4 of the sentencing guidelines. The Court of Appeals granted the motion to remand, retaining jurisdiction of the appeal. On remand, the trial court rescored OV 4 and resentenced defendant. The Court of Appeals then addressed the remainder of the issues raised by defendant on appeal.

The Court of Appeals *held*:

1. Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is generally prohibited, but may be admitted if one of the hearsay exceptions listed in the Michigan Court Rules applies. Under MRE 803(1), a hearsay statement may be admitted if (1) the statement provides an explanation or description of the perceived event, (2) the declarant personally perceived the event, and (3) the explanation or description was made at a time substantially contemporaneous with the event. Under MRE 803(5), a hearsay statement contained in a writing may be admitted if (1) the document pertains to matters about which the declarant once had knowledge, (2) the declarant has an insufficient recollection of those matters at trial, and (3) the document was made or adopted by the declarant while the matter was fresh in his or her memory. In this case, the prosecution read into the record several statements written by the victim for the police on the night of the incident after the victim was unable to recall all the details of the incident when testifying at defendant's trial. All the statements in question were admissible under MRE 803(1) and (5), and the trial court did not abuse its discretion by admitting the statements to which

defendant objected. Nor was there plain error regarding the statements for which no objection was made at trial.

2. A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person in order to facilitate the commission of another felony. In this case, the predicate felony at issue was arson, MCL 750.77(1)(d)(*i*), as amended by 1998 PA 312. Defendant challenged whether there was sufficient evidence that he possessed the intent to willfully and maliciously set fire to or burn the building. The trial court properly rejected defendant's request for a directed verdict on the issue given the evidence that defendant told the victim that he had turned on the gas in the apartment in order to kill them both and given evidence that the victim told her neighbors during the incident that defendant had turned on the gas and was attempting to blow up the apartment complex.

3. Criminal defendants have the right to a unanimous jury verdict, and it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. When a statute lists alternative means of committing an offense that in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternative theories. The unlawful imprisonment statute expressly provides alternative theories under which a defendant may be convicted. The alternative theories each relate to a single element of the offense and are merely different ways of establishing that element. Accordingly, no specific unanimity instruction is required with regard to those theories. Defendant was properly convicted even if some jurors believed he restrained the victim by means of a weapon and some believed he restrained the victim in order to facilitate the commission of the felony of arson.

4. Under OV 8, MCL 777.38, 15 points may be assessed if (1) the defendant transported the victim to another place of greater danger, (2) the defendant transported the victim to a situation of greater danger, or (3) the defendant held the victim captive beyond the time necessary to commit the offense. The crime of unlawful imprisonment can occur even if the victim is held only for a moment. In this case, defendant continued to hold the victim against her will after dragging her into the apartment, thereby holding her longer than the time necessary to commit the offense. Additionally, by moving the victim from the apartment balcony where she was visible to her neighbors to the inside of the apartment, defendant moved the victim to a place or situation involving greater danger. Accordingly, there was no plain error in the scoring of OV 8.

5. Under OV 1, MCL 777.31, 10 points may be assessed if the victim was touched by any type of weapon not specifically listed in MCL 777.31(1)(a) through (c). The offense variables are generally offense specific, meaning that only conduct related to the offense may be considered when scoring the offense variables unless the variable being scored specifically provides otherwise. But in considering the sentencing offense, the trial court may properly consider all of the defendant's conduct during that offense. In this case, defendant's act of holding a BB gun to the victim's head was conduct that occurred during the offense of unlawful imprisonment. Therefore the trial court did not err by assessing 10 points under OV 1.

Affirmed.

CRIMINAL LAW — UNLAWFUL IMPRISONMENT — JURY UNANIMITY.

When a statute lists alternative means of committing an offense that in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternative theories; the unlawful imprisonment statute expressly provides alternative theories under which a defendant may be convicted; the alternative theories each relate to a single element of the offense and are merely different ways of establishing that element; no specific unanimity instruction is required with regard to those theories (MCL 750.349b).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Betsy Mellos*, Assistant Prosecuting Attorney, for the people.

Mark G. Butler for defendant.

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendant Eric Michael Chelmicki was convicted by a jury of domestic assault, MCL 750.81(2), and unlawful imprisonment, MCL 750.349b. He was sentenced to 26 days' imprisonment for the domestic assault conviction and to 50 months to 15 years' imprisonment for the unlawful-imprisonment conviction. Fol-

lowing this Court's order remanding this case for the rescoring of an offense variable, defendant was resentenced to the same term. He appeals as of right. We affirm.

Defendant and the victim were in a dating relationship and lived together in an apartment. On the evening these crimes occurred, they were drinking alcohol and an argument started over an eviction notice the victim had received earlier that day. Defendant became increasingly upset and began to yell. The victim attempted to remove herself from the situation by walking outside onto the balcony of the apartment. Though the victim had trouble at trial recalling the events of the night, she testified that at some point she tried to climb down the fire escape attached to the balcony, however defendant came outside, grabbed her by her coat and dragged her back into the apartment. The victim recalled that she had broken blood vessels in her wrists after the assault. The victim's neighbors, who lived in the apartment below, witnessed some of the events, and also testified that while on the balcony, the victim told them that defendant had turned the apartment stove's gas burners on and was attempting to "blow up" the apartment complex. The neighbors called the police. When officers arrived, they kicked in the door to the apartment, however defendant had jumped out the bedroom window. One officer testified that upon entering the apartment, the victim, who was visibly upset and crying, told the officers that defendant had put a gun to her head. Defendant was subsequently located and arrested. Police recovered a BB gun from the apartment.

Defendant first argues the trial court erred by admitting hearsay statements made by the victim, which were contained in the witness statement she had writ-

ten for the police on the night of the incident. At trial, the prosecution allowed the victim to read her police statement in an effort to refresh her recollection of the events. She recalled certain events after reading it, but otherwise testified that the statement did not refresh her recollection. In response, the prosecution read several statements made by the victim into the record, including (1) that defendant " 'turned the gas on in the kitchen to kill us both. He had me by the throat when he had the BB gun. He told me the cops could kill him, he didn't care' "; (2) that defendant " 'broke my blood vessels in my wrists, put a . . . BB gun to my head and told me to call the cops' "; (3) that defendant " 'grabbed me by my coat, drug me across the kitchen floor, he broke a blood vessel in my wrist. He put his BB gun to my head and told me to call the cops' "; (4) that defendant " 'pinned me down to the bed and would not let me open the door for the police' "; and (5) that defendant " 'had me by the throat when he had the BB gun, he told me the cops could kill him, he didn't care[.]' " Defendant did not object to the first two statements, and his objections on hearsay grounds to the latter three were overruled by the trial court upon its finding that the statements were both a present sense impression and a past recollection recorded.

When the issue is preserved, we review a trial court's decision to admit evidence for an abuse of discretion, but review de novo preliminary questions of law, such as whether a rule of evidence precludes admissibility. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). We review unpreserved errors for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

MRE 801(c). "Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). See also MRE 802 ("Hearsay is not admissible except as provided by these rules.").

We conclude that the statements contained in the victim's police statement were hearsay. However, we agree with the trial court that the statements were admissible either as a present sense impression or as a past recollection recorded. MRE 803(1), the exception for present sense impressions, allows for the admission of a hearsay statement if three requirements are met: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must have personally perceived the event, and (3) the explanation or description must have been made at a time "substantially contemporaneous" with the event. *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998) (opinion by KELLY, J.). See also MRE 803(1). All three requirements are met in this case. The statement provided a description of the events that took place inside the apartment and the victim perceived the event personally. Lastly, the statement was made at a time "substantially contemporaneous" with the event, as the evidence showed, at most, a lapse of 15 minutes between the time police entered the apartment and the time the victim wrote the statement. MRE 803(1) "recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable." *Hendrickson*, 459 Mich at 236 (opinion by KELLY, J.) (noting an instance in which a 16-minute interval was held to satisfy the "substantially contemporaneous" requirement).

Alternatively, the statements were admissible under MRE 803(5), the exception for a past recollection recorded. That exception allows for the admission of a hearsay statement contained in a writing if (1) the document pertains to matters about which the declarant once had knowledge, (2) the declarant has an insufficient recollection of those matters at trial, and (3) the document was made or adopted by the declarant while the matter was fresh in his or her memory. *People v Dinardo*, 290 Mich App 280, 293; 801 NW2d 73 (2010); MRE 803(5). Again, all three requirements were met. The police statement pertained to a matter about which the declarant had sufficient personal knowledge, she demonstrated an inability to sufficiently recall those matters at trial, and the police statement was made by the victim while the matter was still fresh in her memory. Thus, the trial court did not abuse its discretion by admitting the statements to which defendant objected, nor was there plain error as to the two statements for which no objection was made.

Defendant next argues that the trial court erred by denying his motion for a directed verdict on the charge of unlawful imprisonment. We review de novo a trial court's decision whether to deny a motion for a directed verdict. *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010). In doing so, we review the evidence "in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt." *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008) (citation and quotation marks omitted).

The unlawful-imprisonment statute, MCL 750.349b, provides, in relevant part:

> (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> (a) The person is restrained by means of a weapon or dangerous instrument.
>
> * * *
>
> (c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

Defendant does not argue that there was insufficient evidence that he knowingly restrained the victim. Rather, he argues there was insufficient evidence either that he did so by means of a "weapon or dangerous instrument" or that he did so in order to "facilitate the commission of another felony." We disagree.

Defendant argues that the BB gun used to restrain the victim was inoperable and unloaded at the time of its use, and therefore could not constitute a "weapon or dangerous instrument" under subsection (1)(a) of the statute. We decline to address this issue as it is unnecessary given that subsection (1)(c) clearly applies.[1]

With respect to subsection (1)(c) of the statute, defendant argues there was insufficient evidence that he knowingly restrained the victim in order to facilitate the commission of another felony. The predicate felony

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[1] If there was any deficiency regarding the sufficiency of the evidence of restraint by means of a weapon or dangerous instrument under subsection (1)(a), it was evidentiary in nature and went to the issue of whether restraint was actually accomplished through use of the BB gun, when the victim testified that she knew the BB gun was broken, unloaded, and could not hurt her, and physical force was used to restrain the victim. Accordingly, we find that our ruling does not offend *Griffin v United States*, 502 US 46; 112 S Ct 466; 116 L Ed 2d 371 (1991) (discussing due process concerns in the context of a general verdict with alternative bases of criminal liability and the sufficiency thereof).

in this case was arson (preparation to burn property), former MCL 750.77(1)(d)(*i*), which provided, in relevant part:

> (1) A person who uses, arranges, places, devises, or distributes an inflammable, combustible, or explosive material, liquid, or substance, or any device in or near a building or property described in section 72, 73, 74 or 75 with intent to willfully and maliciously set fire to or burn the building or property or who aids, counsels, induces, persuades, or procures another to do so is guilty of a crime as follows:
>
> * * *
>
> (d) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00 or 3 times the combined value of the property intended to be burned, whichever is greater, or both imprisonment and a fine:
>
> (*i*) The property is personal or real property, or both, with a combined value of $20,000.00 or more.[2]

Defendant challenges only whether there was sufficient evidence that he possessed the intent "to willfully and maliciously set fire to or burn the building." MCL 750.77(1)(d)(*i*), as amended by 1998 PA 312. We find that there was such evidence. "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

In this case, the defendant stated to the victim that he turned the gas on in the apartment to " 'kill us

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[2] MCL 750.77(1)(d)(*i*), as amended by 1998 PA 312. The arson statutes were substantially revised by 2012 PA 533.

both.' " Moreover, neighbors testified that the victim told them on the night of the altercation that defendant turned on the gas burners and was "attempting to blow up the apartment complex . . . ." A rational trier of fact could infer from this evidence that defendant possessed the intent to set fire to the apartment building. Thus, the trial court properly denied defendant's request for a directed verdict as to subsection (1)(c) of the unlawful-imprisonment statute. In so ruling, we note that the fact that the jury ultimately found defendant not guilty of the arson charge is immaterial, because a jury's verdict regarding one offense does not preclude it from reaching a different conclusion when that offense forms an element of another crime. *People v Goss (After Remand)*, 446 Mich 587, 599; 521 NW2d 312 (1994) (opinion by LEVIN, J.). See also *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980) (stating that consistency among verdicts is not necessary because each count of an information is treated as a separate indictment).

Defendant next argues that the trial court erred in instructing the jury with respect to unlawful imprisonment because the instruction, which gave jurors the option to convict on the basis of either defendant's restraint of the victim by means of a weapon or dangerous instrument, or on defendant's restraint of the victim in order to facilitate the commission of another felony, violated his "absolute constitutional right to be convicted only upon a unanimous jury verdict . . . ." Defendant also argues that he was denied the effective assistance of counsel because his trial counsel failed to request a unanimity instruction.

Michigan law provides criminal defendants the right to a unanimous jury verdict. MCR 6.410(B). "In order to protect a defendant's right to a unanimous verdict, it is

the duty of the trial court to properly instruct the jury regarding the unanimity requirement." *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). Often, the trial court fulfills that duty by providing the jury with a general instruction on unanimity. *Id*. at 512. However, a specific unanimity instruction may be required in cases in which "more than one act is presented as evidence of the actus reus of a single criminal offense" and each act is established through materially distinguishable evidence that would lead to juror confusion. *Id*. at 512-513. Defendant, relying on *Cooks*, argues that a more specific unanimity instruction was required in this case because "discrete, specific acts were committed," each of which was claimed to satisfy all the elements of the unlawful-imprisonment charge. We disagree.

This Court held that "[w]hen a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991). Our Supreme Court has found that cases in which "more than one act is presented as evidence of the actus reus of a single criminal offense" are "analytically distinct" from cases like the one before us today, in which defendant may be properly convicted on multiple theories that represent the same element of the offense. *Cooks*, 446 Mich at 512, 515 n 16.

In this case, defendant was charged with one count of unlawful imprisonment, which expressly provides alternative theories under which a defendant may be convicted. The alternative theories each relate to a single element of the offense, and are merely different ways of establishing that element. Accordingly, defendant was properly convicted of unlawful imprisonment even if

some jurors believed he restrained the victim by means of a weapon, and the rest of the jurors believed he restrained the victim in order to facilitate the commission of the felony of arson (preparation to burn). No specific unanimity instruction was required, and it necessarily follows that defendant's claim of ineffective assistance of counsel must fail because defense counsel is not required to make a meritless request or objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). See also *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994) (stating that to prevail on a claim for ineffective assistance of counsel, a defendant must first establish that his or her counsel's representation fell below an objective standard of reasonableness under prevailing professional norms).

Defendant next argues that the trial court erred by scoring 15 points for Offense Variable (OV) 8 of the sentencing guidelines. Because defendant's challenge to the scoring of OV 8 on appeal is based on grounds different than those asserted at sentencing, the issue is unpreserved. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). "Even though defendant did not preserve this issue for appeal, this Court may review an unpreserved scoring issue for plain error affecting substantial rights." *People v Loper*, 299 Mich App 451, 457; 830 NW2d 836 (2013), citing *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). "To avoid forfeiture of the issue under the plain error rule, the defendant bears the burden to show that '1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.' " *Loper*, 299 Mich App at 457, quoting *Carines*, 460 Mich at 763.

Under OV 8 of the sentencing guidelines, 15 points may be assessed if the defendant transported the victim "to another place of greater danger or to a situation of greater danger" or if the defendant held the victim "captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). See also *People v Apgar*, 264 Mich App 321, 329-330; 690 NW2d 312 (2004). OV 8 may properly be scored when the sentencing offense is unlawful imprisonment. *People v Kosik*, 303 Mich App 146, 157-159; 841 NW2d 906 (2013). However, defendant argues that OV 8 was improperly scored in this case because there was no basis for concluding that he held the victim captive longer than the time necessary to commit the offense of unlawful imprisonment. Specifically, he argues that all of the alleged conduct in this case—beginning with grabbing the victim from the balcony and ending with him holding her down on the bed before police arrived—was not conduct that occurred beyond the time necessary to commit the offense, but rather was conduct that constituted the offense. We recognize that all of defendant's conduct during the time he restrained the victim was conduct that occurred "during" the offense. Nonetheless, we find OV 8 was properly scored in this case.

The unlawful-imprisonment statute's definition of "restrain" provides that "[t]he restraint does not have to exist for any particular length of time . . . ." MCL 750.349b(3)(a). In other words, the crime can occur when the victim is held for even a moment. Accordingly, when defendant continued to hold the victim against her will after dragging her into the apartment, he effectively held her longer than the time necessary to commit the offense of unlawful imprisonment. In any event, we find that OV 8 could have properly been scored in this case on the basis of "asportation." A victim is asported to a place or situation involving

greater danger when moved away from the presence or observation of others. *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009).

In this case, the evidence demonstrated that the victim was standing on the balcony of her apartment, visible to her neighbors who lived in the apartment directly below her, when defendant came outside and dragged her back inside the apartment. The victim was thus asported to a place of greater danger because she was moved away from the balcony, where she was in the presence or observation of others, to the interior of the apartment, where others were less likely to see defendant committing a crime. Accordingly, there was no plain error in the scoring of OV 8.

Finally, defendant argues that the trial court erred in scoring OV 1. Defendant's argument as to this offense variable is also unpreserved and reviewed for plain error. *Loper*, 299 Mich App at 457. OV 1 addresses the aggravated use of a weapon and provides, in part, that 10 points may be assessed if "[t]he victim was touched by any other type of weapon." MCL 777.31(1)(d). Defendant argues that, if the offense of unlawful imprisonment was "complete" the moment he dragged the victim from the balcony, then evidence of his putting the BB gun to the victim's head occurred after that crime and, therefore, cannot be used in scoring OV 1. Defendant is correct in that "the offense variables are generally offense-specific," meaning that customarily, "only conduct 'relating to the offense' may be taken into consideration when scoring the offense variables" unless the variable being scored specifically provides otherwise. *People v McGraw*, 484 Mich 120, 124, 129; 771 NW2d 655 (2009) (citation and quotation marks omitted).

OV 1 is an "offense-specific" variable; therefore, in scoring OV 1, the trial court was limited to "considering the sentencing offense alone." *Id.* at 127. However, in doing so, a trial court may properly consider all of "defendant's conduct during" that offense. See *id*. at 134. In this case, defendant's act of holding a BB gun to the victim's head was conduct that occurred "during" the ongoing offense of unlawful imprisonment. Therefore, the trial court did not err by assessing 10 points under OV 1.[3]

Affirmed.

MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ., concurred.

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[3] Defendant also argues on appeal that OV 4 was improperly scored. However, this Court previously remanded this case to the trial court for reconsideration of OV 4. The trial court, on remand, rescored OV 4 and subsequently resentenced defendant. Therefore, defendant's argument with respect to OV 4 is now moot and need not be addressed.

QUINTO v WOODWARD DETROIT CVS, LLC

Docket No. 311213. Submitted November 6, 2013, at Detroit. Decided April 29, 2014, at 9:00 a.m. Leave to appeal denied, 497 Mich ___.

Elena Quinto brought an action in the Macomb Circuit Court against Woodward Detroit CVS, LLC, seeking damages for injuries sustained when she tripped and fell while shopping in defendant's self-service retail store. The accident occurred when plaintiff, after walking down a display aisle and starting to turn the corner at the end of the aisle, tripped on a removable low platform used to support heavy displays of items. Defendant sought summary disposition on the basis that the platform was an open and obvious hazardous condition that it had no duty to warn plaintiff about. The court, Matthew S. Switalski, J., agreed and granted summary disposition in favor of defendant. Plaintiff appealed.

The Court of Appeals *held*:

Pursuant to MCR 7.215(J)(1), the decision of the Court of Appeals in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710 (2007), must be followed in this case. *Kennedy* held that mere distractions in the form of advertising and merchandise displays in a store are not sufficient to prevent application of the open and obvious danger doctrine absent something unusual about the distractions. Application of *Kennedy* in this case requires affirmance of the trial court's order. Were this panel not required to follow *Kennedy* and affirm, it would reverse and remand to the trial court and hold that the merchandise-display aisleways of a self-service retail store present particular circumstances to the extent that the open and obvious danger doctrine does not eliminate the duty of the store to take reasonable actions to make the aisleways reasonably safe for its customer-invitees. A special conflict panel should be convened to address the conflict between *Kennedy* and this opinion.

Affirmed.

CAVANAGH, J., concurring in the result only, expressed his agreement with the analysis and holding in *Kennedy* and stated that a special panel should not be convened. Self-service retail store owners owe the same duty of care as other premises owners. That duty is to exercise reasonable care to protect customer-

invitees from an unreasonable risk of harm caused by a dangerous condition in the store, including in the aisles. If special aspects of an open and obvious condition create an unreasonable risk of harm, the store owner is not relieved of its duty to protect its customer-invitees from that risk. But the mere possibility that customers might be distracted by the merchandise displays and advertisements commonly found in all self-service retail stores, alone, neither relieves customers of their duty to exercise reasonable care for their own safety nor imposes a unique duty on the store owners to protect customers from even open and obvious hazardous conditions that do not pose an unreasonable risk of harm. Defendant did not have a duty to protect plaintiff from tripping over the display platform. The trial court's order should be affirmed on this basis.

Christopher R. Baratta for plaintiff.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Dean A. Etsios* and *Beth A. Wittmann*) for defendant.

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

SHAPIRO, J. Plaintiff appeals by right the trial court order that granted summary disposition in favor of defendant under MCR 2.116(C)(10) in this action arising out of a trip and fall in defendant's self-service retail store.[1] Plaintiff filed a complaint against defendant alleging a single count styled as "storekeeper liability." The trial court granted defendant's motion for summary disposition on the basis that the object on which plaintiff tripped was an open and obvious hazardous condition. We conclude, consistent with Michigan Supreme Court caselaw, that the merchandise-display aisleways of a self-service retail store present particular circumstances to the extent that the open and obvious

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

danger doctrine does not eliminate the duty of the store to take reasonable actions to make those aisleways reasonably safe for its customer-invitees. While this conclusion would require that we reverse and remand, we are bound, MCR 7.215(J)(1), by the decision in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007), which rejected this view. Accordingly, we affirm and request that this Court convene a special conflict panel pursuant to MCR 7.215(J)(2).

Plaintiff was shopping in defendant's retail store. She walked down a display aisle and began to turn the corner at the end of the aisle. Projecting from the end of the aisle was a very low platform used to support heavy displays of items such as high stacks of cases of pop. The platform was not affixed to the floor and defendant does not dispute that it served no function on that day, because it was not needed and could easily have been removed.[2] In her statement given to defendant shortly after the incident, plaintiff stated that when she reached the end of the aisle, she was "looking at cereal and turned the corner" and then "tripped over the end cap display," i.e., the floor-level platform. Plaintiff conceded that she was not looking down at the floor while walking.

Plaintiff filed a negligence suit. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "The duty that a possessor of land

[2] A portable cardboard display was on the platform, covering a small portion of it. Defendant concedes that this type of display does not require a platform and that there was no reason for the platform to have been left at that location.

owes to another person who is on the land depends on the latter person's status." *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999). In this case, it is uncontested that plaintiff was an invitee on the day of the fall.

It is a fundamental common-law principle that a premises owner owes a duty "to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the [premises]." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995) (quotation marks and citation omitted). Over the last two decades, however, our Supreme Court has limited this duty pursuant to the open and obvious danger doctrine. This doctrine was originally adopted in a very limited form in *Riddle v McLouth Steel Prod Corp*, 440 Mich 85; 485 NW2d 676 (1992), where the Supreme Court concluded that there is no duty to warn invitees of hazards they will easily discover on their own. In subsequent decisions, the Court broadened the scope of the open and obvious danger doctrine so that it greatly reduced not only the duty to warn, but also the general duty to maintain the premises in a safe condition. See, e.g., *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519-520; 629 NW2d 384 (2001).

The Supreme Court has never addressed the application of the doctrine in the context of its long-standing holdings that a self-service retail store owes a specific duty to its customer-invitees to provide reasonably safe display aisleways. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Jaworski v Great Scott Supermarkets, Inc*, 403 Mich 689, 699; 272 NW2d 518 (1978). The *Clark* Court observed that " '[i]t is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an

unsafe condition . . . caused by the active negligence of himself and his employees[.]' " *Clark*, 465 Mich at 419, quoting *Serinto v Borman Food Stores*, 380 Mich 637, 640; 158 NW2d 485 (1968), quoting the syllabus in *Carpenter v Herpolsheimer's Co*, 278 Mich 697; 271 NW 575 (1937). Further, as this Court observed, on remand, in *Clark*, "an individual shopping in a self-service store is entitled to *presume* that passageways provided for his use are reasonably safe, and is not under an obligation to see every defect or danger in his pathway." *Clark v Kmart Corp* (*On Remand*), 249 Mich App 141, 152; 640 NW2d 892 (2002) (emphasis added), citing *Jaworski*, 403 Mich at 699.

These cases remain good law and, in our view, for good reason. As the Supreme Court explained in *Jaworksi*, self-service store aisles present a fundamentally different circumstance than do other premises, in that the store owner has purposefully displayed merchandise

> so that customers [can] inspect the merchandise as they walked in the aisles or passageways of the store. The storekeeper certainly intended that his customers would devote the major part of their attention to the merchandise which was being displayed, rather than to the floor to discover possible obstructions in the aisle . . . . A patron of a self-service type store . . . is entitled to rely upon the presumption that the proprietor will see that the passageways provided for his use are reasonably safe, considering the fact that while using these passageways he may be devoting some of his attention toward inspecting the merchandise. [*Jaworski*, 403 Mich at 699-700 (quotation marks and citation omitted).][3]

[3] Even the dissent in *Jaworski* did not dispute that the storeowner had a duty " 'to provide a reasonably safe aisle or aisles for customers.' " See *Jaworski*, 403 Mich at 705 (MOODY, J., dissenting, quoting the trial court's jury instruction).

Our Supreme Court has never held that the open and obvious danger doctrine applies where a customer is injured by a hazard on the floor while the customer is looking at the store owner's displays placed directly along the aisle intended for walking. Nor has the Supreme Court overruled either *Jaworski* or *Clark*. Indeed, the Supreme Court's unanimous *Clark* opinion was issued *after* the decision in *Lugo* and reversed an opinion of this Court that had dismissed the plaintiff's claim. *Clark*, 465 Mich at 421, rev'g *Clark v Kmart Corp*, 242 Mich App 137; 617 NW2d 729 (2000). And, our review of all the opinions and orders of our Supreme Court since *Lugo* reveals no cases involving floor-level hazards in the display aisleways of a self-service retail store. Other than *Clark* and *Jaworski*, the Court has never addressed whether and how a store owner's purposeful and near-continuous display of merchandise and advertising along pedestrian aisleways affects the duties of that store owner with regard to floor-level hazards in those aisleways.

The only published decision of this Court since *Lugo* that addresses *Clark* and *Jaworski* is *Kennedy*, 274 Mich App 710. There, the panel chose not to apply *Clark* and *Jaworski*, instead citing *Lugo* for the general proposition that the presence of distractions does not affect the application of the open and obvious danger doctrine. *Id.* at 715-718. However, in *Lugo*, the distraction, a passing vehicle, was neither continuous nor created, let alone intentionally created, by the defendant. *Lugo*, 464 Mich at 514-515. By contrast, in *Clark*, 465 Mich at 416-421, and *Jaworski*, 403 Mich at 695-696, as in the instant case, the distractions from the floor were continuous, i.e., displays along all the aisleways, and were intentionally created by the defendant to command the customer's attention for a commercial purpose. Therefore, when defining the duty of a store

owner, the intentional and continuous actions of the store owners that lessen the ability of the customer-invitee to protect himself or herself must be taken into account.[4]

Moreover, this case presents a fundamentally different question than that presented in the many cases dealing with snowy and icy conditions. See, e.g., *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012). Wintry outdoor conditions are the result of a natural phenomenon and are present over broad areas of territory, not merely on the property of a single person or entity. These widespread weather conditions draw attention to themselves and invite heightened attention to the hazards they create. By contrast, in this case, defendant's

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[4] Our state's adoption of the open and obvious danger doctrine was grounded in the text of 2 Restatement Torts, 2d, § 343A(1), p 218, which states: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." See, e.g., *Riddle*, 440 Mich at 92-95. Comment *f* applicable to § 343A(1) of the Restatement goes on to state:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. [Restatement, § 343A, comment *f*, p 220.]

An illustration offered by the Restatement for this principle, illustration 2, bears a striking resemblance to the instant case as well as *Clark* and *Jaworski*:

> The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B. [Restatement, § 343A, p 220.]

purposeful action of displaying goods and advertisements in its aisleways created a distraction *away from the hazard*. And, the hazard was not a universally present natural phenomenon such as winter precipitation and freezing temperatures. Instead, the hazard was an isolated and unexpected variation in the otherwise consistent walking surface.

We note that defendant's actions in displaying its goods and advertisements are not improper; indeed, they represent marketing skill and desirable commerce. Recognizing that these actions distract customers from looking at the floor does not mean that the displays should be limited in any fashion. Rather, it requires that we determine the most economical means of avoiding the costs to society of unnecessary injuries. Providing effective marketing at a retail store necessitates that customers' attentions be directed away from their feet and toward the displays of merchandise and advertising. Since customer engagement with the displays results in greater commerce and economic benefit to both the store and the customer, this alteration of attention is economically desirable and should not be discouraged. However, it also naturally reduces the degree to which the law can expect customer-invitees to constantly attend to the condition of the floor over which they walk and increases the likelihood of injuries that cost resources and lower productivity.[5]

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[5] Our dissenting colleague asserts that this Court rejected this argument in *Charleston v Meijer, Inc*, 124 Mich App 416; 335 NW2d 55 (1983). In that case, the plaintiff appealed a jury verdict in her favor that also found her 50% comparatively negligent. *Id*. at 417. This Court ruled that the trial court did not err by issuing a comparative negligence jury instruction. *Id*. at 418. As the dissent notes, the panel did state that a customer "may [not] remain blind to visible dangers." *Id*. However, the panel also stated that: "The structure of a supermarket is merely a factor the jury may consider when deciding whether the plaintiff exercised reasonable care." *Id*. at 418-419. Such is the case here—a jury could

Clark and *Jawroski* present an approach in which self-service retail store owners owe a duty to reasonably reduce the presence of hazards in store aisleways in light of their practices that distract a customer's gaze from the floor to merchandise and advertising displays. Such an approach allows the greatest degree of commercial freedom and access while also minimizing the social costs of unnecessary injuries. As noted by Justice MCCORMACK in *Bailey v Schaaf*, 494 Mich 595, 621; 835 NW2d 413 (2013) (MCCORMACK, J., concurring), in some situations, the defendant is "in the best position to reduce the risk of harm presented[.]" The issue, as she defined it, is which party is the "cheapest cost-avoider[]," i.e., which party is in the best position to minimize the risk of harm.[6] *Id*. Typically, that is the invitee, given their interest in self-protection and the unpredictability of distractions beyond the control of the premises owner. However, when the premises owner intentionally takes action that will, over an extended period, redirect the invitee's attention away from floor-level hazards, the premises owner thereby becomes the cheapest cost avoider as the likelihood of customer-invitee self-protection is substantially reduced.

Our holding should not be read to impose the duty of an insurer on retail store owners. Insurers are liable to their insureds as a matter of contract, and, with very few exceptions, their common-law duties are irrelevant

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properly determine whether plaintiff exercised reasonable care. Moreover, in *Charleston*, the plaintiff made no assertion that her view of the hazard was blocked or that she did not see the hazard because of a distracting marketing display. Accordingly, to the extent *Charleston* even applies to the particular facts of this case, it does not preclude our holding.

[6] See, e.g., Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970); Posner, *Economic Analysis of Law*, 7th ed (Aspen Publishers, 2007).

to their duty to pay. Insurers are essentially strictly liable as a matter of contract. Our opinion would not make retail store owners strictly liable for injuries to their customers and it would be error to interpret it as such. Self-service retail store owners could still maintain any of the defenses on the following nonexhaustive list: (a) that the claimed hazard was either not a hazard or not an unreasonable one under the circumstances, (b) lack of notice of the alleged hazard, (c) lack of "but-for" causation, (d) lack of proximate cause, (e) intentional acts by the plaintiff or third parties, and (f) comparative negligence, i.e., a customer-invitee's duty to reasonably safeguard himself or herself from injury under the circumstances remains even where the store owner owes a contemporaneous duty to reasonably safeguard its customers under the circumstances.

Absent this Court's ruling in *Kennedy*, 274 Mich App 710, we would apply the foregoing analysis, reverse the trial court's grant of summary disposition in favor of defendant, and remand for further proceedings. However, we are bound by *Kennedy*, MCR 7.215(J)(1), and so affirm and request this Court to convene a special conflict panel, MCR 7.215(J)(2).

Affirmed.

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

CAVANAGH, J. (*concurring in the result only*). I agree with this Court's analysis and holding in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 714-719; 737 NW2d 179 (2007); therefore, I concur in the result only and conclude that a special conflict panel should not be convened under MCR 7.215(J)(2).

"[A] premises owner is not an insurer of the safety of invitees." See *Riddle v McLouth Steel Prod Corp*, 440

Mich 85, 94; 485 NW2d 676 (1992). Although, generally, a premises owner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land, an invitee also has a duty to exercise reasonable care for his or her own safety. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995); *Charleston v Meijer, Inc*, 124 Mich App 416, 418-419; 335 NW2d 55 (1983).

Here, the majority imposes a heightened duty of care on self-service retail store owners after concluding that merchandise displays and advertisements cause customers to be so distracted that they cannot reasonably be expected to observe even an open and obvious danger that exists in an aisle while shopping, i.e., a condition that "an average person with ordinary intelligence would have discovered [ ] upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). Therefore, the majority concludes, the open and obvious danger doctrine should not apply to floor-level hazards located in aisles containing displays of merchandise and advertising.[1] I disagree and would hold that self-service retail store owners owe the same duty of care as other premises owners and that duty is to

[1] This argument was also rejected by this Court in *Charleston*, 124 Mich App at 418. In that case, the plaintiff slipped in a puddle of water while shopping in a supermarket. She argued that the holding in *Jaworski v Great Scott Supermarkets, Inc*, 403 Mich 689, 699; 272 NW2d 518 (1978), created a heightened standard of care for supermarkets, or lowered her standard of care, because of the distractions attracting a shopper's attention away from the floor. *Charleston*, 124 Mich App at 418. Noting that the *Jaworski* Court had held that a customer is not "under an obligation to see every defect or danger in his pathway," this Court nevertheless concluded that the statement did not mean "that the customer may remain blind to visible dangers." *Id*. (quotation marks and citation omitted).

exercise reasonable care to protect customer-invitees from an unreasonable risk of harm caused by a dangerous condition in the store, including in the aisles. And if "special aspects" of an open and obvious condition create an unreasonable risk of harm, the retail store owner is not relieved of its duty to protect its customer-invitees from that risk. See *Lugo*, 464 Mich at 517. But the mere possibility that customers might be distracted by the merchandise displays and advertisements commonly found in all self-service retail stores, alone, neither relieves customers of their duty to exercise reasonable care for their own safety nor imposes a unique duty on self-service retail store owners to protect customers from even open and obvious dangers that do not pose an unreasonable risk of harm.

In this case, plaintiff tripped over an open and obvious display platform located in an aisle of defendant's store. That is, the danger was discoverable by an average person upon casual inspection. See *Hoffner*, 492 Mich at 461. And plaintiff did not argue that "special aspects" of this open and obvious danger created an unreasonable risk of harm. Therefore, defendant did not have a duty to protect plaintiff from tripping over the display platform. Accordingly, consistent with the analysis and holding in *Kennedy*, I would affirm the trial court's order granting summary disposition in favor of defendant.

PEOPLE v RHODES (ON REMAND)

Docket No. 310135. Submitted February 27, 2014, at Lansing. Decided May 6, 2014, at 9:00 a.m.

A jury in the Wayne Circuit Court convicted Anthony E. Rhodes of assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court, Michael M. Hathaway, J., sentenced defendant to 5½ to 10 years in prison for the assault conviction and to a consecutive sentence of 2 years' in prison for the felony-firearm conviction. Defendant appealed. The Court of Appeals, SHAPIRO and RONAYNE KRAUSE, JJ. (K. F. KELLY, P.J., concurring), affirmed in an unpublished opinion per curiam, issued August 1, 2013. In lieu of granting leave to appeal, the Michigan Supreme Court vacated that portion of the Court of Appeals opinion that affirmed defendant's sentence. The Supreme Court remanded the case to the Court of Appeals for reconsideration of defendant's sentencing challenge. The Supreme Court denied leave to appeal in all other respects.

On remand, the Court of Appeals *held*:

1. Offense Variable (OV) 14 of the sentencing guidelines concerns the offender's role in the criminal transaction. Ten points must be assessed under OV 14 if the defendant was a leader in a multiple offender situation. 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. Whether the facts found by the trial court are adequate to satisfy the trial court's scoring decision is subject to review de novo. A "leader" is a person that leads, or a guiding or directing head. To "lead" means to guide, precede, show the way, direct, or conduct. In this case, the trial court relied on the fact that defendant was the only offender with a gun in determining that defendant was a leader in the criminal transaction. While defendant's exclusive possession of a gun was some evidence of leadership, that fact did not meet the preponderance of the evidence standard, and the record failed to reveal any other evidence of leadership. Merely posing a greater threat to a joint victim is not sufficient to establish an indi-

vidual as a leader within the meaning of OV 14 in the absence of other evidence showing that the individual played some role in guiding or initiating the criminal transaction. OV 14 should have been scored at zero points.

2. A defendant is entitled to resentencing if his or her sentence is based on an inaccurate guidelines score that affects the applicable sentencing guidelines range. Once defendant's OV 14 score was corrected, the guidelines range for his minimum sentence for the assault conviction would drop, and his minimum sentence of 66 months' imprisonment would fall outside the correct guidelines range. Defendant, therefore, was entitled to resentencing.

Sentence for assault with intent to commit great bodily harm vacated; case remanded to the trial court for resentencing.

CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLE 14 — POSSESSION OF A GUN AS EVIDENCE OF LEADERSHIP.

Ten points must be assessed under offense variable (OV) 14 of the sentencing guidelines if the defendant was a leader in a multiple offender situation; a "leader" is a person that leads, or a guiding or directing head; to "lead" means to guide, precede, show the way, direct, or conduct; while a defendant's exclusive possession of a gun may be some evidence of leadership, merely posing a greater threat to a joint victim is not sufficient to establish an individual as a leader within the meaning of OV 14 in the absence of other evidence showing that the individual played some role in guiding or initiating the criminal transaction.

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

Anthony E. Rhodes, *in propria persona*, and *Lee A. Somerville* for defendant.

ON REMAND

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendant was convicted by a jury of assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 5½ years' to 10 years' incarceration for the assault conviction and to a consecutive sentence of 2 years for the felony-firearm conviction. Defendant appealed by right and, in our prior opinion, we affirmed his convictions and sentence. *People v Rhodes*, unpublished opinion per curiam of the Court of Appeals, issued August 1, 2013 (Docket No. 310135).[1] In lieu of granting leave to appeal, our Supreme Court vacated the portion of our opinion affirming defendant's sentence and remanded the matter to us for reconsideration in light of *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). *People v Rhodes*, 495 Mich 938 (2014). In all other respects, our Supreme Court denied leave to appeal. *Id*. We now vacate defendant's sentence for assault with intent to commit great bodily harm and remand for resentencing.

Defendant's challenge to his sentence is predicated on asserting that the trial court erroneously scored Offense Variable (OV) 14, which is scored at either 10 points or zero points, depending on whether the defendant was "a leader in a multiple offender situation" when considering the "entire criminal transaction." MCL 777.44. We affirmed the trial court's score of 10 points in reliance on *People v Davis*, 300 Mich App 502, 508; 834 NW2d 897 (2013), wherein this Court held that a trial court's sentencing decision would not be considered clearly erroneous if *any* evidence in the record would have supported the trial court's finding. We noted that defendant had been the only offender present at the time of the charged offenses who was in

[1] Judge KELLY concurred in the result only.

possession of a gun, and we concluded that this was at least some evidence of leadership. We were therefore unable to find that the trial court clearly erred in scoring OV 14.

In *Hardy*, however, our Supreme Court explicitly rejected the "any evidence" standard and held that any decisions from this Court citing the "any evidence" standard were incorrect. *Hardy*, 494 Mich at 438. "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." *Id*. However, we review de novo whether the facts found by the trial court are adequate to satisfy the trial court's scoring decision. *Id*. Consequently, we can no longer affirm a trial court's scoring decision merely because *any* evidence in the record supports that decision.

The testimony indicates that several other people were present at the scene of the assault, but only one other person, Terence Adams, who was initially a codefendant but ultimately pleaded guilty to a reduced charge in exchange for testifying against defendant, was actually involved in the assault. Multiple defendants may be considered leaders under OV 14 if there are at least three offenders involved. MCL 777.44(2)(b). Because the record only supports a finding that two offenders were involved, only one individual may be considered a leader in the instant criminal transaction.

The trial court concluded at sentencing that defendant "was clearly . . . the leader" because defendant "was the one with the gun." The trial court initially opined that defendant had also "sort of led the charge against" the victim and "may have been the one that had the beef, too, or thought he did." However, the prosecutor and defendant's attorney subsequently dis-

puted the extent to which defendant said anything to the victim, and it is unclear from the transcript of the sentencing proceedings whether the trial court maintained its belief that defendant had been the instigator on the basis of any facts other than defendant's possession of the gun.

The victim testified that he was walking home from a bar when he stopped to go into a gasoline station. After he continued walking, he heard a car stop near him. Two men jumped out of the car and approached him, one of whom he had seen a few minutes previously in the gasoline station and the other of whom had a gun. The former was later identified as Adams, and the latter was later identified as defendant. The victim testified that both men ordered him to get on the ground, and Adams asked him what he had been "laughing at in the store." When the victim did not comply, both men began hitting him, and at some point the gun discharged, injuring the victim. More shots were fired at the victim as he ran away. Adams testified that both he and defendant punched the victim, that defendant had something that "looked like a gun" in his hand, and that he heard gunshots before he and defendant returned to their car. Adams denied knowing why the driver stopped the car, why defendant got out of the car, or that defendant had a gun prior to getting out of the car; but he conceded that he got out with the intention "[t]o hit the guy." Other than Adams, defendant, and the victim, the only witnesses were the three other people in the car, of whom the driver did not testify and one passenger did not recall anything. The last passenger only recalled defendant and Adams getting out of the car, arguing with a man and hitting him, hearing a single gunshot, and seeing defendant put a gun under the seat.

The Legislature did not define by statute what constitutes a leader for the purposes of OV 14. We have not found any binding caselaw defining "leader" in this context. Consequently, we turn to the dictionary. See *Ter Beek v City of Wyoming*, 495 Mich 1, 20; 846 NW2d 531 (2014). According to *Random House Webster's College Dictionary* (2001), a "leader" is defined in relevant part as "a person or thing that leads" or "a guiding or directing head, as of an army or political group." To "lead" is defined in relevant part as, in general, guiding, preceding, showing the way, directing, or conducting. The evidence unequivocally supports the trial court's factual determination that defendant possessed a gun and the only other person involved in the criminal transaction did not. However, the evidence does not show that defendant acted first, gave any directions or orders to Adams, displayed any greater amount of initiative beyond employing a more dangerous instrumentality of harm, played a precipitating role in Adams's participation in the criminal transaction, or was otherwise a primary causal or coordinating agent.

We remain of the opinion that defendant's exclusive possession of a gun during the criminal transaction is *some* evidence of leadership, however it does not meet the preponderance of the evidence standard found in *Hardy*. This fact alone does not support the finding by the trial court that defendant issued orders that Adams did not. The record simply fails to reflect any other evidence of leadership. Under the dictionary definition of leadership, we cannot conclude that merely posing a greater threat to a joint victim is sufficient to establish an individual as a leader within the meaning of OV 14, at least in the absence of any evidence showing that the individual played some role in guiding or initiating the transaction itself. We are therefore constrained to re-

verse the trial court's scoring of OV 14, which should have been scored at zero points.

"If a scoring error does not alter the guidelines range, resentencing is not required." *People v Sims*, 489 Mich 970 (2011). However, a defendant *is* entitled to resentencing if his or her sentence is based on an inaccurate guidelines score that affects the applicable sentencing guidelines range. *Id*.; *People v Jackson*, 487 Mich 783, 792-794; 790 NW2d 340 (2010). According to the record, defendant's total OV score is presently 50 points, resulting in an OV level of V and a guidelines range for defendant's minimum sentence of 34 to 67 months in prison. If the score of OV 14 is corrected, defendant's total OV score would be 40 points and his OV level would change to IV. This would result in a corrected guidelines range for defendant's minimum sentence of 29 to 57 months in prison. MCL 777.65. Defendant's present minimum sentence of 66 months is therefore outside the correct guidelines range, and he is entitled to resentencing.

Defendant's sentence for assault with intent to commit great bodily harm is vacated, and the matter is remanded to the trial court for resentencing. In all other respects, pursuant to our prior opinion, we continue to affirm. We do not retain jurisdiction.

K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ., concurred.

THE RESERVE AT HERITAGE VILLAGE ASSOCIATION v WARREN FINANCIAL ACQUISITION, LLC

Docket No. 317830. Submitted April 1, 2014, at Detroit. Decided May 6, 2014, at 9:05 a.m.

On January 11, 2012, The Reserve at Heritage Village Association, an association of condominium coowners, brought an action in the Macomb Circuit Court against Warren Financial Acquisition, LLC (Warren), the titleholder of 76 of the 205 units in the condominium development. Plaintiff alleged that, since October 2010, Warren had failed to pay association dues for the units it owned. Plaintiff sought foreclosure of its condominium association lien on those units and collection of the unpaid assessments. In November 2005, Winnick Heritage Village, LLC, had acquired title to 150 units in the development from the developer, Heritage Village Single Family, Inc. (HVSF). Fifth Third Bank acquired a mortgage on 76 of the Winnick units. Fifth Third assigned its mortgage interest to Warren, and Winnick conveyed its 76 units to Warren by covenant deed, which provided that the transfer was without merger of the mortgage interest. After plaintiff filed suit, Warren assigned the mortgage to Reserve Mortgage Holding, LLC, which commenced foreclosure proceedings and purchased the 76 units by sheriff's deed. On July 16, 2012, plaintiff filed a first amended complaint, adding as defendants the developer, HVSF; Gary Sakwa, the principal of Warren, the developer, and several other entities; Nick Donofrio, a former director and officer of plaintiff; Whitehall Property Management, Inc.; Christine Metiva; Stanley L. Scott; and others. The amended complaint also added 19 new counts. Reserve Mortgage Holding, LLC, then intervened, seeking a declaratory judgment to quiet title, asserting that its foreclosure extinguished all encumbrances by plaintiff. Plaintiff subsequently filed a second amended complaint on September 14, 2012, adding Reserve Mortgage Holding, Winnick, and David A. Gans as parties, and adding another nine counts. After considering several motions, the court, John C. Foster, J., issued an opinion and order in which it vacated the assignment of the mortgage from Warren to Reserve Mortgage Holding and vacated the foreclosure sale. The court ordered that the non-merger

clause in the conveyance from Winnick to Warren be given effect, and that Warren could proceed with a foreclosure of its units. The court granted defendants' motion for partial summary disposition with regard to Counts IV through XXX of plaintiff's second amended complaint, dismissing those counts. The Court of Appeals granted plaintiff's interlocutory application for leave to appeal.

The Court of Appeals *held*:

1. When the holder of a real estate mortgage becomes the fee owner, the former estate is generally merged in the latter. This rule, however, is subject to the exception that when it is to the interest of the mortgagee and it is the mortgagee's intention to keep the mortgage alive, there is no merger unless the rights of the mortgagor or third persons are affected thereby. In this case, Warren was not seeking to protect itself from the claims of junior lienholders for debts incurred by Winnick. Rather, Warren was seeking to avoid paying the debt it incurred to plaintiff, which is a third party affected by the nonmerger. Although there were no assessments due at the time of the conveyance containing the nonmerger clause, the time for considering the effect on a third party is not limited to the time of the transaction. A determination of nonmerger would allow Warren to avoid paying the debt it incurred to plaintiff, because if there was no merger, Warren could foreclose and extinguish plaintiff's lien. Therefore, despite the express intention in the conveyance for nonmerger, there was a merger of the mortgage and the fee title. As a result, Warren could not foreclose on the mortgage, and the trial court abused its discretion by ruling that Warren could foreclose.

2. Under MCL 559.276(1), the following limitations apply in a cause of action arising out of the development or construction of the common elements of a condominium project, or the management, operation, or control of a condominium project: (1) if the cause of action accrues on or before the transitional control date, a person shall not maintain an action against a developer, residential builder, licensed architect, contractor, sales agent, or manager of the project later than three years after the transitional control date or two years after the date on which the cause of action accrued, whichever occurs later, and (2) if the cause of action accrues after the transitional control date, a person shall not maintain an action against a developer, residential builder, licensed architect, contractor, sales agent, or manager of a condominium project later than two years after the date on which the cause of action accrued. The term "transitional control date" means the date on which the board of directors for an association

of coowners takes office pursuant to an election in which the votes that may be cast by eligible coowners unaffiliated with the developer exceed the votes that may be cast by the developer. This statute of limitations clearly applied to developer HVSF and Whitehall, the manager. The statute of limitations also applied to the remaining defendants. The Condominium Act, MCL 559.101 *et seq*., states in MCL 559.235 that successive developers must comply with the act in the same manner as a developer before selling any units. Accordingly, the act's statute of limitations also applied to successive developers such as Warren and Winnick. Moreover, plaintiff's arguments generally suggested that all the defendants in this case should be considered one party as agents or alter egos of the others. Plaintiff, for instance, asserted that the amended complaints did not add any new parties. Given plaintiff's arguments in that regard, the statute of limitations set forth in MCL 559.276(1) applied to all the defendants.

3. The period of limitations set forth in MCL 559.276(1) applies to causes of action arising out of the development or construction of the common elements of a condominium project, or the management, operation, or control of a condominium project. "Common elements" means the portions of the condominium project other than the condominium units. MCL 559.276(1) clearly applied to Counts IV, VI, and VIII, which alleged breaches related to the design, construction, and delivery of the common elements, as did Counts V, VII, IX, X, and XI. Counts XII through XXVII all pertained to an alleged fraudulent scheme carried out by defendants. These counts arose out of the management of the project because the allegations indicated that the fraudulent scheme was an integral part of the management and operation of the condominium project. Counts XXVIII through XXX concerned the allegedly fraudulent conveyance from Warren to Reserve Mortgage Holding. These counts thus concerned the management of the condominium project in light of the fact that plaintiff alleged that Warren, Reserve Mortgage Holding, and the other defendants connected to Sakwa were really one entity that controlled the management of the project. Accordingly, MCL 559.276(1) applied to Counts IV through XXX.

4. In an interrogatory response, plaintiff acknowledged that the transitional control date was January 27, 2009, but subsequently asserted that it used the term incorrectly and that the transitional control date had not yet occurred. However, plaintiff's second amended complaint also suggested that the transitional control date was January 27, 2009, and the allegations in plaintiff's complaint had to be accepted as true unless contra-

dicted by documentary evidence. There was no evidence contradicting the complaint's suggestion that the transitional control date was January 27, 2009. Thus, the trial court did not err by finding that the transitional control date was January 27, 2009.

5. Under MCL 559.276(1)(a), if plaintiff's causes of action accrued before January 27, 2009, plaintiff had until January 27, 2012, at the latest, to bring suit. Under MCL 559.276(1)(b), if plaintiff's causes of action accrued after January 27, 2009, plaintiff had until two years after the date on which the causes of action accrued to bring suit. The causes of action set forth in Counts IV through IX of plaintiff's second amended complaint—relating to the delivery and development of the complex, which occurred in 2005—were required to be brought by January 27, 2012. The physical defects were not concealed, so there was no fraudulent concealment that might have tolled the running of the period of limitations. And the allegations in plaintiff's amended complaints, raising Counts IV through XXX, did not relate back to the original complaint because the claims in the amended complaints did not arise out of the conduct, transaction, or occurrence set forth in the original complaint, given that the original complaint only concerned Warren's alleged failure to pay association dues. Accordingly, Counts IV through IX were brought after the period of limitations had expired and were time-barred. The causes of action in Counts XII through XXVII, concerning the alleged fraudulent scheme, accrued in December 2008 or March 2009. There was no fraudulent concealment of this scheme given that plaintiff was aware of a possible cause of action by March 3, 2009, when it became aware of the missing association dues. Given that Counts XII through XXVII did not relate back to the filing of the original complaint, like Counts IV through IX, they were brought after the period of limitations had expired and were time-barred. The causes of action in Counts XXVIII through XXX concerned the 2012 transfer of the mortgage to Reserve Mortgage Holding and were not time-barred. Nonetheless, Counts XXVIII through XXX were moot because plaintiff agreed with the vacation of the mortgage transfer. Therefore, the trial court did not err by dismissing Counts IV through XXX of plaintiff's second amended complaint.

That portion of the trial court's order concluding that Warren could foreclose on the mortgage because there was no merger reversed; dismissal of Counts IV through XXX of plaintiff's second amended complaint affirmed; case remanded to the trial court for further proceedings.

PROPERTY — MORTGAGES — MERGER WITH FEE ESTATE — EFFECT ON THIRD PARTIES.

When the holder of a real estate mortgage becomes the fee owner, the former estate is generally merged in the latter, but when it is to the interest of the mortgagee and it is the mortgagee's intention to keep the mortgage alive, there is no merger unless the rights of the mortgagor or third persons are affected thereby; the time for considering the effect on a third party is not limited to the time of the transaction.

The Meisner Law Group, PC (by *Robert M. Meisner* and *Daniel P. Feinberg*), for plaintiff.

Kirk, Huth, Lange & Badalamenti, PLC (by *Robert W. Kirk*, *Raechel M. Badalamenti*, and *Robert T. Carollo, Jr.*), *Merigan Law Firm, PLC* (by *Gary Merigan*), and *Sable Law Firm PC* (by *Richard J. Sable*), for defendants.

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

PER CURIAM. Plaintiff, The Reserve at Heritage Village Association, appeals by leave granted the order granting declaratory relief to defendant Warren Financial Acquisition, LLC (Warren), and defendant/intervening plaintiff Reserve Mortgage Holding, LLC (Reserve), and granting partial summary disposition to defendants on Counts IV through XXX of plaintiff's second amended complaint. We affirm in part, reverse in part, and remand.

The Reserve at Heritage Village is a condominium complex with 205 units. In November 2005, Winnick Heritage Village, LLC (Winnick), acquired fee title to 150 units of the complex from Heritage Village Single Family, Inc. (HVSF), the developer of the complex. On November 29, 2005, Fifth Third Bank acquired a mortgage on 76 units of The Reserve at Heritage Village,

which were owned by Winnick.[1] In December 2005, HVSF sold the other 55 units to Canvasser Heritage, LLC (Canvasser).[2]

Fifth Third Bank assigned the mortgage to Warren, and on May 18, 2009, Winnick conveyed the 76 units to Warren by covenant deed, which provided that the transfer was "without merger of the Mortgage dated as of November 29, 2005 . . . ." On December 7, 2011, plaintiff recorded a lien for unpaid condominium assessments against Warren.

Following the initiation of plaintiff's lawsuit to collect the unpaid condominium assessments against Warren, filed on January 11, 2012, Warren assigned the mortgage to Reserve on April 18, 2012. Reserve then commenced foreclosure proceedings and purchased the 76 units on July 20, 2012, by sheriff's deed.

On January 11, 2012, plaintiff filed a complaint against Warren, alleging that Warren failed to pay condominium assessments. In Count I, plaintiff sought to foreclose on its lien for the unpaid assessments. In Count II, plaintiff sought to collect the unpaid assessments in the amount of $205,884.[3]

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[1] According to plaintiff's second amended complaint, a mortgage was also granted to HVSF.

[2] Plaintiff also filed suit against Canvasser, Mark A. Canvasser, and Mound Warren Holdings, LLC (the Canvasser defendants) in Lower Court No. 2012-0594-CH. On October 3, 2012, the trial court consolidated plaintiff's case against Warren and the other defendants with its case against the Canvasser defendants. On May 1, 2013, the trial court entered an order granting plaintiff's motion for partial summary disposition with regard to Canvasser and Mound, and on Count III of Mound's counter-complaint.

[3] At the time of oral arguments before this Court, plaintiff indicated that the amount due is now over $500,000. The trial court, concluding that Warren could foreclose on the mortgage, did not decide whether Warren was liable for the assessments. The trial court also noted that the parties disputed whether Warren was a developer or successor developer.

On July 16, 2012, plaintiff filed its first amended complaint. Plaintiff added the following parties as defendants: HVSF, Heritage Village Master Community Association (HVMCA), Grand/Sakwa Properties, LLC, Grand/Sakwa of Warren, LLC, Nick Donofrio, Whitehall Property Management, Inc. (Whitehall), Christine Metiva, and Stanley L. Scott. Plaintiff also added Counts III through XXI.

On August 17, 2012, Reserve filed a motion to intervene. Reserve claimed that it had commenced foreclosure proceedings against Warren and that Reserve became the owner of the 76 units on July 20, 2012, or July 27, 2012, when Warren executed a waiver of statutory and equitable rights of redemption to Reserve. Reserve argued that its foreclosure extinguished all encumbrances by plaintiff. On August 27, 2012, a stipulated order was entered granting Reserve's motion to intervene. On August 28, 2012, Reserve filed an intervening complaint against plaintiff. In Count I, Reserve sought a declaratory judgment to quiet title. In Count II, Reserve claimed that plaintiff slandered the title of the 76 units. In Count III, Reserve alleged that plaintiff breached the Condominium Act, MCL 559.101 *et seq*., and the condominium association bylaws.

On September 14, 2012, plaintiff filed its second amended complaint. Plaintiff added the following parties as defendants: Reserve, David A. Gans, and Winnick. Plaintiff alleged that from December 1, 2005, to September 4, 2008, the Sakwa defendants (Gary Sakwa, Warren, HVSF, Grand/Sakwa Properties, LLC, and Grand/Sakwa of Warren, LLC), Donofrio, HVMCA, Whitehall, Winnick, Canvasser, and Metiva collected only a portion of the actual assessments applicable to the Winnick and Canvasser units, failed to collect annual assessments applicable to the Winnick and

Canvasser units, and failed to collect the master association assessments applicable to the Winnick and Canvasser units. Plaintiff claimed that those defendants, nonetheless, paid HVMCA the full amount of master association assessments from plaintiff's funds. Plaintiff further alleged that on October 8, 2008, the Sakwa defendants, HVMCA, and their agents agreed not to pursue collection of any of the assessments from the period of December 1, 2005, to September 4, 2008. Plaintiff claimed that, after September 4, 2008, the Sakwa defendants, HVMCA, and their agents continued to pay master association assessments, although plaintiff was never paid such assessments. Plaintiff alleged that the Sakwa defendants, HVMCA, and their agents engaged in a fraudulent scheme, in which they charged discounted assessments, failed to collect any assessments, paid the assessments to HVMCA even though they were never collected, and then refused to cause HVMCA or the Sakwa defendants to maintain, repair, and replace the "berm areas" of the complex. Plaintiff claimed that the fraudulent scheme continued while Whitehall was the managing agent from September 2008 through December 12, 2010.

Plaintiff's second amended complaint contained the following counts: foreclosure of condominium association lien (Count I), collection of unpaid assessments (Count II), collection of unpaid assessments—Winnick (Count III), breach of contract—Sakwa defendants (Count IV), breach of contract—Winnick defendants (Winnick and Gans) (Count V), breach of master deed covenants—Sakwa defendants (Count VI), breach of master deed covenants—Winnick (Count VII), breach of warranty—Sakwa defendants (Count VIII), breach of warranty (Count IX), breach of contract—defendant Whitehall (Count X), breach of covenants (Count XI), conversion and embezzlement (Count XII), civil

conspiracy—all defendants (Count XIII), concert of action (Count XIV), breach of fiduciary duty—HVMCA and Sakwa (Count XV), breach of fiduciary duty—Donofrio and Gary Sakwa (Count XVI), breach of fiduciary duty—Whitehall (Count XVII), breach of fiduciary duty—Metiva (Count XVIII), breach of fiduciary duty —defendant director Scott (Count XIX), fraudulent misrepresentation (Count XX), negligent misrepresentation (Count XXI), unjust enrichment/quantum meruit—Sakwa and HVMCA (Count XXII), violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. (Count XXIII), violation of the Condominium Act (Count XXIV), declaratory relief/piercing the separate entity veil (Count XXV), declaratory relief/piercing the limited liability company veil (Count XXVI), declaratory relief—partnership/amalgamation of interests (Count XXVII), declaratory relief (Count XXVIII), slander of title (Count XXIX), and quiet title (Count XXX).

The order appealed addressed three motions. First, on March 6, 2013, Warren and Reserve sought a declaratory order and partial stay of the proceedings. They proposed that the trial court enter an order (1) setting aside the assignment of the mortgage from Warren to Reserve and the foreclosure sale and sheriff's deed to Reserve, (2) staying the proceedings regarding Counts I, II, XXV, XXVIII, XXIX, and XXX of plaintiff's second amended complaint and the entire intervening complaint, and (3) dismissing all counts of plaintiff's second amended complaint that referred to irregularities in the assignment from Warren to Reserve. They argued that Warren would then foreclose on the mortgage, most likely be the successful bidder at the foreclosure sale, and demand scheduling of the 2012 annual meeting and special meeting. Warren and Reserve argued that the assessments would be extinguished, Counts I, II, XXV, XXVIII, XXIX, and XXX would be

moot, and the intervening complaint would be moot. Second, on March 7, 2013, defendants moved for partial summary disposition on Counts IV through XXX of plaintiff's second amended complaint, claiming plaintiff lacked standing and that Counts IV through XXX were time-barred. Third, on March 18, 2013, plaintiff sought leave to reschedule the hearing on its second motion for partial summary disposition and for partial stay of the proceedings.

On March 25, 2013, the trial court entered an order stating that the parties agreed to the relief requested in the motion for a declaratory order and partial stay of the proceedings, except that plaintiff objected to the nonmerger clause and a partial stay of the proceedings.[4] The trial court requested briefing on the merger issue in order for it to address the validity and enforceability of the mortgage and Warren's ability to foreclose.

Following briefing and a hearing on the motions, the trial court issued an opinion and order. The trial court concluded that the parties intended to keep the mortgage alive and, at the time of the conveyance from Winnick to Warren there were no assessments due. Accordingly, it found that at the time of the conveyance containing the nonmerger clause, the nonmerger had no effect on the rights of third parties. It further found that plaintiff's position was made no worse by the nonmerger because, before the conveyance from Winnick to Warren, Warren held a mortgage and could have foreclosed at any time. The trial court declined to decide whether Warren would continue to be liable for the assessments after the foreclosure. The trial court granted Warren and Reserve's motion, in part, set aside

[4] Despite setting aside the conveyance to Reserve, it does not appear that the trial court dismissed Counts XXVIII through XXX of the second amended complaint or the intervening complaint.

the assignment to Reserve and the foreclosure sale, and ordered that Warren had the power to foreclose. The trial court denied Warren and Reserve's requests to (1) stay the proceedings on Counts I, II, XXV, XXVIII, XXIX, and XXX, (2) dismiss all counts referring to irregularities in the assignment or alleging fraudulent transfer, and (3) stay all motions held in abeyance by a previous order.

The trial court concluded that the bylaw provisions purporting to restrict plaintiff's right to initiate litigation contravened MCL 450.2261 and, thus, were unenforceable. Accordingly, it ruled that plaintiff did not lack standing. The trial court further found no question of material fact that the transitional control date was January 27, 2009, on the basis of plaintiff's interrogatory response and the fact that control had clearly passed from the developer to the board of directors based on its ability to prosecute this case. It found that plaintiff's first amended complaint, which first raised the factual allegations serving as the factual predicate for Counts IV through XXX, was not filed until July 16, 2012, more than three years after the transitional control date, and, thus, were time-barred by MCL 559.276(1). The trial court also determined that plaintiff was on notice of the existence of the facts underlying Counts IV through XXX on March 9, 2009, and, thus, should have filed suit by March 9, 2011. The trial court dismissed Counts IV through XXX because the amended complaint was untimely.

Finally, the trial court granted plaintiff's request for leave to reschedule its motion for partial summary disposition against Warren. The trial court denied plaintiff's request for a stay of all other matters.

On August 1, 2013, the trial court denied plaintiff's motion for partial reconsideration, concluding that

MCL 559.276 applied to Warren and Winnick as successive developers and to the other defendants either directly or because they were alleged to be the agents or alter egos of another defendant to whom the statute applied directly. It further concluded that the statute applied to Counts XXVIII through XXX because the claims arose out of the control of the condominium project. Finally, it ruled that the amendments did not relate back because they added wholly new parties.

On September 30, 2013, we granted leave to appeal, expedited the appeal, granted the motion for stay pending appeal, and stayed further proceedings pending the resolution of the appeal.[5] *Reserve at Heritage Village Ass'n v Warren Fin Acquisition, LLC*, unpublished order of the Court of Appeals, entered September 30, 2013 (Docket No. 317830). On November 20, 2013, we denied Warren's motion to lift the stay of proceedings. *Reserve at Heritage Village Ass'n v Warren Fin Acquisition, LLC*, unpublished order of the Court of Appeals, entered November 20, 2013 (Docket No. 317830).

I. MERGER

Plaintiff contends that the equitable exception to the merger doctrine is not applicable and the trial court erred by concluding that the mortgage and fee title did not merge at the time of the conveyance from Winnick to Warren. We agree.

A. PRESERVATION AND STANDARD OF REVIEW

"Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal." *Gen Motors Corp v*

[5] Nonetheless, the sale had already taken place, as evidenced by the sheriff's deed filed with this Court.

Dep't of Treasury, 290 Mich App 355, 386; 803 NW2d 698 (2010). The trial court concluded that the parties intended to keep the mortgage alive and, at the time of the conveyance containing the nonmerger clause, the nonmerger had no effect on the rights of third parties because no assessments were due. It ruled that plaintiff's position was made no worse by the nonmerger. Thus, this issue is preserved.

Defendants contend that plaintiff failed to preserve its equitable arguments. Although it does not appear that plaintiff used the term "unclean hands" in the lower court, it did make equitable arguments and essentially made the same arguments that it makes on appeal—that Warren is seeking to protect itself from having to pay its own debt, the equities demand finding a merger, and the rationale and purposes of the antimerger exception do not apply. Accordingly, this issue is preserved. Regardless, we "may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is 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." *Id.* at 387. Resolution of the issue of equity and "unclean hands" is necessary for a proper determination of the case. Accordingly, we may overlook the preservation requirement.

"We review the trial court's decision to grant or deny declaratory relief for an abuse of discretion." *Guardian Environmental Servs, Inc v Bureau of Constr Codes & Fire Safety*, 279 Mich App 1, 6; 755 NW2d 556 (2008). "An abuse of discretion occurs when a trial court's decision is not within the range of reasonable and principled outcomes." *Sys Soft Technologies, LLC v Artemis Technologies, Inc*, 301 Mich App 642, 650; 837

NW2d 449 (2013) (citation and quotation marks omitted). "[W]e review equitable issues de novo." *Id*.

B. DISCUSSION

In *Byerlein v Shipp*, 182 Mich App 39, 48; 451 NW2d 565 (1990), this Court stated:

> In Michigan, the equitable rule regarding merger is much the same as that in California:
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> > There is no doubt about the general rule that when the holder of a real estate mortgage becomes the owner of the fee, the former estate is merged in the latter. This rule is, however, subject to the exception that when it is to the interest of the mortgagee and is his intention to keep the mortgage alive, there is no merger, unless the rights of the mortgagor or third persons are affected thereby. [*Anderson v Thompson*, 225 Mich 155, 159; 195 NW 689 (1923).]
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> Further:
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> > The intention is controlling. It is either expressed or is implied from the circumstances of the transaction. If it is to the interest of the mortgagee to keep the mortgage alive, the intention to do so will be implied; for it is presumed that a man intends to do that which is to his advantage. But if the intention to merge the estates is expressed, the fact that it is to his benefit to keep the mortgage alive is immaterial. [*First National Bank of Utica v Ramm*, 256 Mich 573, 575; 240 NW 32 (1932).]

It is "the expressed intention at the time of the transaction" that is controlling. *First Nat'l Bank*, 256 Mich at 577.

In *Union Bank & Trust Co, NA v Farmwald Dev Corp*, 181 Mich App 538, 547-548; 450 NW2d 274 (1989), this Court concluded that a third party's rights "were not affected by the intention to keep the mort-

gage alive inasmuch as it was already aware that its mortgage was junior to [the bank's] mortgage." See also *Titus v Cavalier*, 276 Mich 117, 121; 267 NW 799 (1936) (concluding that where the individual knew he was receiving a junior mortgage, his rights were not affected by the intent to keep the mortgage alive); *Clark v Fed Land Bank of St Paul*, 167 Mich App 439, 445; 423 NW2d 220 (1987) (concluding that "plaintiff's rights were not affected by the intention to keep the mortgage alive, for she knew her judgment lien was subject to a first mortgage pursuant to the judgment of divorce"). In *Tower v Divine*, 37 Mich 443, 446 (1877), the Michigan Supreme Court concluded that the junior mortgagee's position was "made no worse . . . ."

In *US Leather, Inc v Mitchell Mfg Group, Inc*, 276 F3d 782, 787-789 (CA 6, 2002), the Sixth Circuit, applying Michigan law, found merger, despite an express nonmerger clause, because of the effect on a third party. Mitchell Automotive, Inc. (Mitchell Automotive), owed over $1.5 million to United States Leather, Inc. (USL), by early 1998 and had also received over $4.5 million in loans from its parent corporation, Mitchell Corporation of Owosso (Mitchell Corp.). *Id*. at 785. In April 1998, Lamont Group, Inc. (Lamont Group), purchased Mitchell Automotive's assets and granted Mitchell Automotive a security interest and a mortgage. *Id*. Lamont Group also assumed the debt owed USL. *Id*. A few days later, USL filed suit to recover on the debt. *Id*. In May 1998, Mitchell Automotive granted Mitchell Corp. a security interest to secure its existing and future debt. *Id*. Lamont Group defaulted and, in November 1998, delivered a quitclaim deed to Mitchell Automotive, in lieu of foreclosure, which included a nonmerger clause. *Id*. In January 1999, a consent judgment was entered in favor of USL against Mitchell

Automotive and Lamont Group. *Id*. USL claimed that Mitchell Corp.'s security interest was extinguished by merger. *Id*. at 786.

The court stated, "As the Michigan courts have explained, the purpose of declining to find a merger is to allow a mortgagee/lender to protect itself from the claims of junior lienholders of the mortgagor/borrower." *Id.* at 787. The court concluded "that equitable considerations preclude Mitchell Automotive from avoiding merger when the effect is not to protect its own interests from the creditors of the Lamont Group (the mortgagor), but rather to prefer the debt owed to its parent corporation over the debt owed to USL as a third party." *Id*. at 788. The court further found that USL's judgment was not expressly made subject to Mitchell Corp.'s security interest in the mortgage and USL's notice of Mitchell Corp.'s claim was "not akin to the lienholder's express knowledge of the first mortgagee's superior rights in *Farmwald* and *Clark*." *Id*.

In this case, the trial court concluded that the parties intended to keep the mortgage alive based on the language of the covenant deed. It further concluded that, at the time of the conveyance containing the nonmerger clause, there were no assessments due and, accordingly, the nonmerger had no effect on the rights of third parties. The trial court also ruled that plaintiff's position was made no worse by the nonmerger because, before the conveyance from Winnick to Warren, Warren held a mortgage and could have foreclosed. The trial court granted Warren and Reserve's motion, in part, setting aside the assignment to Reserve and the foreclosure sale, and ordered that Warren had the power to foreclose on the mortgage.

Plaintiff argues that the rationale and purposes of the exception to the merger rule do not apply because

Warren is not seeking to protect itself from the claims of junior lienholders for debts incurred by Winnick, but to protect itself from the claims of its own creditor. Plaintiff contends that Warren has no basis to seek equity under the doctrine of unclean hands in order to extinguish debt that it owes. Plaintiff further argues that its interest could be lost if the exception to the merger rule is applied.

Fifth Third Bank assigned the mortgage to Warren and, on May 18, 2009, Warren became the owner of the fee title through the covenant deed. Although generally the fee and the mortgage merge, the covenant deed expressly provided that it was "without merger." See *Byerlein*, 182 Mich App at 48. This intent, expressed at the time of the transaction, is controlling. *First Nat'l Bank*, 256 Mich at 577; *Byerlein*, 182 Mich App at 48. Given this express intention, whether nonmerger was to the benefit of Warren is "immaterial." *Byerlein*, 182 Mich App at 48 (citation and quotation marks omitted).

Despite the express intent for nonmerger, we agree with plaintiff that the purpose of the exception to the general merger rule, as expressed in *US Leather*, 276 F3d at 787, does not apply in this case because Warren is not seeking to protect itself from the claims of junior lienholders for debts incurred by Winnick.[6] Similar to Mitchell Automotive, which was seeking to avoid paying its own debt to USL and prefer the debt owed to its

[6] Plaintiff's second amended complaint alleged that the scheme to collect only a portion of the assessments due took place from approximately December 1, 2005, to September 4, 2008. Plaintiff also alleged that when Warren acquired the units in May 2009, the assessments applicable to Warren were understated and Warren was obligated to pay all assessments. However, the trial court relied on plaintiff's interrogatory response, in which it stated that no assessments were paid after Whitehall was terminated (2010). Thus, it is Warren's unpaid assessments that are at issue.

parent corporation, *id*. at 788, Warren is seeking to avoid paying its debt to plaintiff. A finding of nonmerger would allow Warren to avoid paying the debt it incurred to plaintiff.

The trial court erred by finding that plaintiff was not a third party affected by the nonmerger because there were no assessments due at the time of the conveyance containing the nonmerger clause. Although it is necessary to consider the party's intent for nonmerger at the time of transaction, see *First Nat'l Bank*, 256 Mich at 577, the time for considering the effect on a third party is not limited to the time of the transaction. In *US Leather*, 276 F3d at 785, although the debt owed to USL existed at the time of the conveyance containing the nonmerger clause, the consent judgment was not entered until after the conveyance. Similarly, plaintiff did not obtain a lien for the unpaid condominium assessments until after the conveyance containing the nonmerger clause. Nonetheless, plaintiff is a third party affected by the nonmerger.

The trial court's finding that plaintiff's situation was made no worse by the nonmerger is also erroneous. The trial court's finding of nonmerger meant that Warren could foreclose and extinguish plaintiff's lien. As the trial court found, it is unclear whether the foreclosure would extinguish the past-due assessments under MCL 559.158.

In conclusion, despite the express intent to keep the mortgage alive, there was a merger of the mortgage and the fee title because a finding of nonmerger would affect the rights of plaintiff. See *Byerlein*, 182 Mich App at 48. Because the fee and the mortgage merged, Warren could not foreclose on the mortgage. The trial court abused its discretion by ordering that Warren could

foreclose. We remand for the trial court to vacate and set aside Warren's foreclosure and the subsequent sale.[7]

II. MCL 559.276(1)

Plaintiff contends that its claims were not time-barred by MCL 559.276(1). We conclude that the trial court properly dismissed Counts IV through XXVII on the basis of the statute of limitations. The trial court erred by finding that Counts XXVIII through XXX were time-barred; however, dismissal was proper on other grounds.

A. PRESERVATION AND STANDARD OF REVIEW

Plaintiff raised the same arguments in the trial court as on appeal. The trial court found that the transitional control date was January 27, 2009, plaintiff's claims were time-barred by MCL 559.276(1), and plaintiff was on notice of the facts underlying its claims by March 9, 2009. In denying plaintiff's motion for reconsideration, the trial court found that MCL 559.276 applied to all defendants, Counts XXVIII to XXX were related to control of the project, and the relation-back doctrine did not apply. Even if some of plaintiff's arguments were not preserved because they were first raised by plaintiff and addressed by the trial court in the motion for partial reconsideration, see *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009), we "may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a

[7] We note that the trial court also set aside the assignment to Reserve and the foreclosure sale and did not abuse its discretion in doing so. Contrary to plaintiff's assertion at oral argument, the setting aside of the assignment and sale to Reserve was not conditioned on a finding of nonmerger.

proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Gen Motors Corp*, 290 Mich App at 387. Resolution of all of plaintiff's arguments is necessary for a proper determination of the case.

Although defendants' motion for partial summary disposition was brought pursuant to MCR 2.116(C)(5), (7), and (8), the trial court dismissed Counts IV to XXX on the basis of the statute of limitations.

> MCR 2.116(C)(7) allows a party to file a motion for summary disposition on the ground that a claim is barred because of the expiration of the applicable period of limitations. A movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. Moreover, the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. Appellate review of a trial court's summary disposition ruling pursuant to MCR 2.116(C)(7) is de novo. [*Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553; 837 NW2d 244 (2013) (citations omitted).]

"In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). "Questions of statutory interpretation are also reviewed de novo." *Fisher Sand & Gravel Co*, 494 Mich at 553.

B. DISCUSSION

MCL 559.276(1) provides:

> The following limitations apply in a cause of action arising out of the development or construction of the

> common elements of a condominium project, or the management, operation, or control of a condominium project:
>
> (a) If the cause of action accrues on or before the transitional control date, a person shall not maintain an action against a developer, residential builder, licensed architect, contractor, sales agent, or manager of a condominium project later than 3 years after the transitional control date or 2 years after the date on which the cause of action accrued, whichever occurs later.
>
> (b) If the cause of action accrues after the transitional control date, a person shall not maintain an action against a developer, residential builder, licensed architect, contractor, sales agent, or manager of a condominium project later than 2 years after the date on which the cause of action accrued.

In order to determine whether plaintiff's claims are time-barred, it is necessary to consider (1) whether the statute applies to each defendant, (2) whether the statute applies to each cause of action, (3) if and when the transitional control date occurred, and (4) when each cause of action accrued. Plaintiff also asserts that the statute of limitations was tolled by fraudulent concealment and that plaintiff's amended complaints relate back to the original complaint.

1. APPLICABILITY OF MCL 559.276(1) TO DEFENDANTS

MCL 559.276(1) applies to actions against "a developer, residential builder, licensed architect, contractor, sales agent, or manager of a condominium project . . . ." In ruling on plaintiff's motion for partial reconsideration, the trial court concluded that the statute applied to Warren and Winnick as successive developers and that the remaining defendants fell under MCL 559.276 either directly or because they were alleged to be liable as an agent or alter ego of a defendant that fell under the statute.

Plaintiff contends that the statute only applies to HVSF, the developer, and Whitehall, the manager. Plaintiff argues that (1) the statute clearly does not apply to HVMCA and Scott; (2) the statute does not apply to alter egos or agents, such as Grand/Sakwa, LLC, Grand/Sakwa Warren, LLC, Gary Sakwa, and Donofrio; (3) the statute does not apply to the claims against Sakwa and Donofrio as directors; (4) the statute does not apply to Metiva because she was not the manager; and (5) the statute does not apply to successive developers, such as Warren and Winnick, or Winnick's principal, Gans. Plaintiff contends that other statutes of limitations providing longer periods in which to bring suit apply to the claims against these defendants and, accordingly, the claims are not time-barred.

MCL 559.106(2) provides:

> "Developer" means a person engaged in the business of developing a condominium project as provided in this act. Developer does not include any of the following:
>
> (a) A real estate broker acting as agent for the developer in selling condominium units.
>
> (b) A residential builder who acquires title to 1 or more condominium units for the purpose of residential construction on those condominium units and subsequent resale.
>
> (c) Other persons exempted from this definition by rule or order of the administrator.

It is undisputed that the statute applies to the claims against HVSF, the developer, and Whitehall, the manager. In its second amended complaint, plaintiff referred to Gary Sakwa, Warren, Grand/Sakwa Properties, LLC, Grand/Sakwa of Warren, LLC, HVSF, and Reserve jointly as "Sakwa." Plaintiff also specifically alleged that these entities were the alter egos or mere instrumentalities of Gary Sakwa and

should be considered one entity. Although some claims are against Gary Sakwa and Donofrio as directors of the association and HVMCA, plaintiff alleged that they were working in concert with Sakwa and that Donofrio was the agent or employee of Sakwa. Plaintiff further alleged that HVMCA, the master association, was controlled by Sakwa in 2008, and participated in the fraudulent scheme, and that Donofrio and Metiva were agents of Sakwa. Metiva was also an agent of Whitehall. Accordingly, the statute also applies to the claims against these defendants. Plaintiff's contention that the statute does not apply to agents or alter egos contradicts its later argument, in regard to the relation-back doctrine, that the Sakwa entities are "one party." Although plaintiff only refers to the "Sakwa entities," it argues that the amended complaints did not add any new parties. Thus, it appears that plaintiff is arguing that all defendants should be considered one party.

Similarly, with regard to the claims against Scott, he was a director, which is not listed in the statute. Nonetheless, plaintiff alleged that Warren improperly elected Scott to the board, Scott was part of the fraudulent scheme, Scott acted in concert with Sakwa, and Scott was an agent of Sakwa and HVMCA. Accordingly, the statute applies to the claims against him as well.

With regard to Winnick and Gans, plaintiff alleged that they participated in the development of the complex. Also, plaintiff contends that Winnick may be considered a successive developer and Gans is its agent, but argues that the statute does not apply to successive developers, such as Warren and Winnick. The term "successive developer" is not defined in the definitions sections of the Condominium Act, but is

defined at MCL 559.235(1). As the trial court ruled, because a successive developer must comply with the act in the same manner as a developer before selling any units, MCL 559.235(2)(a), MCL 559.276 applies to actions against a successive developer. Moreover, plaintiff suggests that all defendants are a single party. Accordingly, the statute also applies to the claims against Winnick and Gans.

2. APPLICABILITY OF MCL 559.276(1) TO THE CAUSES OF ACTION IN COUNTS IV THROUGH XXX

MCL 559.276(1) applies to causes of action "arising out of the development or construction of the common elements of a condominium project, or the management, operation, or control of a condominium project[.]" " 'Common elements' means the portions of the condominium project other than the condominium units.' " MCL 559.103(7). The trial court found that MCL 559.276(1) barred Counts IV through XXX. In ruling on plaintiff's motion for partial reconsideration, it found that the claims regarding the alleged fraudulent conveyance, Counts XXVIII through XXX, related to the control of the project.

Counts IV, VI, and VIII alleged breaches related to the design, construction, and delivery of the common elements of the condominium complex, among other claims. Accordingly, MCL 559.276(1) applies to each of these causes of action. Counts X and XI alleged, among other claims, breaches relating to the failure to maintain the berm areas—which arise out of the development or construction of the common elements of a condominium project—and to the fraudulent scheme—which, as discussed in the next paragraph, arise out of the management or operation of the condominium project. Although Counts V, VII, and IX refer to the

design, construction, and delivery of the Winnick units (not common elements), Counts V and IX also refer to the drainage system and grading serving those units. Moreover, Count VII also refers to the fraudulent scheme. Thus, MCL 559.276(1) also applies to these causes of action. Although some of these counts allege breaches of the master deed covenants, they nonetheless arise out of the development or construction of the common elements of a condominium project.

With regard to Counts XII through XXVII, the causes of action relate to the alleged fraudulent scheme. These causes of action arise out of the management of the condominium project. Plaintiff contends that the management was incidental to the fraudulent scheme. The statute does not define the phrase "arising out of." The Michigan Supreme Court has considered the meaning of this phrase in other contexts.

> "Arise" is defined as "to result; spring or issue." The Court of Appeals has explained that the language "arising out of the sentencing offense" means that the "sexual penetration of the victim must result or spring from the sentencing offense." . . .
>
> In interpreting an insurance contract containing the language "arising out of," we held that such language requires a " 'causal connection' " that is " 'more than incidental . . . .' " Similarly, in interpreting a workers' compensation statute containing the language "arising out of," we held that this language requires a " ' "causal connection . . . ." ' " [*People v Johnson*, 474 Mich 96, 100-101; 712 NW2d 703 (2006) (citations omitted).]

"Something that aris[es] out of, or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen." *Id*. at 101 (quotation marks omitted; alteration in original).

In its second amended complaint, plaintiff alleged:

> The Fraudulent Scheme . . . consisted of charging the Discounted Assessments, rather than the actual assessments, and then not collecting any assessments, yet wrongfully and illegally paying to the Master Association from The Reserve Association's bank account (the "Diverted Funds") assessments owed by, but which were never collected from, Winnick, Canvasser and, on information and belief, other members of The Reserve Association; and refusing to cause the Master Association and/or Sakwa to maintain, repair and replace the Berm Areas.

These allegations indicate that the fraudulent scheme was an integral part of the management and operation of the condominium project. Thus, the causes of action relating to the fraudulent scheme result, spring, or issue from the management or operation of the condominium project and have more than an incidental connection to the management and operation of the project. See *Johnson*, 474 Mich at 100-101. Thus, MCL 559.276(1) applies to the causes of action in Counts XII through XXVII.

With regard to Counts XXVIII through XXX, plaintiff argues that these causes of action, which relate to the alleged fraudulent conveyance, do not arise out of the "development, etc." of the project. However, MCL 559.276(1) also applies to causes of action "arising out of the . . . management, operation, or control of a condominium project." The conveyance from Warren to Reserve is related to the management, operation, or control of the condominium project given that Warren, Reserve, and the other Sakwa defendants are alleged to be one entity, which controlled the management. Accordingly, the statute applies to these causes of action.[8]

[8] Nonetheless, as discussed later in this opinion, these claims are not time-barred.

3. TRANSITIONAL CONTROL DATE

MCL 559.110(7) provides: " 'Transitional control date' means the date on which a board of directors for an association of co-owners takes office pursuant to an election in which the votes that may be cast by eligible co-owners unaffiliated with the developer exceed the votes which may be cast by the developer." The trial court stated this definition, but then found that the transitional control date was January 27, 2009, given that plaintiff had indicated in its response to an interrogatory that the transitional control date was January 27, 2009, and given the trial court's belief that control had "clearly passed" in light of plaintiff's ability to prosecute this case. Plaintiff contends that the transitional control date has not yet occurred.

In an interrogatory response, plaintiff acknowledged that the transitional control date was January 27, 2009. Plaintiff's counsel similarly acknowledged that fact at the October 3, 2012 hearing. Plaintiff, however, subsequently argued that the transitional control date had not yet occurred and the statute of limitations had not yet begun to run. Defendant contends that plaintiff is bound by its admission. Plaintiff replies that it incorrectly used the term "transitional control date." Plaintiff further argues that its incorrect statement does not mean that the transitional control date had occurred and notes that defendants were not prejudiced by the admission.

This Court has concluded that a party's negative response to an interrogatory asking whether at the time of an accident he had any physical or mental impairment or disability did not constitute a binding admission precluding the party from arguing that his insanity tolled the running of the period of limitations, noting that the admission was made before the statute of limitations issue had been raised. See *Davidson v*

Baker-Vander Veen Constr Co, 35 Mich App 293, 302; 192 NW2d 312 (1971). Similarly, it appears that plaintiff's response was made before the statute of limitations issue was first raised in defendants' August 24, 2012 motion for summary disposition on Counts III through XXI of plaintiff's first amended complaint.

On the other hand, plaintiff's attorney's statement was made after the issue was raised, and more importantly, plaintiff's second amended complaint also suggested that the transitional control date was January 27, 2009. Specifically, plaintiff alleged that before January 2009, HSVF appointed Scott to serve as director of the "developer-controlled Board of Directors . . . ." This suggested that the board of directors was controlled by the developer only before January 2009. Plaintiff also alleged that before the transitional control date, plaintiff was controlled by Sakwa and after the transitional control date, the nondeveloper officers and directors were impeded from discovering the causes of action. Thus, plaintiff alleged that there was a transitional control date and suggested that it was in January 2009. Plaintiff's allegations must be accepted as true, unless contradicted by documentary evidence. See *McLean*, 302 Mich App at 72-73. There is no evidence to contradict the allegation that the transitional control date was January 27, 2009. Plaintiff argues that 106 units are still controlled by the developer (the 76 units owned by Warren and the 30 units owned by Canvasser). However, defendants argue that the developer only controls 76 units (the 76 units owned by Warren). The trial court did not err by finding that the transitional control date was January 27, 2009.

4. ACCRUAL

Next, it is necessary to determine when plaintiff's causes of action accrued. Under MCL 559.276(1)(a), if

the cause of action accrued on or before January 27, 2009, plaintiff had until January 27, 2012, at the latest, to bring suit. If the cause of action accrued after January 27, 2009, plaintiff had until two years after the date on which the cause of action accrued to bring suit. MCL 559.276(1)(b).

Plaintiff's original complaint was filed on January 11, 2012; its first amended complaint was filed on July 16, 2012; and its second amended complaint was filed on September 14, 2012. Accordingly, any causes of action that accrued on or before January 27, 2009, and not contained in the original complaint, are barred, unless the amended complaints relate back to the original complaint. Any causes of action that accrued from January 28, 2009, to January 10, 2010, are barred, as they were required to be brought by January 10, 2012, at the latest. Any causes of action that accrued from January 11, 2010, to July 16, 2010, and not contained in the original complaint, are also barred, unless the amended complaints relate back to the original complaint. Any causes of action that accrued after July 16, 2010, are not time-barred. Moreover, the causes of action would not be time-barred if the statute of limitations was tolled by fraudulent concealment.

a. RELATION-BACK DOCTRINE

MCR 2.118(D) provides:

> An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit.

"[T]he relation-back doctrine does not conflict with the policy behind the statute of limitations because it still requires the party amending its pleadings to plead the transaction or occurrence that forms the original basis of the lawsuit before the limitations period has expired." *Yudashkin v Holden*, 247 Mich App 642, 652; 637 NW2d 257 (2001). "This Court has previously held that the relation-back doctrine does not extend to the addition of new parties." *Tice Estate v Tice*, 288 Mich App 665, 669; 795 NW2d 604 (2010) (citation and quotation marks omitted). A plaintiff may not "substitute or add a wholly new and different party to the proceedings . . . ." *Miller v Chapman Contracting*, 477 Mich 102, 107; 730 NW2d 462 (2007) (citation and quotation marks omitted).

The trial court concluded that plaintiff's amended complaints did not relate back to the original complaint because they added wholly new parties and claims. Plaintiff argues that its amended complaints relate back to the original complaint because the fraudulent scheme allegations addressed in the amended complaints expanded on the allegations concerning the nonpayment of assessments addressed in the original complaint and because the Sakwa entities are one party.

Plaintiff's original complaint was filed against Warren only. Plaintiff added the remaining defendants in its first and second amended complaints. As discussed earlier, plaintiff alleged that the Sakwa defendants, and suggested that all defendants, were the same entity. It is a close question whether the amended complaints added wholly new and different parties. Nonetheless, the claims in the amended complaints do not arise out of the conduct, transaction, or occurrence set forth in the original complaint. See MCR 2.118(D). In its original complaint, plaintiff sought to recover unpaid con-

dominium assessments on the basis of Warren's alleged failure to pay. Plaintiff did not allege any conduct, transaction, or occurrence other than the failure to pay. It did not plead the transaction or occurrence forming the basis for the claims regarding the fraudulent scheme. See *Yudashkin*, 247 Mich App at 652. Accordingly, plaintiff's first and second amended complaints do not relate back to the original complaint.

b. FRAUDULENT CONCEALMENT

MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

This Court has stated:

> Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent. [T]he fraud must be manifested by an affirmative act or misrepresentation. Thus, [t]he plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. [T]here must be concealment by the defendant of the existence of a claim or the identity of a potential defendant, and the plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment. If there is a known cause of action there can be no fraudulent concealment

> which will interfere with the operation of the statute, and in this behalf a party will be held to know what he ought to know . . . .
>
> For a plaintiff to be sufficiently apprised of a cause of action, a plaintiff need only be aware of a possible cause of action. [*Doe v Roman Catholic Archbishop of the Detroit Archdiocese*, 264 Mich App 632, 642-643; 692 NW2d 398 (2004) (citations and quotation marks omitted; alterations in original).]

A plaintiff is required to plead more than mere silence. *Id*. at 645. However, "[a]n exception to [the general rule requiring an affirmative act or misrepresentation] is that there is an affirmative duty to disclose where the parties are in a fiduciary relationship." *Lumber Village, Inc v Siegler*, 135 Mich App 685, 695; 355 NW2d 654 (1984). This Court has found no fraudulent concealment when the defendants had not concealed changes made to physical property. *Terlecki v Stewart*, 278 Mich App 644, 652; 754 NW2d 899 (2008). In so holding, the Court stated that "[t]he statutory scheme of limitations periods is exclusive and precludes tolling the accrual of a claim based on discovery where no statute tolls the running of the limitations period." *Id*.

The trial court found that the running of the period of limitations was not tolled by fraudulent concealment because plaintiff "was clearly on notice of the existence of the facts underlying Counts IV through XXX by March 9, 2009 at the latest." Plaintiff contends that defendants concealed the fraudulent scheme until December 12, 2010, when Whitehall was terminated.

Plaintiff, however, has failed to plead fraudulent concealment with regard to Counts IV through XI. Those Counts concern physical defects of the complex, but there is no evidence that they were concealed. See *id*.

With regard to Counts XII through XXVII, involving the fraudulent scheme, plaintiff alleged that the fraudulent scheme took place during the period of September 2008 to December 12, 2010. The running of the period of limitations was not tolled by fraudulent concealment with regard to these counts because plaintiff was aware of a possible cause of action by October 8, 2008, or March 3, 2009. See *Doe*, 264 Mich App at 643. On October 8, 2008, a letter was sent to Canvasser indicating that he was being improperly billed. The letter was signed "Christe Langdeau, Community Manager" of the "Reserves at Heritage Village Condominium Association." On March 3, 2009, an e-mail was sent indicating that not all of the lots were paying association dues. The e-mail was signed by Sean House "Community Association Manager" with "Whitehall Property Management." Plaintiff argues that its knowledge of the failure to pay assessments did not constitute notice of the fraudulent scheme, but these correspondences show that plaintiff was aware of a "possible cause of action." *Id*. at 643. Plaintiff is not required to have known "*the details of the evidence by which to establish his cause of action*. It is enough that he knows that a cause of action exists in his favor . . . ." *Id*. at 647 (citations and quotation marks omitted). Although plaintiff contends that the stealing continued until December 12, 2010, plaintiff had notice of the missing association dues by March 3, 2009, at the latest.[9]

[9] Although plaintiff claims that there was no evidence that any members of the association unaffiliated with the developer knew of the October 8, 2008 letter until 2012, the March 3, 2009 e-mail was sent after the transitional control date. Also, the trial court noted that the response to the March 3, 2009 e-mail was sent by a co-owner and that defendants' counsel represented that the e-mail was sent to all co-owners. Plaintiff does not appear to dispute that it had knowledge of the March 3, 2009 e-mail, but argues that it did not constitute notice of the fraudulent scheme.

With regard to Counts XXVIII through XXX, the alleged fraudulent conveyance did not take place until 2012. Thus, tolling is unnecessary.

5. APPLICATION OF MCL 559.276(1) TO COUNTS IV THROUGH XXX

The causes of action set forth in Counts IV through IX relating to the delivery and development of the complex, which occurred in 2005, were required to be brought by January 27, 2012. There was no fraudulent concealment because the physical defects were not concealed. Plaintiff's complaints containing Counts IV through XXX were not filed until July 16, 2012, and September 14, 2012. The amended complaints do not relate back to the original complaint. Accordingly, these claims are time-barred.

The causes of action in Counts XII through XXVII (as well as those in Counts IV through IX involving the fraudulent scheme) accrued in either December 2008 or March 2009. Plaintiff had until either March 3, 2011, or January 27, 2012, to file suit. Plaintiff's complaints containing Counts IV through XXX were not filed until July 16, 2012, and September 14, 2012. There was no fraudulent concealment and plaintiff's amended complaints do not relate back to the original complaint. Accordingly, these claims are time-barred.[10]

The causes of action in Counts XXVIII through XXX relate to the transaction that occurred in 2012. The claims are not time-barred. Nonetheless, defendants argue that these claims are moot. In its response to Warren and Reserve's motion for declaratory relief, plaintiff agreed to dismiss those counts, but argued that Counts XXVIII and XXIX would not be moot to the

[10] Some of plaintiff's counts contain multiple claims, but each contains at least one claim that falls under MCL 559.276(1) and is time-barred.

extent that plaintiff was entitled to recover attorney fees. In Count XXVIII, plaintiff sought a declaratory judgment declaring the transaction between Warren and Reserve void and imposing a constructive trust on the property. Plaintiff claimed that the transfer was fraudulent under MCL 566.34 and MCL 566.35, and that the remedies at MCL 566.37 are still available. MCL 566.37(1)(c)(*iii*) authorizes any relief the trial court determines appropriate. In Count XXIX, plaintiff alleged slander of title and sought costs, including attorney fees under MCL 565.108. In Count XXX, plaintiff sought to quiet title. Plaintiff contends that, while Count XXX is moot, the relief sought in Counts XXVIII and XXIX is still available. However, the conveyance to Reserve was not found to be fraudulent or made for the purpose of slandering title; rather, plaintiff agreed to vacate the assignment and the sheriff's sale. Accordingly, those remedies are not available and Counts XXVIII and XXIX are moot. The trial court properly dismissed these counts, albeit for the wrong reason.

We affirm the portion of the trial court's order dismissing Counts IV through XXX, reverse the portion concluding that Warren could foreclose on the mortgage because there was no merger, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

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

PEOPLE v HENRY (AFTER REMAND)

Docket Nos. 306449 and 308963. Submitted March 24, 2014, at Lansing. Decided May 8, 2014, at 9:00 a.m. Leave to appeal sought.

Randall E. Henry was convicted following a jury trial in the Ingham Circuit Court, Joyce A. Draganchuk, J., of five counts of armed robbery. Defendant brought two separate appeals from his convictions. The Court of Appeals consolidated the appeals and remanded the matter to the trial court for an evidentiary hearing to develop a factual record to allow the Court of Appeals to address defendant's Fourth Amendment challenge and his claim of ineffective assistance of counsel. *People v Henry*, unpublished opinion per curiam of the Court of Appeals, issued December 5, 2013 (Docket Nos. 306449 and 308963). On remand, the trial court conducted an evidentiary hearing and affirmed the convictions.

After remand, the Court of Appeals *held*:

1. The trial court did not err, under the unique facts and circumstances of this case, by holding that the police officers' entry into the apartment where defendant was located and detained was reasonable. The entry of the apartment without a warrant was proper under the hot pursuit exception to the warrant requirement. In addition, other exigencies supported the officers' entry into the apartment. The trial court did not clearly err by making its findings of fact or by concluding that the entry of the apartment without a warrant was lawful.

2. Because the entry without a warrant was lawful and a motion to suppress evidence obtained as a result of the entry would have been futile, defense counsel was not ineffective for failing to move to suppress the evidence.

3. There was sufficient evidence to allow a rational juror to convict defendant of committing an armed robbery on November 20, 2010, beyond a reasonable doubt.

4. The trial court erred by holding that during custodial interrogation by the police defendant unequivocally waived his Fifth Amendment right to remain silent. Because the police failed to scrupulously honor defendant's initial assertion of his right to remain silent and because the police subsequently led defendant to

believe that he was not relinquishing his rights by agreeing to make a statement, the trial court erred by concluding that defendant knowingly and intelligently waived his Fifth Amendment rights. However, given the untainted evidence, admission of the statements was harmless beyond a reasonable doubt. It is clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent the error.

5. A police detective's testimony regarding a confidential informant's out-of-court statements was improperly admitted. However, defendant cannot show that the improper testimony affected his substantial rights because he cannot show that it affected the outcome of the lower court proceedings. Defendant is not entitled to a new trial on this basis.

6. The trial court did not abuse its discretion by finding that defendant failed to demonstrate a need for the confidential informant's testimony. The trial court did not abuse its discretion by denying defendant's motion to produce the informant because the informant would not have offered any material or exculpatory evidence. The failure to produce the confidential informant did not amount to a violation of the holding in *Brady v Maryland*, 373 US 83 (1963), that the prosecution's failure to disclose exculpatory or material evidence in its possession constitutes a due process violation regardless of whether a defendant requested the evidence. Undisclosed evidence is deemed material only if it could reasonably be taken to put the whole case in such a different light that it would undermine confidence in the verdict. In this case, the informant would not have offered material or exculpatory evidence and the failure to produce the informant did not undermine confidence in the verdict. No *Brady* violation occurred.

7. Although the information may have been filed in court after defendant waived arraignment, the record supports the conclusion that defendant had an opportunity to review the information before it was filed. Defendant also attended the preliminary examination. Defendant was aware of the charges against him even though the trial court did not hold an arraignment. Defendant cannot show prejudice from the failure to hold an arraignment, which is required to merit relief.

8. Nothing about the photographic lineup shown to Kelly Buell, one of the armed robbery victims, was unduly suggestive. The trial court did not err by allowing Buell to offer identification testimony at trial.

Affirmed.

BOONSTRA, J., concurring in part and dissenting in part, concurred fully with regard to Parts I, II, III, and V to VIII of the majority opinion and the corresponding portions of its concluding Part IX. Judge BOONSTRA also concurred with the result reached in Part IV of the majority opinion and in the corresponding portion of its Part IX. He dissented from the conclusion of the majority in Part IV of its opinion that the trial court erred, even harmlessly, by admitting into evidence the statements defendant made to the police detectives and would find that no violation of the procedures provided in *Miranda v Arizona*, 384 US 436 (1966), occurred. The detectives did not engage in the improper interrogation of defendant in violation of *Miranda*. Defendant did not make an unequivocal invocation of his right to remain silent. The detectives therefore were permitted to continue the interview. The detectives did not fail to scrupulously honor any exercise of defendant's right to cut off questioning. The confusion that resulted from the detectives' inartful attempt to comply with *Miranda* was remediable and the detectives were able to clear up the confusion and secure a valid *Miranda* waiver. Any confusion that initially resulted did not result in a statement procured by coercion or given by a defendant ignorant of the consequences of his or her actions. There was no interrogation of defendant for purposes of *Miranda*. The term "interrogation" under *Miranda* refers not only to express questioning but also to its functional equivalent—words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. "Interrogation," as conceptualized in *Miranda*, must reflect a measure of compulsion above and beyond that inherent in custody itself. The detectives did not engage in express questioning or its functional equivalent before defendant signed a valid *Miranda* waiver. To constitute "express questioning" for purposes of *Miranda*, questions must be ones that the police should know are reasonably likely to elicit an incriminating response from the suspect and must be other than those normally attendant to arrest and custody. The pertinent question at issue in this case was one that is normally attendant to arrest and custody and did not constitute express questioning within the meaning of *Miranda*. The detectives' follow-up question did not exhibit even the least amount of coercion or compulsion, subtle or otherwise. There was no interrogation. Defendant knowingly and voluntarily expressly waived his *Miranda* rights. The waiver was effective. The convictions and sentences must be affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Stuart J. Dunnings III*, Prosecuting Attorney, *Joseph B. Finnerty*, Chief, Appellate Division, and *Susan Hoffman Adams*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker*) for defendant.

Randall K. Henry *in propria persona*.

AFTER REMAND

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

BORRELLO, P.J. In these consolidated appeals, in Docket No. 308963, defendant appeals as of right his jury-trial convictions on four counts of armed robbery, MCL 750.529. In Docket No. 306449, defendant appeals as of right his conviction on one count of armed robbery, MCL 750.529. The trial court joined the cases and both were tried before the same jury. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 216 to 420 months' imprisonment for each conviction. We previously remanded this case to the trial court for an evidentiary hearing to develop a factual record to allow us to address defendant's Fourth Amendment challenge and his claim of ineffective assistance of counsel.[1] On remand, the trial court conducted an evidentiary hearing and affirmed defendant's convictions. Having an adequate factual record to facilitate our review, for the reasons set forth in this opinion, we affirm defendant's convictions and sentences.

[1] *People v Henry*, unpublished opinion per curiam of the Court of Appeals, issued December 5, 2013 (Docket Nos. 306449 and 308963).

Defendant's convictions arise out of a series of armed robberies that occurred at the L & L Gas Express in Lansing on November 16, November 17, November 20, and December 2, 2010, and one armed robbery that occurred at a nearby Quality Dairy on December 2, 2010. A detailed overview of the relevant facts is set forth in our previous opinion and we need not repeat it here. See *People v Henry*, unpublished opinion per curiam of the Court of Appeals, issued December 5, 2013 (Docket Nos. 306449 and 308963). The police ultimately arrested defendant on December 5, 2010, at an apartment complex located near the L & L Gas Express after entering an apartment without a warrant. We remanded this case to the trial court to develop a factual record concerning the entry without a warrant and concerning trial counsel's decision not to raise a Fourth Amendment challenge. *Id*. The following is an overview of the evidence that was introduced at the evidentiary hearing:

On December 4, 2010, Lansing Police Officer Aaron Terrill responded to a call from an anonymous man in the parking lot of the L & L Gas Express. The man offered information about recent armed robberies in the area. The anonymous man told the officer that the robberies were committed by another man with whom he had smoked crack cocaine at 1100 Dorchester, Apartment 104, two nights before. He told the officer that the suspect was in the apartment at that moment.

Officer Terrill went to Apartment 104 at 1100 Dorchester. He walked around the outside of the building and looked at the windows and doors. Officer Terrill saw no signs of forced entry or anything out of the ordinary. He contacted his supervisor, Sergeant Lee Curtis, and advised him of the situation. Sergeant

Curtis told Officer Terrill that he had no authority to enter the apartment, so Officer Terrill left.

The next day at around 11:45 a.m., Officer Terrill was patrolling when he heard a call over the radio about a larceny or robbery at Jackie's Diner, at 3812 Martin Luther King Boulevard. The restaurant was 0.3 miles from 1100 Dorchester. Officer Terrill radioed other police units about the information he learned the previous day and advised them "that they may want to head to 1100 Dorchester, 104."

Lansing Police Officer Ellen Larson was one of the officers dispatched to Jackie's Diner. The time of the incident was 11:45 a.m., according to her police report. She spoke to three or four witnesses. Officer Larson learned that the suspect had been in the restaurant for a long time. At one point, the suspect went into the bathroom. When he came out, he went to the counter and paid $5 for his bill. The suspect told the cashier that there was a problem in the bathroom. The cashier left the cash register and went into the bathroom. The suspect then took a cash drawer from the register. Officer Larson radioed a description of the suspect to other officers, including that the suspect was an African-American male wearing a black puffy coat.

Four witnesses to the incident at Jackie's Diner left the restaurant and drove around the area looking for the suspect. They spotted him leaving an auto parts store on Martin Luther King at Mary Street, about a quarter of a mile from Jackie's Diner. The suspect got into a car and drove away. The witnesses followed the vehicle to 1100 Dorchester. They remained in telephone contact with the police dispatcher and provided the suspect's license plate information. The dispatcher conveyed the witnesses' information to Lansing Police

Officers Rachael Bahl and Jason Pung. The officers proceeded separately to 1100 Dorchester.

Officers Bahl and Pung met the witnesses at the Dorchester apartments. Officer Pung arrived first. The witnesses said that they saw the suspect pull his car into the driveway behind the apartment building. He got out of the car and disappeared down a flight of stairs to the bottom level of the building. Officer Bahl radioed the information from the witnesses to other officers, who proceeded to the apartment building.

The Dorchester apartments are a "rundown multi-level, multiunit complex" with two or three floors. The ground-floor apartments are slightly below ground level, or "somewhat underground." Access to the units is provided through exterior doors, similar to the design of a motel.

Officer Pung established a point of containment to prevent the suspect from escaping if he was still in the area. The officer received information from the police dispatcher that the suspect may have gone to Apartment 104. Apartment 104 was in the 1100 building, on the ground level, in the same area that the witnesses had indicated. The place from which the suspect disappeared from view is the hallway area that leads to Apartment 104.

Lansing Police Sergeant Joe Brown supervised the operations of the officers responding to the incident at Jackie's Diner. Sergeant Brown became involved in the investigation at approximately 11:55 a.m., when he received radio information directing him to Apartment 104. Sergeant Brown arrived at the apartment within a half an hour of the time of the initial call from Jackie's Diner.

Officer Pung stood on the left (hinge) side of the door to Apartment 104, with other officers behind him.

Sergeant Brown stood to the right of the door. Officer Pung knocked and announced, "Lansing Police" several times. He received no response. Sergeant Brown noticed that the window to the right of the door was slightly open, about an eighth of an inch. He saw pry marks in the lower-left part of the metal frame. The pry marks suggested that a forced entry had occurred. The window blinds were closed. Sergeant Brown pulled on the window, which slides from left to right, to see if it was locked, and the window opened completely. The location and size of the window would have allowed a person to easily step through the window into the apartment.

Sergeant Brown provided cover while Officer Pung reached through the open window and unlocked the deadbolt lock on the apartment door. The officers entered the apartment through the door. They performed a protective sweep of the apartment and found defendant and Mark Aimery in a back bedroom.

Mark Aimery was the person suspected of committing the theft at Jackie's Diner.[2] Lansing Police Officer Ryan Wilcox was one of the officers involved in the sweep of the apartment. He arrived at the apartment building at 11:55 a.m. Officer Wilcox spoke with defendant. Officer Wilcox observed that defendant and Aimery were in the process of or had just finished smoking crack cocaine. A black puffy coat was on the couch. Aimery was arrested.

Defendant was detained. A few hours later, a search warrant for the apartment was obtained and executed.

At the evidentiary hearing, Sergeant Brown testified that when he entered the apartment, he was concerned

[2] Aimery pleaded no contest to a charge of larceny in a building, MCL 750.360, for the theft at Jackie's Diner. Aimery's judgment of sentence was admitted at the hearing.

for the safety of persons inside the apartment. He knew that a felony suspect was in the area and he saw pry marks that could have been fresh, suggesting a forced entry. Sergeant Brown also had information from Officer Terrill about Apartment 104. When the sergeant discovered that the window was unsecure, he "felt it appropriate just to make sure that everybody was okay inside and the apartment was secure." Because the blinds were closed, Sergeant Brown was unable to see into the apartment to discern whether someone had gained entry or whether there was damage inside the apartment.

Sergeant Brown was asked about his written report, which did not mention pry marks on the window frame, and his statement in the report: "I could not determine if the window had damage from forced entry, due to the vertical blinds getting in the way." He explained that his reference to not seeing damage pertained to his inability to see into the apartment. The blinds in the window prevented him from assessing whether there was damage or forced entry to the interior of the apartment. Sergeant Brown testified "that it would have been better to articulate that [in the police report]. But I'm clear in my memory that the damage was there on the outside."

Sergeant Brown identified photographs of the exterior of the apartment building that were taken on December 5, 2010, after the police entered and secured the apartment. The photographs showed the partially open window of Apartment 104. Sergeant Brown testified that except for the degree to which the window was open, the photos accurately depicted what he saw when he arrived at the apartment.

Officer Terrill was shown a photograph of the window of Apartment 104. Officer Terrill recognized the

window. He testified that the photograph depicted pry marks on the lower side around the window. He testified that when he observed the window on December 4, 2010, he saw no damage around the window, "there was nothing."

Officer Pung testified that when he responded to the area of Jackie's Diner, "the initial call was a robbery. It was later determined to be more of a snatch and grab larceny." The officer testified that at the apartment, he was concerned about the open window. His experience led him to believe that the apartment was in a high crime area where people do not normally leave windows open. Knowing that a suspect had fled from Jackie's Diner, Officer Pung was "concern[ed] that someone may have entered unlawfully and that the security needed to be checked."

Officer Bahl clarified that she was not dispatched to Jackie's Diner. She responded to check the area, and then proceeded to the Dorchester apartments, while other officers were at the restaurant talking to witnesses. Officer Bahl testified that the length of time from when she first heard the radio report of an incident at Jackie's Diner to when she was actually speaking to the witnesses at the apartment was no greater than 15 minutes. Officer Bahl said that she was in the immediate area "and information was being relayed to everybody." "[T]here were numerous officers involved at different locations, information being relayed[.]" Officer Bahl had been involved in some of the earlier investigations of the L & L gas station robberies, which occurred one block south of the apartment building.

Defense counsel elicited testimony from Officers Bahl and Larson that the police had no information that the incident at Jackie's Diner involved the use of a

weapon or threats. However, Officer Bahl clarified that her discussions with the witnesses who followed the suspect pertained only to what they saw after leaving the diner; she did not interview them about what occurred at the diner.

The trial court determined that the entry was proper under the "exigent circumstances exception" to the warrant requirement and that trial counsel was not ineffective by failing to raise a Fourth Amendment challenge.

I. ENTRY WITHOUT A WARRANT

Defendant argues that the police were not justified in entering the apartment without a warrant and claims that the evidence seized during the entry, including clothing that matched clothing worn by the perpetrator of the armed robberies, should have been suppressed.

We review de novo a trial court's ruling on a motion to suppress evidence. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). The trial court's factual findings are reviewed for clear error, *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009), and the underlying constitutional issues, including whether a Fourth Amendment violation occurred, are reviewed de novo. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007).

The United States and the Michigan Constitutions guarantee the right to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). "Generally, a search conducted without a warrant is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement." *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000) (quotation marks

and citation omitted). "One of the exceptions to the Fourth Amendment warrant requirement is the so-called 'exigent circumstances' exception." *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997). " 'Hot pursuit' is a form of 'exigent circumstances.' " *People v Raybon*, 125 Mich App 295, 301; 336 NW2d 782 (1983), citing *Warden v Hayden*, 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967). "Under the hot pursuit exception, an officer may chase a suspect into a private home when the criminal has fled from a public place." *Smith v Stoneburner*, 716 F3d 926, 931 (CA 6, 2013), citing *Warden*, 387 US at 294, 298-299. Other recognized exigencies include the need to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to the police or others inside or outside a dwelling. *Cartwright*, 454 Mich at 558. In the absence of hot pursuit, the police must have probable cause to believe that at least one of the other three circumstances exists, and the gravity of the crime and the likelihood that a suspect is armed should be considered. *Id*. The validity of a search without a warrant ultimately turns on the reasonableness of the search, as perceived by the police. *Id*. at 561.[3]

Under the unique facts and circumstances of this case, we conclude that the trial court did not err by holding that the officers' entry into the apartment was reasonable. The police were pursuing a fleeing felon from a public place. Witnesses from Jackie's Diner spotted the suspect coming from the auto parts store in the area and followed him to the apartment building. They were in constant contact with the police dispatcher, and the dispatcher relayed their information to the police officers on the ground. The witnesses directed

[3] We previously determined that defendant has standing to challenge the entry without a warrant. See *Henry*, unpub op at 5.

the officers to the area of the apartment building where the witnesses had observed the fleeing suspect descend the stairs and disappear. Their information provided support for a belief that the suspect had gone into Apartment 104. The officers had information from Officer Terrill that the suspect in the string of armed robberies was staying in Apartment 104. Notably, the evidence established that the entry occurred just 10 or 15 minutes after the initial report of the incident at Jackie's Diner at 11:45. Officer Bahl was already in the process of interviewing the witnesses at the apartment building within 15 minutes of receiving the information at 11:45 a.m., and she arrived after Officer Pung. Officer Wilcox and Sergeant Brown arrived at the apartment at 11:55. In light of the short distance between the restaurant and the apartment, and the rapidity with which the events unfolded, entry was proper under the hot pursuit exception to the warrant requirement. See *Warden*, 387 US at 294.

In addition, other exigencies supported the officers' entry into the apartment. Not only did the officers have reason to believe that the fleeing suspect was in Apartment 104, they also had reason to believe that he might have broken into the apartment, putting innocent people in danger. *Cartwright*, 454 Mich at 558. Sergeant Brown's observation of fresh pry marks on the frame of the window of Apartment 104, and the small opening of the window, raised his and Officer Pung's concerns about a possible break-in. The sergeant testified that the pry marks looked fresh, which is consistent with Officer Terrill's testimony that he saw no damage to the window frame of Apartment 104 when he was there the previous day. Sergeant Brown explained the alleged discrepancy in his police report about window damage, and the trial court found him to be credible. Photographs taken on December 5, 2010, depict marks on the

window frame, which further support his testimony. Furthermore, as the trial court noted, the cash taken from the restaurant was evidence that could have easily been destroyed. *Id*.

Defendant argues that the police had no basis to believe that the fleeing suspect was armed and dangerous. He emphasizes that the theft at Jackie's Diner was not an armed robbery. It was a taking of cash from an unattended cash register without a weapon or threats. However, Officers Pung and Terrill testified that the initial radio dispatch to Jackie's Diner indicated that a larceny *or robbery* had occurred. Also, the police had information from Officer Terrill about the anonymous tip that the person who had committed several armed robberies in the area was staying at Apartment 104 of the Dorchester apartments. That fact gave the police reason to be concerned about weapons in Apartment 104, regardless of whether the Jackie's Diner suspect used a weapon and regardless of whether the police believed that that person was the same person who committed the armed robberies.

The hearing on remand addressed the questions and concerns we raised in our prior opinion. Relevant items that previously were outside the record and not appropriate for consideration were admitted at the hearing and are now part of the record. The trial court's findings were detailed, thorough, and supported by the testimony and exhibits at the hearing. The trial court did not clearly err by making its findings of fact nor did it err by concluding that the entry without a warrant was lawful.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel rendered ineffective assistance.

Whether a defendant was deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings, if any, for clear error, while constitutional determinations are reviewed de novo. *Id*.

In order to demonstrate that he or she was denied the effective assistance of counsel under either the federal or the state constitution, a defendant must, first, show that trial counsel's performance was "deficient" and, second, show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (quotation marks and citation omitted). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id*. at 600.

Defendant argues that counsel was ineffective for failing to move to suppress evidence the police seized in the apartment following the entry without a warrant. As discussed already, the entry without a warrant was lawful and a motion to suppress evidence obtained as a result of the entry would have been futile. Counsel is not ineffective for failing to advance a meritless position or make a futile motion. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

In a Standard 4 brief, see Administrative Order No. 2004-6, 471 Mich c (2004), defendant contends that counsel was ineffective as a result of failing to make "mandatory pre-investigations," failing to locate and question alibi witnesses, and failing to make "appropriate objections." However, defendant fails to articulate, and the record does not reveal, what "pre-investigations" counsel should have made or who the alleged alibi witnesses were, what testimony they could

have offered, or how their testimonies would have made any impact at trial. Similarly, defendant does not articulate what objections counsel should have made or how any additional objections would have affected the outcome of the proceeding. Accordingly, defendant has abandoned his argument for review. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

III. SUFFICIENCY OF THE EVIDENCE

Defendant contends that there was insufficient evidence to support his conviction for the November 20, 2010, robbery at the L & L Gas Express.[4] Specifically, defendant contends that the prosecution failed to prove that he assaulted Kelly Buell, the gas station attendant.

We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In conducting our review, we review the evidence in the light most favorable to the prosecution to determine whether "a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010).

"The essential elements of an armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant is armed with a weapon described in the statute."

[4] This offense was Count 7 of Ingham Circuit Court File No. 10-001265-FC.

People v Allen, 201 Mich App 98, 100; 505 NW2d 869 (1993). "The offense of assault requires proof that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Watkins*, 247 Mich App 14, 33; 634 NW2d 370 (2001). A battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005) (citations and quotation marks omitted).

Here, defendant argues that there was insufficient evidence to show that he attempted to commit a battery against Buell or that he put Buell in reasonable apprehension of being battered. Buell testified that defendant stated "give it to me," and then when she asked for clarification he said, "you know the deal. Give me the money. Hurry up, you have two seconds." Buell testified that she knew about the prior robberies and that she understood what defendant meant when he stated, "you know the deal." A trier of fact could have concluded that it was reasonable for Buell to infer that defendant was referring to the previous robberies when he stated, "you know the deal," and that defendant was threatening violence when he told Buell that she had "two seconds." The fact that Buell did not see the scissors defendant was carrying until he was leaving the building would not preclude a rational juror from finding that Buell had a reasonable fear or apprehension of an offensive touching if she did not comply with defendant's demand. *Watkins*, 247 Mich App at 33. Moreover, Buell testified that she was afraid defendant was going to come back because she only gave him a small amount of money and her purse was on the counter. In sum, there was sufficient evidence to allow a

rational juror to convict defendant of committing the armed robbery on November 20, 2010, beyond a reasonable doubt.

IV. WAIVER OF *MIRANDA* RIGHTS

Defendant next argues that the trial court erred by allowing the prosecutor to introduce evidence of statements he made to the police during a custodial interrogation. Defendant contends that the waiver he signed during the interrogation was invalid because the police did not scrupulously honor his unambiguous assertion of his right to remain silent. Defendant preserved this issue for review by filing a pretrial motion to suppress the statements. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). "We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary." *Gipson*, 287 Mich App at 264. However, we review a trial court's factual findings on a motion to suppress for clear error. *Hyde*, 285 Mich App at 436. To the extent we find that constitutional error has occurred, "[w]e review preserved issues of constitutional error to determine whether they are harmless beyond a reasonable doubt." *People v Dendel (On Second Remand)*, 289 Mich App 445, 475; 797 NW2d 645 (2010). "A constitutional error is harmless if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id*. at 475 (quotation marks and citations omitted).

A criminal defendant enjoys safeguards against involuntary self-incrimination during custodial interrogations. *Michigan v Mosley*, 423 US 96, 99-100; 96 S Ct 321; 46 L Ed 2d 313 (1975); *Miranda*, 384 US at 444. Included within these safeguards is the right to remain silent during custodial interrogation and the right to cut off police questioning. *Mosley*, 423 US at 103-104. A defendant may assert his or her right to remain silent at any time, *id*. at 100, however, the assertion must be unequivocal. *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). When a defendant invokes his or her right to remain silent, the police must "scrupulously honor" the defendant's request. *Mosley*, 423 US at 103-104. The police fail to "scrupulously honor" a defendant's invocation of the Fifth Amendment right "by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Id*. at 105-106.

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. [*Id*. at 100.]

In this case, the police read defendant his *Miranda* rights and defendant acknowledged that he understood those rights. The police then had the following exchange with defendant:

> [*Detective Kim Kranich*]: Okay. So you understand everything that I read to you?
>
> [*Defendant*]: Yes.
>
> [*Detective*]: Okay. Are you willing to give up those rights and make a statement to us at this time? Talk to us about what we're, talk to us about what we're doing?

[*Defendant*]: *No sir*.

[*Detective*]: So you don't wanna talk to us?

[*Defendant*]: I mean you say give up the rights.

[*Detective*]: Well no, do you wanna give us, give us a statement at this time? You understand what I read to you.

[*Defendant*]: Yeah.

[*Detective*]: Those are all your rights.

[*Defendant*]: Yeah.

[*Detective*]: Now I'm asking do you wanna make a statement at this time, what we wanna talk to you about?

* * *

[*Defendant*]: Yeap, yes. I understand what you're saying. Yeah, yeah.

[*Detective*]: Okay, okay. You wanna make a statement then and talk to us.

[*Defendant*]: Yes, I'll make a statement yeah.

[*Detective*]: Okay.

[*Defendant*]: *But I'm not give* [sic] *up my rights am I?*

* * *

[*Detective Steven McClean*]: If you're uncomfortable about something or if you just simply don't like us, you can say I'm done, okay. You can interrupt us for that matter, it's no big deal. We just wanna set the matter straight. This has been coming on for some time.

[*Defendant*]: Okay. [Emphasis added.]

Defendant then signed a waiver form, waiving his rights, and then made incriminating statements. The trial court denied defendant's motion to suppress the statements, holding that defendant knowingly waived his Fifth Amendment rights.

Having reviewed the record, we conclude that the trial court erred by holding that defendant unequivocally waived his Fifth Amendment right to remain silent. After the police read defendant his rights and asked him if he was willing to "give up those rights and make a statement," defendant unequivocally stated "No sir." In doing so, defendant asserted his Fifth Amendment right to remain silent.[5] See *Berghuis v Thompkins*, 560 US 370, 382; 130 S Ct 2250; 176 L Ed 2d 1098 (2010) (a defendant can unambiguously assert the right to remain silent by stating that "he did not want to talk with the police").

Instead of scrupulously honoring defendant's assertion of his Fifth Amendment right to remain silent, the police sought to assure defendant that he would not be giving up his rights by making a statement. Specifically, when defendant stated, "you say give up the rights," the detective responded, "Well *no*, do you wanna give us, give us a statement at this time?" (Emphasis added). The detective informed defendant that his rights were on the form; then stated, "Now I'm asking do you wanna make a statement at this time, what we wanna talk to you about?" In doing so, the police distinguished

[5] The dissent contends that defendant did not unequivocally assert his Fifth Amendment right to remain silent when he responded, "No, sir," when the police asked him if he was willing to give up his rights and make a statement. Notably, the dissent fails to articulate what part of the word "no" is equivocal. This is because there is nothing about the word "no" that is equivocal. "Equivocal" is defined, in relevant part, as "allowing the possibility of more than one meaning or interpretation . . . ambiguous." *Random House Webster's College Dictionary*, (1997). The dissent fails to explain how responding "no" to a question allows for the possibility of more than one meaning or how it is deliberately ambiguous. For example, the dissent does not articulate what part of the word "no" means "yes," "maybe," "possibly," or "perhaps." Presumably this is because the word "no" is unambiguous. See *id*. (defining "no," in relevant part, as "a negative expressing . . . denial, or refusal, as in response to a question or request . . . a denial or refusal").

the act of making a statement from the act of waiving the right to remain silent, when in fact, the two are inextricably linked. Indeed, before signing the waiver, defendant again sought assurance that he was not giving up his rights when he stated, "But I'm not give [sic] up my rights am I?" This response showed that defendant believed that he could make a statement without waiving his Fifth Amendment rights. The police did not respond by accurately informing defendant that by agreeing to talk, he was, in fact, waiving his Fifth Amendment rights. Instead, the police informed defendant that he could stop talking if he wanted to. In doing so, the police concealed from defendant the fact that agreeing to talk constituted a waiver of his constitutional rights. Only then did defendant agree to talk with the police and sign the waiver form. Because the police failed to scrupulously honor defendant's initial assertion of his right to remain silent, and because the police subsequently led defendant to believe that he was not relinquishing his rights by agreeing to make a statement, the trial court erred by concluding that defendant knowingly and intelligently waived his Fifth Amendment rights. *Mosley*, 423 US at 100; *Miranda*, 384 US at 479.

Nevertheless, while the trial court erred by admitting defendant's statements, we conclude that, given the untainted evidence in this particular case, admission of the statements was harmless beyond a reasonable doubt. *Dendel*, 289 Mich App at 475.

The admission of the incriminating statements as it related to the November 17 and November 20, 2010 robberies amounted to harmless error. Here, both victims of the robberies identified defendant as the perpetrator at trial. Richard Mellott, the gas station attendant who was robbed on November 17, and Buell

testified that they saw defendant's face during the robberies. Mellott testified that defendant wore a dark-colored coat with fur trim and Buell testified that defendant wore a gray hooded sweatshirt. The police found a similar coat and a gray/brown reversible hooded sweatshirt in the apartment that defendant occupied at the time of his arrest. As discussed already, this evidence was not obtained in violation of defendant's Fourth Amendment rights. Further, Buell identified defendant in a police photographic array, stating that he was 90% certain that defendant was the robber. Independent of the police interview, this evidence standing alone was more than enough evidence for a jury to find beyond a reasonable doubt that defendant committed these robberies.

Similarly, the admission of the incriminating statements as it related to the December 2, 2010 Quality Dairy robbery was harmless error. *Id*. Tamara Miller and Taylor Hatz, the clerks, both testified that they could see defendant's face during the robbery and they both testified that defendant committed the robbery. Berkley Watson, a customer, also identified defendant as an individual who was in the store at about the time of the robbery. In addition, Miller testified that defendant wore a dark hooded sweatshirt and Hatz testified that defendant wore a textured dark hooded sweatshirt. The police found a textured brown hooded sweatshirt in the apartment defendant occupied at the time of his arrest and an expert testified that the sweatshirt was probably the same one depicted on a surveillance video from the Quality Dairy.

With respect to the November 16 and December 2, 2010 L & L robberies, although Christopher Selover, the gas station attendant, did not identify defendant at trial, there was other significant evidence that would

have allowed the jury to convict defendant beyond a reasonable doubt. Selover testified that the same man robbed him on November 16 and December 2. Selover testified that the perpetrator wore a black puffy coat on November 16, and the police found a black puffy coat in the apartment defendant occupied at the time of his arrest. Selover testified that the perpetrator wore a stocking cap with a small visor on it, which was similar to the hat that Mellott testified that defendant wore during the November 17 robbery. Selover testified that the perpetrator wore a camouflage coat with fur trim on December 2, and the police recovered a similar coat in the apartment where defendant was arrested. An expert testified that he was 99% sure that the coat found in the apartment matched the coat depicted in a surveillance video of the robbery and he identified nine unique matching characteristics. Furthermore, Selover testified that the perpetrator had previously entered the store wearing a dark-colored ice company uniform. David Bismack, the Lansing district manager for the Arctic Glacier Ice Company, testified that defendant had previously worked for Arctic Glacier, where he made deliveries and wore a dark-colored shirt with the company's name on it.

In addition, the man who committed the November 16 robbery used the same modus operandi as the man who robbed Mellott in the same store on November 17. Mellott testified that defendant was the man who entered the store, asked for a Black & Mild brand cigar, and then pointed a gun and demanded money as Mellott turned to give defendant the cigar. Similarly, Selover testified that the man who robbed him on November 16 used the identical method to rob him. Selover testified that the man had a silver handgun and Mellott testified that defendant used a black and silver handgun. Furthermore, Selover testified that, during the December 2 robbery, the

perpetrator stated, "you know what the f------ deal is," which would allow a juror to infer that the man was the same man who had previously robbed Mellott and Buell —i.e., defendant, in accordance with their identification testimony. Finally, Selover testified that the perpetrator went toward the Dorchester apartments after the December 2 robbery, the apartment complex that was close to the L & L Gas Express and where the police ultimately arrested defendant several days later.

In sum, defendant is not entitled to reversal because admission of defendant's statements was harmless since it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Dendel*, 289 Mich App at 475 (quotation marks and citations omitted).

V. RIGHT OF CONFRONTATION

Defendant raises two issues in a Standard 4 brief with respect to a confidential informant that the police relied on during their investigation. Specifically, before trial, defendant moved to compel the prosecution to disclose the identity of the confidential informant. The trial court denied the motion.

At trial, Detective Steven McClean testified that at the outset of his investigation, he spoke with the confidential informant. McClean testified that the informant "came forward with the defendant's name." However, following a defense objection that the testimony contained hearsay statements, the prosecutor withdrew the question. The trial court did not provide a curative instruction. McClean then testified that based on his conversations with the informant, he came to believe that defendant was responsible for the November 16 and November 17 robberies. McClean testified

that he provided the informant $200 for "his assistance in both identifying the person involved and also for his assistance in locating him." McClean testified that after he formed an opinion regarding who was responsible for the first two L & L robberies, he prepared photographic lineups to present to the victims. The trial court allowed the testimony over defense counsel's hearsay objection on the ground that it was admissible to show how McClean proceeded with his investigation. During closing and rebuttal arguments, the prosecutor stated that there was significant identification evidence beyond that which the informant provided. Otherwise, the prosecutor did not refer to the informant.

Defendant initially contends that he was denied the right to confront the informant and thereby denied a fair trial.

Defendant failed to preserve this issue for review because he did not object on the same basis in the trial court. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Whether defendant was denied his right of confrontation involves a question of constitutional law that we review de novo. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011). We review unpreserved constitutional issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Under the plain-error rule, a defendant must show: "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763. To show that an error affected substantial rights, a defendant must show that "the error affected the outcome of the lower court proceedings." *Id*. If a defendant satisfies these three requirements, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or

when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*. at 763 (quotation marks and citation omitted).

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him[.]" US Const, Am VI. The Michigan Constitution also affords a defendant this right of confrontation. Const 1963, art 1, § 20; *Fackelman*, 489 Mich at 525. The Confrontation Clause concerns out-of-court statements of witnesses, that is, persons who bear testimony against the defendant. *Id.* at 528.

"As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Bullcoming v New Mexico*, 564 US ___, ___; 131 S Ct 2705, 2713; 180 L Ed 2d 610, 619 (2011). "To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.' " *Id*. 564 US at ___ n 6; 131 S Ct at 2714 n 6; 180 L Ed 2d at 620 n 6, quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). The constitutional concern is out-of-court statements of witnesses, that is, persons "who bear testimony against a defendant." *Fackelman*, 489 Mich at 528.

> A statement by a confidential informant to the authorities generally constitutes a testimonial statement. However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. Thus, a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation

> Clause. Specifically, a statement offered to show why police officers acted as they did is not hearsay. [*People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007) (citations omitted).]

In this case, McClean's testimony regarding the confidential informant's out-of-court statements was improper. McClean testified that the confidential informant "came forward with the defendant's name," and that he came to believe that defendant was responsible for the November 16 and November 17 robberies on the basis of what the informant said, necessarily implying that the informant implicated defendant in the robberies. This testimony was not limited to show why McClean proceeded in a certain direction with his investigation. *Id*. Instead, the testimony necessarily implied that the informant accused defendant of the first two robberies and that McClean considered the informant credible. The primary purpose of these statements was to "establish[] or prov[e] past events potentially relevant to later criminal prosecution," and as such, they were testimonial in nature. *Bullcoming*, 564 US at ___ n 6; 131 S Ct at 2714 n 6; 180 L Ed 2d at 620 n 6 (quotation marks and citation omitted). Therefore, because defendant did not have a prior opportunity to cross-examine the informant, admission of the out-of-court statements was improper. *Id*. 564 US at ___; 131 S Ct at 2713; 180 L Ed 2d at 619. Had McClean limited his testimony to an explanation that, on the basis of the information he received from the informant he proceeded in a certain direction with his investigation, it may have been admissible. See *Chambers*, 277 Mich App at 10-11. And, although the prosecutor "withdrew" his question regarding whether the informant identified the perpetrator, this did not cure the taint of the testimony because the trial court failed to instruct the jury not to consider McClean's response. See *People v*

Crawford, 458 Mich 376, 399 n 16; 582 NW2d 785 (1998) (noting that, "a limiting instruction will often suffice to enable the jury to compartmentalize evidence and consider it only for its proper purpose . . . .") Nevertheless, defendant cannot show that the improper testimony affected his substantial rights because he cannot show that it affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763-764.

In this case, as discussed already, there was significant evidence that would allow a juror to convict defendant. Specifically, in regard to three of the five robberies, the victims testified that defendant was the perpetrator. In regard to the other two robberies, the perpetrator utilized the same modus operandi. In addition, Selover testified that the person who robbed him previously entered the store wearing an ice company uniform, and the evidence showed that defendant had previously worked for Arctic Glacier, a Lansing-area ice company, and had delivered ice to businesses while wearing the company's uniform. Additionally, the police recovered clothing from the apartment where defendant was arrested that matched the clothing the perpetrator wore during the robberies. Finally, the prosecutor did not emphasize the informant's statements during closing or rebuttal argument. On this record, defendant cannot show that the improper aspects of McClean's testimony affected the outcome of the proceedings and, therefore, he is not entitled to a new trial on this basis. *Id*.

VI. DISCLOSURE OF THE CONFIDENTIAL INFORMANT

Next, in a supplemental Standard 4 brief, defendant argues that the trial court abused its discretion by denying his request to produce the informant. Defendant also argues that the identity of the confidential

informant was material evidence that the prosecutor was obligated to disclose under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

We review a trial court's decision whether to order production of a confidential informant for an abuse of discretion. *People v Poindexter*, 90 Mich App 599, 608; 282 NW2d 411 (1979). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "This Court reviews de novo a defendant's claim of a constitutional due-process violation." *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011).

"Generally, the people are not required to disclose the identity of confidential informants." *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520 (1994), overruled in part on other grounds *People v Perry*, 460 Mich 55, 64-65; 594 NW2d 477 (1999). However, when a defendant demonstrates a possible need for the informant's testimony, a trial court should order the informant produced and conduct an in camera hearing to determine if the informant could offer any testimony beneficial to the defense. *People v Underwood*, 447 Mich 695, 705-706; 526 NW2d 903 (1994). Whether a defendant has demonstrated a need for the testimony depends on the circumstances of the case and a court should consider "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id*. at 705 (quotation marks and citation omitted).

In this case, the trial court did not abuse its discretion by finding that defendant failed to demonstrate a need for the informant's testimony. Defendant fails to indicate how disclosure of the informant's identity would have been beneficial to his

defense. Here, even assuming defendant had access to the informant and called him as a witness at trial, the jury learned that the informant was paid for providing information and defendant cannot otherwise articulate how calling the informant at trial would have affected the outcome of the proceedings. While the informant gave information to the police that caused the police to focus their investigation on defendant, the witnesses who identified defendant from the crime scene were not basing their identifications on information from the informant. Rather, the witnesses identified defendant on the basis of their own observations at the time of the robberies. In short, the informant would not have offered any material or exculpatory evidence and the trial court did not abuse its discretion by denying defendant's motion to produce the informant.

Similarly, defendant cannot show that the failure to produce the informant amounted to a *Brady* violation. The prosecution's failure to disclose exculpatory or material evidence in its possession constitutes a due process violation regardless of whether a defendant requested the evidence. *Brady*, 373 US at 87; *Jackson*, 292 Mich App at 590–591. "[U]ndisclosed evidence will be deemed material only if it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998), overruled on other grounds *People v Chenault*, 495 Mich 142, 146 (2014), quoting *Kyles v Whitley*, 514 US 419, 435; 115 S Ct 1555; 131 L Ed 2d 490 (1995). Here, as discussed already, the informant would not have offered material or exculpatory evidence and failure to produce the informant did not undermine confidence in the verdict. Accordingly, there was no *Brady* violation.

VII. ARRAIGNMENT

In his supplemental Standard 4 brief, defendant argues that the trial court lacked subject-matter jurisdiction because defendant signed a waiver of arraignment before the preparation and filing of the information.

Defendant failed to preserve this issue for review because he did not raise it in the trial court. *Grant*, 445 Mich at 545. To obtain relief, defendant must show plain error that affected his substantial rights. *Carines*, 460 Mich at 763-764.

Defendant, represented by counsel, waived arraignment on December 29, 2010. On the waiver form, defendant acknowledged having reviewed the information and that he understood the nature of the charges against him. The information indicates that it was filed on January 12, 2011 (i.e., after defendant waived arraignment). Defendant contends that his waiver was invalid under MCR 6.113(B), which requires the prosecutor to "give a copy of the information to the defendant before the defendant is asked to plead." Defendant argues that the prosecutor could not have provided him a copy of the information before he waived arraignment because that document was not filed until after the waiver.

"The purpose of an arraignment is to provide formal notice of the charge against the accused." *People v Waclawski*, 286 Mich App 634, 704; 780 NW2d 321 (2009). In this case, although the information may have been filed in court after defendant waived arraignment, the record supports the conclusion that defendant had an opportunity to review the information before it was filed. Specifically, on the waiver form defendant acknowledged that he had read the information and understood the charges against him. Merely because

the prosecutor had not filed the information did not deprive defendant of the opportunity to review the information before he waived the arraignment. In addition, defendant attended the preliminary examination in this case. Thus, defendant was aware of the charges against him even though the trial court did not hold an arraignment. Accordingly, defendant cannot show prejudice. See *People v Nix*, 301 Mich App 195, 208; 836 NW2d 224 (2013) ("A showing of prejudice is required to merit relief for the failure to hold a circuit court arraignment.").

Defendant argues that the invalid waiver deprived the circuit court of subject-matter jurisdiction. This argument lacks merit. "Subject matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and *is not dependent on the particular facts of the case*." *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011) (quotation marks, citations, and some emphasis omitted). Here, the trial court had subject-matter jurisdiction over defendant. See Const 1963, art 6, §§ 1 and 13; MCL 600.151; MCL 600.601; MCL 767.1.

VIII. DUE PROCESS

Finally, in his supplemental Standard 4 brief, defendant argues that the police used "improper and unjust" identification methods during their investigation that violated his due process rights.

During his investigation, Detective McClean presented photographic lineups to Selover and Buell individually. Neither Selover nor Buell identified defendant in the first lineup. McClean then displayed a second lineup to Selover using a more recent photograph of defendant. The photographs in this second lineup were small. When Selover could not identify defendant, McClean showed Selover a

large photograph of defendant and Selover identified defendant as the perpetrator with "100-percent" certainty. McClean then displayed another lineup to Buell using six large photographs including the large photograph of defendant. Buell identified defendant with "90-percent" certainty.

Defendant moved to suppress the identification testimony on the ground that the procedure was unduly suggestive. Following an evidentiary hearing, the trial court suppressed Selover's identification testimony and refused to allow Selover to identify defendant at trial. The court reasoned that McClean tainted the second photographic lineup he showed to Selover when he displayed a large photograph of defendant next to small photographs of five other individuals. With respect to Buell, the trial court held that "the issue is nonexistent. She was never shown just one photograph. She was shown a collection of six large photographs and made an identification based on that." At trial, Buell testified that she identified defendant in the photograph lineup and she identified defendant in court as the person who robbed her.

On appeal, defendant contends that the trial court erred. We review de novo a trial court's ruling on a motion to suppress evidence. *Williams*, 472 Mich at 313. The trial court's factual findings are reviewed for clear error, *Hyde*, 285 Mich App at 436, and the underlying constitutional issues are reviewed de novo. *Gillam*, 479 Mich at 260. To the extent that defendant raises issues that were not raised in the trial court, we review unpreserved constitutional issues for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

"A photographic identification procedure or lineup violates due process guarantees when it is so impermis-

sibly suggestive as to give rise to a substantial likelihood of misidentification." *People v McDade*, 301 Mich App 343, 357; 836 NW2d 266 (2013). The suggestiveness of a photographic lineup must be examined in light of the totality of the circumstances. *Id*.

> As a general rule, physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness . . . . Differences among participants in a lineup are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up. . . . It is then that there exists a substantial likelihood that the differences among line-up participants, rather than recognition of defendant, was the basis of the witness' identification. [*People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.) (quotation marks and citations omitted).]

Here, the only evidence of the photographic lineups admitted at trial concerned the lineups shown to Buell. Defendant has failed to articulate how those lineups were unduly suggestive. McClean showed Buell a lineup of six large photographs of individuals, including one of defendant. Buell identified defendant as the perpetrator. There was nothing about this lineup that was unduly suggestive. Buell explained that the photographs were all large, page-sized photographs of individuals. Defendant does not indicate any unique differences about his photograph that served to make the lineup unduly suggestive and there are none apparent on the record before us. Therefore, we cannot conclude that the trial court clearly erred by allowing Buell to offer identification testimony at trial.

Defendant raises several other ancillary arguments. He contends that the trial court erred by refusing to allow him to introduce evidence of the improper method McClean used in administering the lineup to Selover.

However, had the court allowed that information, the jury would have been informed that Selover identified defendant in the lineup. This would have prejudiced defendant, and he moved, successfully, to exclude the evidence on that basis. He cannot now claim that the trial court erred by granting him the relief he requested. See *People v Buie*, 491 Mich 294, 312; 817 NW2d 33 (2012) (a defendant cannot harbor error as an appellate parachute). Moreover, the trial court did allow defendant to cross-examine the witnesses regarding their inability to identify defendant in the photographic arrays and defendant's argument to the contrary lacks merit.

Defendant also argues that the identification procedure was improper because his name and photograph were broadcast on television before the preliminary examination. This argument fails. While Selover testified at the preliminary examination that he saw defendant's photograph on television, Selover was precluded from identifying defendant at trial. Nothing in the record supports that Buell saw defendant on television. Defendant has failed to show error.

IX. CONCLUSION

Having reviewed the record, we conclude that, given the particular facts of this case, defendant was not denied his Fourth Amendment right to privacy or his Sixth Amendment right to the effective assistance of counsel. Additionally, there was sufficient evidence to support the jury's conviction with regard to the November 20, 2010 armed robbery, the trial court did not err by denying defendant's motion to produce the confidential informant, defendant was not prejudiced when he waived the arraignment, and defendant was not denied due process with respect to the identification testimony.

However, the trial court erred in concluding that defendant waived his *Miranda* rights and McClean's testimony concerning out-of-court statements made by an informant was improper and violated the Confrontation Clause. Nevertheless, on the specific record before us, for the reasons set forth in this opinion, we cannot conclude that these errors warrant reversal and a new trial.

Affirmed.

M. J. KELLY, J., concurred with BORRELLO, P.J.

BOONSTRA, J. (*concurring in part and dissenting in part*). I concur fully with Parts I, II, III, and V to VIII of the majority opinion, and to the corresponding portions of its concluding Part IX. I also concur with the result reached in Part IV of the majority opinion and in the corresponding portion of its Part IX. Where I respectfully part company with the majority is in its holding that the trial court erred, even harmlessly, by admitting into evidence defendant's statements to the police detectives. To that extent, I respectfully dissent. I write separately to detail why I would find that no *Miranda*[1] violation occurred here.

I. BACKGROUND OF *MIRANDA*

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." US Const, Am V; accord Const 1963, art 1, § 17. The genesis of that fundamental constitutional protection lies in the " 'iniquities of the ancient system' " of "inquisitorial and manifestly unjust methods of interrogating accused

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

persons," including by "resort[ing] to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions." *Miranda v Arizona*, 384 US 436, 442-443, 446; 86 S Ct 1602; 16 L Ed 2d 694 (1966) (quotation marks and citations omitted).

The *Miranda* procedures are a now-familiar judicially created mechanism for protecting this constitutional right "not to be compelled to incriminate" oneself against what a majority of the United States Supreme Court termed "overzealous police practices." *Id*. at 439, 444. The Court recognized that, by the time of the adoption of the *Miranda* procedures in 1966, the modern police practices with which they were concerned had become less those of physical brutality and more in the nature of psychological coercion. *Id*. at 448. The *Miranda* Court thus described its concern as being with the "interrogation atmosphere and the evils it can bring." *Id*. at 456. Stated differently, "the *Miranda* warning procedures protect against the coercion that can occur when a citizen is suddenly engulfed in a police-dominated environment." *People v Cortez (On Remand)*, 299 Mich App 679, 702; 832 NW2d 1 (2013) (O'CONNELL, P.J., concurring). The Supreme Court recently has described the following as the typical scenario that triggers the *Miranda* procedures:

> [A] person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures. A person who is cut off from his normal life and companions and abruptly transported from the street into a police-dominated atmosphere may feel coerced into answering questions. [*Howes v Fields*, 565 US ___, ___; 132 S Ct 1181, 1190; 182 L Ed 2d 17, 29 (2012) (quotation marks and citations omitted).]

II. "CUSTODIAL INTERROGATION"

The *Miranda* Court thus created certain safeguards to protect individuals from excesses that might occur in the "police-dominated" "interrogation atmosphere."[2] As the Court explained, however, those safeguards apply only in the context of "custodial interrogation":

> Our holding . . . briefly stated . . . is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [*Miranda*, 384 US at 444.]

"Custodial interrogation" obviously has two components: (1) custody and (2) interrogation. Custody is not at issue in this case, because it is undisputed here that defendant was in custody.[3]

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[2] The *Miranda* Court stressed, however, that it did not intend to create a "constitutional straightjacket" or to "hamper the traditional function of police officers in investigating crime." *Miranda*, 384 US at 467, 477. Nor, the Court clarified, did the constitution require "any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." *Id*. at 490.

[3] Since *Miranda*, the Supreme Court has clarified that "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Fields*, 565 US at ___; 132 S Ct at 1189; 182 L Ed 2d at 28. The question of "custody" instead further turns on "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id*. at ___; 132 S Ct at 1190; 182 L Ed 2d at 28. The courts thus have recently grappled, for example, with whether the questioning of prisoners

The relevant question here, therefore, is whether the detectives engaged in improper interrogation of defendant in violation of *Miranda*. I would hold that they did not.

A. DEFENDANT RECEIVED THE REQUISITE *MIRANDA* WARNINGS

As the majority acknowledges, defendant was read his rights and acknowledged that he understood them. To give proper context to what occurred thereafter, it is worth reviewing the rights that the detectives read to defendant. The record reflects the following recitation of rights and related colloquy with defendant:

> [*Detective Kim Kranich*]: What time you got? I don't — About 6:45. Okay. I'm gonna read these to you and I want you to answer me yes or no, okay. You have the right to remain silent. You do not have to talk to anyone and you do not have to answer any questions. Do you understand that one?
>
> [*Defendant*]: Yes.
>
> [*Detective*]: Anything you say can and will be used as evidence . . . excuse me. Anything you say can and will be used against you in a court of law.
>
> [*Defendant*]: Yeah.
>
> [*Detective*]: You have the right to speak to an attorney but you have the . . . attorney present while during questions . . . Jesus crimeney, the light here . . . You have the right to speak to an attorney and have an attorney present while you're being questioned. Do you understand that one?
>
> [*Defendant*]: Yes sir.
>
> [*Detective*]: If you want an attorney but cannot afford one, an attorney will be appointed to represent you at public expense before answering any questions. Understand that one?

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necessarily is "custodial" for purposes of *Miranda*. See, e.g., *id.* at ___; 132 S Ct at 1190; 182 L Ed 2d at 28-29; *Cortez*, 299 Mich App at 699-701 (opinion by METER, J.), 701-703 (O'CONNELL, P.J., concurring).

[*Defendant*]: Yeap.

[*Detective*]: If you give up your right to remain silent you may at any time change your mind and stop talking and stop answering questions. Do you understand that one Randall?

[*Defendant*]: Yeah.

[*Detective*]: If you give up your right to an attorney you may at any time change your mind and ask to speak to an attorney. Understand all of those ones, six things I read to ya?

[*Defendant*]: Yes.

B. THE CONTEXT OF DEFENDANT'S SUBSEQUENT EXCHANGE WITH THE DETECTIVES REVEALS CONFUSION, NOT AN UNEQUIVOCAL INVOCATION OF DEFENDANT'S RIGHT TO REMAIN SILENT

The detectives then had the following initial exchange with defendant:

[*Detective Kranich*]: Okay. So you understand everything that I read to you?

[*Defendant*]: Yes.

[*Detective*]: Okay. Are you willing to give up those rights and make a statement to us at this time? Talk to us about what we're, talk to us about what we're doing?

[*Defendant*]: No sir.

Indisputably, defendant answered "No sir" when, after he was read his rights and acknowledged his understanding of them, he was presented with the above-quoted follow-up query from the detectives. On its face, it would thus appear, as the majority in fact concludes, that defendant had unambiguously asserted his right to remain silent. Were that in fact the case, I would agree that the detectives could not have interrogated defendant at that time.[4]

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[4] The majority cites *Michigan v Mosley*, 423 US 96, 100; 96 S Ct 321; 46 L Ed 2d 313 (1975) (quotation marks and citation omitted), for the

However, for the reasons that follow, I conclude, on closer inspection, that defendant's "No sir" response did not constitute an unequivocal invocation of his right to remain silent.[5] As the majority acknowledges, to invoke the right to remain silent, a suspect must "unequivocally" indicate that he or she wishes to remain silent. *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984); *People v Adams*, 245 Mich App 226, 234-235; 627 NW2d 623 (2001). When the suspect does not unequivocally invoke the right to remain silent,

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proposition that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." This is a quotation from *Miranda* itself. See *Miranda*, 384 US at 473-474. However, while this general statement remains true, *Mosley* dealt with the issue of when the police may resume questioning after an *unequivocal* invocation of the right to remain silent. *Mosley*, 423 US at 101. *Mosley* does not address the situation here, where, as explained further later in this opinion, defendant did not unequivocally invoke his right to remain silent; nor does it provide any aid in determining whether "interrogation" took place.

[5] The majority posits that I have "fail[ed] to articulate what part of the word 'no' is equivocal," and goes on to incorrectly suggest that I state or imply that the word "no" is ambiguous and may mean " 'yes,' 'maybe,' 'possibly,' or 'perhaps.' " Of course, that is not my position. The majority misstates my position, attacks a position that I have not taken, and fails entirely to address the merits of this dissent. Simply put, I need not, and do not, contend that the bare word "no," in and of itself, is ambiguous. Rather, read in context and with a proper understanding of *Miranda* and its progeny, defendant's response to the detective's multipart and confusing question, to use the majority's chosen terminology, "allow[ed] the possibility of more than one meaning or interpretation," as explained further later in this opinion. (Quotation marks and citation omitted.) See *People v Adams*, 245 Mich App 226, 239; 627 NW2d 623 (2001) (declining to view transcript words cited by the defendant in isolation and examining the "context" and "circumstances" surrounding the defendant's statement alleged to be an unequivocal assertion of the right to counsel). Moreover, the subsequent dialogue did not constitute "interrogation" for purposes of *Miranda*. See the discussion later in this opinion. The majority, in failing to address the substantive merits of this dissent, and in choosing instead to distort my position, fails to articulate why I am wrong.

police officers are permitted to continue the interview. *Adams*, 245 Mich App at 234-235. Here, viewed in context, defendant's response reflects not an unequivocal invocation of his right to remain silent, but instead reflects understandable confusion about what he was being asked. See *id*. at 239.

To properly understand defendant's initial "No sir" response, we must consider the question(s) to which he was responding. As noted, after reading defendant his rights (i.e., "those . . . six things I read to ya"), the detectives posed the following query to defendant:

> [*Detective Kranich*]: Okay. Are you willing to give up those rights and make a statement to us at this time? Talk to us about what we're, talk to us about what we're doing?

The detectives thus clumsily asked defendant three confusing questions, all combined and compounded into one simultaneous[6] query: (1) "Are you willing to give up those rights [?]", (2) "Are you willing to . . . make a statement to us at this time?", and (3) "Are you willing to . . . talk to us about what we're doing?" Arguably, the second and third questions are essentially the same, inquiring of defendant whether he wished to talk with the detectives notwithstanding the rights that had been read to him.

But the first question ("Are you willing to give up those rights[?]") was entirely inconsistent with the other questions to which it was joined. Specifically, and notably, among the "six things" that comprised the *Miranda* rights that the detectives read to defendant were both the right to remain silent and the right, if he chose not to remain silent, to "at any time change [his] mind and stop talking and stop answering questions."

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[6] The transcript reflects two question marks, but three inquiries, all posed to defendant simultaneously.

So, by posing their query to defendant in the clumsy, confusing, and compound manner in which they did, the detectives simultaneously and inconsistently asked defendant if he wanted to "give up" both his right to remain silent and his right, if he gave up that right, to "change [his] mind and stop talking and stop answering questions." It is hardly surprising in this context that defendant was confused. He may well have been willing to speak with the detectives, yet unwilling, for example, to "give up" his right to stop talking whenever he chose.[7]

For all of the foregoing reasons, I would hold that defendant did not unequivocally invoke his right to remain silent and the detectives did not fail to "scrupulously honor[]" any exercise of defendant's "right to cut off questioning." *Catey*, 135 Mich App at 725 (quotation marks and citation omitted).

C. THE CONFUSION WAS REMEDIABLE, AND WAS REMEDIED

The next question, for *Miranda* purposes, is whether the confusion that resulted from the detectives' inartful attempt to comply with *Miranda* was remediable. I conclude that it was and that it must be. Otherwise, we will have mechanically transformed *Miranda* from the intended safeguard against coercive and overzealous police practices into the very "constitutional straightjacket" that *Miranda* itself decried.

Detective Kranich immediately followed up defendant's initial "No sir" response with the following question: "So you don't wanna talk to us?" That question can hardly be described as the kind of coercive or

[7] For this reason, I disagree with the majority's conclusion that defendant "unequivocally" made an "assertion of his Fifth Amendment right to remain silent" by responding "No sir" to the detectives' initial inartful query.

overzealous police practice to which *Miranda* was directed. To the contrary, it simply served to further a preliminary dialogue to clarify the confusion that was inherent in the detectives' earlier query, to advance and confirm defendant's understanding of his rights, and to facilitate defendant's knowledgeable decision-making, with regard to the exercise of his rights, in an understandable context. Defendant's immediate response reflects his initial confusion:

> [*Detective*]: So you don't wanna talk to us?
>
> [*Defendant*]: I mean you say give up the rights.

The exchange that continued thereafter reflected a clarification of the confusion, greater clarity of defendant's understanding of his rights, and a knowledgeable decision by defendant to talk with the detectives but not to otherwise "give up" his rights:

> [*Detective Kranich*]: Well no, do you wanna give us, give us a statement at this time? You understand what I read to you.
>
> [*Defendant*]: Yeah.
>
> [*Detective*]: Those are all your rights.
>
> [*Defendant*]: Yeah.
>
> [*Detective*]: Now I'm asking do you wanna make a statement at this time, what we wanna talk to you about?
>
> [*Detective Steven McClean*]: In order for us . . .
>
> [*Defendant*]: Yeap, yes. I understand what you're saying. Yeah, yeah.
>
> [*Detective Kranich*]: Okay, okay. You wanna make a statement then and talk to us.
>
> [*Defendant*]: Yes, I'll make a statement yeah.
>
> [*Detective*]: Okay.
>
> [*Defendant*]: But I'm not give [sic] up my rights am I?
>
> [*Detective McClean*]: You can stop talking –

[*Detective Kranich*]: You can -------- you know at any time you want.

[*Detective McClean*]: If you're uncomfortable about something or if you just simply don't like us, you can say I'm done, okay. You can interrupt us for that matter, it's no big deal. We just wanna set the matter straight. This has been coming on for some time.

[*Defendant*]: Okay.[8]

Beyond a doubt, the handling of the *Miranda*-rights process that the detectives exhibited here was not one that I would encourage others to emulate. They initially stumbled over the reading of some of the rights. They then posed a confusing, compound, inconsistent, and unnecessary query to defendant about "giving up" his rights. Rather than following these detectives' example, others should learn from it and should endeavor to employ a practice whereby they clearly read each of the rights in question, secure the suspect's understanding of them, and then clearly inquire of the suspect whether, understanding his or her rights, the suspect wishes to speak to them.

However, I conclude that, when the totality of the circumstances is examined, the detectives were able to clear up the confusion and secure a valid *Miranda* waiver, as I will discuss further later in this opinion. Thus any confusion that initially resulted did not result in a statement procured by coercion or given by a defendant ignorant of the consequences of his or her actions. See *People v Ryan*, 295 Mich App 388, 397; 819 NW2d 55 (2012); see also *People v McBride*, 273 Mich App 238, 254-255; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008).

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[8] Defendant thereupon signed a written form waiving his *Miranda* rights.

D. THERE WAS NO "INTERROGATION" FOR PURPOSES OF *MIRANDA*

Equally importantly for *Miranda* purposes, neither the detective's follow-up question ("So you don't wanna talk to us?") nor the succeeding dialogue constituted "interrogation" to which *Miranda* applies. The *Miranda* Court was careful to limit its holding to the "interrogation" process, thereby restricting police officers, upon a defendant's exercise of the right to remain silent, from further "interrogation." *Miranda*, 384 US at 444, and passim. This, of course, raises the question of what constitutes "interrogation" for *Miranda* purposes.

The Court in *Miranda* did not provide a definition of "interrogation" per se, but simply stated that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. at 444.

1. *INNIS*'S DEFINITION OF "INTERROGATION"

The question of what constitutes "interrogation" for purposes of *Miranda* was answered by the Supreme Court in *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980). In *Innis*, two police officers, after repeatedly advising the defendant of his *Miranda* rights, and after the defendant had stated that he understood his rights and wanted to speak to a lawyer, engaged in a dialogue ostensibly directed to each other (and not directed to the defendant). During that dialogue, one of the officers stated that there were " 'a lot of handicapped children running around in this area' " because a school for handicapped children was located nearby, and that " 'God forbid one of them might find a weapon with shells and they might hurt

themselves.' " *Id*. at 294-295. Having overheard the conversation, the defendant interrupted it, stating that the officers should turn the car around so that he could show them where the gun was located. The officers again advised the defendant of his *Miranda* rights, and he replied that he understood them but that he " 'wanted to get the gun out of the way because of the kids in the area in the school.' " *Id*. at 295. The defendant then led the officers to the gun in question.

The defendant in *Innis* unsuccessfully moved to suppress the gun and his statements regarding it. The evidence was introduced at the defendant's trial, and he was convicted on a number of counts. The Rhode Island Supreme Court reversed, finding that the defendant "had been subjected to 'subtle coercion' that was the equivalent of 'interrogation' within the meaning of the *Miranda* opinion." The United States Supreme Court granted certiorari "to address for the first time the meaning of 'interrogation' under [*Miranda*]." *Id*. at 296-297.

As a starting point, the Court in *Innis* looked to *Miranda* itself, and to its reference to " '*questioning* initiated by law enforcement officers . . . .' " *Innis*, 446 US at 298, quoting *Miranda*, 384 US at 444 (emphasis in *Innis*). But notwithstanding *Miranda*'s use of the term "questioning," the Court in *Innis* rejected the suggestion that the *Miranda* principles should apply "only to those police interrogation practices that involve express questioning of a defendant . . . ." *Innis*, 446 US at 298. "We do not, however, construe the *Miranda* opinion so narrowly." *Id*. at 299.

In vacating the reversal of the defendant's conviction, the Court in *Innis* thus supplied the following definition of "interrogation" for purposes of *Miranda*:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [*Id*. at 300-301.]

The definition of "interrogation" supplied in *Innis* thus did two important things: (1) it broadly construed "interrogation" to include not only "express questioning" but also its "functional equivalent," i.e., in certain circumstances, to also include "words or actions on the part of the police (other than those normally attendant to arrest and custody)"; and (2) it added the qualifier that "the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id*. With regard to the latter, the Court noted that it "focuses primarily upon the perceptions of the suspect, rather than the intent of the police. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." *Id*. at 301.

In providing that definition, the Court further clarified that " '[i]nterrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id*. at 300. See also *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995).

2. *WHITE*

Our Supreme Court also recently had occasion to apply *Innis*'s definition of "interrogation" in *People v White*, 493 Mich 187; 828 NW2d 329 (2013). In *White*, as in *Innis*, a police officer engaged in commentary after

the defendant had invoked his *Miranda* rights. That commentary was prefaced by the officer's admonition to the defendant that he was " 'not asking you questions, I'm just telling you,' " followed by the officer's statement that " 'I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay. All right.' " *Id*. at 191. The defendant interrupted the officer's comments and blurted out, among other incriminating statements, that " 'I didn't even mean for it to happen like that. It was a complete accident.' " *Id*. at 192.

Our Supreme Court held in *White* that the defendant was not subjected to "interrogation" within the meaning of *Miranda*. *Id*. at 209. Pursuant to *Innis*, the Court analyzed both whether the defendant had been subjected to "express questioning" and whether he had been subjected to its "functional equivalent." *Id*. at 197-198, 208-209. The Court held that he had been subjected to neither. *Id*. at 209.

The Court concluded in *White* that there had been no "express questioning" for several reasons. First, the officer's comment "was not a question because it did not ask for an answer or invite a response. It was a mere expression of hope and concern." *Id.* at 198. Second, particularly when the conversation is considered in its entirety, "the officer's addition of the words 'okay' and 'all right' at the end of his comment did not transform a non-question into a question." *Id*. Third, the officer prefaced his comment with " 'I'm not asking you questions, I'm just telling you.' " *Id*. at 199. While not dispositive, the Court found that factor "relevant with regard to whether the officer reasonably should have expected an answer." *Id*. Fourth, the fact that the defendant's response (that it was an " 'accident' " and that he " 'didn't even mean for it to happen like that' ")

had nothing to do with the subject of the officer's preceding comment (regarding the location of the gun) "reinforces the conclusion that the officer's comment here was not a question." *Id*. at 200. Fifth, the fact that the officer responded to the defendant's incriminating statement by attempting to "veer the conversation away from any further incriminating statements" serves to "underscore[] that the officer's comment was not 'designed to elicit an incriminating response . . . .' " *Id*. at 200-201, citing *Innis*, 446 US at 302 n 7.[9] Finally, "to the extent that the officer's statement can even be reasonably viewed as a question, this particular question does not seem intended to generate an incriminating response. Instead, if anything, the officer was simply trying to ensure that defendant heard and understood him." *White*, 493 Mich at 201-202.

The Court in *White* additionally held that the defendant "was not subjected to the 'functional equivalent' of express questioning after he invoked his right to remain silent." *Id*. at 202. Noting that "direct statements to the defendant do not necessarily constitute 'interrogation,' " the Court stressed that "the dispositive question is whether the 'suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response,' " *Id*. at 208, quoting *Innis*, 446 US at 303. The Court determined that it was not, rejecting the argument that *Innis* was distinguishable because the officers there "were talking to themselves, and not directly to the defendant." *White*, 493 Mich at 205 ("[W]e do not believe that this difference

[9] This is relevant because "the intent of the police . . . may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Innis*, 446 US at 301 n 7.

alone requires a different outcome.") *Id*. at 205-206. And the Court further found that none of the criteria referenced in *Innis* was present to support a conclusion that the defendant's incriminating response " 'was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.' " *Id*. at 208, quoting *Innis*, 446 US at 303.[10]

3. *WOODS*

Recently, the United States Court of Appeals for the Sixth Circuit applied the *Innis* definition of "interrogation" in *United States v Woods*, 711 F3d 737 (CA 6, 2013). In *Woods*, an officer in the process of arresting and patting down a suspect asked the suspect, " 'What is in your pocket?' " *Id*. at 739. The suspect responded with an incriminating statement; specifically that he had a gun in his car. *Id*. The suspect had not been advised of his *Miranda* rights. The court concluded that the officer's question did not meet the *Innis* definition of "interrogation" because it "was not an investigatory question or otherwise calculated to elicit an incriminating response, but rather a natural and automatic response to the unfolding events during the normal course of an arrest." *Id*. at 741. The court referred to

[10] As the Court noted in *White*, there was " 'nothing in the record to suggest that the officers were aware that [the defendant] was peculiarly susceptible to an appeal to his conscience concerning the safety' " of others. *White*, 493 Mich at 197, quoting *Innis*, 446 US at 302. Also, there was nothing " 'in the record to suggest that the police' " were aware that the defendant was " 'unusually disoriented or upset at the time of his arrest[.]' " *Id.*, quoting *Innis*, 446 US at 302-303. "Furthermore, the officer only made a single remark about the gun. 'This is not a case where the police carried on a lengthy harangue in the presence of the suspect.' " *White*, 493 Mich at 204, quoting *Innis*, 446 US at 303. "Indeed, the officer's comment in [*White*] was far less 'evocative' than the officer's comment in *Innis*." *White*, 493 Mich at 204.

the officer's question as "essentially an automatic, reflexive question" that had "nothing to do with an interrogation as that term is commonly understood." *Id*. Additionally, the court stated that the officer's "question was not reasonably likely to elicit an incriminating response beyond what he was already entitled to know . . . ." *Id*. at 742.

The court also invoked "common sense":

> We believe that our analysis is also consistent with common sense. If we were to hold that the question "What is in your pocket?" amounted to an interrogation such as to require *Miranda* warnings, we would be saying, in effect, that the police were acting lawfully when they drew a gun on Woods, dragged him out of his car by the wrists, ordered him to the ground, cuffed his hands behind his back, and patted him down; but the moment that they asked "What is in your pocket?", they went beyond the bounds of constitutionally permissible action. The Fifth Amendment does not require such an impractical regime of stilted logic. [*Id*. at 742.]

Finally, the court cautioned against elevation of "form over substance" by fixating on whether or not "the alleged interrogation is phrased in the form of a question or a declarative sentence," because the test is "whether the conduct implicates the concerns with police 'compulsion' and 'coercion' that animated the *Miranda* decision." *Id*. at 744, citing *Innis*, 446 US at 299-301.

> The proper interpretation of *Innis* . . . thus requires us to determine whether the words or actions on the part of the police are those normally attendant to arrest and custody, and whether they give rise to the concerns about police coercion that animated the *Miranda* decision. It does not require us to attach talismanic importance to whether the words are punctuated by a question mark. [*Woods*, 711 F3d at 744.]

4. APPLICATION OF *INNIS*, *WHITE*, AND *WOODS*

In applying *Innis*, *White*, and *Woods* to the facts of this case,[11] it is worth noting at the outset that the defendants' invocations of their *Miranda* rights in *Innis* (invoking the right to counsel) and in *White* ("I don't even want to speak") were more unequivocal than defendant's initial expression ("No sir") arguably was here.[12] Those invocations did not end the inquiry in *Innis* and *White*, however, regarding whether subsequent dialogue or events constituted "interrogation" within the meaning of *Miranda*. Even more clearly, defendant's more equivocal expression cannot end the inquiry here.

We must therefore determine whether, in following up defendant's "No sir" response with "So you don't wanna talk to us?" and the succeeding dialogue quoted earlier in this opinion, the detectives here engaged in either "express questioning" or its "functional equivalent," as defined in *Innis* and interpreted in *White*. I would hold that they did neither.

a. THERE WAS NO "FUNCTIONAL EQUIVALENT" OF EXPRESS QUESTIONING

To begin, I note that the detective here indisputably asked defendant a follow-up *question*. We therefore

[11] I am mindful of the fact that "none of the cited decisions fully addresses the specific circumstances at issue here—few criminal cases are factually identical—these decisions are nonetheless helpful in resolving the present question . . . ." *White*, 493 Mich at 208, n 10.

[12] For the reasons noted, for example, defendant's "No sir" response here was far less indicative of an invocation of *Miranda* rights than was the defendant's " 'I don't even want to speak' " response in *White*, 493 Mich at 191. In context, defendant's "No sir" response exhibited confusion about what he was being asked. Consequently, unlike in *White*, there was here no unequivocal invocation by defendant of his *Miranda* rights. See *id*.

arguably are not faced, as were the Courts in *Innis* and *White*, with the question whether a comment or statement—not punctuated by a question mark—constitutes "interrogation." Therefore, it may be unnecessary for us in this context to even address the "functional equivalent" component of the *Innis* definition of "interrogation." I do so nonetheless, because aspects of the above-quoted succeeding dialogue between the detectives and defendant were in the form of statements by the detectives, rather than questions, and because the "functional equivalent" analysis informs my analysis of the "express questioning" component of the *Innis* test. In so doing I am mindful that *Miranda* does not require this Court to attach "talismanic importance to whether the words are punctuated by a question mark." *Woods*, 711 F3d at 744.

As our Supreme Court noted in *White*, the "dispositive question," even under a "functional equivalent" analysis, is "whether the 'suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response,' " *White*, 493 Mich at 208, quoting *Innis*, 446 US at 303. In my view, that question almost has no place here, because defendant in fact gave no "incriminating response" in response to any of the dialogue in question. All of defendant's responses dealt solely with his understanding of his rights, the meaning of "give up the rights," and an affirmation, after receiving clarification of the detectives' initial query, that defendant indeed wanted to speak with the detectives. Plainly and simply, defendant at that juncture said nothing "incriminating."

Lest it be contended, notwithstanding this, that defendant's *subsequent* incriminating statements, made *after* defendant had knowingly waived his right to

remain silent, were somehow tainted, as the majority concludes by stating that the "police subsequently led defendant to believe that he was not relinquishing his rights by agreeing to make a statement," I will further address the remaining components of *Innis*'s "functional equivalent" test. Specifically, and as in *White* and *Innis*, there is nothing in the record here to suggest that the detectives were aware that defendant was "peculiarly susceptible" in any respect.[13] Unlike the defendant in *White* (who was only 17 years old) defendant here was at least 43 years old at the time of these events.[14] But even in the circumstances presented in *White*, our Supreme Court stated that "the mere fact that defendant was 17 years old and inexperienced in the criminal justice system[15] does not mean that he was 'peculiarly susceptible to an appeal to his conscience' or 'unusual[ly] susceptib[le] . . . to a particular form of persuasion . . . .' " *White*, 493 Mich at 203,

[13] In both *Innis* and *White*, where the officers made reference to the location of a gun, the Courts considered whether there was any evidence that each defendant was "peculiarly susceptible to an appeal to his conscience." *Innis*, 446 US at 303; *White*, 493 Mich at 197. Here, by contrast, there was no similar reference, and not even arguably such an appeal.

[14] Defendant was interviewed on December 5, 2010, following his arrest. He gave his birth date as March 17, 1967, making him 43 at the time of the interview. See also defendant's entry on the Michigan Offender Tracking Information System (OTIS), <http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=238185> (accessed April 10, 2014) [http://perma.cc/BW3M-9JNA].

[15] Here, defendant was not inexperienced in the criminal justice system; the complaint against defendant states that he was previously convicted of three separate offenses involving the manufacture and delivery of controlled substances and a previous breaking and entering, for which he served substantial prison time. Defendant's sentencing information report indicates that he was assigned 170 points as a Prior Record Variable score (PRV) and placed in Category F, the highest PRV category. The sentencing transcript also reflects defendant's numerous past convictions.

quoting *Innis*, 446 US at 302. Moreover, there is nothing to suggest that the detectives here were "aware" of any "peculiar susceptibility" nor, for the reasons noted, was any " 'appeal to [defendant's] conscience' " or any other " 'particular form of persuasion' " even employed here. *White*, 493 Mich at 202-203, quoting *Innis*, 446 US at 302.

Nor is there anything in the record to suggest that the detectives were aware that defendant was " 'unusually disoriented or upset at the time of his arrest.' " *White*, 493 Mich at 204, quoting *Innis*, 446 US at 303. To the contrary, the record, including the video of the police interview of defendant, reflects otherwise. Nor did the detectives here engage in any " 'lengthy harangue' " or say anything even remotely " 'evocative.' " *White*, 493 Mich at 204, quoting *Innis*, 446 US at 303. Defendant was not subjected even to " 'subtle compulsion,' " which in any event has been held not to constitute " 'interrogation.' " *White*, 493 Mich at 204, citing *Innis*, 446 US at 294-295.

For all of these reasons, I conclude that there was no "functional equivalent" of "express questioning" within the meaning of *Innis* and *White*.

b. THERE WAS NO "EXPRESS QUESTIONING"

That brings me to the next question that we must address: whether defendant was subjected to "express questioning" in violation of *Miranda*. Again, I would hold that he was not.

As noted, defendant indisputably was asked a follow-up *question*: "So you don't wanna talk to us?" But keeping in mind the perceived evils that *Miranda* was intended to address, every "question" does not equate to "questioning" or, therefore, to "interrogation," for purposes of *Miranda*. See *Woods*, 711 F3d at

744. As the Supreme Court recently noted, "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Fields*, 565 US at ___; 132 S Ct at 1192; 182 L Ed 2d at 31, quoting *Berkemer v McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984).

The question at issue here ("So you don't wanna talk to us?") had nothing whatsoever to do with the substantive matter about which the detectives sought to question defendant. Certainly, the question invited a response, and the detectives reasonably could have expected one. But the response that was invited, and that reasonably could have been expected, was only regarding *whether* defendant would talk to the detectives, not about *what* he and the detectives would discuss if he chose to do so. Further, in the totality of the circumstances, this question resembles the "automatic, reflexive question" asked by the officer in *Woods*, 711 F3d at 741; it is natural, after all, in a confusing situation, to seek clarity through follow-up questioning.

Relatedly, this particular question clearly was not intended to generate an incriminating response. This factor indeed is critical. Much more than the statement made by the officer in *White* (which related to the substantive issue of the location of a gun), the question here ("So you don't want talk to us?") indisputably could not have reasonably been expected, or intended, to elicit a *substantive* response of any kind, much less an "incriminating" one. To the contrary, the only response that reasonably could have been expected, or intended, related to defendant's understanding of his rights and his willingness to speak with the detectives. See *White*, 493 Mich at 201-202 ("[T]o the extent that the officer's statement can even be reasonably viewed as a question,

this particular question does not seem intended to generate an incriminating response. Instead, if anything, the officer was simply trying to ensure that defendant heard and understood him.").

To close this loop of my analysis, I will again quote the definition of "interrogation" that the Supreme Court supplied in *Innis*, because I believe that definition further supports my conclusion that no "express questioning" occurred here:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [*Innis*, 446 US at 300-301 (footnote omitted).]

To the extent that it might be argued that the Court's use of the language "that the police should know are reasonably likely to elicit an incriminating response from the suspect" does not apply to "express questioning," but only to "words or actions on the part of the police," I categorically reject that notion, for several reasons. First, our Supreme Court in *White* already has specifically interpreted that language as having application to "express questioning." See *White*, 493 Mich at 200-202.[16] Moreover, the very point of *Innis* was to juxtapose "express questioning" with other "words or actions on the part of the police" as "functional equiva-

[16] This Court has concluded similarly. See *People v Elliott*, 295 Mich App 623, 634-635; 815 NW2d 575 (2012), rev'd on other grounds 494 Mich 292 (2013) (the "express questioning of defendant about the robbery in an attempt to obtain defendant's statement constituted an interrogation *because her questions were reasonably likely to elicit an incriminating response from defendant*") (emphasis added).

lent[s]." It would make no sense to apply a qualifier ("that the police should know are reasonably likely to elicit an incriminating response from the suspect") to one but not the other; indeed, they then would not be "functional equivalent[s]." Clearly, therefore, to constitute "express questioning" for purposes of *Miranda*, questions must be ones "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 US at 301.

The same reasoning necessarily also holds true for the parenthetical language found in the *Innis* definition of "interrogation." Therefore, in order to constitute "express questioning" for purposes of *Miranda*, questions must be "other than those normally attendant to arrest and custody." *Id.*; see also *Woods*, 713 F3d at 741. This conclusion, of course, dovetails with my earlier observation that the question here ("So you don't wanna talk to us?") was merely a non-substantive inquiry that "simply served to further a preliminary dialogue to clarify the confusion that was inherent in the detectives' earlier query, to advance and confirm defendant's understanding of his rights, and to facilitate defendant's knowledgeable decision-making, with regard to the exercise of his rights, in an understandable context." Simply put, the question was one that was "normally attendant to arrest and custody," because it related to the *Miranda* warning process itself, and not to the substantive, underlying merits of the subject matter that caused those warnings to have to be given to defendant. As such, it did not constitute "express questioning" within the meaning of *Miranda*. See, e.g., *Pennsylvania v Muniz*, 496 US 582, 601-602; 110 S Ct 2638; 110 L Ed 2d 528 (1990) (questions asked for biographical and administrative purposes are not covered by *Miranda* unless they are designed to elicit incriminating statements).

Finally, it can hardly be disputed that neither the detective's follow-up question ("So you don't wanna talk to us?") nor the detectives' succeeding dialogue with defendant exhibited even the least amount of coercion or compulsion, subtle or otherwise. I disagree with the majority's characterization of the subsequent statements by the detectives as "conceal[ing] from defendant the fact that agreeing to talk constituted a waiver of his constitutional rights," resulting in defendants' being led "to believe that he was not relinquishing his rights by agreeing to make a statement." The majority takes issue with the detectives' statement, in the following portion of the colloquy, that defendant could stop talking at any time:

> [*Detective Kranich*]: Well no, do you wanna give us, give us a statement at this time? You understand what I read to you.
>
> [*Defendant*]: Yeah.
>
> [*Detective*]: Those are all your rights.
>
> [*Defendant*]: Yeah.
>
> [*Detective*]: Now I'm asking do you wanna make a statement at this time, what we wanna talk to you about?
>
> [*Detective McClean*]: In order for us . . .
>
> [*Defendant*]: Yeap, yes. I understand what you're saying. Yeah, yeah.
>
> [*Detective Kranich*]: Okay, okay. You wanna make a statement then and talk to us.
>
> [*Defendant*]: Yes, I'll make a statement yeah.
>
> [*Detective*]: Okay.
>
> [*Defendant*]: But I'm not give [sic] up my rights am I?
>
> [*Detective McClean*]: You can stop talking –
>
> [*Detective Kranich*]: You can -------- you know at any time you want.
>
> [*Detective McClean*]: If you're uncomfortable about

> something or if you just simply don't like us, you can say I'm done, okay. You can interrupt us for that matter, it's no big deal. We just wanna set the matter straight. This has been coming on for some time.
>
> [*Defendant*]: Okay.

The transcript thus reveals that defendant, mere moments *before* his query to the detectives, had indicated that he understood all of his *Miranda* rights that had been read to him. The majority's reasoning, that the police somehow convinced defendant (by later accurately informing him that he could stop talking at any point) that he could give a statement without waiving his right to self-incrimination is, at best, strained, and in any event is not supported by the record or the caselaw regarding waiver of *Miranda* rights, as discussed in Part III, later in this opinion. The only measure of conceivable compulsion that was even arguably reflected in the circumstances presented was merely that which was "inherent in custody itself." Accordingly, there was no "interrogation." *Innis*, 446 US at 300. Holding otherwise would violate both common sense and the language of *Innis*. *Woods*, 711 F3d at 744, citing *Innis*, 446 US at 299-301.

III. DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS *MIRANDA* RIGHTS

In addition, I would hold that defendant "knowingly and voluntarily waived" his *Miranda* rights. *North Carolina v Butler*, 441 US 369, 373; 99 S Ct 1755; 60 L Ed 2d 286 (1979). The "question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " *Id*. at 375 (citation omitted). "The waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice

rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " *Berghuis v Thompkins*, 560 US 370, 382-383; 130 S Ct 2250; 176 L Ed 2d 1098 (2010) (citation omitted). This Court has further stated that the analysis of whether a defendant's waiver of his or her rights is valid is essentially the same as that for determining if a confession is admissible, and requires review of the totality of the circumstances. See *Ryan*, 295 Mich App at 397; see also *McBride*, 273 Mich App at 254-255. Here, the totality of the circumstances indicates that the waiver was " 'the product of a free and deliberate choice' " made in the absence of " 'intimidation, coercion, or deception.' " *Berghuis*, 560 US at 382 (citation omitted); see also *Ryan*, 295 Mich App at 398. Additionally, although the process of reaching that point was somewhat labored, I conclude that defendant understood "basically what those [*Miranda*] rights encompass and minimally what their waiver will entail." *McBride*, 273 Mich App at 254 (quotation marks and citations omitted).

Since *Miranda*, the Supreme Court has clarified that the "prosecution . . . does not need to show that a waiver of *Miranda* rights was express"; rather, "[a]n 'implicit waiver' of the 'right to remain silent' is sufficient." *Berghuis*, 560 US at 384, citing *Butler*, 441 US at 376. Here, however, I would find that defendant's waiver of his right to remain silent indeed was made expressly. After receiving clarification of his rights, defendant said, "Yes, I'll make a statement yeah." After being further told that he could stop talking at any time, defendant responded, "Okay." He then signed a waiver of rights form. Without a doubt, defendant's waiver was the " 'product of a free and deliberate choice,' " and did not result from " 'intimidation, coercion, or deception.' " *Berghuis*, 560 US at 382

(citation omitted). It was therefore "voluntary." It also was " 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " *Id*. at 382-383 (citation omitted).

The question then becomes whether that waiver was effective, given that it was made after defendant's initial "No sir" response. I would hold that it was. For all of the reasons stated already in this opinion, I would find that defendant received proper *Miranda* warnings, there was no unequivocal invocation of defendant's *Miranda* rights, and there was no "interrogation" for purposes of *Miranda*. "The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions." *Id*. at 387. Those requirements are met here. It would defeat the very purpose of the *Miranda* procedures if, when presented with a degree of confusion about a defendant's rights, such as occurred here, the police and the defendant were forbidden from engaging in any dialogue by which to clarify those rights and to enable the defendant to make an informed decision.

Further, although I would find that no "interrogation" occurred here before defendant's waiver of rights, the Supreme Court has "rejected the rule . . . which would have requir[ed] the police to obtain an express waiver of [*Miranda* rights] before proceeding with interrogation." *Id*. (quotation marks and citation omitted). Absent an unambiguous invocation of rights, even a substantive "interrogation" could have proceeded. *Id*. at 388.

IV. CONCLUSION

For these reasons, I would hold that no *Miranda* violation occurred here and that the trial court did not

err, even harmlessly, in admitting into evidence defendant's statements to the police detectives. Accordingly, I respectfully dissent from the majority's conclusion otherwise, and concur only in the result reached in Part IV of the majority opinion (and in its concluding Part IX with respect to that issue). As stated already, I concur fully with all other portions of the majority opinion.

GREER v ADVANTAGE HEALTH

Docket No. 312655. Submitted January 8, 2014, at Grand Rapids. Decided May 13, 2014, at 9:00 a.m. Leave to appeal granted, 497 Mich ___.

Makenzie Greer, a minor; her father, Kenneth Greer, acting individually and as her conservator; and her mother, Elizabeth Greer, brought an action in the Kent Circuit Court against Advantage Health; Anita Avery, M.D.; Trinity Health Michigan, doing business as St. Mary's Hospital; and Kristina Mixer, M.D., alleging medical malpractice during Elizabeth's delivery of Makenzie. Before trial, plaintiffs' claims against Mixer were dismissed, and plaintiffs reached a settlement with St. Mary's hospital. The settlement did not differentiate between plaintiffs' claims for damages involving the personal injuries of Elizabeth and Makenzie and Kenneth's claims for Makenzie's medical expenses and loss of consortium. At trial, plaintiffs introduced evidence of invoices totaling $425,533.75 for medical services. The jury returned a verdict in favor of Makenzie for past medical care of $425,533.75, future medical and attendant care, and future pain, suffering, and disability. The jury returned a verdict of no cause of action with respect to the claims asserted by Makenzie's parents. Defendants moved to set off the entire amount that St. Mary's Hospital had paid to settle plaintiffs' claims and to reduce the award for past medical expenses to the amount that insurance actually paid and for which there existed a lien for reimbursement. The court, James R. Redford, J., denied the motion to reduce the award for past medical expenses and granted only a partial setoff of the settlement, ruling that it would allow a setoff of 1/3 of the $600,000 settlement, which, according to the court, represented that portion of the settlement paid in exchange for the release of liability for Makenzie's injuries. After making adjustments to the jury verdict consistent with its rulings, the court entered judgment in favor of Kenneth, as Makenzie's conservator, in the amount of $1,058,825.56. The court denied defendants' motion for reconsideration. Defendants appealed.

The Court of Appeals *held*:

1. In general, if an action includes a medical malpractice claim and the plaintiffs are determined to be without fault, as in this

case, the liability of each defendant is joint and several, and the common-law setoff rule applies. Under the common-law setoff rule, when a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his or her potential liability by paying a lump sum in exchange for a release and a judgment is subsequently entered against the nonsettling tortfeasor, the judgment is reduced pro tanto by the settlement amount. By assigning 1/3 of the settlement to the claims of each plaintiff, the trial court failed to fully apply the principle of setoff that for one injury there may be a single recovery. Plaintiffs collectively settled all their claims arising out of a single instance of malpractice against a jointly liable tortfeasor for a single undifferentiated lump sum. After trial against the nonsettling defendants, the jury determined the value of all plaintiffs' claims. To ensure that plaintiffs are fully—but not overly—compensated for all their claims, the entire settlement had to be offset against the amount that the jury determined represented plaintiffs' collective damages. There was no basis in the settlement agreement between plaintiffs and St. Mary's Hospital, or in the jury's verdict, to allocate any portion of St. Mary's payment to injuries other than those of Makenzie.

2. Under the common-law collateral source rule, the introduction of evidence of other insurance coverage for the purpose of mitigating damages is barred and the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his or her injuries from other sources. MCL 600.6303 modifies the common-law rule by permitting the presentation of evidence to a trial court, after the verdict but before judgment, to show that a plaintiff's claimed expense or loss was paid or is payable, in whole or in part, by a collateral source. And, if so, the statute requires that the court reduce the portion of the judgment that represents damages paid or payable by the collateral source. As defined in § 6303, the term "collateral source" includes benefits received or receivable from an insurance policy. In this case, two insurers paid, in whole or in part, the expense of medical care that plaintiffs sought in a personal injury action and for which plaintiffs obtained a favorable verdict, and insurance discounts were provided that reduced the amount of medical expenses that plaintiffs would otherwise have been responsible to pay. Both the cash payments and the insurance discounts fit within the basic definition of a collateral source because they constituted benefits received or receivable from an insurance policy. Under MCL 600.6303(4), however, the term "collateral source" does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien

against the proceeds of a recovery by a plaintiff in a civil action for damages if the contractual lien has been exercised under MCL 600.6303(3). Both the cash payments and the insurance discounts were benefits paid or payable under the exclusionary language of § 6303(4). The words "paid" and "payable" derive from the word "pay," which means to discharge or settle a debt, obligation, etc., as by transferring money or goods, or by doing something. The insurance discounts were used, along with the cash payments, to settle plaintiffs' debts to their healthcare providers. The insurance companies that discharged plaintiffs' medical expenses through cash payments and insurance discounts were entitled by contract to a lien against the proceeds of plaintiffs' civil action and exercised that lien under § 6303(3), compelling the conclusion that the cash payments and the insurance discounts were excluded under § 6303(4) as collateral source benefits. Accordingly, the trial court correctly denied defendants' motion to reduce the amount of the jury's award by the amount of the insurance discounts.

Trial court's collateral-source ruling affirmed; trial court's ruling regarding common-law setoff reversed; case remanded for entry of an amended judgment.

RONAYNE KRAUSE, J., concurring, agreed that the trial court correctly excluded the entirety of plaintiffs' insurance discounts under the collateral source statute and that the trial court erroneously set off only 1/3 of the settlement amount, but disagreed with the majority's conclusion that the trial court's setoff error violated the principle that plaintiffs should be compensated fully but only once for a given injury. The court attempted to fulfill the principle of compensating fully but only once for an injury, but in doing so impermissibly rewrote plaintiffs' settlement agreement with St. Mary's Hospital because the settlement agreement did not allocate the settlement among plaintiffs' injuries.

1. NEGLIGENCE — MEDICAL MALPRACTICE — COMMON-LAW SETOFF RULE.

In general, if an action includes a medical malpractice claim and the plaintiffs are determined to be without fault, the liability of each defendant is joint and several, and the common-law setoff rule applies; under the common-law setoff rule, when a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his or her potential liability by paying a lump sum in exchange for a release and a judgment is subsequently entered against the nonsettling tortfeasor, the judgment is reduced pro tanto by the settlement amount; when plaintiffs collectively settle all their claims arising out of a single instance of malpractice against a jointly liable tortfeasor for a single undifferentiated lump

sum, to ensure that plaintiffs are fully—but not overly—compensated for all their claims, the entire settlement must be offset against the amount that a jury in a subsequent trial involving the nonsettling defendants determines represents plaintiffs' collective damages.

2. NEGLIGENCE — MEDICAL MALPRACTICE — RECOVERY — COLLATERAL SOURCES — INSURANCE DISCOUNTS.

Under MCL 600.6303, evidence may be presented to a trial court, after the verdict but before judgment, to show that a plaintiff's claimed expense or loss was paid or is payable, in whole or in part, by a collateral source, and, if so, the statute requires that the court reduce the portion of the judgment that represents damages paid or payable by the collateral source; as defined in § 6303, the term "collateral source" includes benefits received or receivable from an insurance policy, but it does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages if the contractual lien has been exercised under MCL 600.6303(3); insurance discounts are generally benefits paid or payable by a legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages and, therefore, insurance discounts are not collateral source benefits if the contractual lien has been exercised under MCL 600.6303(3).

Law Offices of William J. Waddell (by *William J. Waddell*) and *Jonathan S. Damon* for Makenzie Greer, Kenneth Greer, and Elizabeth Greer.

Rhoades McKee, PC (by *Steven C. Berry*), for Advantage Health and Anita R. Avery, M.D.

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

MARKEY, J. In this medical malpractice case, nonsettling defendants, Advantage Health and Anita R. Avery, M.D. (defendants), appeal by right the trial court's ruling applying only a portion of the amount a potentially jointly liable codefendant paid to settle plaintiffs' claims as a setoff against a jury award. Defendants also

appeal the trial court's failure to reduce the amount of the jury's award for past economic damages by the amount medical bills were reduced pursuant to the providers' agreement with insurance companies (i.e., the insurance discount). We affirm the trial court's collateral source ruling, but we reverse and remand for entry of an amended judgment consistent with this opinion regarding the application of common-law setoff.

I. SUMMARY OF PERTINENT FACTS

This case arises out of the birth of Makenzie Greer. Plaintiffs asserted joint and several claims of negligence against all defendants attending Elizabeth Greer during the delivery of Makenzie, which resulted in injury to both Elizabeth (ruptured uterus) and Makenzie (hypoxic brain injury, respiratory depression, metabolic acidosis, permanent brain damage, and blindness). Before trial, defendant St. Mary's Hospital settled all plaintiffs' claims, including those of Elizabeth's husband, Kenneth Greer, for $600,000.[1] The settlement did not differentiate between plaintiffs' claims for damages that included the personal injuries of Elizabeth and Makenzie and Kenneth's claims for Makenzie's medical expenses and loss of consortium.

At trial, plaintiffs introduced evidence of medical services invoices for $425,533.75. Defense counsel acknowledged the accuracy of the medical bills but contended plaintiffs could recover only the amounts the insurance companies actually paid and for which they asserted a lien for reimbursement. The jury returned a verdict in favor of Makenzie for past medical care (economic damages) of $425,533.75, future medical and

[1] Plaintiffs' claim against Dr. Kristina Mixer, an intern employed by St. Mary's Hospital, was dismissed without prejudice early in the litigation by stipulation of the parties.

attendant care (economic damages), and future pain, suffering and disability (noneconomic damages); however, it awarded her no damages for past pain and suffering. The jury found no cause of action with respect to the claims asserted by Elizabeth and Kenneth.

Before entry of judgment, defendants moved the trial court to reduce the award of future damages to present value pursuant to MCL 600.6306,[2] to setoff the entire amount ($600,000) that St. Mary's Hospital paid to settle plaintiffs' claims, and to reduce the award for past medical expenses to the amounts that insurance actually paid, as opposed to billed, for which there existed a lien for reimbursement. The trial court issued an opinion and order, granting in part and denying in part defendants' motion. The trial court opined, relying on *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002), that no reduction of the jury's award for past medical expenses was warranted because the insurance companies that made payments to the medical providers (Aetna and Priority Health) asserted contractual subrogation liens with respect to the proceeds of any judgment plaintiffs might collect.

With respect to the amount St. Mary's Hospital paid to settle plaintiffs' claims, the trial court recognized the common-law rule that "where a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount." *Thick v Lapeer Metal Prod*, 419 Mich 342, 348 n 1; 353 NW2d 464 (1984) (opinion by BOYLE, J.). But

[2] The trial court granted this part of defendants' motion, and it is not at issue on appeal.

the trial court declined to fully apply common-law setoff. The court reasoned that it would be manifestly unjust to apply the full settlement to offset the jury award for Makenzie because the St. Mary's settlement payment was for the claims of all three plaintiffs and because the jury returned a verdict of no cause of action as to Kenneth's and Elizabeth's separate claims, which were included in the St. Mary's settlement payment. The court, therefore, ruled it would allow a setoff of "$162,058.11 or 1/3 of the settlement amount . . . which represents that portion of the settlement paid in exchange for release of liability for Makenzie's injuries."

Defendants filed a motion for reconsideration, which the trial court denied in an opinion and order. The trial court reaffirmed its ruling regarding past medical expenses, opining that defendants failed to prove this claim. The trial court also reaffirmed its ruling regarding setoff and distinguished the case of *Velez v Tuma*, 492 Mich 1; 821 NW2d 432 (2012), on which defendants relied. The trial court noted that *Velez* involved a single plaintiff whereas the present case concerned a settlement with three plaintiffs. Again, the trial court reasoned that the settlement was for all three plaintiffs, but the jury awarded damages to only one plaintiff. The trial court also speculated that the jury would not have returned a verdict of no cause of action as to Elizabeth and Kenneth if the case had proceeded to trial against St. Mary's Hospital. The trial court further explained its ruling:

> The Court finds, factually, that this settlement allocation was for the three plaintiffs equally and that the only reasonable, rational and record based way to allocate the amount to be set off against the verdict was equally in one-third increments allowing the Defendants first a $200,000 setoff; which necessarily had to be reduced by the one-third amount of medical expense liens paid out of the settlement amount.

Thereafter, after making calculations regarding the jury verdict consistent with its rulings, the trial court entered judgment in favor of Kenneth as conservator for Makenzie against defendants in the amount of $1,058,825.56. The court entered a separate order awarding plaintiffs' their costs of $32,393.80 as prevailing parties. Defendants now appeal by right the trial court's rulings applying only a partial setoff for the St. Mary's Hospital settlement payment and declining to reduce the jury's award for past economic damages to the amount insurance companies actually paid providers to satisfy plaintiffs' medical bills.

II. ANALYSIS

A. PRESERVATION AND STANDARD OF REVIEW

Each issue on appeal has been preserved because it was raised before and decided by the trial court. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). We review both issues de novo as they present questions of law regarding the interpretation of statutes and the application of the common law. *Velez*, 492 Mich at 10-11.

B. COMMON-LAW SETOFF

Under the common-law rule of setoff among jointly liable tort defendants "where a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount." *Thick*, 419 Mich at 348 n 1 (opinion by BOYLE, J.). See also *Velez*, 492 Mich at 14 n 27, and *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich

App 245, 250; 660 NW2d 344 (2003). We conclude that the trial court erred in applying common-law setoff in the present case because the $600,000 St. Mary's Hospital paid to *all* plaintiffs to settle *all* plaintiffs' claims arising out of the alleged malpractice of the codefendants attending to the birth of Makenzie must reduce *pro tanto* the amount of the jury verdict, after any statutory reductions, *Velez*, 492 Mich at 23, against the jointly liable defendants regarding *all* plaintiffs' identical malpractice claims. Moreover, we can find no basis in the release and settlement agreement between plaintiffs and St. Mary's Hospital, or in the jury's verdict, to allocate any portion of the St. Mary's payment to injuries other than those of Makenzie, nor do we have the ability to alter the settlement agreement, which is, of course, a contract. Consequently, we reverse the trial court's decision regarding setoff and remand for entry of an amended judgment.

Tort reform legislation in 1995 replaced joint and several liability among defendants for most torts with several liability on the basis of the proportion of each defendant's fault or "fair share" liability. MCL 600.2956; MCL 600.6304; *Markley*, 255 Mich App at 250, 253; *Smiley v Corrigan*, 248 Mich App 51, 53, 55; 638 NW2d 151 (2001). But the 1995 legislation retained joint and several liability for medical malpractice cases in which the plaintiff is without fault. In general, "[i]f an action includes a medical malpractice claim" and "[i]f the plaintiff is determined to be without fault . . . , the liability of each defendant is joint and several . . . ." MCL 600.6304(6)(a). In this case, it is undisputed that all plaintiffs were without fault. The 1995 legislation also repealed the statutory codification of the common-law rule of setoff among jointly liable tortfeasors. See MCL 600.2925d, as amended by 1995 PA 161; see also *Thick*, 419 Mich at 348 n 1; *Markley*, 255 Mich App at

254-255. The Court in *Markley* concluded "that the Legislature did not intend to allow recovery greater than the actual loss in joint and several liability cases when it deleted the relevant portion of § 2925d, but instead intended that common-law principles limiting a recovery to the actual loss would remain intact." *Markley*, 255 Mich App at 257. Thus, the Court held that "the principle of one recovery and the common-law rule of setoff, in the context of joint and several liability cases, continue to be the law in Michigan." *Id*. Our Supreme Court in *Velez*, 492 Mich at 6, agreed that *Markley* was correct and clarified that "where the Legislature has retained principles of joint and several liability, the common-law setoff rule applies." The issue thus becomes the application of common-law setoff to the facts of this case.

This case arises out of medical services provided to Elizabeth while she was giving birth to Makenzie at St. Mary's Hospital. Dr. Mixer, employed by St. Mary's Hospital, and Dr. Avery, employed by Advantage Health, attended the birth. Kenneth, individually and as conservator of Makenzie, and Elizabeth, alleged that Makenzie suffered horrific, permanent injuries. Plaintiffs filed their complaint against the doctors alleging various acts of malpractice during the labor and delivery that occurred on September 27-28, 2008, and asserted that the corporate defendants were vicariously liable. Elizabeth asserted a claim for an injury to her uterus, scaring, disfigurement, and lost wages while caring for Makenzie. Kenneth claimed damages for his liability to pay past and future medical expenses for Makenzie and loss of consortium with respect to Elizabeth. Kenneth as conservator of Makenzie, also asserted claims on her behalf for pain, suffering, mental and physical disability, and pecuniary damages, including medical expenses, future care, and loss of earning

capacity. Thus, all Kenneth's claims were derivative of alleged injuries that either Elizabeth or Makenzie sustained during a single alleged incident of malpractice. It is undisputed that plaintiffs were not at fault for their claimed injuries and that the liability of all defendants would be joint and several. MCL 600.6304(6)(a); *Velez*, 492 Mich at 12-13.

Before trial, St. Mary's Hospital paid $600,000 to Elizabeth and to Kenneth, individually and as conservator of Makenzie, to settle "any and all claims demands, damages, actions, causes of action or suits of any kind or nature . . . as a result of an incident which occurred on or about September 28, 2008, including the subsequent medical treatment provided, Makenzie Greer, because of this incident." The receipt of the payment was a "full accord, satisfaction and settlement of *all claims* arising from the incident." The settlement agreement did not articulate in any way how the lump sum payment should be assigned to any particular plaintiff or to any particular claim or legal theory. Rather, the settlement payment was for "any and all claims" that all plaintiffs may have had arising from the incident that "occurred on or about September 28, 2008" and included "the subsequent medical treatment" of Makenzie. The settlement agreement expressly provided that it was "not to be construed as an admission of liability on the part of" any party covered by the release.[3] In sum, the settlement was a lump sum payment by an alleged jointly and severally liable tortfeasor to settle all claims of all plaintiffs arising out of the malpractice incident described in plaintiffs' complaint.

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[3] It is unclear when plaintiffs dismissed their claims against Mixer, but as one of St. Mary's employees, she was covered by the release that St. Mary's Hospital obtained.

By assigning 1/3 of the St. Mary's settlement to each plaintiff's claims, the trial court failed to fully apply the principle of setoff that for one injury there may be a single recovery. *Velez*, 492 Mich at 12-13; *Markley*, 255 Mich App at 250-251. The trial court distinguished caselaw involving a single plaintiff, thus justifying parsing the settlement here, because several plaintiffs' claims were settled. On the facts of this case, this distinction is inapposite.

Plaintiffs brought their complaint against all defendants alleging a single count of malpractice concerning a single discrete incident, the birth of Makenzie. Because any liability of defendants was joint and several, plaintiffs were free to settle with some defendants and proceed to trial against other defendants. *Markley*, 255 Mich App at 251, citing *Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW 287 (1928). But for a single injury, plaintiffs could have only one recovery. *Markley*, 255 Mich App at 250-251. Plaintiffs might have been able, with St. Mary's agreement, to apportion the settlement among plaintiffs' separate claims. See, e.g., *Markley*, 255 Mich App at 248 (in which a joint tortfeasor's settlement was divided into an amount allocated to wrongful death and an amount allocated to pain and suffering). Plaintiffs here did not do so. Plaintiffs collectively settled *all* their claims against a jointly liable tortfeasor arising out of a single instance of malpractice involving Makenzie's birth for a single undifferentiated lump sum of $600,000. After trial against the nonsettling defendants on all the same claims, a jury determined the value of all plaintiffs' claims. To ensure that plaintiffs are fully but not overly compensated for *all* their claims, the entire St. Mary's settlement must be offset against the amount the jury determined represented plaintiffs' collective damages. *Markley*, 255 Mich App at 250-251. When there is a recovery "for an injury

identical in nature, time and place, that recovery must be deducted from [the plaintiffs'] other award." *Great Northern Packaging, Inc v Gen Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986).

This reasoning is reinforced by our Supreme Court's decision in *Velez*, 492 Mich at 13, which noted that "[t]he term 'joint and several' liability, as used in MCL 600.6304(6)(a), is a technical legal term." It means when multiple tortfeasors cause " 'a *single or indivisible injury*, the injured party [may] either sue all tortfeasors jointly or he [may] sue any individual tortfeasor severally, and each individual tortfeasor [is] liable for the entire judgment . . . .' " *Id*. (citation omitted; alterations in original; emphasis added). In the context of the Court's discussion of the interplay between common-law setoff and statutory limitations on damages in medical malpractices cases, it is clear that the "single or indivisible injury" referred to is the allegation of malpractice. The damages flowing from the single injury—the malpractice—may be economic or noneconomic, past or future. See MCL 600.6306(3); *Velez*, 492 Mich at 18-19. "Inherent in the meaning of joint and several liability is the concept that a plaintiff's recovery is limited to one compensation for the single injury." *Velez*, 492 Mich at 13. Because in this case Makenzie had already received partial compensation for her malpractice injury, "application of the common-law setoff rule requires that codefendants' settlement be subtracted from the final judgment so that [she] does not receive more than a single recovery for her single injury." *Id*. at 23.

The *Velez* Court also discouraged what the trial court attempted in this case: apportionment of an indivisible lump-sum settlement into partial, severable settlements. The Court observed that when "a judgment

contains both economic and noneconomic damages, a circuit court's applying the setoff to the jury's verdict *before* application of the collateral source rule would have to determine how to allocate the settlement between economic and noneconomic damages." *Velez*, 492 Mich at 25. The Court reasoned such a practice could not be condoned because it would be contrary to MCL 600.1483, and it would discourage settlements among business-related defendants. *Id*. at 25-26. The Court further opined:

> Additionally, in instances like the present, in which the composition of the settlement is unknown, circuit courts would be left to guess at how a settlement should be allocated. Requiring circuit courts to engage in this guesswork, from which a range of potential outcomes could result, unreasonably burdens them with a determination that they are, in the absence of any statutory guidance, ill-prepared to make. Our holding, on the other hand, that a circuit court must subtract the total settlement from the final judgment, creates no need to allocate the settlement proceeds between economic or noneconomic damages before applying the setoff. Rather, the settlement is treated as an aggregate award to be applied against the plaintiff's total actual loss, meaning the final judgment after application of the applicable statutory adjustments. [*Id*. at 26.]

Similarly, in this case, to avoid speculative apportionment of an undifferentiated lump-sum settlement paid by a jointly liable codefendant to settle more than one plaintiff's claim arising from a single alleged incident of malpractice, the entire settlement must offset the entire jury award to all plaintiffs. Further support for this conclusion is found by analogy to application of the noneconomic cap of MCL 600.1483(1), which provides in part that "the total amount of damages for noneconomic loss recoverable by *all plaintiffs*, resulting from the medical malpractice of *all defendants*, shall not exceed" a specified amount with certain exceptions.

(Emphasis added). See also *Velez*, 492 Mich at 17-18 (holding that the word "recoverable" in § 1483(1) necessarily "includes recovery through settlements, jury verdicts, or arbitration").

Finally, any necessary apportionment of the St. Mary's settlement among the three plaintiffs should be made in accordance with the fact-finders' determination. The jury determined that Kenneth's and Elizabeth's claims were valued at zero. Accordingly, if it were possible to apportion the undifferentiated lump-sum settlement, their portion should be valued at zero. That apportionment would result in setting off the entire St. Mary's settlement from damages that remain after applying the relevant statutory adjustments to arrive at the final judgment in favor of Makenzie's conservator. See *Velez*, 492 Mich at 26.

For the foregoing reasons, we reverse the trial court's ruling regarding setoff and remand for entry of an amended judgment consistent with this opinion.

C. COLLATERAL SOURCE RULE OF MCL 600.6303

Defendants' argument that insurance discounts are collateral source payments under MCL 600.6303 has some merit. Specifically, such a discount falls within the definition of "collateral source" because such discount are "benefits received or receivable from an insurance policy" as set forth in MCL 600.6303(4). Nevertheless, because MCL 600.6303 is in derogation of the common law, it may not be extended beyond the meaning of its plain language. See *Velez*, 492 Mich at 11-12. Further, the statute must be read as a whole, and the last sentence of MCL 600.6303(4), on which plaintiffs rely, provides in pertinent part, that "[c]ollateral source does not include *benefits paid or payable* by a person . . . or other legal entity entitled by contract to a lien . . . *if the*

contractual lien has been exercised . . . ." (Emphasis added). The statute nowhere specifies that this exclusion from the statutory collateral source rule is limited to the amount of the lien exercised or the amount actually paid. In fact, the exclusion applies by its plain terms to all benefits "paid or payable" by a legal entity that timely asserts a contractual lien pursuant to MCL 600.6303(3). Thus, we affirm the trial court on this issue.

Whether, under MCL 600.6303, a discount on an incurred medical expense negotiated between medical services providers and health care insurers is a "collateral source" that may reduce a jury award for the medical expense presents a question of statutory interpretation. The principles of statutory construction to be used in resolving this question were articulated in *Velez*, 492 Mich at 16-17:

> Our function in construing statutory language is to effectuate the Legislature's intent. Plain and clear language is the best indicator of that intent, and such statutory language must be enforced as written. Further, a statute in derogation of the common law will not be construed to abrogate the common law by implication, but if there is any doubt, the statute is to be given the effect that makes the least change in the common law. [Citations omitted.]

MCL 600.6303 is in partial derogation of the common-law collateral source rule. That rule has both an evidentiary component—it "bars evidence of other insurance coverage when introduced for the purpose of mitigating damages," *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58; 457 NW2d 637 (1990)—and a substantive component—it "provides that the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his injuries from other sources." *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d

181 (1984) (opinion by BRICKLEY, J.). MCL 600.6303(1) modifies the common-law collateral source rule by permitting the presentation of evidence to a trial court after the verdict but before judgment to show that a plaintiff's claimed "expense or loss was paid or is payable, in whole or in part, by a collateral source," and, if so, requires the trial court to "reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2)."[4] MCL 600.6303(3) provides that after a favorable verdict, a plaintiff or the plaintiff's attorney must notify potential lien claimants, who then have 20 days to assert their contractual right of subrogation. The heart of the issue centers on the definition of "collateral source" found in MCL 600.6304(4), which provides:

> As used in this section, "collateral source" means *benefits received or receivable from an insurance policy*; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source *does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien* against the proceeds of a recovery by a plaintiff in a civil action for damages, *if the contractual lien has been exercised* pursuant to subsection (3). [Emphasis added.]

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[4] Subsection (2) provides that the amount of the collateral source setoff be reduced by the amount paid for insurance premiums, except for premiums on insurance that was required by law. MCL 600.6303(2).

The trial court initially ruled that because each of the healthcare insurers that paid medical expenses asserted a lien in accordance with § 6303(3), it was

> satisfied that the collateral source rule does not encompass a situation, such as is found in the instant case, in which a lien holder exercises a lien. All payments made by Aetna and Priority Health are subject to asserted liens. Wherefore the statutory collateral source set off rule no longer applies to this case and no reduction in the Jury award is warranted.

Although the trial court relied on *Zdrojewski*, we find that case is not dispositive of the issue presented here. The *Zdrojewski* Court held that when healthcare insurers asserted liens for less than the amount that they actually paid, the latter amount determined the exclusion as a collateral source under § 6303(4). The Court noted that "the statute does not make any provision for a situation where a lien has been exercised, but for an amount less than the lienholder would be legally entitled to recover." *Zdrojewski*, 254 Mich App at 70. The Court concluded that "[b]ecause the statute clearly states that benefits subject to an exercised lien do not qualify as a collateral source, and [Blue Cross Blue Shield of Michigan (BCBSM)] and Medicare exercised their liens, health insurance benefits provided by BCBSM and Medicare to plaintiff do not constitute a collateral source under MCL 600.6303(4)." *Id*. While this ruling supports plaintiffs' position that the insurance payments were not collateral sources because the insurers asserted a lien with respect to the payments, it also supports defendants' position that only payments an entity actually makes and asserts a lien for—and no lien may be asserted for insurance discounts—are excluded under § 6303(4).

In denying defendants' motion for reconsideration on this issue, the trial court asserted an alternative

basis for its ruling. Specifically, the court found that defendants did not prove the amount of the discount or that the insurance companies would not assert a lien in the future. This reasoning does not appear to have merit. From the arguments of the parties, it does not appear that there is any dispute regarding the amount of the insurance discount or that an additional lien would be asserted in the future. Indeed, § 6303(3) sets a strict time limit for the assertion of a lien after a plaintiff gives notice of a favorable verdict: "If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation." Consequently, we conclude that the trial court's supplemental reason does not support its ruling.

We conclude that the two insurers in this case, Aetna and Priority Health, or the payments they made to plaintiffs' healthcare providers are "collateral sources" within the plain meaning of § 6303(1) because both insurers "paid . . . in whole or in part" "the expense of medical care" that plaintiffs sought in a personal injury action and for which plaintiffs obtained a jury verdict in their favor. Furthermore, the insurance discounts that reduced the amount of the medical expenses that plaintiffs would otherwise have been responsible to pay must also plainly be "benefits received or receivable from an insurance policy" and, therefore, a "collateral source" within the meaning of the first sentence of MCL 600.6303(4). Although this reading of the first sentence of § 6303(4) is consistent with common sense and economic reality, it is also consistent with how a dictionary defines "benefit" as being "something that is advantageous or good; an advantage" or "a payment made to help someone or given by a benefit society,

insurance company, or public agency." *Random House Webster's College Dictionary* (1996).[5]

Additionally, treating insurance discounts as a collateral source under § 6303 is consistent with the Legislature's purpose in enacting the statute: precluding a plaintiff from receiving a double recovery for a single loss. See *Heinz v Chicago Rd Inv Co*, 216 Mich App 289, 301; 549 NW2d 47 (1996). But because § 6303 is in derogation of the common law that permits a plaintiff's double recovery when a loss was also paid by insurance, *Nasser*, 435 Mich at 58, the statute must be construed consistently with its plain terms to make "the least change in the common law," *Velez*, 492 Mich at 17. Because insurance discounts are "benefits received or receivable from an insurance policy" within the plain meaning of the first sentence of § 6303(4), we must conclude that the insurance discounts are also "benefits paid or payable" within the plain and ordinary meaning of the last sentence of § 6303(4). The words "paid" and "payable" are both derived from the word "pay," which is defined as "to discharge or settle (a debt, obligation, etc.), as by transferring money or goods, or by doing something." *Random House Webster's College Dictionary* (1996). There appears to be no dispute that the insurance discounts here, along with cash payments, discharged or settled plaintiffs' debt or obligation to their healthcare providers. So, assuming that an insurance discount is a "benefit[] paid or payable" within the meaning of § 6303(4), then the last sentence of subsection (4) would read: "Collateral source does not include [an insurance discount used to settle or discharge a debt of the plaintiff for medical expenses provided] by [an

[5] Where statutory words are undefined, a dictionary may be consulted to confirm their plain and ordinary meaning. *McLean v McElhaney*, 289 Mich App 592, 602; 798 NW2d 29 (2010).

insurance company] entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3)."

When we apply this analysis of the statute to the undisputed facts of this case, we must affirm the trial court. It is undisputed that each insurance company that discharged plaintiffs' medical expenses, in part by cash payment and in part by an insurance discount, also was "entitled by contract to a lien against the proceeds" of plaintiffs' civil action and "exercised [the lien] pursuant to subsection (3)." MCL 600.6303(4). Thus, applying the plain terms of the last sentence of § 6303(4) compels the conclusion that both the cash payments and discount, i.e., the "benefits received or receivable from an insurance policy," are excluded as statutory collateral source benefits. This reading of the statute's plain terms makes "the least change in the common law." *Velez*, 492 Mich at 17. The Legislature could have, but did not, write the statute to say that the § 6303(4) collateral source exclusion is limited to the "amount of" a validly exercised lien. The intent of the Legislature to so limit the statutory exclusion cannot be derived from the language of the statute itself. Accordingly, we may not read that intent into the statute. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 218; 801 NW2d 35 (2011). Finally, although not directly on point, our reading of the statute is also consistent with this Court's holding in *Zdrojewski*, 254 Mich App at 70.

In sum, we affirm the trial court's ruling regarding collateral source payments under MCL 600.6303. Although we find that an insurance discount is a "collateral source" by which plaintiffs' medical expenses were "paid or payable" and that such a discount is a benefit "received or receivable from an insurance policy," the

plain terms of the exclusion from the statutory collateral source rule of § 6303(4) when a contractual lien is exercised is not limited to the amount of the lien; it applies to all benefits that were paid or payable by a "legal entity entitled by contract to a lien."

We affirm the trial court's collateral source ruling, but we reverse and remand for entry of an amended judgment regarding the application of common-law setoff consistent with this opinion. We do not retain jurisdiction. Because neither party prevailed in full and because questions of public policy are involved, we award no taxable costs under MCR 7.219.

HOEKSTRA, P.J., concurred with MARKEY, J.

RONAYNE KRAUSE, J. (*concurring*). I agree that the trial court erroneously set off only 1/3 of the settlement amount and correctly excluded the entirety of plaintiffs' insurance discounts under the collateral source statute. As to the latter, I agree with the majority's conclusion that a plain reading of MCL 600.6303 compels that result. As to the former, I disagree with the majority's conclusion that the trial court's error was a violation of the important and long-standing principle that plaintiffs should be compensated fully but only once for a given injury. Nonetheless, I agree with the result reached by the majority.

It appears to me that, in fact, the trial court made a valiant but necessarily doomed attempt to *fulfill* the principle of compensating fully but only once for an injury. Unfortunately, I concur that the trial court was not permitted to do so, for the simple reason that in making the attempt, the trial court essentially rewrote plaintiffs' settlement agreement with St. Mary's Hospital. Because the agreement did not itself allocate the

settlement among the injuries, it would be impossible for any court to do so without drafting into the parties' contract something that the parties themselves did not include. Absent extreme and unusual circumstances, courts may not do so; the parties are of necessity bound to their contract. Had the contract specified a percentage or dollar value allocated to Makenzie's injuries, it would have been proper for the court to set off only that amount. Because the contract did not do so, the trial court could not rescue plaintiffs from their own voluntary agreement. Consequently, I conclude that the court had no choice but to set off the entire amount, and it erred by failing to do so.

I concur in the majority's result.

MERCANTILE BANK MORTGAGE COMPANY, LLC v
NGPCP/BRYS CENTRE, LLC

Docket Nos. 311326 and 313276. Submitted May 7, 2014, at Lansing. Decided May 13, 2014, at 9:05 a.m.

Mercantile Mortgage Bank Company, LLC (Mercantile Bank), brought an action in the Wayne Circuit Court against NGPCP/BRYS Centre, LLC (the Centre); NGP Capital Partners, LLC (Capital Partners); Ford A. Grifo; Daniel J. Nemes; and Mark S. Provenzano, alleging that the Centre had breached the parties' contract by defaulting on a promissory note and a business loan agreement in the amount of $744,000, that the individual defendants had breached personal guaranties they had provided for the indebtedness, and that Capital Partners had breached its corporate guaranty for the indebtedness. The Centre, Capital Partners, and the personal guarantors filed a counter-complaint, alleging promissory estoppel, breach of contract, interference with business opportunities, fraudulent misrepresentation, and negligent misrepresentation. A case evaluation panel issued a single, unanimous award in favor of Mercantile Bank against defendants in the amount of $750,000. Mercantile Bank attempted to accept the award as to the personal guarantors while rejecting it as to the Centre and Capital Partners. Defendants attempted to accept the award. The court, Wendy M. Baxter, J., ruled that the case evaluation did not resolve Mercantile Bank's claims against the Centre and Capital Partners, but did resolve Mercantile Bank's claims against the personal guarantors. The court granted Mercantile Bank's motion for summary disposition and ordered judicial foreclosure. Mercantile Bank filed a proposed order granting summary disposition and ordering judicial foreclosure in the amount of $979,777.05. The Centre and Capital Partners challenged the proposed order, filing a motion for a determination of attorney fees and seeking credit for certain payments made on the loan, including those made under an assignment of rents. In the midst of the proceedings, the personal guarantors paid Mercantile Bank $760,109.62 and they were dismissed from the case. The trial court ultimately entered an order granting Mercantile Bank's motion for summary disposition, ruling that the Centre and Capital Partners were jointly and severally liable for $979,777.05.

The trial court's order contained a judgment of foreclosure, ordering a foreclosure sale of the mortgaged property unless the Centre and Capital Partners paid the entire unpaid balance of the mortgage debt, plus interest, costs, attorney fees, and other amounts due and owing under the loan documents. The court awarded Mercantile Bank attorney fees of $90,191.95. In Docket No. 311326, the Centre and Capital Partners appealed the trial court's order granting summary disposition and a judgment of foreclosure in favor of Mercantile Bank. In Docket No. 313276, the Centre and Capital Partners appealed the trial court's order determining the reasonableness of Mercantile Bank's attorney fees.

The Court of Appeals *held*:

1. Under MCR 2.403(K)(2), case evaluators must include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action, with all claims filed by one party against any other party treated as a single claim. Under MCR 2.403(L)(3)(a), in cases involving multiple parties, a party may accept awards against some opposing parties while rejecting awards against other opposing parties. The court rules do not permit a party to partially accept and partially reject a single award. When a party's response to a case evaluation does not conform to the court rules, the trial court should deem the response a rejection. In this case, the case evaluation panel failed to follow MCR 2.403(K)(2), instead issuing a single award that Mercantile Bank tried to partially accept and partially reject. Because Mercantile Bank's response was an improper response, it constituted a rejection of the case evaluation, so the case evaluation did not resolve the parties' claims. Accordingly, although the trial court erred when it concluded that Mercantile Bank could partially accept the award, the trial court did not err when it granted Mercantile Bank's motion for summary disposition, because case evaluation had not resolved the claims between Mercantile Bank, the Centre, and Capital Partners.

2. When a plaintiff files a complaint to foreclose on a mortgage, the trial court may order a foreclosure sale sufficient to discharge the amount due on the mortgage on real estate plus costs. The amount to be calculated in the judgment of foreclosure is that which is owed under the written instrument. The mortgagor is entitled to credits on the indebtedness for partial payments made before the judgment of foreclosure. In this case, the trial court erred when it stated in its order that the amount due was $979,777.05, because the judgment failed to reflect payments that

the Centre, Capital Partners, and the personal guarantors had made on the note. The trial court erred when it failed to rule on, thereby denying, the Centre and Capital Partners' motion for application of payments. Remand was necessary for the trial court to determine the credits due the Centre and Capital Partners, and for entry of judgment in the amount sufficient to discharge the debt plus costs.

3. The Centre and Capital Partners' assertion that because the case evaluation award included attorney fees, the trial court's attorney fee award required them to pay some attorney fees twice, lacked merit. There was no accepted case evaluation, and judgment was never entered on the case evaluation, contravening the premise of the Centre and Capital Partners' argument.

In Docket No. 311326, order granting summary disposition in favor of Mercantile Bank affirmed, judgment of foreclosure vacated, and case remanded for further proceedings.

In Docket No. 313276, order determining the reasonableness of Mercantile Bank's attorney fees affirmed.

1. PRETRIAL PROCEDURE — CASE EVALUATION — PARTIAL ACCEPTANCE.

Under MCR 2.403(K)(2), case evaluators must include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action, with all claims filed by one party against any other party treated as a single claim; under MCR 2.403(L)(3)(a), in cases involving multiple parties, a party may accept awards against some opposing parties while rejecting awards against other opposing parties; the court rules do not permit a party to partially accept and partially reject a single award; when a party's response to a case evaluation does not conform to the court rules, including when a party improperly tries to partially accept and partially reject a single award, the trial court should deem the response a rejection.

2. MORTGAGES — FORECLOSURE — JUDGMENT OF FORECLOSURE — ENTITLEMENT TO CREDITS ON THE INDEBTEDNESS.

When a plaintiff files a complaint to foreclose on a mortgage, the trial court may order a foreclosure sale sufficient to discharge the amount due on the mortgage on real estate plus costs; the amount to be calculated in the judgment of foreclosure is that which is owed under the written instrument; the mortgagor is entitled to credits on the indebtedness for partial payments made before the judgment of foreclosure (MCL 600.3115).

Kreis, Enderle, Hudgins & Borsos PC (by *Floyd E. Gates, Jr.*, and *Sara E. D. Fazio*) for Mercantile Bank Mortgage Company, LLC.

Nemes Rooney, P.C. (by *Thomas C. Nemes*), for NGPCP/BRYS Centre, LLC, and NGP Capital Partners, LLC.

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

PER CURIAM. These consolidated cases involve extensive, contentious proceedings surrounding the judicial foreclosure of a mortgage securing a commercial loan. In Docket No. 311326, defendants, NGPCP/BRYS Centre, LLC (the Centre) and NGP Capital Partners, LLC, appeal as of right the trial court's order granting summary disposition and judgment of foreclosure in favor of plaintiff, Mercantile Mortgage Bank Company, LLC. Because the trial court properly granted summary disposition after it determined that case evaluation did not resolve the claims against the Centre and Capital Partners by Mercantile Bank, but incorrectly determined the amount of the judgment for foreclosure, we affirm in part, vacate in part, and remand.

In Docket No. 313276, the Centre and Capital Partners appeal as of right the trial court's order determining the reasonableness of Mercantile Bank's attorney fees. We affirm.

I. FACTS

A. BACKGROUND FACTS

On July 23, 2007, Mercantile Bank agreed to loan the Centre $744,000 as a business loan. Ford A. Grifo, Daniel J. Nemes, and Mark S. Provenzano (collectively, the personal guarantors) provided personal guaranties

of up to 100% of the indebtedness, and Capital Partners provided an "unlimited" corporate guaranty. The Centre also provided an assignment of rents and a mortgage on property at 21139 Mack Avenue in Grosse Point Woods as security for the loan.

B. THE COMPLAINT AND COUNTER-COMPLAINT

On December 09, 2009, Mercantile Bank filed a complaint against the individual guarantors, Capital Partners, and the Centre. Mercantile Bank alleged that the Centre breached the parties' contract by defaulting on the promissory note and business loan agreement. Mercantile Bank alleged breach of guaranty against the individual guarantors and Capital Partners, asserting that they had failed to pay the Centre's past-due amounts. Mercantile Bank sought damages and a judgment of foreclosure on the basis of the Centre's default.

The Centre, Capital Partners, and the personal guarantors filed a counter-complaint, alleging promissory estoppel, breach of contract, interference with business opportunities, fraudulent misrepresentation, and negligent misrepresentation. Contentious discovery proceedings followed.

C. THE CASE EVALUATION AWARD

On March 22, 2011, the parties attended a case evaluation. The case evaluation panel checked the boxes "Award" and "Unanimous," and hand-wrote 750,000 in the box labeled "Amount." In the box labeled "For Party," the evaluation panel hand-wrote "1" (Mercantile Bank), and in the box labeled "Against Party," the evaluation panel hand-wrote "2, 3, 4, 5, 6, 7, 8, & 9" (respectively: Nemes, Capital Partners, Provenzano, Grifo, the Centre,

Nemes, Provenzano, and Grifo). The award sheet also contains the evaluators' signatures, but is otherwise blank.

A notification form, dated April 20, 2011, summarized the results. The summary form indicated in all capital letters that Mercantile Bank "rejects award #1," specifying that Mercantile Bank had accepted the award against the personal guarantors, but had rejected the award against the Centre and Capital Partners. The summary form also indicated that each defendant had accepted the award. The summary form indicated that the case evaluation had been "[r]ejected."

D. THE MOTION FOR SUMMARY DISPOSITION

Before case evaluation, Mercantile Bank had filed a motion for summary disposition under MCR 2.116(C)(8) and (10), to which the Centre, Capital Partners, and personal guarantors had responded with general denials. On May 20, 2011, Mercantile Bank updated their motion for summary disposition, asserting that case evaluation had resolved its claims against the personal guarantors but not against the Centre and Capital Partners.

At the hearing on the motion, Mercantile Bank contended that it could accept the case evaluation award as to some defendants but not others, and therefore it could accept the award against the personal guarantors but not against the Centre and Capital Partners. The defendants asserted that Mercantile Bank could not partially accept the award and, therefore, had accepted the award in full against all the defendants.

The trial court ruled that the case evaluation did not resolve Mercantile Bank's claims against the Centre and Capital Partners, but did resolve Mercantile Bank's

claims against the personal guarantors. The trial court granted Mercantile Bank's motion for summary disposition and ordered judicial foreclosure.

E. THE CENTRE'S MOTION FOR ATTORNEY FEES AND APPLICATION OF PAYMENTS

Following summary disposition, Mercantile Bank filed a proposed order granting summary disposition and ordering judicial foreclosure in the amount of $979,777.05. The Centre and Capital Partners challenged the proposed order, and filed a motion for a determination of attorney fees and "proper application of payments received." In their motion, the Centre and Capital Partners asserted that Mercantile Bank had not credited them for a $46,000 principal payment or for the rents that Mercantile Bank had received under an assignment of rents.

At the May 25, 2011 hearing on the motion, the trial court orally granted the Centre and Capital Partners' motion and ordered Mercantile Bank to furnish a bill of particulars. More contentious proceedings followed the trial court's oral ruling, including several competing motions. In the midst of the proceedings, the personal guarantors paid Mercantile Bank $760,109.62 on June 30, 2011, and the court dismissed them from the case.

During the proceedings, the Centre and Capital Partners opposed Mercantile Bank's bill of particulars because it included fees that related to the case evaluation and fees related to the personal guarantors. The Centre and Capital Partners also asserted that Mercantile Bank's bill of particulars regarding payments received was inadequate because Mercantile Bank had omitted the payment from the personal guarantors. The Centre and Capital Partners at-

tached documentation, including Nemes's affidavit, in which he stated that Mercantile Bank had not applied the following payments to the debt: (1) $760,109.62 on June 30, 2011, (2) $62,100 under the assignment of rents, and (3) $42,000 paid in December 2009.

The trial court clarified that it had only meant to grant the Centre and Capital Partners' motion for a bill of particulars related to attorney fees, not to payments received. The trial court clarified that it was granting attorney fees under the parties' contract, not as a case evaluation sanction. The trial court ordered Mercantile Bank to exclude from its bill of particulars attorney fees related to the personal guarantors. In March 2012 and April 2012, the trial court held hearings on the reasonableness of attorney fees, ruled on the Centre and Capital Partners' objections to Mercantile Bank's bill of particulars, and eventually awarded Mercantile Bank attorney fees of $90,191.95.

F. THE TRIAL COURT'S ORDERS

On September 23, 2011, the trial court entered its order granting Mercantile Bank's motion for summary disposition, ruling that the Centre and Capital Partners were jointly and severally liable for $979,777.05. The trial court's order also contained a judgment of foreclosure, ordering a foreclosure sale of the mortgaged property unless the Centre and Capital Partners paid "[t]he entire unpaid balance of the Mortgage debt . . . in the amount of $979,777.05 as of the date of this Order, plus interests, costs, attorney fees, and other amounts due and owing under the loan documents . . . ."

On October 22, 2012, the trial court entered its order awarding Mercantile Bank $90,191.95 in attorney fees.

II. CASE EVALUATION

A. STANDARD OF REVIEW

This Court reviews de novo the interpretation and application of our court rules.[1] This Court also reviews de novo the trial court's decision on a motion for summary disposition.[2] When a party moves the trial court for summary disposition under MCR 2.116(C)(8) and (10) and the trial court considered documents outside the pleadings when deciding the motion, we review the trial court's decision under MCR 2.116(C)(10).[3] A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

B. LEGAL STANDARDS

Case evaluation is a mediation proceeding. During case evaluation, the parties submit and argue a concise summary of their factual and legal positions to a panel of three independent evaluators.[4] The case evaluators must "include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action."[5] "[A]ll . . . claims filed by any one party against any other party shall be treated as a single claim."[6]

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[1] *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

[2] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[3] *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

[4] MCR 2.403(D)(1), (I)(1), (I)(3), and (J)(3); MCR 2.404.

[5] MCR 2.403(K)(2).

[6] MCR 2.403(K)(2).

A party must file an acceptance or rejection to the panel's evaluation within 28 days.[7] MCR 2.403(L)(3)(a) provides that, in cases involving multiple parties, a party may accept awards against some opposing parties while rejecting awards against other opposing parties:

> Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

"If all parties accept the panel's evaluation, the case is over."[8] "If all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion."[9] A party's failure to file an acceptance or rejection constitutes a rejection.[10] When a party's response does not conform to the court rules, the trial court should deem it a rejection.[11]

C. APPLYING THE STANDARDS

The Centre and Capital Partners contend that the trial court erred by awarding additional judgments against them because it should have determined that the case evaluation resolved the case. Mercantile Bank responds that the trial court properly determined that the case evaluation did not resolve the case because it accepted the award against the personal guarantors, but rejected it against the Centre and Capital Partners. We disagree with both positions.

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[7] MCR 2.403(L)(1).

[8] *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 557; 640 NW2d 256 (2002). See MCR 2.403(M)(1).

[9] MCR 2.403(N)(1).

[10] MCR 2.403(L)(1).

[11] *Bush v Mobil Oil Corp*, 223 Mich App 222, 227; 565 NW2d 921 (1997), overruled in part on other grounds in *CAM Constr*, 465 Mich 549.

In cases involving multiple parties, MCR 2.403(L)(3) gives a party two options: "accepting all of the awards covering the claims by or against that party" or "accepting some and rejecting others." The grammar of this rule indicates that the word "some" in the phrase "accepting some and rejecting others" refers to the *awards*, not the *parties*. Because MCR 2.403(K)(2) requires the case evaluation panel to issue a separate award as to each plaintiff against each defendant, if the case evaluation panel follows MCR 2.403(K)(2), a plaintiff will be able to accept awards against some defendants while rejecting awards against other defendants.

Here, the case evaluation panel did *not* follow MCR 2.403(K)(2), but instead issued a single award. Mercantile Bank attempted to partially accept and partially reject the single award. The court rules do not allow a party to partially accept and partially reject a single award.[12] Because Mercantile Bank's response was an improper response, the case evaluation panel stated that Mercantile Bank rejected the award. Further, because a party may not partially accept and partially reject a single award, the trial court erred when it determined that Mercantile Bank could partially accept the award.

However, the trial court did *not* err when it determined that case evaluation had not resolved the claims between the parties now on appeal. Mercantile Bank's improper response constituted a rejection of the case evaluation, so case evaluation did not resolve the parties' claims. We conclude that the trial court did not err when it granted Mercantile Bank's motion for summary

[12] See *Henderson v Sprout Bros, Inc*, 176 Mich App 661, 667; 440 NW2d 629 (1989) (construing a similar phrase under a previous version of the court rule).

disposition, because case evaluation had not resolved the claims between Mercantile Bank, the Centre, and Capital Partners.

III. JUDGMENT OF FORECLOSURE

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews de novo issues of law.[13] "A trial court commits legal error when it incorrectly chooses, interprets, or applies the law."[14]

B. LEGAL STANDARDS

When a plaintiff files a complaint to foreclose on a mortgage, the trial court may order a foreclosure sale "sufficient to discharge the amount due on the mortgage on real estate . . . plus costs."[15] "[T]he amount to be calculated in the judgment of foreclosure is that which is owed *under the written instrument*."[16] The mortgagor is entitled to credits on the indebtedness for partial payments made before the judgment of foreclosure.[17]

C. APPLYING THE STANDARDS

The Centre and Capital Partners contend that the trial court erred when it stated in its order that the amount due was "$979,777.05 as of the date of this

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[13] *Singer v American States Ins*, 245 Mich App 370, 373-374; 631 NW2d 34 (2001).

[14] *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008).

[15] MCL 600.3115. See *Stewart v Isbell*, 155 Mich App 65, 81; 399 NW2d 440 (1986).

[16] *Stewart*, 155 Mich App at 81.

[17] See *Dusseau v Roscommon State Bank*, 80 Mich App 531, 549; 264 NW2d 350 (1978).

Order . . . ." because its judgment failed to reflect payments that they made on the note. We agree.

In *Dusseau v Roscommon State Bank*, the plaintiff sought to prevent the defendant from foreclosing on a mortgage until it credited the plaintiff for "the value of a portion of the mortgaged property released by the mortgagee[.]"[18] The parties disputed the amount for which the defendant should have credited the plaintiff.[19] This Court ordered the trial court to correct the judgment of foreclosure to reflect the fair market value of the property that the trial court should have credited against the mortgage.[20]

In this case, Mercantile Bank asserts that the trial court's order accurately reflected its oral ruling on May 24, 2011. Mercantile Bank confuses the trial court's ruling on its motion for summary disposition with the trial court's judgment of foreclosure. On May 24, 2011, the trial court granted Mercantile Bank's motion for summary disposition under MCR 2.116(C)(10). Because the Centre and Capital Partners failed to prove an issue of fact regarding damages, the trial court's September 23, 2011 order correctly reflects that summary disposition was granted for $979,777.05 in damages.

However, the trial court's September 23, 2011 order does not only contain a ruling on the motion for summary disposition. It also contains a judgment of foreclosure. As in *Dusseau*, here, the Centre and Capital Partners disputed the amount that it owed Mercantile Bank on the underlying debt in their motion to determine an application of payments. However, unlike in *Dusseau*, the trial court did not award the Center and

[18] *Id*. at 532.

[19] *Id*.

[20] *Id*. at 549.

Capital Partners a lower amount than the amount to which they were entitled. Instead, the trial court failed to make any determination.

We conclude that the trial court erred when it failed to rule on, thereby denying, the Centre and Capital Partners' motion for application of payments. On the judgment of foreclosure, the Centre and Capital Partners were entitled to credits for their partial payments and the payment made by the personal guarantors on the debt. As a result of its failure to determine whether and in what amount partial payments were made on the debt, the trial court's order did not accurately state the amount owed under the written instrument in the judgment of foreclosure.

However, unlike in *Dusseau*, we cannot simply remand for a correction of the judgment. Though it is clear from the record that the Centre and Capital Partners are entitled to some credit, it is unclear whether that credit should include an amount under the assignment of rents and the alleged December 2009 payment. We thus remand for the trial court to (1) determine what credits are due the Centre and Capital Partners, and (2) order judgment in the amount sufficient to discharge the debt, plus costs.

IV. ATTORNEY FEES

The Centre and Capital Partners contend that, because the case evaluation award included attorney fees, the trial court's attorney fee award requires them to pay some attorney fees twice. The Centre and Capital Partners premise their argument on the existence of an accepted case evaluation award. However, for the reasons previously stated, there was no accepted case evaluation in this case. And, in any event, judgment was never entered on the case evaluation. The court instead

dismissed the personal guarantors from the case. We conclude that the Centre and Capital Partners' argument lacks merit.

V. CONCLUSIONS

The trial court properly determined that case evaluation did not resolve Mercantile Bank's claims against the Centre and Capital Partners, but also conclude that it did not properly determine the amount of the judgment of foreclosure. We conclude that the Centre and Capital Partners' challenge to the trial court's award of attorney fees lacks merit.

In Docket No. 311326, we affirm in part, vacate in part, and remand. In Docket No. 313276, we affirm. We do not retain jurisdiction. Neither party having prevailed in full, neither may tax costs.[21]

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

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[21] MCR 7.219(A).

PEOPLE v ARMSTRONG

Docket No. 312301. Submitted May 6, 2014, at Lansing. Decided May 13, 2014, at 9:10 a.m.

Parys A. Armstrong was convicted by a jury in the Calhoun Circuit Court, Conrad J. Sindt, J., of third-degree criminal sexual conduct. He was sentenced to 10 to 15 years' imprisonment. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

1. The trial court did not clearly err by holding that the prosecutor's use of a peremptory challenge to remove a prospective juror was not based on the juror's race. The trial court properly found that the facts did not establish discrimination as a matter of law. No violation of the Equal Protection Clause of the Fourteenth Amendment occurred.

2. A rational view of the evidence supports the trial court's decision to issue a flight instruction to the jury.

3. The trial court did not abuse its discretion when it denied defendant's motion for a new trial based on alleged newly discovered evidence on the basis that defense counsel had not been reasonably diligent in attempting to secure the evidence.

4. The trial court properly scored Prior Record Variable (PRV) 1, MCL 777.51, which concerns previous high-severity felony convictions, instead of PRV 3, MCL 777.53, which concerns previous high-severity juvenile adjudications, with regard to a previous court action in which defendant had been tried as an adult, convicted, and then sentenced as a juvenile. The prior court's decision regarding defendant's sentence did not alter the fact that he received a conviction, not a juvenile adjudication. Pursuant to MCL 712A.2d(7), defendant's prior conviction has the same liabilities as any other adult conviction.

5. There was no evidence that the complainant received or required medical treatment. The trial court improperly assessed 10 points under Offense Variable (OV) 3, MCL 777.33, because the preponderance of the evidence did not support the trial court's determination that the complainant required medical treatment.

Defendant is entitled to resentencing because correcting the error results in a different sentencing guidelines range.

6. The complainant's statements about the way the sexual assault affected her life showed that she suffered a psychological injury and may require treatment in the future. The trial court did not clearly err when it determined that the complainant suffered a serious psychological injury requiring professional treatment. The trial court did not err by assessing 10 points under OV 4, MCL 777.34.

Conviction affirmed, sentence vacated, and remanded for resentencing.

1. CONSTITUTIONAL LAW — EQUAL PROTECTION — TRIAL — PEREMPTORY CHALLENGES.

A prosecutor's use of a peremptory challenge to remove a prospective juror solely because of the juror's race violates the Equal Protection Clause of the Fourteenth Amendment.

2. CONSTITUTIONAL LAW — EQUAL PROTECTION — TRIAL — PEREMPTORY CHALLENGES.

A trial court employs a three-step process to determine whether a defendant has shown impermissible racial discrimination resulting from a prosecutor's use of a peremptory challenge to remove a prospective juror: first, the defendant must show a prima facie case of discrimination, second, the prosecutor may rebut the defendant's prima facie case with a race-neutral reason for dismissing the juror, and, third, the trial court must determine whether the prosecutor's explanation is a pretext for discrimination.

3. CRIMINAL LAW — CONSTITUTIONAL LAW — TRIAL — PEREMPTORY CHALLENGES.

A defendant, in order to establish a prima facie case of discrimination based on race in the exercise of a peremptory challenge, must show, first, that he or she is a member of a cognizable racial group, second, that the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool, and, third, that all relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race; the defendant must offer facts that at least give rise to the inference that the prosecutor had a discriminatory purpose for excluding the prospective juror.

4. CRIMINAL LAW — EVIDENCE — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

A defendant seeking a new trial on the basis of newly discovered evidence must show that the evidence itself, not merely its

materiality, was newly discovered, the newly discovered evidence was not cumulative, the defendant could not, using reasonable diligence, have discovered and produced the evidence at trial, and that the new evidence makes a different result probable on retrial; newly discovered impeachment evidence may be grounds for a new trial if, as well as meeting these criteria, there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence.

5. CRIMINAL LAW — SENTENCING — PRIOR RECORD VARIABLES — JUVENILES.

A juvenile tried as an adult and who is found guilty or who pleads no contest receives a judgment of conviction having the same effect and liabilities as any other adult conviction; a subsequent trial court properly employs Prior Record Variable (PRV) 1, pertaining to prior felony convictions, in determining the defendant's sentence instead of PRV 3, pertaining to prior juvenile adjudications, where the prior trial court tried the juvenile as an adult but sentenced the juvenile as a juvenile (MCL 712A.2d).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Marc Crotteau*, Assistant Prosecuting Attorney, for the people.

Daniel D. Bremer for defendant.

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

PER CURIAM. Defendant, Parys Antwon Armstrong, appeals by leave granted his conviction, following a jury trial, of third-degree criminal sexual conduct (CSC III)[1] and his sentence of 10 to 15 years' imprisonment. We affirm Armstrong's conviction. But because the trial court improperly scored Offense Variable (OV) 3,[2] we vacate Armstrong's sentence and remand for resentencing.

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[1] MCL 750.520d(1)(a) (sexual penetration, complainant at least 13 years of age and under 16 years of age).

[2] MCL 777.33.

I. FACTS

A. THE ASSAULT

According to the complainant, on June 27, 2011, she visited a park with her friends between 4:00 and 5:00 p.m. She was 14 years old at the time. The complainant testified that when her friends left, she remained in the park to speak with a boy. After a couple of hours, the boy told her that he would return shortly and left.

After she waited about 15 minutes, Armstrong approached her and began talking to her. She did not know him, and he told her that he had been kicked out of his house. She went with him to the other side of the park, where Armstrong told her that he liked her and tried to kiss her. She turned away and told Armstrong that she had a boyfriend. While she had her back to Armstrong, he reached around and touched her undershorts, twice putting his finger in her vagina.

The complainant testified that she was frightened and in shock. She told Armstrong to stop and that she had to go meet a friend. Armstrong asked where she lived and gave her his phone number, which she recorded in her phone. The complainant testified that she left the park at about 7:00 or 8:00 p.m. While walking home, she called a friend and told him that she thought that she had been molested. The friend told her to call the police.

According to the complainant's mother, the complainant was frightened and crying when she got home. The complainant testified that she did not tell her mother what had happened because she was afraid that her mother would "flip out," and that her father would hurt Armstrong and get in trouble. The complainant called her sister. The complainant's sister testified that the complainant was "a little hysterical," confused, and

crying, and the complainant stated that she may have been molested. According to the complainant, she told her mother what happened after her sister told her to do so, and described Armstrong to her parents.

The complainant's father testified that he began calling friends and went to the park to look for Armstrong. Dustin Wade, a friend of the complainant's father, testified that he found Armstrong in the park and followed Armstrong until the complainant's father arrived. According to the complainant's father, he asked Armstrong if he had touched the complainant and told him to stay where he was until the police arrived. Armstrong became angry and tried to punch the father. Wade grabbed Armstrong around the neck and wrestled him to the ground. People who lived across the street thought that the complainant's father and Wade were attacking Armstrong, came over, and ordered Wade to let Armstrong get up. The father told Wade to let Armstrong up. The police were just rounding the corner, and Armstrong ran away.

B. JURY SELECTION

During jury selection, the trial court asked the jurors if any of them had personal issues that would interfere with their ability to pay attention to the case. Juror Two responded that he had three children, ages two, three, and five, and that he had to pick one of his children up at school at 3:30 p.m. Juror Two stated that his wife worked from 3:30 to 11:30 p.m., they were new to the area and did not have a babysitter, and his wife would have to take the day off if the trial went past 3:30 p.m.

The prosecutor used a peremptory challenge to excuse Juror Two. The trial court briefly removed the jury from the courtroom before it was sworn in so that defense counsel could place an objection on the record. Defense

counsel contended that the prosecutor had inappropriately excused Juror Two because Armstrong is black and Juror Two was the only black juror in the jury pool. The prosecutor responded that Juror Two was a stay-at-home parent who was new to the community and who had issues concerning his availability to provide childcare.

The trial court reasoned that the prosecutor's use of a single peremptory challenge did not show a pattern of discrimination and that Juror Two, who was responsible to care for his young children, had concerns about childcare. The trial court found that the prosecutor did not excuse Juror Two for the purpose of racial discrimination.

The jury ultimately found Armstrong guilty of one count of CSC III.

C. SENTENCING

At the sentencing hearing, defense counsel challenged the use of Prior Record Variable (PRV) 1,[3] which concerns previous felony convictions. Defense counsel asserted that the trial court should use PRV 3,[4] which concerns previous juvenile adjudications, instead of PRV 1 because, though a previous court had tried Armstrong as an adult, it had sentenced him as a juvenile. The trial court concluded that it should score PRV 1 because the previous court had tried Armstrong as an adult.

Defense counsel then challenged the scoring of OV 3, which concerns physical injury. Defense counsel asserted that the trial court should not assess 10 points for OV 3 because the complainant did not suffer an injury or receive medical treatment. The prosecutor responded that

[3] MCL 777.51.

[4] MCL 777.53.

the SANE (sexual assault nurse examiner) report, following the complainant's examination, indicated that her hymen was reddened and tender. Relying on the SANE report, the trial court assessed Armstrong 10 points under OV 3.

Defense counsel also challenged the scoring of OV 4,[5] which concerns psychological injury. Defense counsel asserted that the complainant's injury did not require medical treatment because she did not receive counseling. In the complainant's impact statement, the complainant detailed her emotional difficulties following the assault, but stated that she did not want counseling. The complainant's father stated at the hearing that the complainant would receive counseling when she was ready for it. The trial court concluded that the complainant's statements that she did not want counseling did not mean that she would not need counseling, and it assessed Armstrong 10 points under OV 4.

D. ARMSTRONG'S MOTION FOR A NEW TRIAL

Before sentencing, Armstrong filed a motion for a new trial on the basis of newly discovered evidence. Following the sentencing hearing, Armstrong attached three affidavits to his supplemental motion for a new trial. The affiants stated that the complainant had a poor reputation for truthfulness and provided potential impeachment material.

Defense counsel indicated in his motion that he had searched for these witnesses on Facebook on December 7, 2011, the day before trial began, but he was not able to obtain their proposed testimony until after the trial. The trial court found that Armstrong did not show that he could not have discovered the evidence by using

[5] MCL 777.34.

reasonable diligence before trial. The trial court noted that defense counsel should not have waited until the night before trial to attempt to discover witnesses. Alternatively, the trial court concluded that newly discovered impeachment evidence cannot support a motion for a new trial.

II. JUROR DISMISSAL

A. STANDARD OF REVIEW

A defendant's preserved challenge to the prosecutor's use of a peremptory challenge on the basis that it violated the Equal Protection Clause is a mixed question of fact and law.[6] When reviewing whether a defendant has shown a prima facie case of discrimination, we review for clear error the trial court's findings of fact and review de novo whether those facts constitute discrimination as a matter of law.[7] The trial court's findings are clearly erroneous if, after we have reviewed the entire record, we are definitely and firmly convinced that it made a mistake.[8]

B. LEGAL STANDARDS

A prosecutor violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution when he or she uses a peremptory challenge to remove a prospective juror solely because of the juror's race.[9] The trial court uses a three-step process to determine whether the defendant has shown impermis-

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[6] *People v Knight*, 473 Mich 324, 342; 701 NW2d 715 (2005).

[7] *Id*.

[8] *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

[9] *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *Knight*, 473 Mich at 335.

sible discrimination.[10] First, the defendant must show a prima facie case of discrimination.[11] Second, the prosecutor may rebut the defendant's prima facie case with a race-neutral reason for dismissing the juror.[12] Third, the trial court must determine whether the prosecutor's explanation is a pretext for discrimination.[13]

C. APPLYING THE STANDARDS

Armstrong contends that the trial court erred when it concluded that he did not establish a prima facie case of discriminatory purpose. We disagree.

A defendant must show three things to establish a prima facie case of discrimination based on race:

> (1) he [or she] is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race.[14]

The defendant must offer facts that *at least* give rise to an inference that the prosecutor had a discriminatory purpose for excluding the prospective juror.[15]

In this case, Armstrong established the first two elements of a prima facie case of discrimination. However, the trial court concluded that he did not establish the third element. The trial court found that the prosecutor had only used a single peremptory challenge and that

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[10] *Knight*, 473 Mich at 336.

[11] *Batson*, 476 US at 96; *Knight*, 473 Mich at 336.

[12] *Batson*, 476 US at 97; *Knight*, 473 Mich at 337.

[13] *Batson*, 476 US at 98; *Knight*, 473 Mich at 337-338.

[14] *Knight*, 473 Mich at 336.

[15] *Johnson v California*, 545 US 162, 168; 125 S Ct 2410; 162 L Ed 2d 129 (2005); *Knight*, 473 Mich at 336-337.

Juror Two had childcare issues. We conclude that the trial court's finding was not clearly erroneous because Juror Two detailed his childcare issues on the record.

We also conclude that the trial court properly found that the facts did not establish discrimination as a matter of law. Juror Two was the only black juror in the jury pool, but Juror Two also had childcare issues. The prosecutor did not engage in a pattern of discrimination. The prosecutor did not excuse any other prospective jurors, but no other prospective jurors expressed similar issues. Given the facts, the circumstances did not lead to the inference that the prosecutor dismissed Juror Two because of his race.

III. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

When reviewing a claim of instructional error, this Court views the instructions as a whole to determine whether the issues to be tried were adequately presented to the jury.[16] This Court reviews for an abuse of discretion the trial court's decision regarding the applicability of a jury instruction to the facts of a specific case.[17] The trial court abuses its discretion when its outcome falls outside the range of principled outcomes.[18]

B. LEGAL STANDARDS

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him."[19]

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[16] *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

[17] *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

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

[19] *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); MCL 768.29.

The jury instructions "must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them."[20] The trial court may issue an instruction to the jury if a rational view of the evidence supports the instruction.[21]

C. APPLYING THE STANDARDS

Armstrong contends that the trial court erred when it issued an instruction on flight because the evidence did not support the instruction. We disagree.

As part of its instructions, the trial court issued a flight instruction to the jury:

> There's been evidence presented by the prosecution which he claims shows the defendant ran away after the alleged crime at the time that he was being confronted about it. This evidence does not prove guilt. A person may run or hide for perfectly innocent reasons, panic, mistake, or fear, for example. However, a person may also do so because of a certain consciousness of guilt. You must decide whether you accept the evidence of flight as true. Then decide if true whether it shows that the defendant did have a consciousness of guilt. Those are all decisions for you to make.

The complainant's father testified that Armstrong ran away as the police were approaching. Thus, a rational view of the evidence supported the flight instruction. The instruction also fairly encompassed a theory of the case because one of the prosecutor's theories was that Armstrong's decision to flee showed his consciousness of guilt. We conclude that the trial court's decision to issue this instruction did not fall outside the range of principled outcomes.

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[20] *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975) (citations omitted).

[21] MCL 768.29; *Riddle*, 467 Mich at 124.

IV. NEWLY DISCOVERED EVIDENCE

A. STANDARD OF REVIEW

"We review for an abuse of discretion a trial court's decision to grant or deny a motion for new trial."[22]

B. LEGAL STANDARDS

A trial court may grant a defendant a new trial on the basis of newly discovered evidence, but this does not negate the parties' responsibility to "use care, diligence, and vigilance in securing and presenting evidence."[23] The defendant must show the trial court that

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.[24]

Newly discovered impeachment evidence may be grounds for a new trial if, as well as meeting these criteria, there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence.[25]

C. APPLYING THE STANDARDS

Armstrong contends that the trial court abused its discretion when it denied his motion for a new trial based on newly discovered evidence because his attorney was reasonably diligent in trying to secure the evidence before trial. We disagree.

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[22] *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012).

[23] *Id*. (quotation marks and citations omitted).

[24] *Id*. at 313 (quotation marks and citations omitted); MCR 6.508(D).

[25] *Grissom*, 492 Mich at 319.

The record, including defense counsel's statements in his motions in the trial court, indicates that defense counsel waited until the evening before trial to search for the newly discovered impeachment witnesses. At that time, defense counsel had been Armstrong's appointed counsel since June 30, 2011. The three witnesses responded to defense counsel within 11 weeks of his first contact. Thus, the record indicates that had defense counsel more actively attempted to secure impeachment witnesses, he could have discovered the witnesses in time for Armstrong's December 8, 2011 trial. We conclude that the trial court did not abuse its discretion when it denied Armstrong's motion for a new trial because defense counsel was not reasonably diligent in attempting to secure his newly discovered impeachment witnesses.

Armstrong also contends that the trial court erred when it held that newly discovered impeachment evidence cannot support a motion for a new trial. Because we conclude that the trial court was correct when it determined that Armstrong's attorney did not act with reasonable diligence, we decline to review the trial court's alternative holding.

V. SENTENCING GUIDELINES

A. STANDARD OF REVIEW

This Court reviews the sentencing court's scoring of a sentencing guidelines variable for clear error.[26] The trial court's findings are clearly erroneous if, after we have reviewed the entire record, we are definitely and firmly convinced that it made a mistake.[27]

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[26] *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

[27] *Coomer*, 245 Mich App at 219.

The proper interpretation and application of the statutory sentencing guidelines is a question of law that this Court reviews de novo.[28] Our purpose when interpreting a statute is to determine and give effect to the Legislature's intent.[29] If the plain and ordinary meaning of a statute's language is clear, we enforce it as written.[30] This Court will not interpret statutes in a way that renders any part of the statute surplusage.[31]

B. PREVIOUS ADJUDICATIONS UNDER PRV 1

Armstrong contends that the trial court improperly assessed him 25 points under PRV 1 because, though he was previously tried as an adult, the previous trial court sentenced him as a juvenile. Armstrong contends that under such circumstances the trial court should instead score PRV 3. We conclude that the trial court properly determined that it must score PRV 1 because Armstrong was tried as an adult and thus had a conviction.

The trial court properly scores PRV 1 if the defendant has previous high-severity felony convictions.[32] In contrast, the trial court should score PRV 3 if the offender has previous high-severity juvenile adjudications.[33]

MCL 712A.2d concerns juveniles who are tried as adults following the prosecuting attorney's designation. There are two subsections of MCL 712A.2d at issue here: MCL 712A.2d(7) and MCL 712A.2d(8). MCL 712A.2d(7) provides that a juvenile tried as an adult

[28] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

[29] *Id*.

[30] *Id*.

[31] *People v Blunt*, 282 Mich App 81, 83; 761 NW2d 427 (2009).

[32] MCL 777.51(1).

[33] MCL 777.53(1).

who is found guilty or who pleads guilty or no contest receives a judgment of conviction, which has "the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(8) directs the trial court to sentence the juvenile under "section 18(1)(n) of this chapter."[34] Interestingly, there is no such subdivision: MCL 712A.18(1) ends at MCL 712A.18(1)(m), which provides that the trial court may impose a sentence on the juvenile that could be imposed on an adult, or may delay imposing a sentence of imprisonment and may instead place the juvenile on probation. However, whether MCL 712A.2d(8) contains a typographical error is not determinative in this case.

The clear import of MCL 712A.2d is that a juvenile tried as an adult receives a *conviction*. In contrast, juveniles who proceed as juveniles are *adjudicated responsible*.[35] PRV 1 concerns convictions.[36] PRV 3 concerns juvenile adjudications.[37] And, notably, MCL 712A.18e—to which the instructions section for the prior record variables directly refers[38]—also draws a distinction between adjudications and convictions.[39] We thus conclude that the trial court must score the previous conviction under PRV 1, regardless of how the previous trial court sentenced the juvenile.

Here, the previous trial court tried Armstrong as an adult for allegedly engaging in forcible sexual intercourse with a girl when he was 14 years old. Armstrong

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[34] MCL 712A.2d(8).

[35] See, e.g., *In re Hutchinson*, 278 Mich App 108, 109; 748 NW2d 604 (2008).

[36] See MCL 777.51(1).

[37] See MCL 777.53(1).

[38] MCL 777.50(4)(c).

[39] See MCL 712A.18e(5) ("any record of adjudication *or* conviction . . . setting aside of any adjudication *or* conviction . . . .") (emphasis added).

pleaded no contest to a charge of assault with intent to commit sexual penetration and received a conviction. Exercising its sentencing discretion, the previous trial court delayed Armstrong's imprisonment and placed him on probation. We conclude that the previous trial court's decision regarding Armstrong's sentence did not alter the fact that he received a conviction. Under MCL 712A.2d(7), Armstrong's previous conviction has the same liabilities as any other adult conviction. Thus, the trial court here properly assessed Armstrong 15 points under PRV 1.

C. PHYSICAL INJURY UNDER OV 3

Armstrong contends that the trial court improperly assessed 10 points under OV 3 because there was no evidence that the complainant received or required medical treatment. We agree.

The trial court may consider all the record evidence when sentencing, including the contents of a presentence investigation report.[40] A preponderance of the record evidence must support the trial court's determinations.[41]

The trial court scores OV 3 if a victim was physically injured. OV 3 provides, in relevant part:

> (d) Bodily injury requiring medical treatment occurred to a victim.....10 points
>
> (e) Bodily injury not requiring medical treatment occurred to a victim ..... 5 points
>
> (f) No physical injury occurred to a victim .... 0 points[42]

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[40] *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987).

[41] *Osantowski*, 481 Mich at 111; *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991).

[42] MCL 777.33(1).

Whether an injury required medical treatment depends on whether the treatment was necessary, not on whether the victim successfully obtained treatment.[43]

We note that, during the sentencing hearing, the prosecutor relied on a "SANE report" that does not appear in the record. There was no testimony at trial regarding the report, the prosecutor did not admit the report into evidence at the trial or sentencing hearing, and the report is not a part of Armstrong's presentence investigation report. However, we need not decide whether the trial court properly relied on the SANE report. Even if the trial court properly considered the prosecutor's statement that the SANE report showed that the complainant suffered from a reddened and tender hymen, the evidence did not support assessing 10 points under OV 3 because there is no evidence that medical treatment was necessary for her injury.

The complainant did not testify that she received any treatment, and neither of the police officers who testified stated that the complainant received medical treatment. Marshall Police Lieutenant Scott McDonald testified that a nurse examiner collected DNA samples from the complainant, and Officer Robert Ritsema only responded affirmatively when asked if officers took the complainant for "the SANE examination." Were we to construe OV 3 in a way that would allow courts to assume that all bodily injuries require medical treatment, when there is no evidence that treatment was necessary, it would render MCL 777.33(1)(e)—which concerns injuries that do *not* require medical treatment—surplusage.[44] We decline to do so.

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[43] MCL 777.33(3).

[44] Compare *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011) (the trial court properly assessed 10 points for OV 3 when the sexual assault victim received precautionary medical treatment), with

We conclude that a preponderance of the record evidence did not support the trial court's determination that the complainant required medical treatment.

D. PSYCHOLOGICAL INJURY UNDER OV 4

Armstrong contends that the trial court should not have assessed 10 points under OV 4 because the complainant did not want counseling and did not suffer a serious psychological injury. We disagree.

The trial court must score 10 points for OV 4 if a "[s]erious psychological injury requiring professional treatment occurred to a victim."[45] Whether the victim has sought treatment does not determine whether the injury may require professional treatment.[46] The trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated.[47]

Here, the complainant expressed that she has felt confusion, emotional turmoil, anger, guilt, and the inability to trust others. The complainant's father stated that she was suffering emotional difficulties. And, though the complainant testified that she did not want counseling because she did not want to continue to talk about her experience, the complainant's father stated that the complainant would eventually receive counseling. Thus, the complainant's statements about the way the sexual assault affected her life showed that she suffered a psychological injury, and the complainant

People v Apgar, 264 Mich App 321, 329; 690 NW2d 312 (2004) (opinion by GAGE, J.) (the trial court properly assessed 5 points for OV when the sexual assault victim sustained redness to her vaginal opening).

[45] MCL 777.34(1)(a).

[46] MCL 777.34(2).

[47] *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013).

may require treatment in the future. We conclude that the trial court did not clearly err when it found that the complainant suffered a serious psychological injury requiring professional treatment.

E. RESENTENCING IS REQUIRED

We have concluded that the trial court should not have assessed Armstrong 10 points under OV 3. If a sentencing error results in a different sentencing guidelines range, the defendant is entitled to resentencing.[48] Here, reducing Armstrong's score by 5 points—from 50 to 45 points—reduces his minimum sentence range from 78 to 130 months' imprisonment to 72 to 120 months' imprisonment.[49] Accordingly, we conclude that Armstrong is entitled to resentencing.

VI. CONCLUSION

We conclude that Armstrong has not established that the prosecutor's peremptory challenge to the juror was racially motivated or that the trial court erred by instructing the jury. We also conclude that the trial court properly denied Armstrong's motion for a new trial, properly scored him under PRV 1 for his previous conviction of assault with intent to commit sexual penetration, and properly assessed him 10 points under OV 4. However, we conclude that the trial court clearly erred by assessing 10 points under OV 3 because no evidence supported its finding that the complainant suffered a bodily injury requiring medical treatment. Because the trial court's error changes Armstrong's sentencing range, he is entitled to resentencing.

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[48] *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010); *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

[49] MCL 777.16y; MCL 777.63.

We affirm Armstrong's conviction, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

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

DEPARTMENT OF TRANSPORTATION v
AMERICAN MOTORISTS INSURANCE COMPANY

Docket No. 313978. Submitted May 9, 2014, at Detroit. Decided May 15, 2014, at 9:00 a.m.

The Department of Transportation and the Mackinac Bridge Authority (MBA) brought an action in the Mackinac Circuit Court against Allstate Painting and Contracting Company, Inc., and the underwriter of Allstate's performance bonds, American Motorists Insurance Company (AMICO), after the MBA determined that maintenance work Allstate had performed on the Mackinac Bridge was deficient. The trial court, William W. Carmody, J., entered an order of default against Allstate for failing to appear and scheduled a trial. AMICO moved to stay the proceedings after its parent company became the subject of a rehabilitation order entered by an Illinois state court, then moved to dismiss the case on the grounds of comity and forum non conveniens. The court denied the motion to dismiss, and AMICO applied for leave to appeal. While the application was pending, the Illinois state court entered a liquidation order against AMICO that included a parallel injunction prohibiting a party from bringing or maintaining any action against AMICO outside the liquidation proceedings. The Court of Appeals granted the application for leave to appeal.

The Court of Appeals *held*:

MCL 500.8156(1) provides that in a liquidation proceeding in a reciprocal state against an insurer domiciled in that state, claimants against the insurer who reside within this state may file claims either with the ancillary receiver, if any, in this state or with the domiciliary liquidator. Because AMICO was the subject of a liquidation proceeding in Illinois, which met the requirements for a reciprocal state set forth in MCL 500.8103(*l*), and because Michigan had no ancillary receiver, plaintiffs were limited to pursuing their claim with the Illinois liquidator, the Illinois director of insurance. Accordingly, it was unnecessary to decide whether the trial court abused its discretion by denying the motion to dismiss under the doctrine of forum non conveniens.

Remanded for dismissal without prejudice.

1. INSURANCE — LIQUIDATION PROCEEDINGS — RECIPROCAL STATES — ILLINOIS.

A Michigan claimant against an insurer domiciled in Illinois that is the subject of a liquidation order is limited to pursuing that claim against the Illinois director of insurance (MCL 500.8156(1)).

2. INSURANCE — LIQUIDATION PROCEEDINGS — RECIPROCAL STATES — ILLINOIS.

Illinois is a reciprocal state as defined in MCL 500.8103(*l*).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *John P. Mack* and *Michael J. Dittenber*, Assistant Attorneys General, for the Department of Transportation and the Mackinac Bridge Authority.

Kerr, Russell and Weber, PLC (by *James R. Case* and *Joanne Geha Swanson*), for the American Motorists Insurance Company.

Before: DONOFRIO P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM. Defendant American Motorists Insurance Company (AMICO) appeals by leave granted the trial court's order denying its motion for dismissal on the grounds of forum non conveniens. Because events transpiring during the pendency of this appeal prohibit further proceedings in this case, we remand to the trial court for dismissal.

I. BASIC FACTS

In May 2002, defendant Allstate Painting and Contracting Company contracted with plaintiff Michigan Department of Transportation to perform specified maintenance work on the Mackinac Bridge. Also in May 2002, AMICO provided a performance bond for the maintenance work, including a two-year warranty period following completion of the maintenance work.

Allstate started the maintenance work in September 2002 and completed it in October 2003. In September 2005, employees of plaintiff Mackinac Bridge Authority inspected the work and determined that it was deficient. Neither defendant repaired the deficiencies, and plaintiffs ultimately sued defendants in Mackinac Circuit Court in November 2008. The trial court entered an order of default against Allstate after it failed to appear in the case.[1]

In December 2011, the trial court scheduled trial for September 2012. In July 2012, however, AMICO moved to stay the proceedings because its parent company, Lumbermens Mutual Casualty Company, was the subject of an order of rehabilitation entered by an Illinois state court. AMICO indicated that its counsel had been informed that a separate order of rehabilitation would be entered against AMICO within a relatively short time. The parties stipulated to stay the proceedings pending further developments in Illinois.

In August 2012, AMICO moved to dismiss the case on the grounds of comity[2] and forum non conveniens. AMICO stated that, as anticipated, the Illinois state court entered an order of rehabilitation on August 16, 2012, and it provided in relevant part as follows:

> The officers, directors, agents, servants, representatives and employees of [Lumbermens Mutual Casualty Company], and all other persons and entities having knowledge of this Order are restrained and enjoined from bringing or further prosecuting any claim, action or proceeding at law

[1] Allstate has been a defunct, inactive corporation throughout these proceedings.

[2] Although the dismissal of a case based on a finding that a foreign forum may be more favorable "is sometimes described as 'comity,' it is more essentially akin to a dismissal on the basis of the doctrine of forum non conveniens." *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 214; 813 NW2d 752 (2011).

> or in equity or otherwise, whether in this State or elsewhere, against [Lumbermens Mutual Casualty Company], or [its] property or assets, or the Director or Rehabilitator, except insofar as those claims, actions or proceedings arise in or are brought in the rehabilitation proceedings prayed for herein . . . .

The trial court denied the motion to dismiss in December 2012, explaining that the instant case had been ongoing for several years whereas the order of rehabilitation was a relatively recent development. The trial court distinguished this case from *Hare v Starr Commonwealth Corp*, 291 Mich App 206; 813 NW2d 752 (2011), in which this Court ruled that a garnishment action against a New York insurer should be dismissed on the grounds of forum non conveniens, given that the New York insurer was subject to an order of rehabilitation. AMICO promptly filed an application for leave to appeal.

While the application for leave to appeal was pending before this Court, the Illinois state court entered an order of liquidation against AMICO. The liquidation order included a parallel injunction prohibiting a party from bringing or maintaining any action against AMICO outside the liquidation proceedings:

> The officers, directors, agents, servants, representatives and employees of AMICO, and all other persons and entities having knowledge of this Order are restrained and enjoined from bringing or further prosecuting any claim, action or proceeding at law or in equity or otherwise, whether in this State or elsewhere, against AMICO, or [its] property or assets, or the Director or Rehabilitator, except insofar as those claims, actions or proceedings arise in or are brought in these rehabilitation proceedings . . . .

II. ANALYSIS

Generally, we review a trial court's decision to deny a motion to dismiss on the basis of the doctrine of forum

non conveniens for an abuse of discretion. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006); *Hare*, 291 Mich App at 215. A trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *Radeljak*, 475 Mich at 603. We review questions of law, however, de novo. *Meredith Corp v City of Flint*, 256 Mich App 703, 711; 671 NW2d 101 (2003).

" 'Forum non conveniens' is defined as the 'discretionary power of the court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.' " *Id*. at 604, quoting *Black's Law Dictionary* (6th ed). The concept is a common-law doctrine that is not derived from statutes. *Radeljak*, 475 Mich at 604. However, we need not consider this doctrine because we hold that, pursuant to Michigan law, plaintiffs' claims are to be heard in Illinois, not Michigan, and dismissal is proper.

MCL 500.8156(1) provides, "In a liquidation proceeding in a reciprocal state against an insurer domiciled in that state, claimants against the insurer who reside within this state may file claims either with the ancillary receiver, if any, in this state or with the domiciliary liquidator." Because it is established that AMICO is the subject of a liquidation proceeding in Illinois, the salient issue is whether Illinois is a "reciprocal state."[3] If it is,

[3] Several states have enacted the terms of the Uniform Insurers Liquidation Act (UILA). See *Hawthorne Savings FSB v Reliance Ins Co of Ill*, 421 F3d 835, 852 (CA 9, 2005), amended in part on other grounds 433 F3d 1089 (CA 9, 2006). A state that has done so is referred to as a "reciprocal state." See *id*. at 853. Michigan had explicitly enacted the UILA at MCL 500.7836 *et seq*., see *Attorney General v Ambassador Ins Co*, 166 Mich App 687, 694; 421 NW2d 271 (1988), but it was repealed by 1989 PA 302, which simultaneously implemented MCL 500.8101 *et seq*.

then plaintiffs are limited to pursuing their claim with the Illinois liquidator or an ancillary receiver, if one exists in Michigan. And because there is no ancillary receiver in Michigan, plaintiffs would thus be limited to pursuing their claim with the Illinois liquidator. For the reasons provided herein, we conclude that Illinois is a reciprocal state, which requires that the pending case in Michigan be dismissed.

MCL 500.8103(*l*) provides the definition of what constitutes a "reciprocal state" and reads as follows:

> "Reciprocal state" means a state other than this state in which all of the following occurs:
>
> (*i*) In substance and effect [MCL 500.8118(1), 8152, 8153, 8155, 8156, and 8157] are in force.
>
> (*ii*) Provisions requiring that the commissioner or equivalent official be the receiver of a delinquent insurer are in force.
>
> (*iii*) Some provision for the avoidance of fraudulent conveyances and preferential transfers are in force.

With respect to the first list of requirements under MCL 500.8103(*l*)(*i*), MCL 500.8118(1) provides that when a domestic insurer is liquidated, the Commissioner of Insurance becomes the liquidator and is vested with title to the domestic insurer's assets, property, contracts, and rights of action. This provision is substantively matched by the Illinois statute 215 ILCS 5/191.[4] Next, MCL 500.8152 provides that the liquidator of an insurer domiciled in a reciprocal state is vested with title to the insurer's assets, property, contracts, and rights of action, which is substantively matched by

[4] 215 ILCS 5/191 provides that "[t]he Director and his successor and successors in office shall be vested by operation of law with the title to all property, contracts, and rights of action of the company as of the date of the order directing rehabilitation or liquidation."

215 ILCS 5/221.2.[5] Next, MCL 500.8155 provides that claims against a domestic insurer may be filed with the liquidator or the ancillary receiver, if one exists, which is substantively matched by 215 ILCS 5/221.3.[6] Next, MCL 500.8156 provides that claims against an insurer domiciled in a reciprocal state may be filed with the domiciliary liquidator or the ancillary receiver, if one exists; this provision is substantively matched by 215 ILCS 5/221.4.[7] And finally, MCL 500.8157 provides that an attachment, garnishment, levy of execution, or other related proceeding may not be commenced or maintained against the domestic insurer during liquidation proceedings, and that is substantively matched by 215 ILCS 5/189 and 215 ILCS 5/221.9,[8] taken together.

With respect to the second requirement of MCL 500.8103(*l*)(*ii*), 215 ILCS 5/191 provides that the director of insurance is the receiver of a domiciliary insurer.

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[5] 215 ILCS 5/221.2 provides that "[t]he domiciliary receiver of an insurer domiciled in a reciprocal state shall . . . be vested by operation of law with the title to all of the assets, property, contracts, agents' balances, and all of the books, accounts and other records . . . ."

[6] 215 ILCS 5/221.3 provides that "[i]n any delinquency proceeding begun in this state against a domiciliary insurer of this state, claimants residing in a reciprocal ancillary state may file claims either with the ancillary receiver, if any, or with the domiciliary receiver."

[7] 215 ILCS 5/221.4 provides that "[i]f a delinquency proceeding is commenced in a reciprocal state . . . claimants against such insurer who reside within this State may file claims either with the ancillary receiver, if any, appointed in this State or with the domiciliary receiver."

[8] 215 ILCS 5/189 provides that the court may "restrain all persons, companies, and entities from bringing or further prosecuting all actions and proceedings at law or in equity or otherwise, whether in this State or elsewhere, against the company or its assets or property or the Director . . . ." And 215 ILCS 5/221.9 provides that "[i]n the event of the commencement of delinquency proceedings in any reciprocal state no action or proceeding in the nature of an attachment, garnishment, execution or otherwise, shall be commenced in the courts of this state against such delinquent insurer or its assets."

And with respect to the last requirement of MCL 500.8103(*l*)(*iii*), 215 ILCS 5/204 prohibits and renders voidable fraudulent conveyances and preferential transfers.

Accordingly, the requirements of MCL 500.8103(*l*) are met, and Illinois is a reciprocal state. As a result, MCL 500.8156(1) requires plaintiffs to file their claims with either the ancillary receiver in Michigan, if one exists, or with the Illinois liquidator. And because there is no ancillary receiver in Michigan, plaintiffs must file their claim with the Illinois liquidator, i.e., the Illinois director of insurance.

We note that when the trial court made its reasoned decision in December 2012 to deny defendant's motion to dismiss without prejudice, there was no order to liquidate before it; the only order was an order of rehabilitation. It is clear that, given the Illinois liquidation proceedings, dismissal is now required under MCL 500.8156(1). Accordingly, we remand this case to the trial court with instructions to dismiss. Having resolved the appeal on this basis, we need not address whether the trial court erred by declining to dismiss this case under the principles of comity or forum non conveniens.

Remanded for dismissal without prejudice. We do not retain jurisdiction.

DONOFRIO, P.J., and K. F. KELLY and FORT HOOD, JJ., concurred.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v LAGOONS FOREST CONDOMINIUM ASSOCIATION

Docket No. 313953. Submitted May 9, 2014, at Detroit. Decided May 15, 2014, at 9:05 a.m.

The Federal National Mortgage Association (Fannie Mae) brought an action in the Oakland Circuit Court against the Lagoons Forest Condominium Association, seeking, in part, declaratory relief in the form of an order releasing Fannie Mae from a lien with regard to delinquent condominium association fees filed by defendant against a condominium unit. RBS Citizen's Bank had purchased the unit at the sheriff's sale on March 1, 2011, after the owners of the unit defaulted on the mortgage. The sheriff's deed stated that the statutory redemption period would end on September 1, 2011, at which time the deed would become fully operative. On April 7, 2011, RBS Citizens Bank transferred the property to Fannie Mae by quitclaim deed for $1. Defendant then filed an amendment to its lien, seeking more in unpaid association assessment fees and naming Fannie Mae as the owner of the unit. Defendant also sent a letter to Fannie Mae that claimed that because Fannie Mae never requested a written statement from defendant of the amount of unpaid assessments owed, pursuant to MCL 559.211(2), Fannie Mae owed defendant for all the unpaid assessments, including those that accrued before and those that accrued after the foreclosure sale. Fannie Mae's complaint also alleged common-law slander of title, statutory slander of title, and recording documents with the intent to harass or intimidate. Defendant filed a counter-complaint, and both parties moved for summary disposition. The trial court, Shalina D. Kumar, J., determined that, because Fannie Mae had not requested a written statement of the unpaid assessments at least five days before the property was transferred to it by RBS Citizens Bank, Fannie Mae owed the assessments, including those that accrued before the foreclosure sale. The trial court entered an order denying Fannie Mae's motion and granting defendant's motion. Fannie Mae appealed.

The Court of Appeals *held*:

1. Pursuant to MCL 559.158, both RBS Citizens Bank and Fannie Mae were not liable for any assessments and fees that had

accrued on the unit before RBS Citizens Bank's purchase on March 1, 2011. The fact that Fannie Mae did not comply with MCL 559.211(2) by requesting a written statement from defendant before it obtained title from RBS Citizens Bank does not restore the association assessments that were eliminated by the foreclosure. The circumstance described in MCL 559.158 involving foreclosure sales is more specific than the circumstances involving generic sales or conveyances addressed in MCL 559.211. The provisions of MCL 559.158 and MCL 559.211 create a patent ambiguity and irreconcilably conflict with one another. The provisions of MCL 559.158, being the more specific, prevail over the provisions of MCL 559.211 in resolving this appeal.

2. Fannie Mae, as the successor of RBS Citizens Bank, is only liable for the assessments that accrued after RBS Citizens Bank acquired title to the unit. RBS Citizens Bank took title, albeit title limited by the statutory redemption period, on the date of the sheriff's sale, March 1, 2011. The equitable title the bank received on March 1, 2011, was sufficient "title" for purposes of MCL 559.158. Fannie Mae properly owes all the assessments from March 1, 2011, onward.

3. The trial court did not err by dismissing Fannie Mae's claims for common-law slander of title, statutory slander of title, and unlawful recording of documents with intent to harass or intimidate. It cannot be said that defendant filed an invalid lien with the intent to cause Fannie Mae injury. Defendant's claim under the lien was asserted in good faith, upon probable cause, or was prompted by a reasonable belief that it had rights in the condominium unit at issue.

Affirmed in part, reversed in part, and remanded.

1. STATUTES — JUDICIAL CONSTRUCTION.

Specific statutory provisions prevail over more general ones when confronted with two conflicting statutory provisions.

2. CONDOMINIUMS — FORECLOSURES — TITLE — ASSESSMENTS.

When a party obtains "title" to a condominium unit as a result of a foreclosure of a first mortgage, that party is not liable for the assessments by the administering body of the condominium that are chargeable to the unit that became due before the acquisition of title to the unit by that mortgagee or purchaser and his or her successors and assigns; an equitable title possessed by the purchaser at a sheriff's sale, which does not vest full title in its holder until the statutory redemption period expires, is a "title" for purposes of the rule (MCL 559.158).

3. ACTIONS — SLANDER OF TITLE — MALICE.

To prove slander of title under the common law or MCL 565.108, a claimant must show falsity, malice, and special damages; the crucial element is malice; the claimant must show some act of express malice by the defendant, which implies a desire or intention to injure; malice may not be inferred merely from the filing of an invalid lien; the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury; a plaintiff may not prevail 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 (MCL 565.108).

Trott & Trott, PC (by *Charles L. Hahn*), for plaintiff.

Zelmanski, Danner & Fioritto, PLLC (by *Tracy N. Danner* and *Corene C. Ford*), for defendant.

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

DONOFRIO, J. Plaintiff/counterdefendant, Federal National Mortgage Association (Fannie Mae), appeals as of right an order denying summary disposition in its favor and granting summary disposition in favor of defendant/counterplaintiff, Lagoons Forest Condominium Association. For the reasons stated below, we affirm in part, reverse in part, and remand.

I. BASIC FACTS

This case arises out of a foreclosure and subsequent sheriff's sale of a condominium unit in West Bloomfield, Michigan. The owners of the condominium unit had stopped making payments and defaulted on the mortgage. Additionally, the owners also had failed to pay their condominium association fees and owed defendant $2,460.58 in delinquent association assessment fees.

Defendant filed a lien against the property for the unpaid condominium assessments on January 5, 2006.

On March 1, 2011, at the sheriff's sale, RBS Citizens Bank purchased the unit for $162,800 and received a sheriff's deed for the property. The sheriff's deed stated that the statutory period for redemption by the previous owners would end on September 1, 2011, at which time the sheriff's deed would become fully operative. On April 7, 2011, RBS Citizens Bank transferred the property to Fannie Mae by quitclaim deed in exchange for $1.

On September 9, 2011, defendant filed an amendment to its existing lien against the condominium at issue. The amendment provided that the unpaid sum was $13,144.27 and that the owner of the condominium unit was Fannie Mae. On the same day, attorneys for defendant sent a letter to Fannie Mae claiming that because Fannie Mae never requested a written statement from the condominium association of the amount of unpaid assessments owed, pursuant to MCL 559.211(2), it owed defendant for all of the unpaid assessments, including those that accrued before and those that accrued after the foreclosure sale.

On March 29, 2012, Fannie Mae filed its complaint against defendant in this case. The complaint requested that the court grant declaratory relief in the form of an order releasing Fannie Mae from defendant's condominium lien. The complaint further alleged common-law slander of title, statutory slander of title, and recording of documents with the intent to harass or intimidate. Defendant filed a countercomplaint, alleging that Fannie Mae owed it $21,619.27 for unpaid assessments, late charges, and legal fees pursuant to the Condominium Act, MCL 559.101 *et seq*.

On June 27, 2012, Fannie Mae filed its motion for summary disposition, pursuant to MCR 2.116(C)(8), (9), and (10). Fannie Mae argued that the condominium fees were illegal because defendant's lien was extinguished by the foreclosure and that the provision of the Condominium Act requiring notice to the association before a transfer, MCL 559.211, does not apply to assignments after a foreclosure. Fannie Mae further argued that the acquisition of title that occurs as the result of a sheriff's sale does not take place until after the statutory redemption period, rather than on the date of sale. Finally, Fannie Mae argued that its claims for slander of title and unlawful recording of documents with the intent to harass or intimidate were proper because defendant knew that its condominium lien was illegal at the time it filed the amendment.

On July 31, 2012, defendant filed its competing motion for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10). Defendant argued that there was no genuine issue of material fact that Fannie Mae acquired title to the condominium unit as a result of the quitclaim deed from RBS Citizens Bank and, as a result of Fannie Mae's failure to pay the amount owed or to request a written statement setting forth the unpaid fees, Fannie Mae was liable for the full amount of assessments and costs. Further, defendant argued that Fannie Mae failed to state a claim on which relief could be granted for either its claims for slander of title or recording of documents with the intent to harass or intimidate.

On September 19, 2012, the trial court held a hearing on the parties' competing motions for summary disposition. The trial court determined that MCL 559.211 did not distinguish between types of conveyances, which meant that RBS Citizens Bank's transfer to Fannie Mae

was a conveyance under the statute. Consequently, because Fannie Mae had not requested a written statement of the unpaid assessments at least five days before the sale, it owed "*any* unpaid assessments against the condominium," which included assessments owed on the condominium that accrued before the foreclosure. The trial court entered an order denying Fannie Mae's motion and granting defendant's motion.

II. STANDARD OF REVIEW

Both parties moved for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10). But because the parties relied on materials outside the pleadings, such as the mortgage filings attached to the parties' briefs in this case, this Court will treat the trial court's decision as one based on MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing a grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of

material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, the record leaves open an issue upon which reasonable minds may differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

But to the extent that our review involves issues of statutory interpretation, that aspect of our review is de novo. *Podmajersky v Dep't of Treasury*, 302 Mich App 153, 162; 838 NW2d 195 (2013). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). To ascertain the Legislature's intent, we look to the language in the statute and give the words their plain and ordinary meanings. *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246; 801 NW2d 629 (2010). If the plain and ordinary meaning is otherwise clear, "judicial construction is neither required nor permitted." *In re Receivership of 11910 S Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). Judicial construction is only appropriate when an ambiguity exists in the language of the statute. *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013). A statute is ambiguous when it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

III. ANALYSIS

A. CONDOMINIUM ACT

Fannie Mae first contends that the trial court erred by ruling that it was liable for association assessments because the court's application of MCL 559.211 to the instant case was improper. We agree, in part.

MCL 559.211 provides, in pertinent part:

> (1) Upon the sale or conveyance of a condominium unit, all unpaid assessments, interest, late charges, fines, costs, and attorney fees against a condominium unit shall be paid out of the sale price or by the purchaser in preference over any other assessments or charges of whatever nature . . . .
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> * * *
>
> (2) . . . Unless the purchaser or grantee requests a written statement from the association of co-owners as provided in this act, at least 5 days before sale, the purchaser or grantee shall be liable for any unpaid assessments against the condominium unit together with interest, costs, fines, late charges, and attorney fees incurred in the collection thereof.

"Association of co-owners" is defined as "the person designated in the condominium documents to administer the condominium project," MCL 559.103(4), which is in this case, defendant. However, MCL 559.158 provides, in pertinent part:

> 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.

The statute does not define "successors and assigns." When a legal term of art is left undefined, it is appropriate for this Court to consult a legal dictionary. *Hunter v Sisco*, 300 Mich App 229, 239; 832 NW2d 753 (2013). *Black's Law Dictionary* (9th ed) defines "successor" as "one who replaces or follows a predecessor," and "successor in interest" as "[o]ne who follows an-

other in ownership or control of property." Further, "assign" is defined by way of "assignee" as "[o]ne to whom property rights or powers are transferred by another." *Id*.

Neither party disputes that RBS Citizens Bank acquired the sheriff's deed to the condominium as the result of a purchase pursuant to a foreclosure sale on March 1, 2011. Further, neither party disputes that Fannie Mae obtained its interest in the condominium as a result of a quitclaim deed granted by RBS Citizens Bank. Therefore, RBS Citizens Bank can properly be described as the "purchaser" and Fannie Mae can properly be described as its "successor and assign." Accordingly, pursuant to MCL 559.158, both RBS Citizens Bank and Fannie Mae were not liable for any assessments and fees that had accrued on the condominium before RBS Citizens Bank's purchase on March 1, 2011.[1]

The trial court's reliance on MCL 559.211 in ruling that Fannie Mae was liable for all of the assessments, even those incurred before March 1, 2011, was misplaced. While there is no doubt that the quitclaim deed transfer between RBS Citizens Bank and Fannie Mae was a "sale or conveyance" under MCL 559.211 and that Fannie Mae never requested a written statement from defendant regarding the amount of unpaid assessments, it is clear that the specific provisions of MCL 559.158 govern the circumstances here.

It is "well established that to discern the Legislature's intent, statutory provisions are *not* to be read in

[1] While it is certain that RBS Citizens Bank and Fannie Mae cannot be held liable for assessments made before March 1, 2011, we address later in this opinion whether any liability attaches for assessments made between the date of the sheriff's sale and the date the redemption period expired, September 1, 2011.

isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). Reading the statutes as a whole, it is clear that MCL 559.158 and MCL 559.211 create a patent ambiguity and irreconcilably conflict with each other: MCL 559.158 provides that any purchaser (along with any successors or assigns) who acquires title as a result of a foreclosure sale is "not liable" for any assessments that became due before the purchaser obtained title, but MCL 559.211(2) provides that if any "purchaser or grantee" does not request a written accounting of the property's assessments, then that purchaser or grantee "shall be liable for any unpaid assessments." Thus, given the ambiguity, judicial construction is permissible. *Whitman*, 493 Mich at 312.

When confronted with two conflicting statutory provisions, specific statutory provisions prevail over more general ones. *Ter Beek v City of Wyoming*, 495 Mich 1, 22; 846 NW2d 531 (2014). It is abundantly clear that MCL 559.158 acts to eliminate all preexisting association assessments and corresponding fees and costs once a condominium is foreclosed upon, unless the original owner reclaims the property during the redemption period. The specific circumstance described in MCL 559.158 involving "foreclosure" sales prevails over the general circumstance described in MCL 559.211 involving generic "sale[s] or conveyance[s]." See *id*. Thus, because RBS Citizens Bank took title as a result of a sheriff's sale after a foreclosure, and because Fannie Mae was a successor in interest, the foreclosure acted to eliminate all preexisting association assessments. MCL 559.158. Furthermore, even though Fannie Mae did not comply with MCL 559.211(2) by requesting a written statement from defendant before it obtained title from

RBS Citizens Bank, this fact does not restore the association assessments that were eliminated by the foreclosure.

Therefore, we must determine the applicable date from which Fannie Mae is liable for any outstanding association assessments. Pursuant to MCL 559.158, if a party obtains "title" to a condominium unit as a result of foreclosure, that party is not liable for assessments "that became due prior to the *acquisition of title* to the unit." (Emphasis added.) As RBS Citizens Bank's successor, Fannie Mae is only liable for the assessments that accrued after RBS Citizens Bank acquired "title" to the condominium unit.

Fannie Mae argues that because a sheriff's deed does not vest "full title" in its holder until after the statutory redemption period passes, it is not liable for any assessments that became due before the end of the statutory redemption period, which was September 1, 2011. In support of this contention, Fannie Mae cites caselaw holding that a sheriff's deed grants the holder an equitable interest in the foreclosed property, which vests or ripens into absolute title only if the sheriff's deed is not defeated by redemption during the statutory period. See, e.g., *Gerasimos v Continental Bank*, 237 Mich 513, 519-520; 212 NW 71 (1927); *Dunitz v Woodford Apartments Co*, 236 Mich 45, 49; 209 NW 809 (1926); *Ruby & Assoc, PC v Shore Fin Servs*, 276 Mich App 110, 117-118; 741 NW2d 72 (2007), vacated in part on other grounds 480 Mich 1107 (2008). However, this argument ignores those same cases, which state that a sheriff's deed grants "equitable *title*," *Gerasimos*, 237 Mich at 520 (emphasis added); *Ruby*, 276 Mich App at 118 (emphasis added), or "an interest or *title*, equitable in character," *Dunitz*, 236 Mich at 49 (emphasis added). While there is no doubt that a sheriff's deed does not

grant absolute title, that characteristic is not dispositive. As this Court has recently held, "[MCL 559.158] does not require that the purchaser have 'absolute title,' just a 'title,' and an equitable title is a form of title." *Wells Fargo Bank v Country Place Condo Ass'n*, 304 Mich App 582, 593; 848 NW2d 425 (2014).

Therefore, on this basis, we hold that RBS Citizens Bank took title, albeit title limited by the statutory redemption period, on the date of the sheriff's sale, March 1, 2011. The statute, MCL 559.158, does not specify the type of "title" a purchaser must acquire after which assessments can accrue, and the equitable title possessed by RBS Citizens Bank as a result of the sheriff's deed and then transferred to Fannie Mae was sufficient. *Id*. Therefore, Fannie Mae properly owes all association fees and assessments from March 1, 2011, onward.[2]

B. SLANDER OF TITLE AND UNLAWFUL RECORDING OF DOCUMENTS WITH INTENT TO HARASS OR INTIMIDATE

Fannie Mae next contends that the trial court erred by granting summary disposition in favor of defendant and dismissing its claims for common-law slander of title, statutory slander of title, and unlawful recording of documents with intent to harass or intimidate. We disagree.

To prove slander of title under the common law, a claimant "must show falsity, malice, and special dam-

[2] We also note that it is not unfair or inequitable to hold a purchaser or grantee in Fannie Mae's position liable for such assessments because (1) as an equitable title holder, it is benefiting from the association's governance during the redemption period (e.g., common-area maintenance) and (2) in the event that the original owner redeems the property before the expiration of the applicable period, the owner would have to reimburse the purchaser or grantee for any assessments it paid. MCL 600.3240(1) and (4).

ages, 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 establishes a cause of action for "[a] person who violates [MCL 565.25] by encumbering 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 is required to show some act of express malice by the defendant, 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 prevail on 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.

Fannie Mae contends that the trial court erred by dismissing its claims for slander of title, both common law and statutory, and unlawful recording of a document with the intent to harass or intimidate because defendant's lien was knowingly filed in contradiction of established law. However, because we held that defendant did properly have a claim to association assess-

ments against Fannie Mae, it cannot be said that defendant "filed an *invalid lien* with the intent to cause [Fannie Mae] injury." *Stanton*, 186 Mich App at 262 (emphasis added).

Further, even if defendant did not partially prevail on its claim for association assessments, defendant's "claim under the [lien] was asserted in good faith upon probable cause or was prompted by a reasonable belief that [it] had rights in the real estate in question." *Glieberman*, 248 Mich at 12. Fannie Mae has cited, and this Court has found, no caselaw of either this Court of our Supreme Court that is directly contrary to the position that defendant took at trial regarding the lien, a fact that cuts against a finding of malice.

Additionally, Fannie Mae's counsel attached to its motion for summary disposition a list of decisions from both the Wayne and the Oakland Circuit Courts that counsel characterized as either "favorable decisions" or "unfavorable decisions." By Fannie Mae's own assertion, this issue has led to some disagreement between judges in the circuit courts. Even based on Fannie Mae's proffered "unfavorable decisions," defendant could have asserted its claim "in good faith upon probable cause." *Id*.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No costs, as neither party has prevailed in full. MCR 7.219.

RIORDAN, P.J., and FORT HOOD, J., concurred with DONOFRIO, J.

MAGDICH & ASSOCIATES, PC v NOVI DEVELOPMENT ASSOCIATES LLC

Docket No. 314518. Submitted May 9, 2014, at Detroit. Decided May 15, 2014, at 9:10 a.m. Leave to appeal sought.

Magdich & Associates, PC, brought an action for declaratory relief in the Oakland Circuit Court against its landlord, Novi Development Associates LLC, after defendant charged plaintiff rent on a space adjacent to plaintiff's. Defendant asserted that it had not renewed the lease on the adjacent space because plaintiff had exercised its right of first refusal, but plaintiff denied having done so. After defendant filed a counterclaim, the parties stipulated to limit the litigation to issues regarding the adjacent space. Defendant filed a motion to amend the counterclaim to remove the resolved issues and retain the remaining issues, which the court, Rudy J. Nichols, J., denied. A month later, defendant again moved to amend the counterclaim, asserting that amendment was necessary because plaintiff had damaged the premises, removed defendant's property, and failed to meet its obligations after the case was originally filed. While the court was considering the matter, the parties proceeded to case evaluation and accepted the resulting award. After the amount was paid, the court granted in part defendant's motion to allege additional claims and denied plaintiff's subsequent motion to dismiss. Plaintiff's application for leave to appeal this order included a motion for peremptory reversal, which the Court of Appeals granted. The Supreme Court, in lieu of granting defendant's application for leave to appeal, vacated the peremptory-reversal order and remanded the case to the Court of Appeals for plenary consideration. 495 Mich 864 (2013).

The Court of Appeals *held*:

The parties' acceptance and payment of the case evaluation award required the trial court to dismiss all claims with prejudice pursuant to MCR 2.403(M). Defendant's contention that plaintiff's case summary and the outstanding ruling on the motion to amend the counterclaim meant that fewer than all available claims were submitted to case evaluation, as well as defendant's contention that it had no obligation to file a motion to adjourn in light of

the trial court's order limiting the case issues, were contrary to the Supreme Court's decision in *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549 (2002).

Reversed and remanded for entry of an order of dismissal with prejudice pursuant to MCR 2.403(M).

CASE EVALUATION AWARDS — ACCEPTANCE — DISMISSAL WITH PREJUDICE — STIPULATIONS TO LIMIT THE ISSUES — OUTSTANDING MOTIONS TO AMEND A COUNTERCLAIM.

The parties' acceptance and payment of a case evaluation award requires the trial court to dismiss all claims with prejudice pursuant to MCR 2.403(M), including any claims that were excluded by stipulation or were the subject of an outstanding motion to amend a counterclaim.

Magdich Law (by *Karen W. Magdich* and *Neil E. Hansen*) for plaintiff.

Kim T. Capello and *Berkley Mengel PLC* (by *Christopher E. Mengel*) for defendant.

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM. On January 29, 2013, plaintiff, Magdich & Associates, PC, filed an application for leave to appeal the trial court order denying its motion to dismiss the case following the acceptance of a case evaluation award by plaintiff and defendant, Novi Development Associates LLC. With the application, plaintiff also filed a motion for immediate consideration, a motion for stay, and a motion for peremptory reversal. On March 19, 2013, this Court granted the motion for peremptory reversal. *Magdich & Assoc PC v Novi Dev Assoc, LLC*, unpublished order of the Court of Appeals, entered March 19, 2013 (Docket No. 314518). Defendant applied for leave to appeal in the Supreme Court. On September 30, 2013, the Supreme Court, in lieu of granting leave to appeal, vacated the Court of Appeals order and remanded the case to the

Court of Appeals for plenary consideration. *Magdich & Assoc PC v Novi Dev Assoc LLC*, 495 Mich 864 (2013). Having given plenary consideration to the issue, we once again reverse the trial court's denial of plaintiff's motion to dismiss the case with prejudice pursuant to MCR 2.403(M).

This litigation arose from a dispute between plaintiff, the tenant, and defendant, the landlord. Pursuant to a lease agreement, plaintiff had a right of first refusal to adjacent lease space. Defendant asserted that it did not renew the lease agreement of the suite known as the "Crawford space" because plaintiff had exercised the right of first refusal. Plaintiff denied exercising the option and filed an action for declaratory relief in light of defendant's demands regarding rent. In response, defendant filed a counterclaim. However, the parties entered into a stipulation to limit the circuit court case to the issues regarding the Crawford space.

In light of the parties' stipulation to limit the issues, defendant filed a motion to amend the counterclaim to remove the resolved issues and retain the remaining issues. The trial court denied the motion. Approximately one month later, on August 6, 2012, defendant filed another motion to amend the counterclaim. Defendant asserted that amendment was necessary because plaintiff had caused damage to the premises, removed property belonging to defendant, and failed to meet its obligations—claims that defendant alleged did not exist when the complaint was filed. The trial court took the motion under advisement.

On November 21, 2012, the parties proceeded to case evaluation. That same day, the case evaluation panel issued an award. Both parties accepted the award without qualification. Plaintiff alleged, and defendant does not dispute, that it learned of the acceptance of the

case evaluation award on December 20, 2012, and paid the award to defendant on December 21, 2012. Following the acceptance and payment of the award, the trial court rendered its decision regarding defendant's motion to amend the counterclaim. Specifically on January 4, 2013, the trial court issued an opinion and order granting in part defendant's motion to allege additional claims. On January 8, 2013, plaintiff filed a motion for entry of an order of dismissal with prejudice pursuant to MCR 2.403(M). Pursuant to court rule and interpretative caselaw, plaintiff alleged that the case was resolved with regard to all claims, irrespective of the type of claims submitted to the case evaluation panel. Defendant opposed the motion, alleging that fewer than all the claims had been submitted to the case evaluation, and sought a new scheduling order for the remaining claims. The trial court denied the motion to dismiss, noting that it created the circumstance by failing to rule on the motion to amend the counterclaim sooner. Plaintiff's request for a stay of the decision was denied.

Plaintiff alleges that the acceptance and payment of the case evaluation award required the trial court to dismiss all claims with prejudice pursuant to MCR 2.403(M). We agree. "The proper interpretation and application of a court rule is a question of law, which [an appellate court] reviews de novo." *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). The interpretation and application of a court rule is governed by the principles of statutory construction, commencing with an examination of the plain language of the court rule. *Id*. at 704-705. "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Id*. at 706.

MCR 2.403, the case evaluation rule, provides in relevant part:

> (A) Scope and Applicability of Rule.
>
> (1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property.
>
> * * *
>
> (3) A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.
>
> * * *
>
> (M) Effect of Acceptance of Evaluation.
>
> (1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits under MCL 500.3101 *et seq*., for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing.
>
> (2) If only a part of an action has been submitted to case evaluation pursuant to subrule (A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order disposing of only those claims.

"In general, the purpose of MCR 2.403 is to expedite and simplify the final settlement of cases to avoid a trial." *Larson v Auto-Owners Ins Co*, 194 Mich App 329, 332; 486 NW2d 128 (1992). "An accepted [case] evaluation serves as a final adjudication . . . and is therefore

binding on the parties similar to a consent judgment or settlement agreement." *Id*. "The purpose of case evaluation sanctions is to shift the financial burden of trial onto the party who demands a trial by rejecting a proposed case evaluation award." *Tevis v Amex Assurance Co*, 283 Mich App 76, 86; 770 NW2d 16 (2009).

In *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549; 640 NW2d 256 (2002), the plaintiff filed a four-count complaint against the defendant claiming damages for breach of contract and failure to pay for services rendered. Specifically, Counts I through III alleged a failure to pay for services rendered, but Count IV alleged that a separate contract was breached by preventing the plaintiff from performing the work. The trial court granted the defendant's motion for summary disposition of Count IV because the contract did not comply with the statute of frauds, and the plaintiff did not appeal that decision. *Id*. at 550-551.

The case was submitted to case evaluation, where the parties disputed whether the dismissal of Count IV was addressed to the case evaluation panel. The panel recommended that the defendant pay the plaintiff $5,400, and the parties accepted the award. The defendant asked the trial court to enter an order dismissing the entire case with prejudice in accordance with MCR 2.403(M)(1). The plaintiff opposed the motion, asserting that it reserved the right to appeal the summary disposition ruling on Count IV. Specifically, the plaintiff alleged that the case evaluation award only addressed the claims raised in Counts I through III of the complaint. The trial court agreed with the plaintiff, instructing the parties to craft a judgment that preserved the appellate issue regarding summary disposition and otherwise constituted a final order in the case. This Court, however, dismissed the appeal of the summary

disposition decision, holding that the plaintiff was not an aggrieved party because of the acceptance of the award. *Id*. at 551-553.

On appeal, our Supreme Court rejected the assertion that a party could challenge an earlier partial summary disposition ruling after accepting a case evaluation award because it was contrary to the plain language of the court rule. *Id*. at 553-554. Our Supreme Court examined the principles governing interpretation of the court rules and the dictionary definitions of the terms "claim" and "action" before ruling as follows:

> The language of MCR 2.403(M)(1) could not be more clear that accepting a case evaluation means that *all claims* in the *action*, even those summarily disposed, are dismissed. Thus, allowing bifurcation of the claims within such actions, as plaintiff suggests, would be directly contrary to the language of the rule. We, therefore, reject plaintiff's position because it is contrary to the court rule's unambiguous language that upon the parties' acceptance of a case evaluation all claims in the action be disposed.
>
> * * *
>
> These [Court of Appeals decisions holding to the contrary] improperly allow a party to make a showing that "less than all issues were submitted" to case evaluation. Allowing the parties involved in the case evaluation process to make such a showing has no basis in the court rule. . . . As we have explained, this unambiguous language [of MCR 2.403(M)(1)] evidences our desire to avoid bifurcation of civil actions submitted to case evaluation. To the extent that *Reddam* [*v Consumer Mortgage Corp*, 182 Mich App 754; 452 NW2d 908 (1990)] and its progeny have been read to suggest that parties may except claims from case evaluation under the current rule, these cases are overruled. If all parties accept the panel's evaluation, the case is over.
>
> In the present case, both parties accepted the panel's case evaluation, and defendant sent the required check

> within twenty-eight days. In those circumstances, the circuit court should have granted defendant's motion to dismiss, without condition or reservation. Thus, because the circuit court should have dismissed this case in its entirety, the Court of Appeals did not err when it dismissed the plaintiff's claim of appeal. Accordingly, we affirm the dismissal order of the Court of Appeals. [*Id*. at 555-557.]

In light of *CAM Constr*, the trial court erred by denying plaintiff's motion to dismiss with prejudice. The purpose of the case evaluation rule is to expedite and simplify the final settlement of cases to avoid a trial. *Larson*, 194 Mich App at 332. The case evaluation is binding and is comparable to a consent judgment or settlement agreement. *Id*. The court rules governing case evaluation provide that "claims seeking equitable relief" may be exempted from case evaluation upon good cause shown or the stipulation of the parties if the court finds that the evaluation of such claims would be inappropriate. MCR 2.403(A)(3). However, the plain language of the court rule does not exempt any other type of claim from case evaluation, see *Haliw*, 471 Mich at 704-705, and defendant does not allege that the claims raised fall within the equitable-relief exception.

Defendant contends that fewer than all available claims were submitted to case evaluation as evidenced by plaintiff's case evaluation summary and the outstanding ruling on the motion to amend the counterclaim. Further, defendant asserts that it could rely on the trial court order limiting the case issues and did not have an obligation to file a motion to adjourn.[1] We

[1] We reject defendant's assertion that it could rely on the trial court's order of June 4, 2012, as a limitation on the issues submitted to the case evaluation panel. This order was a stipulated administrative order to distinguish the claims raised in district court. The parties did not expressly reserve the right to exempt claims from case evaluation in accordance with MCR 2.403(M)(2) in this order.

disagree with these arguments because they are contrary to the *CAM Constr* decision.

The *CAM Constr* Court noted that the plain language of the court rule provides that the judgment entered pursuant to case evaluation disposes of "*all claims* in the *action* . . . ." *CAM Constr*, 465 Mich at 555. The Court analyzed the terms "claim" and "action" and held that "a claim consists of facts giving rise to a right asserted in a judicial proceeding, which is an action. In other words, the action encompasses the claims asserted." *Id*. at 554-555. The Court rejected the defendant's assertion that claims could be bifurcated because it was "directly contrary to the language of the [court] rule." *Id*. at 555. Indeed, the purpose of case evaluation is to resolve the case, not to bifurcate litigation or decide it piecemeal. See *Larson*, 194 Mich App at 332. Additionally, MCR 2.403(C)(1) allows a party to file a motion to remove the matter from case evaluation. There is no indication that defendant filed a motion to remove or adjourn the matter until a ruling was rendered on the motion to amend its counterclaim.

Moreover, to the extent that defendant claims that it definitively established that fewer than all claims were submitted to case evaluation, the *CAM Constr* Court held that such a showing is impermissible. *CAM Constr*, 465 Mich at 556 ("These [Court of Appeals decisions] improperly allow a party to make a showing that 'less than all issues were submitted' to case evaluation. Allowing the parties involved in the case evaluation process to make such a showing has no basis in the court rule."). The *CAM Constr* Court overruled those Court of Appeals cases suggesting "that parties may except claims from case evaluation under the current rule," stating that "[i]f all parties accept the panel's evaluation, the case is over." *Id*. at 557.

In short, both parties accepted the case evaluation award without qualification, and therefore, the case is over. The trial court erred by denying the motion to dismiss the case with prejudice.

Reversed and remanded for entry of an order of dismissal with prejudice pursuant to MCR 2.403(M). Plaintiff, the prevailing party, may tax costs. MCR 7.219. We do not retain jurisdiction.

RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ., concurred.

MARIE DE LAMIELLEURE TRUST v DEPARTMENT OF TREASURY

Docket No. 313753. Submitted March 5, 2014, at Lansing. Decided March 20, 2014. Approved for publication May 20, 2014, at 9:00 a.m.

The Marie DeLamielleure Trust (identified in the order being appealed as the Marie "De Lamielleure" Trust) petitioned the Department of Treasury, challenging respondent's decision to assess the trust additional taxes after an audit revealed that the trust had improperly received a principal residence exemption (PRE) for tax years 2005 through 2007. In 2003, Marie DeLamielleure had executed a quitclaim deed of the property at issue to herself as trustee of petitioner. In 2004, after DeLamielleure's death, petitioner filed a request to rescind the PRE. The local assessor, mistakenly believing that it was unnecessary to remove the PRE until the property was sold, did not effectuate petitioner's rescission request. Respondent later reviewed petitioner's PRE status, in accordance with MCL 211.7cc(8), for the tax years 2005 through 2007 and assessed the tax for those three years petitioner was ineligible for, yet received, a PRE. Respondent did not assess any interest or penalties because the assessor acknowledged that he was responsible for the mistaken application of the PRE. The Tax Tribunal, Kimbal R. Smith III, J., initially adopted the proposed opinion and judgment of the hearing referee, which concluded that petitioner was not entitled to the PRE for the years at issue. However, on petitioner's motion for reconsideration, the Tax Tribunal vacated this order in light of *Mikelonis v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2012 (Docket No. 304054). Under *Mikelonis*, the Tribunal concluded that respondent's authority to review a taxpayer's PRE status was limited to instances in which the taxpayer "claimed" the exemption, and petitioner had not claimed the PRE but rather requested that it be rescinded. The Tribunal denied respondent's motion for reconsideration, and respondent appealed.

The Court of Appeals *held*:

The Tax Tribunal erred by reinstating petitioner's PRE for tax years 2005 through 2007. The plain language of MCL 211.7cc(15) required the tax to be corrected after the assessor failed to

effectuate petitioner's written request to rescind the PRE and after the audit determined that the PRE should have been denied. The Tax Tribunal lacked the power to allow the exemption as a matter of equity.

Reversed and remanded.

TAXATION — PRINCIPAL RESIDENCE EXEMPTION — REQUESTS TO RESCIND EXEMPTION — ASSESSOR ERRORS.

A corrected or supplemental tax bill must be issued to a taxpayer who received an invalid principal residence exemption as the result of an assessor's failure to effectuate the taxpayer's request to rescind the exemption (MCL 211.7cc(8)).

Richard J. DeLamielleure for petitioner.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for respondent.

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

DONOFRIO, P.J. Respondent, the Department of Treasury, appeals as of right the October 19, 2012, order of the Michigan Tax Tribunal granting the motion of petitioner, Marie DeLamiellure Trust,[1] for reconsideration of the Tribunal's April 27, 2012, final opinion and judgment. The Tribunal reinstated petitioner's principal residence exemption (PRE) for the tax years in issue. We reverse and remand.

In 2003, Marie De Lamielleure executed a quitclaim deed of the property in issue to herself as trustee of petitioner. In 2004, after De Lamielleure's death, petitioner filed a request to rescind the PRE. The local

[1] We note that the spelling of Marie's last name varies between "DeLamielleure" and "De Lamielleure" in the lower court record, but because the final order uses the latter form in the caption, we will employ that form for consistency.

assessor mistakenly believed that it was unnecessary to remove the PRE until the property was sold and did not effectuate petitioner's rescission request. Respondent later audited petitioner, in accordance with MCL 211.7cc(8), a provision of the General Property Tax Act (GPTA), for the tax years 2005 through 2007 and assessed the tax for those three years petitioner was ineligible for, yet received, a PRE. Respondent did not assess any interest or penalties because the assessor acknowledged that he was responsible for the mistaken application of the PRE.

"Where a statute is clear and unambiguous, judicial construction is neither appropriate nor permitted, and the language contained in the statute must be read according to its ordinary and generally accepted meaning." *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 666; 649 NW2d 760 (2002). "Nothing may be read into a clear statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010) (citation and quotation marks omitted).

"[T]ax exemptions are strictly construed against the taxpayer because exemptions represent the antithesis of tax equality . . . ." *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 150; 549 NW2d 837 (1996). However, ambiguities in the language of a tax statute are resolved in favor of the taxpayer. *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 493; 618 NW2d 917 (2000).

Section 7cc(1) of the GPTA, MCL 211.1 *et seq.*, provides, in relevant part:

> 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 211.7cc(1).]

MCL 211.7cc(2) provides that an owner of property may claim a PRE by filing an affidavit stating that "the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed." MCL 211.7cc also provides for the rescission of a claim for a PRE where the exemption is no longer applicable:

> Except as otherwise provided in this subsection, not more than 90 days after exempted property is no longer used as a principal residence by the owner claiming an exemption, that owner shall rescind the claim of exemption by filing with the local tax collecting unit a rescission form prescribed by the department of treasury. [MCL 211.7cc(5).]

In addition to prescribing procedures by which respondent "may review the validity of exemptions for the current calendar year and for the 3 immediately preceding calendar years," MCL 211.7cc(8) provides the remedy in the instant situation. MCL 211.7cc(8) provides, in relevant part:

> The department of treasury may waive interest on any tax set forth in a corrected or supplemental tax bill for the current tax year and the immediately preceding 3 tax years if the assessor of the local tax collecting unit files with the department of treasury a sworn affidavit in a form prescribed by the department of treasury stating that the tax set forth in the corrected or supplemental tax bill is a result of the assessor's classification error or other error *or the assessor's failure to rescind the exemption after the owner requested in writing that the exemption be rescinded*. Taxes levied in a corrected or supplemental tax bill shall be returned as delinquent on the March 1 in the year imme-

> diately succeeding the year in which the corrected or supplemental tax bill is issued. [Emphasis added.]

MCL 211.7cc(15) provides, in relevant part:

> When an exemption is rescinded, the assessor of the local tax collecting unit shall remove the exemption effective December 31 of the year in which the affidavit was filed that rescinded the exemption. For any year for which the rescinded exemption has not been removed from the tax roll, the exemption shall be denied as provided in this section. However, interest and penalty shall not be imposed for a year for which a rescission form has been timely filed under subsection (5).

Under the plain statutory language, if an assessor failed to rescind a PRE as requested and it is later determined that the PRE should have been denied, the tax should be corrected, but no interest or penalty should be assessed.

Petitioner argues, and the Tax Tribunal agreed, that MCL 211.7cc(8) did not apply to the instant circumstances because petitioner no longer claimed a PRE after requesting a rescission in 2004. Petitioner relies on *Mikelonis v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2012 (Docket No. 304054),[2] in which the Court stated:

> MCL 211.7cc(8) clearly limits respondent's authority to review a taxpayer's PRE status to instances where the taxpayer claimed a PRE, and to deny a claim for a PRE if the property is not the residence of the owner claiming the exemption. Respondent cannot broaden the clear statutory language by denying exemptions under § 7cc(8) that were not claimed by the property owner. In this case, petitioner did not claim a PRE and, therefore, there was no claim for respondent to deny. [*Id*., unpub op at 4.]

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[2] Unpublished cases are not binding authority. MCR 7.215(C)(1).

The Court based its interpretation of MCL 211.7cc(8) on the inclusion of the word "claim" throughout the statute and the requirement in MCL 211.7cc(2) that an affidavit must accompany a claim. *Mikelonis*, unpub op at 3-4. The Court explained that a "claim" could not be equated with receiving a PRE benefit. *Id*. at 4. However, the petitioner in *Mikelonis* made no claim and took no action regarding a PRE throughout the tax years at issue. *Id*. The petitioner could not file a PRE claim because she did not own the property when it was eligible for the PRE and because she was informed that it was no longer eligible for a PRE after she purchased it. See *id*. at 1-2, 4.

In contrast, De Lamielleure claimed a PRE on the property during her lifetime and her trust attempted to rescind the claim after her death. MCL 211.7cc(2) provides that an affidavit for a PRE filed before January 1, 2004, "shall remain in effect until rescinded as provided in this section." Petitioner benefitted from that claim despite an ineffectual attempt to rescind the PRE.

Additionally, the Legislature's inclusion of scenarios in which an assessor failed to rescind a PRE as requested and in which a rescinded PRE had not been removed from the tax rolls indicate that a claim can continue to exist despite the intention to have it removed.

Petitioner cites three cases for the proposition that respondent should be estopped from assessing taxes that were not previously assessed because of respondent's errors.[3] However, these cases do not deal with the

[3] The cases petitioner cites are *Spoon-Shacket Co v Oakland Co*, 356 Mich 151, 167-168; 97 NW2d 25 (1959), *Oliphant v Frazho*, 381 Mich 630, 637-639; 167 NW2d 280 (1969), and *Detroit Hilton Ltd Partnership v Dep't of Treasury*, 422 Mich 422, 429-431; 373 NW2d 586 (1985).

statutory scheme set forth in MCL 211.7cc, which addresses the procedures for claiming and rescinding a PRE. Also, the express powers of the Tax Tribunal are those authorized by statute, and the Tribunal has not been invested with equitable powers. MCL 205.731; MCL 205.732; *Federal-Mogul Corp v Dep't of Treasury*, 161 Mich App 346, 359; 411 NW2d 169 (1987).

The Tribunal committed an error of law, *Klooster v Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011), and reversal is warranted.

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

SAAD and METER, JJ., concurred with DONOFRIO, P.J.

FELLOWS v MICHIGAN COMMISSION FOR THE BLIND

Docket No. 313563. Submitted May 7, 2014, at Lansing. Decided May 20, 2014, at 9:05 a.m. Leave to appeal denied, 497 Mich ___.

Ronald Fellows petitioned in the Ingham Circuit Court for judicial review of a final decision by the Michigan Commission for the Blind (the Commission), which refused to award him monetary damages resulting from a purported violation of the blind and visually disabled persons act, MCL 393.351 *et seq*., by the Commission. Fellows, a blind man, operated vending machines and a food service business from 2005 to 2008 at Cadillac Place, a building leased by the state of Michigan. He did so in accordance with the act, which requires that concessions in buildings owned or occupied by the state be operated by a blind person. Three other concessions, run by sighted persons, also operated in the building. The other concessions were already operating in the building when the state leased it, and the state allowed these vendors to continue operating under their lease agreements. Fellows complained to the Commission's Business Enterprise Program, asserting that one of the other concessions, Star Pharmacy, was taking away business that was rightfully his. The program's agent determined that it could not address Fellows's complaint because Star Pharmacy had a valid lease. Fellows sought administrative review, asking that the Commission (1) advise blind operators of the efforts the Commission made on their behalf, (2) inform other state agencies in Cadillac Place of the rules governing food service and catering, (3) help resolve his conflict with Star Pharmacy, and (4) bar advertisements for outside catering companies in Cadillac Place. When the administrative review failed to resolve Fellows's concerns, he sought a contested case hearing. The hearing officer recommended dismissal of the complaint. The Commission rejected the recommendation and remanded the case to the hearing officer for an evidentiary hearing to determine any damages that Fellows may have suffered. At the hearing, Fellows asserted that the Commission had breached a vending facility agreement, misrepresented the existing competition at Cadillac Place, and illegally allowed sighted persons to operate in the building. Fellows claimed entitlement to $475,576 in damages. The hearing officer recommended that the Commission determine an appropriate amount of dam-

ages in light of the evidence presented at the hearing. After reviewing the recommendation of the hearing officer, the Commission refused to award Fellows damages. Fellows petitioned for judicial review in the Ingham Circuit Court, Paula J. Manderfield, J., which reversed the decision of the Commission and awarded Fellows $475,576 in damages. The Commission sought leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

Administrative agencies are a creation of the Legislature, and their powers are limited to those that the Legislature chooses to delegate to them through statute. Under MCL 393.358, the Commission, pursuant to state-federal agreements: may cooperate with the federal government in carrying out the purposes of a federal statute or regulation, not in conflict with state law, which pertains to rehabilitation of blind persons; may adopt methods of administration, not in conflict with state law, which are necessary for the proper and efficient operation of the agreements or plans for rehabilitation of blind persons; and may comply with conditions, not in conflict with state law, which are necessary to secure the full benefits of federal statute. Contrary to Fellows's assertion, MCL 393.358 does not authorize the Commission to award monetary damages. The statute does not expressly delegate to the Commission the power to award monetary damages, and the statute only applies to state-federal agreements and, therefore, was irrelevant to Fellows's case. Further, the Commission could not infer the authority to award monetary damages because such an award is not necessary to the due and efficient exercise of the powers expressly granted to the Commission by the blind and visually disabled persons act, MCL 393.351 *et seq*. Because the act does not grant the Commission the authority to award monetary damages, Fellows's claim had to be rejected.

Decision of the Ingham Circuit Court reversed, and Fellows's claim dismissed.

ADMINISTRATIVE LAW — MICHIGAN COMMISSION FOR THE BLIND — MONETARY DAMAGES.

Administrative agencies are a creation of the Legislature, and their powers are limited to those that the Legislature chooses to delegate to them through statute; the blind and visually disabled persons act, MCL 393.351 *et seq*., does not expressly authorize the Michigan Commission for the Blind to award monetary damages for violations of the act, and the commission cannot infer the authority to award monetary damages.

Mark E. Kamar and *Gerald J. Cichocki* for Ronald Fellows.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Thomas D. Warren* and *Christopher W. Braverman*, Assistant Attorneys General, for the Michigan Commission for the Blind.

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

SAAD, J.

I. NATURE OF THE CASE

This case involves an issue of first impression: namely, the proper interpretation of the Michigan blind and visually disabled person's act (the Act), MCL 393.351 *et seq*. Among other things, the Act created respondent, the Michigan Commission for the Blind (the Commission),[1] an administrative agency to which the Legislature delegated certain powers. This dispute is about the extent of those powers—specifically, whether the Legislature granted the Commission the

[1] In June 2012, Governor Snyder issued Executive Order No. 2012-5, now codified at MCL 445.2033, which reconstituted the Commission as a constituent part of the newly created Bureau of Services for Blind Persons (the Bureau) within the Department of Licensing and Regulatory Affairs. In addition to transferring the Commission's powers under MCL 393.351 *et seq*. to the Bureau, the executive order also granted the Bureau other statutory authority that is not relevant to this case. See MCL 445.2033. Though petitioner makes no mention of the executive order or the changes it made to the Commission's structure (despite the fact that the Governor issued the executive order more than a year before petitioner filed his brief), his action is not moot, because the executive order provided that suits commenced against the Commission before the order's effective date could be maintained against the Commission's "appropriate successor." MCL 445.2033(X)(B).

ability to award monetary damages to aggrieved claimants. Petitioner, a blind man who operated a concession at the Cadillac Place state office building, claims the Act implies that the Commission has the power to award monetary damages; the Commission says petitioner's reading of the Act is incorrect, and that the Act does not permit it to award monetary damages.

We agree with the Commission, and hold that it does not have the power to award monetary damages to claimants, including petitioner. The powers of an administrative agency are limited to: (1) express powers (i.e., powers that are expressly granted by the Legislature in the language of the enabling statute); and (2) implied powers (i.e., powers that are necessary to the due and efficient exercise of the powers expressly granted by the enabling statute). Because no part of the Act expressly grants the Commission the authority to award monetary damages, and because that authority is not necessary to the due and efficient exercise of the powers expressly granted by the Act, the Commission does not have the power to award monetary damages.

Accordingly, the holding of the trial court, which stated that the Commission had the power to award petitioner monetary damages, is hereby reversed and petitioner's claim is dismissed.

II. FACTS AND PROCEDURAL HISTORY

Petitioner, Ronald Fellows, is blind and operated vending machines and a coffee shop at Cadillac Place from 2005 to 2008. He did so pursuant to the Act, which mandates that a concession "in a building or on property owned or occupied" by the state "shall be operated by a blind person . . . ." MCL 393.359. At the time the

state took occupancy of Cadillac Place,[2] three concessions run by sighted vendors also operated in the building: Star Pharmacy, Subway, and Blend Café.[3] When it occupied Cadillac Place, the state allowed these vendors to continue to operate under their old lease agreements.

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[2] In 1999, General Motors sold the building to New Center Development, Inc., which then leased the building to the state. New Center Development sold the building to the Michigan Strategic Fund, a state agency, in 2011.

[3] Though petitioner characterizes the presence of these other businesses as "illegal," it is not at all clear that the Commission violated any of its statutory obligations by allowing sighted persons to operate concessions in Cadillac Place. As noted, MCL 393.359 states that "[a] concession in a building . . . owned or occupied by this state shall be operated by a blind person . . . except in cases provided for in [MCL 393.360]." This exception provides that: "[a] sighted person operating a concession under contract or lease at the time this act becomes effective [October 1, 1978] shall not be required to surrender the rights before the contract or lease expires." MCL 393.360(2).

Petitioner's argument, then, which seems to suggest that the state should throw out any concessions not run by a blind person, is not necessarily the correct interpretation of the Act. Further, the Act does not contemplate the particular set of facts involved here: when the state leases a private building (Cadillac Place) in a year after 1978 (1999), and that building has existing concessions run by sighted persons under leases that may have been agreed to *after* 1978. Though the Legislature did not contemplate this scenario in MCL 393.360(2), that subsection's preservation of already existing sighted-operator leases indicates that the Legislature would not have wanted to break the type of leases involved here. This position is also common sense: breaking such leases would violate the contractual rights of sighted concession operators, and cost the state an enormous amount of money in litigation fees and damages.

This issue is irrelevant to our determination of this case, as petitioner's claim seeks only monetary damages from the Commission, not the eviction from Cadillac Place of concessions operated by sighted persons, or a declaratory judgment that the Commission's actions violated MCL 393.351 *et seq*. But it is important to note that the basis of petitioner's claim—that the Commission did something "illegal" by permitting sighted persons to operate concessions—might be incorrect.

Petitioner did not like the competition he received from Star Pharmacy, which apparently sold similar food items as his café. He complained to the Commission's Business Enterprise Program (BEP),[4] and alleged that Star Pharmacy was taking away business that was rightfully his. After reviewing his complaint, the BEP's agent determined that it could not address petitioner's demands, because Star Pharmacy had a valid lease. Petitioner then sought administrative review, and asked that the Commission: (1) advise blind operators of the efforts the Commission made on their behalf, (2) inform other state agencies in Cadillac Place of the rules governing food service and catering, (3) help resolve his conflict with Star Pharmacy, and (4) bar advertisements for outside catering companies in Cadillac Place. He did not request monetary damages.

When the BEP's internal administrative review failed to resolve his claim, petitioner sought a contested hearing before a hearing officer pursuant to MCL 393.355(g) and Mich Admin Code, R 393.56, and made the same demands that he had made during the administrative review process. Again, he did not ask for monetary damages. The hearing officer heard the case in 2010 and recommended dismissal of petitioner's complaint. He noted that petitioner had ceased operation of his café, and that the issue was now moot. In the alternative, he suggested the Commission's board find for the Commission, because it had taken all appropriate steps to address the business competition of which petitioner complained.

The Commission's board rejected the hearing officer's recommendations, and instead remanded the mat-

[4] The BEP ran the leasing program for blind vendors at state-owned and state-occupied buildings.

ter to the hearing officer "for a full evidentiary hearing to determine damages Mr. Fellows may have suffered at Cadillac Place." This was the first time the question of damages was mentioned.

Petitioner then received a second contested hearing before a hearing officer. The BEP moved to dismiss the case because: (1) the hearing officer had no jurisdiction to award damages, and (2) petitioner never claimed damages. The hearing officer did not rule on the BEP's motion to dismiss. Petitioner, now represented by an attorney, alleged that the Commission had breached a "vending facility agreement" and misrepresented the existing competition at Cadillac Place to induce him to open his business.[5] He also asserted that the Commission "illegally" allowed sighted vendors to operate in the building, which supposedly reduced his potential profits for three years, and demanded $475,576 in damages.

The hearing, which took place in 2011, was not a model of proper procedure. The hearing officer heard no testimony; no representatives of the Commission were present; and the only evidence received was a copy of the Star Pharmacy lease, some sales reports from petitioner, Subway, and Star Snack, and an affidavit concerning Subway's business records. The hearing officer made no findings on whether a breach of contract, misrepresentation, or any other misconduct occurred, but it nonetheless recommended that the Com-

[5] Petitioner provides no evidence that he actually had a "vending facility agreement" with the Commission, nor has he provided any evidence of misrepresentation or fraud on the part of the Commission. In any event, he appears to have abandoned these contract claims on appeal, because he does not assert them in his brief. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008) ("A party abandons a claim when it fails to make a meaningful argument in support of its position.").

mission "determine an appropriate amount of damages in this matter based on the evidence presented at the hearing."

When the matter returned to the Commission's board in March 2012, the board refused to award petitioner damages. Petitioner appealed in the Ingham Circuit Court, which reversed the board's decision and awarded petitioner $475,576 in damages. The court rejected the Commission's argument that the Commission lacked jurisdiction to award monetary damages, on the grounds that "such power is clearly necessary for the proper and efficient operation of BEP agreements." In support of its theory, the court cited one administrative decision in which the board had awarded monetary damages to a blind licensee, and claimed that MCL 393.358 implied that the board had the authority to do so. Further, the court stated that the board's decision not to award damages was arbitrary and capricious, holding that the board had "implicitly" admitted its own liability for failing to curtail competition when it remanded for a hearing on damages.

The Commission appealed the trial court's order to our Court in late 2013, and argues that it should be reversed because: (1) as an administrative entity, it does not have express statutory authority to award monetary damages, nor does it have the implied power to do so; and (2) its refusal to award damages thus cannot be arbitrary and capricious.

III. STANDARD OF REVIEW

When we analyze an appeal of a trial court's review of an agency decision, we afford "[g]reat deference . . . to the [trial court's] review of the agency's factual findings." *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 62; 678 NW2d 444 (2003). But "substan-

tially less deference, if any, is [afforded] to the [trial court's] determinations on matters of law." *Id*. "Questions of statutory interpretation are reviewed de novo," *Petersen v Magna Corp*, 484 Mich 300, 351; 773 NW2d 564 (2009), and our analysis of the trial court's determination of the law looks to "whether the [trial] court applied correct legal principles," *Romulus*, 260 Mich App at 64 (quotation marks and citation omitted).

Our Court's "objective when interpreting a statute is to discern and give effect to the intent of the Legislature." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013). "When ascertaining the Legislature's intent, a reviewing court should focus first on the plain language of the statute in question, and when the language of the statute is unambiguous, it must be enforced as written." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 560; 837 NW2d 244 (2013) (citation omitted). "An agency's decision that is in violation of statute or constitution [or] in excess of the statutory authority or jurisdiction of the agency . . . is a decision that is *not* authorized by law and must be set aside." *Romulus*, 260 Mich App at 64 (quotation marks, citations, and alteration marks omitted).

IV. ANALYSIS

Administrative agencies are a creation of the Legislature, and their powers are accordingly limited to those that the Legislature chooses to delegate to them through statute. *York v Detroit (After Remand)*, 438 Mich 744, 767; 475 NW2d 346 (1991). The statutory language conferring such powers must be "clear and unmistakable" and is subject to "strict interpretation." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 583; 810 NW2d 110 (2011) (quotation marks and citation omitted). Though it is possible for an adminis-

trative agency to possess implied powers, it can only infer such authority when that authority is " 'necessary to the due and efficient exercise of the powers expressly granted' by the enabling statute." *Id*. at 586, quoting *Ranke v Corp & Securities Comm*, 317 Mich 304, 309; 26 NW2d 898 (1947).

In this case, petitioner brings suit against an administrative agency (the Michigan Commission for the Blind) created by an enabling act (MCL 393.351 *et seq*.). Petitioner asserts, and the trial court agreed, that this act gives the Commission the power to award monetary damages to claimants. Specifically, petitioner points to MCL 393.358 as the basis for this supposed delegation of authority, a rationale the trial court adopted in its holding.

Petitioner's argument distorts the law, because MCL 393.358 does not in any way authorize the Commission to award monetary damages. In full, that section reads:

> The commission, *pursuant to state-federal agreements*: may cooperate with the federal government in carrying out the purposes of a federal statute or regulation, not in conflict with state law, which pertains to rehabilitation of blind persons; may adopt methods of administration, not in conflict with state law, which are necessary for the proper and efficient operation of the agreements or plans for rehabilitation of blind persons; and may comply with conditions, not in conflict with state law, which are necessary to secure the full benefits of federal statute. [MCL 393.358 (emphasis added).]

MCL 393.358 neither expressly delegates the power to the Commission to award monetary damages, nor does it allow the Commission to infer such authority, because the award of monetary damages is not " 'necessary to the due and efficient exercise of the powers expressly granted by the enabling statute.' " *Herrick*, 293 Mich App at 586 (citation omitted). Moreover, MCL 393.358 is not rel-

evant to petitioner's case, because, by its plain language, it only applies to "state-federal agreements" between the Commission and the federal government. As the Commission correctly observes, this suit does not involve a "state-federal agreement"—it involves a state-owned office building and a concession operated by a private citizen. And finally, no other section of the Act, expressly or by implication, grants the Commission the power to award monetary damages to claimants.[6]

Perhaps aware of the dubious nature of his statutory claim, petitioner avers that the Commission has awarded monetary damages in the past, and suggests that this practice serves as additional justification for a monetary award to him.[7] This argument is unconvincing. Courts "are not bound by an administrative agency's interpretation of a statute . . . ." *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167, 178; 775 NW2d 342 (2009). Rather, a reviewing court gives an agency's interpretation of a statute "respectful consideration" and must state "cogent reasons for overruling an agency's interpretation"; the agency's interpretation

[6] Because the Commission lacks the power to award monetary damages, its refusal to do so cannot be arbitrary and capricious.

[7] Petitioner fails to make the most obvious nonstatutory argument: namely, if the Act does not allow the Commission to award monetary damages, it confers a right without a remedy, in that blind concession operators are unable to enforce the rights granted by the Act in a meaningful way. This argument, however, is incorrect, because the Legislature required the promulgation of rules to implement the Act, and those rules provide a remedy in the event that a blind person believes the Act has been violated: an extensive administrative process that allows Commission employees to assist blind concession owners in dispute resolution. See MCL 393.355(g) and Mich Admin Code, R 393.1 *et seq*. Petitioner made use of this remedy when he availed himself of the Commission's extensive administrative process. In addition, other remedies besides monetary damages are available to petitioners that seek redress under the Act: declaratory judgment and injunctive relief.

"is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008) (quotation marks omitted). The fact that the Commission exceeded its legal authority in the past is no reason for our Court to sanction continued abuse of that authority in the present. The Commission properly ended its improper and unauthorized exercise of authority with its decision in this case, and now correctly limits its powers to those delegated by the Legislature. Again: the Act does not grant the Commission the authority to award monetary damages, and for this reason alone, petitioner's claim must fail.

V. CONCLUSION

The trial court misinterpreted the Act because the Commission does not have the authority, express or implied, to award monetary damages. We therefore reverse the holding of the trial court and petitioner's claim is hereby dismissed.

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

COALITION PROTECTING AUTO NO-FAULT v
MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION

Docket No. 314310. Submitted January 8, 2014, at Lansing. Decided May 20, 2014, at 9:10 a.m.

The Coalition Protecting Auto No-Fault (CPAN) brought an action in the Ingham Circuit Court, seeking to compel the Michigan Catastrophic Claims Association (MCCA) to disclose information concerning claims that the MCCA had serviced, including the claimants' ages, dates of injuries, and total amounts paid. The MCCA had refused to provide this information on the ground that MCL 500.134(4) and (6)(c) expressly exempted its records from Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The case was consolidated by stipulation with a separate complaint filed by the Brain Injury Association of Michigan, and was later joined by several additional individual plaintiffs. In its amended complaint, CPAN claimed that MCL 500.134 was unconstitutional on several grounds and that plaintiffs had a right to inspect the MCCA's records under the common law and under various trust theories. Plaintiffs and the MCCA moved for summary disposition. The court, Clinton Canady, III, J., denied the MCCA's motion and granted summary disposition in plaintiffs' favor except to the extent they sought information about individual claimants. The Court of Appeals granted the MCCA's application for leave to appeal, limited to the issues raised in the application and supporting brief, and plaintiffs cross-appealed.

The Court of Appeals *held*:

1. Plaintiffs did not have a right to access the MCCA's records because the records were expressly exempted from disclosure under FOIA by MCL 500.134(4) and (6)(c).

2. The Legislature's failure to reenact and republish FOIA when it enacted MCL 500.134 did not render MCL 500.134 unconstitutional under Const 1963, art 4, § 24, because that statute did not revise, alter, or amend FOIA but rather operated pursuant to FOIA.

3. The title and the body of MCL 500.134 were not so diverse in nature that they violated the Title-Object Clause, Const 1963, art 4, § 25.

4. The trial court erred by ruling that Michigan citizens were entitled to inspect the MCCA's records under *Shavers v Attorney General*, 402 Mich 554 (1978), because the constitutional deficiencies in the Insurance Code identified in *Shavers* have been corrected; *Shavers* did not hold that policyholders could access every component of their insurance rates; and, unlike in *Shavers*, there is an effective regulatory scheme that governs the MCCA and the procedures it uses to determine its premiums. Plaintiffs did not have a right to access the records under *Nowack v Auditor General*, 243 Mich 200 (1928), because the Legislature supplanted any preexisting common-law rights to access public records when it enacted FOIA and MCL 500.134.

5. The trial court erred by ruling that plaintiffs had a right to access the MCCA's records under trust theories. Resulting trusts are unrelated to an individual's right to know how insurance premiums are calculated, and constructive trusts are equitable remedies rather than independent causes of action and are, in any event, not applicable in this case.

Reversed and remanded for entry of an order awarding summary disposition to the MCCA.

1. STATUTES — FREEDOM OF INFORMATION ACT — EXEMPTIONS — MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION.

MCL 500.134(4) and (6)(c) exempt the records of the Michigan Catastrophic Claims Association from disclosure under the Freedom of Information Act, MCL 15.231 *et seq*.

2. CONSTITUTIONAL LAW — REQUIREMENT TO REENACT AND REPUBLISH — FREEDOM OF INFORMATION ACT — EXEMPTIONS — INSURERS.

The Legislature's failure to reenact and republish the Freedom of Information Act, MCL 15.231 *et seq*., when it enacted MCL 500.134, which exempts the records of certain associations of insurers from disclosure under the Freedom of Information Act, MCL 15.231 *et seq*., did not render MCL 500.134 unconstitutional under Const 1963, art 4, § 25.

3. CONSTITUTIONAL LAW — TITLE-OBJECT CLAUSE — FREEDOM OF INFORMATION ACT — EXEMPTIONS — INSURERS.

The title and the body of 1988 PA 349, which amends MCL 500.134 to exempt the records of certain associations of insurers from disclosure under the Freedom of Information Act, MCL 15.231 *et seq*., were not so diverse in nature that they violated the Title-Object Clause, Const 1963, art 4, § 24.

4. Statutes — Freedom of Information Act — Common-Law Right to Access Public Records — Michigan Catastrophic Claims Association.

The Legislature supplanted any preexisting common-law rights to access the records of the Michigan Catastrophic Claims Association when it enacted the Freedom of Information Act, MCL 15.231 *et seq*., and MCL 500.134.

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson*), and *Sinas, Dramis, Brake, Boughton & McIntyre, PC* (by *George T. Sinas*), for the Coalition Protecting Auto No-Fault and others.

James R. Giddings for the Brain Injury Association of Michigan and others.

Noah D. Hall, of counsel for plaintiffs.

Dykema Gossett PLLC (by *Lori McAllister*, *Joseph K. Erhardt*, and *Jill M. Wheaton*) for the Michigan Catastrophic Claims Association.

Amici Curiae:

Willingham & Coté (by *John A. Yeager* and *Kimberlee A. Hillock*) for the Insurance Institute of Michigan and the Michigan Insurance Coalition.

Kerr, Russell and Weber, PLC (by *Daniel J. Schulte* and *Jacquelyn A. Klima*), for the Michigan State Medical Society and others.

Before: Owens, P.J., and Borrello and Gleicher, JJ.

Borrello, J. Defendant, the Michigan Catastrophic Claims Association (MCCA), appeals by leave granted a December 26, 2012 trial court order granting partial summary disposition in favor of plaintiffs, the Coalition Protecting Auto No-Fault and others, pursuant to MCR 2.116(C)(8), and denying the MCCA's motion for sum-

mary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). Plaintiffs cross-appeal the same order. For the reasons set forth in this opinion, we reverse and remand for entry of an order awarding summary disposition in favor of the MCCA.

I. BACKGROUND

This action involves plaintiffs' requests to inspect certain of the MCCA's records. Plaintiffs advance arguments premised on the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*., the common law, and the law of trusts. The MCCA was created by the Legislature to protect no-fault automobile insurers from catastrophic losses arising from their obligation to pay or reimburse no-fault policyholders' lifetime medical expenses. *League Gen Ins Co v Mich Catastrophic Claims Ass'n*, 435 Mich 338, 340-341; 458 NW2d 632 (1990). As a precondition to writing no-fault insurance in Michigan, every insurer must be a member of the MCCA. MCL 500.3104(1). Member insurers are required to pay annual premiums to the MCCA, MCL 500.3104(7), and in turn, the MCCA indemnifies its members for their "ultimate loss sustained under personal protection insurance coverage in excess [of a fixed statutory amount,]" MCL 500.3104(2).

On November 22, 2011, plaintiff Coalition Protecting Auto No-Fault (CPAN) sent the MCCA a FOIA request, seeking certain information concerning "all" open and closed claims "serviced by" the MCCA. CPAN requested information including the age of claimants, the dates of injuries, when claims were closed, and the total amounts paid. The MCCA refused to disclose the information, claiming in a letter that it was "expressly exempted from FOIA requests" by MCL 500.134, which provides in pertinent part:

> (4) A record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act . . . , [MCL 15.243].
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> * * *
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> (6) As used in this section, "association or facility" means . . .
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> * * *
>
> (c) The catastrophic claims association . . . .

On January 23, 2012, CPAN filed suit against the MCCA in the Ingham Circuit Court, seeking to compel the MCCA to disclose the requested information. Meanwhile, plaintiff Brain Injury Association of Michigan (BIAMI) and several individual plaintiffs (the BIAMI plaintiffs) commenced a separate lawsuit against the MCCA after it denied their FOIA request for similar information. On July 5, 2012, CPAN, the MCCA and the BIAMI plaintiffs stipulated to consolidate the cases and to allow CPAN to file an amended complaint.

CPAN alleged four counts in its amended complaint.[1] In Count I, CPAN claimed that MCL 500.134 was unconstitutional in that it (1) violated Const 1963, art 4, § 25, because the statute amended FOIA by exempting the MCCA from FOIA without reenacting and republishing FOIA, (2) violated the Title-Object Clause of the state constitution, Const 1963, art 4, § 24, and (3) violated the state and federal constitutional "guarantees of due process and equal protection" as articulated in *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978). In Count II, CPAN alleged that it had a common-law right to inspect the MCCA's records, and

[1] Several additional individual plaintiffs were added to the case when CPAN filed its amended complaint.

in Counts III and IV, CPAN claimed a right to inspect the MCCA's records under resulting and constructive trust theories. The BIAMI plaintiffs alleged that they had a right to access the MCCA's records pursuant to *Shavers*, the common law, and under resulting and constructive trust theories.

Shortly thereafter, the MCCA moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), and CPAN filed a cross-motion for summary disposition pursuant to MCR 2.116(I)(2), which the trial court construed as a motion brought under MCR 2.116(C)(8). The BIAMI plaintiffs moved for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10), then later withdrew their (C)(10) motion. Despite the differences in plaintiffs' motions, the trial court ultimately granted partial summary disposition in favor of all plaintiffs under MCR 2.116(C)(8), denying plaintiffs' motions to the extent they sought disclosure of information concerning individual claimants. The court denied the MCCA's motion in its entirety.

The trial court ruled that the MCCA was a "public body" for purposes of FOIA because the MCCA was "created entirely by statute." The court concluded that MCL 500.134 did not exempt the MCCA's records from FOIA, stating:[2]

> MCL 500.134 does not contain any specific references regarding information exempt from disclosure.
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> Secondly, the plain language of section (4) . . . does not indicate that the legislature intended for a "whole sale" carve out exemption of all MCCA records because there is a general cross reference to MCL 15.243 (A record of an

[2] The trial court's original opinion and order is missing from the lower court record; however, the MCCA attached a copy to its application for leave to appeal and plaintiffs do not contest the authenticity of that document.

> association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act . . . . The fact that the Legislature used the phrase "pursuant to section 13" of FOIA, rather than specifically indicating that all MCCA records are exempt under 15.243(d) . . . tends to show that the Legislature intended for information to be exempt from FOIA only if such information came within one of the specified exemptions in MCL 15.243. [Emphasis in original.]

The trial court also held that plaintiffs were entitled to the MCCA's records under *Shavers*, 402 Mich at 554, the common law, and trust theories, explaining:

> In addition, the Court agrees with CPAN's argument regarding the decision in [*Shavers*] that Michigan citizens have a right to know how the insurance premium they pay is calculated to ensure that no-fault insurance is provided on a fair and equitable basis. This concept intertwines with the theories asserted by BIAMI regarding the common law right to information and resulting trusts. Because the MCCA rate charged to insurers is passed on to the insured individuals as part of the premium they pay, it is reasonable to conclude that citizens essentially fund the MCCA reserves by paying that premium; thus, individual citizens have a financial interest in the rate calculation process and how it is conducted.
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> . . . Specifically, pursuant to the constitutional principles articulated in *Shavers*, the MCCA must disclose general rate calculation information such as amount of funds contained in MCCA reserves, number of claimants, administrative costs, nature and type of investments of the reserves, amount currently paid by insurers and specific accounting as to increase/decrease in yearly rate calculated, etc. However . . . MCCA is not required to disclose personal information regarding individual claims or information that could reasonably lead to extrapolation of individual claimants' names.

On January 16, 2013, the MCCA moved for leave to appeal the trial court's order in this Court and moved this Court to stay the proceedings pending its appeal. On March 8, 2013, this Court granted the MCCA leave to appeal and stayed the proceedings pending resolution of the appeal.[3] Thereafter, plaintiffs filed a claim of cross-appeal.

II. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Id*. at 119. In deciding the motion, a trial court may only consider the pleadings and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. Summary disposition is appropriate if the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). To the extent that we must interpret and apply relevant statutory provisions, "[i]ssues of statutory construction involve questions of law that we review de novo." *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 271; 826 NW2d 519 (2012). Similarly, we review de novo constitutional issues and the proper interpretation and application of the common law. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 425; 761 NW2d 371 (2008); *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

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[3] *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, unpublished order of the Court of Appeals, entered March 8, 2013 (Docket No. 314310).

III. ANALYSIS

A. FOIA

The MCCA contends that the trial court erred by holding that its records were not exempt from FOIA.

"Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011), citing MCL 15.233(1). In this case, even assuming that the MCCA is a public body for purposes of FOIA, the MCCA is not required to disclose any of its records because the records are expressly exempted from FOIA by statute.

Section 13 of FOIA, MCL 15.243, lists various types of records and information that a public body may exempt from the act's disclosure requirements. MCL 15.243(1)(d) provides that "[a] public body may exempt from disclosure as a public record under this act . . . [*r*]*ecords or information specifically described and exempted from disclosure by statute*" (emphasis added). MCL 500.134, a section of the Insurance Code,[4] specifically describes and exempts the MCCA's records from FOIA disclosure as follows:

> (4) A record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act . . . .
>
> * * *
>
> (6) As used in this section, "association or facility" means an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members, including, but not limited to, the following:
>
> * * *

[4] MCL 500.100 *et seq*.

> (c) *The catastrophic claims association* created under chapter 31. [Emphasis added.]

The MCCA argues that, read together, MCL 500.134(4) and (6) exempt its records from FOIA. Plaintiffs implicitly concede that the MCCA is an "association or facility" under MCL 500.134(6), but nevertheless contend that the statute does not carve out a wholesale exemption for the MCCA's records. Resolution of this issue requires that we construe the meaning of the relevant statutory provisions. "When interpreting the meaning of a statute, our primary goal is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id*. at 247.

Applying the plain language of MCL 500.134(4) and (6), we conclude that the trial court erred as a matter of law by holding that the MCCA's records were not exempt from FOIA. Subsection (4) unambiguously exempts "[a] record of an association or facility" from disclosure, and subsection (6)(c) defines an "association or facility" to include the MCCA. When read together, the subsections provide that "a record of [the MCCA] *shall be exempted* from disclosure pursuant to section 13 of [FOIA]," thus specifically describing and exempting the MCCA's records from disclosure. These provisions work in accordance with § 13 of FOIA, which permits a public body to exempt from disclosure "[r]ecords or information specifically described and exempted . . . by statute." MCL 15.243(1)(d). There is no ambiguity in these provisions: subsections (4) and (6) clearly mandate that if "a record" of the MCCA is at issue, it "shall be exempted from disclosure pursuant to

section 13 of [FOIA]." See *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003) ("The word 'shall' is generally used to designate a mandatory provision . . . .").

Plaintiffs make much of the fact that MCL 500.134(4) refers to "a record," while MCL 15.243(1)(d) applies to "records or information specifically described and exempted from disclosure by statute." We find this minimally differing language of no interpretive consequence. The statute fully exempts *any and all* of the MCCA's records from FOIA. It accomplishes this goal by employing the indefinite article "*a*" to identify which records are exempt from FOIA. The Legislature's use of the indefinite article "*a*" in MCL 500.134(4) clearly indicates its intent to exempt all of the MCCA's records in general.

The trial court erred by concluding that the phrase "pursuant to section 13" in MCL 500.134(4) meant that the MCCA's records were only exempt from FOIA if they fell within one of the enumerated exemptions in § 13. As noted, § 13(1)(d) permits another statute to exempt records from FOIA. In this case, MCL 500.134(4) and (6) exempt the MCCA's records from disclosure. As a result, it is not necessary for the MCCA's records to fall within any of the other § 13 exemptions. See *King v Mich State Police Dep't*, 303 Mich App 162, 177-178; 841 NW2d 914 (2013). The trial court's interpretation to the contrary rendered MCL 500.134(4) and (6) nugatory. When the Legislature enacted MCL 500.134, all the exemptions in § 13 existed.[5] Therefore, to conclude that only the preexisting exemptions in § 13 shielded the MCCA's records from disclosure would render MCL 500.134(4) and (6) nuga-

[5] FOIA was effective in 1977, while MCL 500.134 was enacted in 1988. See 1976 PA 442; 1988 PA 349.

tory. Were plaintiffs' argument correct, the Legislature would have had no reason to enact MCL 500.134. "In interpreting a statute, we must avoid a construction that would render part of the statute surplusage or nugatory." *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (quotation marks, citation, and alterations omitted). Contrary to the trial court's conclusion, the phrase "pursuant to section 13" did not affect the plain meaning of MCL 500.134(4) and (6); rather, that phrase simply indicated that the exemption operated in accordance with FOIA.

Plaintiffs contend that § 13(1)(d) permits a statutory exemption for the production of specified records but it does not permit "a statutory exemption of the public body itself." Therefore, according to plaintiffs, MCL 500.134 cannot wholly exempt the MCCA's records from FOIA. Plaintiffs' argument lacks merit. The plain language of MCL 500.134(4) and (6) meets the requirements of § 13(1)(d) in that, read together, these subsections specifically exempt all records of the MCCA. Nothing in § 13 of FOIA precludes the Legislature from exempting all records of a particular entity from FOIA, and we will not read such a restriction into § 13. See *Paschke v Retool Indus*, 445 Mich 502, 511; 519 NW2d 441 (1994) ("Where the statutory language is clear, the courts should neither add [to] nor detract from its provisions.").

On cross-appeal, plaintiffs contend that MCL 500.134(4) cannot exempt the MCCA's records because the statute violates the state constitution. Although the trial court failed to address and decide this issue, CPAN raised it in the lower court and the issue involves a question of law concerning which the necessary facts have been presented. Therefore, we will address plaintiffs' constitutional arguments. See *Duffy v Dep't of*

Nat'l Resources, 490 Mich 198, 209 n 3; 805 NW2d 399 (2011) (noting that an issue not properly preserved for appeal may be addressed if it involves a question of law concerning which the necessary facts have been presented).

"[W]hen a party seeks our declaration that a statute violates the Constitution, we must operate with the presumption that the statute is constitutional unless its unconstitutionality is clearly apparent." *UAW v Green*, 302 Mich App 246, 252; 839 NW2d 1 (2013) (quotation marks and citation omitted). "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174 (2004) (quotation marks and citation omitted). Therefore, "the burden of proving that a statute is unconstitutional rests with the party challenging it." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007).

Plaintiffs contend that MCL 500.134(4) violates the Michigan Constitution because the Legislature did not reenact and republish FOIA when it enacted MCL 500.134(4). Const 1963, art 4, § 25 provides: "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length."

MCL 500.134(4) did not revise, alter, or amend FOIA. Rather, FOIA contemplates statutory exemptions. Specifically, § 13(1)(d) provides in pertinent part that "[a] public body may exempt from disclosure as a public record under this act . . . [r]ecords or information specifically described and exempted from disclosure by

statute." MCL 15.243(1)(d). By including this language, the Legislature drafted FOIA in such a way that future statutory exemptions would not constitute revisions to or amendments of FOIA, but instead would work pursuant to FOIA. Therefore, when the Legislature enacted MCL 500.134(4), there was no duty to reenact and republish FOIA.

Plaintiffs also contend that MCL 500.134(4) violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24, which provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

"The purpose of the Title-Object Clause is to ensure that legislators and the public receive proper notice of legislative content and [to] prevent[] deceit and subterfuge." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 388; 803 NW2d 698 (2010) (quotation marks and citation omitted). "The constitutional requirement should be construed reasonably and permits a bill enacted into law to include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object." *Id.* (quotation marks and citation omitted).

There are three types of challenges that may be brought under the Title-Object Clause:

> (1) a "title-body" challenge, which indicates that the body exceeds the scope of the title, (2) a "multiple-object challenge," which indicates that the body embraces more than one object, and (3) a "change of purpose challenge," which indicates that the subject matter of the amendment is not germane to the original purpose. [*Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 185; 658 NW2d 804 (2002).]

In the trial court, CPAN advanced all three challenges; however, on appeal plaintiffs do not renew their multiple-object argument. Similarly, with respect to their change of purpose challenge, plaintiffs fail to provide a cognizable argument and they have therefore abandoned it for review. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) ("It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.") (quotation marks and citation omitted). We therefore proceed by addressing plaintiffs' title-body challenge.

A title-body challenge tests "whether the title [of an act] gives fair notice to the legislators and the public of the challenged provision" contained in the act's body. *H J Tucker & Assoc, Inc v Allied Chucker & Eng Co*, 234 Mich App 550, 559; 595 NW2d 176 (1999).

> [I]t is not necessary that a title be an index of all of an act's provisions. It is sufficient that the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose . . . . [*Livonia v Dep't of Social Servs*, 423 Mich 466, 501; 378 NW2d 402 (1985) (quotation marks and citation omitted).]

The fair-notice requirement is violated only "where the subjects [of the title and body] are so diverse in nature that they have no necessary connection . . . ." *People v Cynar*, 252 Mich App 82, 85; 651 NW2d 136 (2002) (quotation marks and citations omitted).

Enrolled Senate Bill 707, which was signed into law as 1988 PA 349, is titled in pertinent part:

> AN ACT to amend section 134 of Act No. 218 of the Public Acts of 1956, entitled as amended "An act to revise, consolidate, and classify the laws relating to the insurance and surety business; to regulate the incorporation or formation of domestic insurance and surety companies and associations and the admission of foreign and alien companies and associations; *to provide their rights, powers, and immunities* and to prescribe the conditions on which companies and associations organized, existing, or authorized under this act may exercise their powers; *to provide the rights, powers, and immunities* and to prescribe the conditions on which other persons, firms, corporations, and *associations* engaged in an insurance or surety business may exercise their powers . . . being section 500.134 of the Michigan Compiled Laws." [Emphasis added.]

The title indicates that part of the purpose of the act is to define the rights, powers, and immunities of associations involved in the insurance business. The MCCA is an association involved in the insurance business, and the FOIA exemption in MCL 500.134(4) concerns the rights, powers, and immunities of such associations. Therefore, it cannot be said that the title and body of the act are so "diverse in nature that they have no necessary connection" between each other and plaintiffs' title-object argument fails. *Cynar*, 252 Mich App at 85.

In sum, the plain language of MCL 500.134(4) and (6) exempts the MCCA's records from FOIA, and MCL 500.134(4) does not violate Const 1963, art 4, § 24 or Const 1963, art 4, § 25. The trial court therefore erred as a matter of law by holding that the MCCA was required to disclose any of its records under FOIA.[6]

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[6] Because we conclude that all MCCA records are exempt from FOIA, we need not address plaintiffs' argument on cross-appeal that the trial court erred by holding that certain information regarding individual claimants was exempt from disclosure.

B. *SHAVERS* v *ATTORNEY GENERAL*

The MCCA next argues that the trial court erred as a matter of law by ruling that plaintiffs and "Michigan citizens" were entitled to inspect its records pursuant to the holding in *Shavers*, 402 Mich at 554. We agree.

In *Shavers*, the Michigan Supreme Court addressed a constitutional challenge to the no-fault act. The *Shavers* Court held that the statutory obligation for all motorists to buy no-fault insurance was dependent on the right of all motorists to have no-fault insurance "available at fair and equitable rates." *Id*. at 599. Accordingly, the Court held that the obligation of motorists to buy no-fault insurance was unconstitutional if their right to have insurance available at fair and adequate rates was not protected by due process. *Id*. at 599-602. In determining what process was due, *Shavers* held that, at a minimum, the statutory scheme must ensure that insurance rates "are not, in fact, 'excessive, inadequate or unfairly discriminatory' " and also ensure that "persons affected have notice as to how their rates are determined and an adequate remedy regarding that determination." *Id*. at 601, quoting MCL 500.2403(1)(d).

Contrary to the trial court's conclusion, *Shavers* is inapplicable in the present case. In response to *Shavers*, the Legislature amended the Insurance Code by enacting 1979 PA 145 and 1979 PA 147. *Kreiner v Fischer*, 471 Mich 109, 115-116; 683 NW2d 611 (2004), overruled on other grounds *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010). In doing so, the Legislature corrected the no-fault act's constitutional deficiencies. *Id*. Moreover, the concerns identified in *Shavers* are not present in this case. Unlike the no-fault premiums at issue in *Shavers*, this case involves premiums that the MCCA charges to its member insurers. And, unlike the

regulatory scheme that was deficient in *Shavers*, there is a detailed regulatory scheme that governs the MCCA and the premiums it charges to its members. See MCL 500.3104.

Furthermore, even assuming that the premiums are passed on to individual policyholders, *Shavers* does not stand for the broad proposition that policyholders are entitled to access *every* component of the cost they pay for no-fault insurance. Instead, *Shavers* mandated disclosure of limited ratemaking criteria to ensure that no-fault policyholders were treated fairly and equally. In this case, to the extent the MCCA's premiums are passed to policyholders, unlike in *Shavers*, they are subject to an extensive regulatory scheme.

In sum, *Shavers* is inapplicable in this case because the Insurance Code corrected the constitutional deficiencies identified in *Shavers*, *Shavers* did not stand for the broad proposition that policyholders have the right to access every component that comprises their insurance rates, and, unlike in *Shavers*, there is an effective regulatory scheme in place that governs the MCCA and the procedures the MCCA uses to determine its premiums. Accordingly, the trial court erred as a matter of law by holding that plaintiffs had a right to access the MCCA's records pursuant to *Shavers*.

C. COMMON LAW

Next, the MCCA argues that the trial court erred by concluding that *Shavers* "intertwined" with plaintiffs' right to access its records under the common law. Plaintiffs counter that the trial court correctly held that they had a common-law right to inspect the MCCA's records, and they rely on *Nowack v Auditor General*, 243 Mich 200; 219 NW 749 (1928), in support of their argument.

In *Nowack*, an editor and publisher of a newspaper sought a writ of mandamus to compel the defendant to permit him to inspect certain public records pertaining to the expenditure of public money. *Id*. at 201-202. Our Supreme Court explained that "[t]here is no question as to the common-law right of the people at large to inspect public documents and records. The right is based on the interest which citizens necessarily have in the matter to which the records relate." *Id*. at 204. The Court held that the plaintiff had a common-law right, as a citizen, to access the defendant's records in order to determine whether public money was being spent properly. *Id*. at 208.

Nowack illustrates this state's longstanding public policy that citizens have access to certain public records. However, by enacting FOIA and MCL 500.134(4) and (6), the Legislature clearly intended to supplant any preexisting common-law right to access the MCCA's records.

"The common law remains in force until it is affirmatively modified." *Hamed v Wayne Co*, 490 Mich 1, 22 n 57; 803 NW2d 237 (2011). "The Legislature is presumed to know the common law, and any abrogation of the common law must be explicit." *Id*. A statutory scheme that is "comprehensive, providing in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions," indicates a legislative intention to supplant the common law on that subject. *Kyser v Kasson Twp*, 486 Mich 514, 539; 786 NW2d 543 (2010) (quotation marks and citations omitted).

While there is no published caselaw in this state directly on point, the United States Supreme Court and federal courts have addressed conflicts between the

federal common law and federal legislation including the federal Freedom of Information Act, (FOIA), 5 USC 552.[7]

In *Nixon v Warner Communications, Inc*, 435 US 589, 591, 594; 98 S Ct 1306; 55 L Ed 2d 570 (1978), the respondents claimed a federal common-law right to access recordings introduced at the trial of President Nixon's former advisors. The United States Supreme Court recognized a federal common-law right to access public information, stating that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id*. at 597. Nevertheless, the Court denied the respondents' request on the ground that the Presidential Recordings Act provided an alternative method of accessing the records. *Id*. at 603-606. In doing so, the *Nixon* Court established the principle that "a statutory disclosure scheme preempts the common law right" of access. *Ctr for Nat'l Security Studies v US Dep't of Justice*, 331 F3d 918, 936; 356 US App DC 333 (2003).

Federal courts have applied this principle to the federal FOIA. In *United States v El-Sayegh*, 131 F3d 158, 163; 327 US App DC 308 (1997), the Court of Appeals for the District of Columbia Circuit applied *Nixon* and held that the media did not have a common-law right to access a withdrawn plea agreement because "[t]he appropriate device" to obtain disclosure was "a [federal FOIA] request addressed to the relevant agency." *Id*., citing *Nixon*, 435 US at 605-606.

Several years later, in *Ctr for Nat'l Security Studies*, 331 F3d 918, the same court reaffirmed the principle

[7] Though not binding on this Court's interpretation of state law, "federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999).

that the federal FOIA supplanted an individual's common-law right to access public information. In that case, the plaintiffs, public interest groups, sought to compel the Department of Justice to disclose information concerning "persons detained in the wake of the September 11 terrorist attacks . . . ." *Id*. at 920. The plaintiffs argued in part that they had both a right under FOIA and a common-law right to access the information. *Id*. at 925, 936. The court rejected both arguments, holding that the information fell within a FOIA exemption and that FOIA supplanted the plaintiffs' common-law right. *Id*. at 932-933, 936-937. The court explained:

> FOIA provides an extensive statutory regime for plaintiffs to request the information they seek. Not only is it uncontested that the requested information meets the general category of information for which FOIA mandates disclosure, but for the reasons set forth above, we have concluded that it falls within an express statutory exemption as well. It would make no sense for Congress to have enacted the balanced scheme of disclosure and exemption, and for the court to carefully apply that statutory scheme, and then to turn and determine that the statute had no effect on a preexisting common law right of access. Congress has provided a carefully calibrated statutory scheme, balancing the benefits and harms of disclosure. That scheme preempts any preexisting common law right. [*Id*. at 936-937.]

We find the principles set forth in *Nixon*, *El-Sayegh*, and *Ctr for Nat'l Security Studies* instructive in this case. Like its federal counterpart, Michigan's FOIA provides a comprehensive statutory scheme that governs requests for public records held by public bodies. FOIA provides a detailed course of conduct for individuals to pursue in order to obtain public records. Included within the scheme are statutory exemptions for certain types of information. As we have explained, the MCCA's

records fall within one of those exemptions. The Legislature has determined that those records are not subject to disclosure. It would be illogical to conclude that this comprehensive legislation has no effect on plaintiffs' preexisting common-law right to access the MCCA's records.

Plaintiffs appear to contend that, irrespective of FOIA's alteration of the common law, if the MCCA is considered a private entity, plaintiffs have a common-law right to inspect its records. However, even if we were to assume that the MCCA is a private entity, plaintiffs would not have the right to inspect its records. *Nowack* concerned the common-law right to access *public* records. See *Nowack*, 243 Mich at 203-204; *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 234; 683 NW2d 639 (2004) (explaining that "FOIA was enacted to continue the common-law right Michigan citizens have traditionally possessed to access government documents"); *Booth Newspapers, Inc, v Muskegon Probate Judge*, 15 Mich App 203, 207; 166 NW2d 546 (1968) (noting that "[t]he *Nowack* decision has placed Michigan at the vanguard of those states holding that a citizen's accessibility to *public records* must be given the broadest possible effect") (emphasis added, quotation marks and citation omitted); *In re Midland Publishing Co, Inc*, 113 Mich App 55, 63; 317 NW2d 284 (1982) (citing *Nowack* and explaining that "Michigan has long recognized a common-law right to access to *public records*") (emphasis added). Thus, contrary to plaintiffs' argument, *Nowack* does not support the proposition that a citizen has a right to access private records.

Plaintiffs' argument that a "special interest" vests an individual with the right to inspect private records under *Nowack* is also without legal merit. While the

Nowack Court referred to the plaintiff's "special interest" in the records of the auditor general, the Court did so only because the plaintiff sought to enforce his right to inspect the records by a writ of mandamus in his own name as opposed to one through the Attorney General. The Court explained:

> So, in the instant case, the plaintiff as a citizen and taxpayer has a common-law right to inspect the public records in the auditor general's office . . . . It is a right that belongs to his citizenship. It is a right which he enjoys in common with all other citizens, a public right which can be enforced only by mandamus proceedings brought by the attorney general. *It is not, and never has been, the policy of the law to permit private individuals the use of the writ of mandamus against public officers, except in cases where they had some special interest, not possessed by the citizens generally* . . . .
>
> The plaintiff has not sought to enforce his rights through the office of the attorney general. He has begun this suit in his own name. In order to maintain it, he must show that he has a special interest not possessed by the citizens generally. [*Nowack*, 243 Mich at 208 (quotation marks and citation omitted; formatting altered).]

Thus, the special interest addressed in *Nowack* did not vest the plaintiff with a right to access private documents. Rather, the inquiry into the plaintiff's special interest occurred only because the plaintiff sought to enforce his right to inspect public records by a writ of mandamus in his own name.

Plaintiffs also argue that the *Nowack* Court's reference to a stockholder's right to inspect the "books and records of his corporation" shows that individuals have a common-law right to inspect private records. In discussing an individual's ability to enforce a right of inspection by way of mandamus, the *Nowack* Court discussed cases involving a "controversy over the right

of a stockholder to inspect the books and records of his corporation." *Id*. at 206. Contrary to plaintiffs' argument, this aspect of the Court's opinion was simply part of a broader discussion of mandamus proceedings. See *id*. at 206-207. It does not stand for the broad proposition that an individual has a right to inspect private records under the common law. Moreover, unlike a shareholder's interest in the books of his or her corporation, which involves contractual rights, here, plaintiffs are not shareholders of the MCCA. Accordingly, even if we were to assume that the MCCA is a private entity, plaintiffs would not have a common-law right under *Nowack* to inspect its records.

In sum, under the common law, citizens of this state had a right to access certain public records held by public entities as articulated in *Nowack*; however, by enacting FOIA and MCL 500.134(4) and (6), the Legislature created a comprehensive statutory scheme that governs access to public records in general and the MCCA's records in particular. In doing so, the Legislature clearly supplanted any preexisting common-law right of inspection that plaintiffs may have had in this case, and the trial court erred by concluding otherwise.

D. RESULTING AND CONSTRUCTIVE TRUSTS

The MCCA argues that, to the extent the trial court ruled that plaintiffs were entitled to access its records under a trust theory, the court erred as a matter of law. After agreeing with plaintiffs' argument concerning *Shavers*, the trial court stated that "[t]his concept intertwines with the theories . . . regarding . . . resulting trusts."

Our Supreme Court described a resulting trust as follows:

> A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein . . . . [*Potter v Lindsay*, 337 Mich 404, 410; 60 NW2d 133 (1953) (quotation marks and citation omitted).]

To the extent the trial court held that plaintiffs are entitled to access the MCCA's records under a resulting trust theory, the trial court erred as a matter of law. A resulting trust is wholly unrelated to an individual's right to know how insurance premiums are calculated. Rather, a resulting trust concerns certain transfers of property to a third party. *Id*. Thus, the trial court erred by holding that *Shavers* "intertwined" with a resulting trust theory. Furthermore, plaintiffs did not transfer money to the MCCA. Instead, member insurers pay the MCCA's premiums. Moreover, even if the MCCA's premiums are reflected in plaintiffs' no-fault rates, plaintiffs cannot reasonably argue that they did not intend their insurers to obtain a beneficial interest in the rates they pay for no-fault insurance. Consequently, plaintiffs' resulting trust claim failed as a matter of law.

Similarly, to the extent the trial court held that the MCCA was required to disclose records under a constructive trust theory, it erred as a matter of law. A constructive trust is not an independent cause of action; rather, it is an equitable remedy. See *Kammer Asphalt Paving Co v East China Twp Sch*, 443 Mich 176, 188; 504 NW2d 635 (1993), quoting *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955) ("A constructive trust may be imposed 'where such trust is necessary to do equity or to prevent unjust enrichment . . . .' "). Thus, the counts in plaintiffs' complaints that sought to impose a constructive trust were legally insufficient to state a claim. Moreover, a constructive trust may only

be imposed when property "has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property . . . ." *Id*. (quotation marks and citations omitted). In this case, plaintiffs sought access to the MCCA's records; they did not seek to recover property. Further, plaintiffs failed to plead any facts to indicate that the MCCA obtained property under any of the aforementioned circumstances. In short, plaintiffs' constructive trust argument was devoid of legal merit.

IV. CONCLUSION

In summary, plaintiffs' claims failed as a matter of law and plaintiffs are not entitled to access the MCCA's records. The MCCA's records are not subject to FOIA disclosure because the plain language of MCL 500.134(4) and (6) expressly exempt the records from FOIA and MCL 500.134(4) does not violate Const 1963, art 4, § 24 or Const 1963, art 4, § 25. In addition, plaintiffs were not entitled to access the MCCA's records pursuant to the holding in *Shavers*, 402 Mich at 554, which is inapplicable in the instant case. Furthermore, plaintiffs did not have a right to access the MCCA's records under the common law because FOIA and MCL 500.134(4) and (6) supplanted the common law. Finally, plaintiffs' resulting and constructive trust theories failed as a matter of law. Given that all of plaintiffs' claims are clearly unenforceable as a matter of law and no factual development could justify recovery, the trial court erred by denying the MCCA's motion for summary disposition under MCR 2.116(C)(8) and in granting partial summary disposition in favor of plain-

tiffs. *Wade*, 439 Mich at 163. Therefore, reversal and remand for entry of an order granting summary disposition in favor of the MCCA is appropriate.

Reversed and remanded for entry of an order awarding summary disposition in favor of the MCCA consistent with this opinion. A public question being involved, no costs awarded. MCR 7.219. We do not retain jurisdiction.

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

In re JOHNSON

Docket No. 318715. Submitted May 6, 2014, at Grand Rapids. Decided May 20, 2014, at 9:15 a.m.

The Kalamazoo County Prosecuting Attorney petitioned in the Kalamazoo Circuit Court, Family Division, on behalf of the Department of Human Services, seeking the termination of the parental rights to D. Johnson, a minor. At a preliminary hearing, the father stated that both of his grandmothers were Native Americans, although he did not know to which tribe they belonged. The court, Curtis J. Bell, J., entered an order that provided that "Caseworker shall make necessary inquiry and/or notification as to possible Native American Indian heritage of [the minor child] through father." A subsequent case service plan and updates to the plan executed by the caseworker and her supervisor indicated that the Native American heritage question had been asked and that there was no applicable tribal affiliation. The subsequent order entered by the trial court terminated the parents' parental rights. On that order, the trial court did not check the box next to the statement that provided that the child is an American Indian child. The respondent mother appealed, alleging, in part, violation of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*.

The Court of Appeals *held*:

1. The ICWA provides in 25 USC 1912(a) that, where the court knows or has reason to know that an American Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right to intervention. The standard for triggering the notice requirements is a cautionary one. Sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement. If sufficient indicia of Indian heritage are presented to give the court a reason to believe the child is or may be an American Indian child, determination of the tribal status of the child, the parents, or both requires notice pursuant to 25 USC 1912(a). Indicia sufficient to trigger tribal notice includes information

suggesting that the child, a parent of the child, or members of a parent's family are tribal members or information indicating that the child has Indian heritage, even though no particular Indian tribe can be identified.

2. The record contains no indication that notice was served under 25 USC 1912(a) in this case. Conditional reversal is necessary in order to determine whether the child is an American Indian child under the law. On remand, the trial court may first explore whether the caseworker did an investigation and reached the conclusion set forth in the service plans or whether the father's claim was entirely discredited by the Department of Human Services. If, following such inquiry, the trial court determines that there is even the slightest possibility that the child is an American Indian child, or if the trial court does not conduct such inquiry, the trial court must order service of the ICWA notice.

3. The trial court did not clearly err by determining that termination of parental rights was in the child's best interests.

Conditionally reversed and remanded.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — INDIAN CHILD WELFARE ACT — NOTICE OF PROCEEDINGS.

Where a court knows or has reason to know that an American Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an American Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right to intervention; sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement (25 USC 1912(a)).

Jeffrey S. Getting, Prosecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for petitioner.

R. Scott Ryder for respondent.

Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

MURPHY, C.J. Respondent mother appeals as of right the trial court's order terminating her parental rights

to the minor child under MCL 712A.19b(3)(g) and (h). For the reasons stated in this opinion, we conditionally reverse and remand for further proceedings.[1]

At the preliminary hearing, and upon inquiry by the trial court, the minor child's father stated that his deceased grandmothers were both "full-blooded" Native Americans, although he did not know to which tribe they belonged. In response, the court asked the assigned caseworker from the Department of Human Services (DHS) to investigate the question of the child's Native American heritage. In an order relative to the preliminary hearing, the trial court ordered: "Caseworker shall make necessary inquiry and/or notification as to possible Native American Indian heritage of [the minor child] through father." The initial case service plan, which was executed by the caseworker and her DHS supervisor approximately two months after the preliminary hearing order was entered, provided that the child "does not identify with a Native American Heritage" and that "[n]o Native American heritage [is] identified at this time." In subsequent updated case service plans, it was repeatedly indicated that the Native American question had been asked and that there was no applicable tribal affiliation. In the trial court's order terminating parental rights, the court did not check the box next to the statement that provided that the child is an American Indian child.

Respondent mother argues on appeal that the trial court erred when it failed to determine, on the record, the Native American heritage of the minor child and erred by not complying with the terms of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., after the court was put on notice at the preliminary hearing of

[1] The father's parental rights were also terminated, but he is not a party to this appeal.

the child's Native American roots. "Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). Any underlying factual findings are reviewed for clear error. *Id*.

Under the ICWA, in 25 USC 1912(a), Congress provided, in relevant part:

> In any involuntary proceeding in a State court, *where the court knows or has reason to know that an Indian child is involved*, the party seeking the foster care placement of, or termination of parental rights to, an Indian child *shall notify the parent or Indian custodian and the Indian child's tribe*, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. [Emphasis added.]

In *Morris*, the Michigan Supreme Court exhaustively examined the ICWA, and in particular 25 USC 1912(a), and summarized its construction of the law as follows:

> While it is impossible to articulate a precise rule that will encompass every possible factual situation, in light of the interests protected by ICWA, the potentially high costs of erroneously concluding that notice need not be sent, and the relatively low burden of erring in favor of requiring notice, we think the standard for triggering the notice requirement of 25 USC 1912(a) must be a cautionary one. Therefore, we hold first that sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement. We hold also that a parent of an Indian child cannot waive the separate and independent ICWA rights of an Indian child's tribe and that the trial court must maintain a documentary record including, at minimum, (1) the origi-

> nal or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. Finally, we hold that the proper remedy for an ICWA-notice violation is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue. [*Morris*, 491 Mich at 88-89.]

"If sufficient indicia of Indian heritage are presented to give the court a reason to believe the child is or may be an Indian child, determination of the tribal status of the child, the parents, or both requires notice pursuant to 25 USC 1912(a)." *Id*. at 124. The *Morris* Court indicated that "indicia sufficient to trigger tribal notice includes[, in part,] situations in which (1) the trial court has information suggesting that the child, a parent of the child, or members of a parent's family are tribal members, [or] (2) the trial court has information indicating that the child has Indian heritage, even though no particular Indian tribe can be identified[.]" *Id*. at 108 n 18.

Here, the record contains no indication that notice was served under 25 USC 1912(a), nor is there any claim that such notice was ever served, apparently because there was a determination, or at least it was stated in court documents, that the minor child is not an American Indian child. Although we are a bit hesitant to do so under the circumstances, we conclude that conditional reversal is appropriate, especially considering "the potential costs of erroneously failing to send notice." *Morris*, 491 Mich at 106. "[I]f the trial court errs by concluding that no notice is required and proceeds to place the child into foster care or terminate parental rights, the purposes of ICWA are frustrated and the Indian child, the parent or Indian custodian, or

the Indian child's tribe may petition to have the proceedings invalidated pursuant to 25 USC 1914." *Id*. at 107-108.

It is unclear from the record exactly how or why the caseworker came to the conclusion, reflected in the case service plans, that the minor child is not an American Indian child for purposes of 25 USC 1912(a); some elaboration would have been appropriate given the father's assertion. There is no indication that an inquiry or investigation was made specifically with respect to the father's claim made at the preliminary hearing, nor an explanation in regard to why the father's claim was being discounted, assuming it was evaluated or pondered in the first place, to the extent that the ICWA notice requirement was not triggered. Of special concern to us is the fact that the initial case service plan, in its summarization of the trial court's preliminary hearing order, made no mention of the court's command that the caseworker "make necessary inquiry and/or notification as to possible Native American Indian heritage . . . ." Furthermore, there is no clear confirmation by the court itself that its initial concerns of whether the child is an American Indian child were alleviated. Moreover, the father's assertion concerning the Native American heritage of the minor child's paternal great-grandmothers fits within the parameters of the examples given by the *Morris* Court, quoted above, that would trigger the need to serve notice. *Morris*, 491 Mich at 108 n 18. Finally, petitioner itself concedes that conditional reversal is necessary in order to determine whether the minor child is an American Indian child under the law.

The remedy in this situation, given our ruling, later in this opinion, rejecting respondent mother's best-interests argument, is conditional reversal of the termi-

nation order for resolution of the ICWA-notice issue. *Id*. at 121-123. In *Morris*, the Court, which was addressing consolidated appeals, explained the nature of the proceedings to take place on remand:

> On remand, the trial courts shall first ensure that notice is properly made to the appropriate entities. If the trial courts conclusively determine that ICWA does not apply to the involuntary child custody proceedings—because the children are not Indian children or because the properly noticed tribes do not respond within the allotted time—the trial courts' respective orders terminating parental rights are reinstated. If, however, the trial courts conclude that ICWA does apply to the child custody proceedings, the trial courts' orders terminating parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA. [*Id*. at 123.]

The circumstances here differ from those in the two cases addressed in *Morris*, wherein the trial courts there found that the children were indeed American Indian children but the courts either did not order notification or failed to make the proper documentary record showing service of notice. *Id*. at 90-97. In the case at bar, it is conceivable that the caseworker did a thorough investigation and inquiry as directed by the trial court, resulting in the conclusion set forth in the initial case service plan and subsequent updated service plans. It is also conceivable that the Native-American-grandmothers claim made by the father, who has an extensive criminal history, including retail fraud, was entirely discredited by DHS. On remand, the trial court may first explore these possibilities, or it may directly proceed with ordering the service of the ICWA notice. If it chooses the former, we direct the court to order ICWA notification if, after the court's initial inquiry, it concludes that there is even the slightest possibility that the minor child is an American Indian child.

Respondent mother also argues that the trial court erred by finding that termination of her parental rights was in the minor child's best interests. A trial court's finding that termination is in a child's best interests is reviewed under the clearly erroneous standard. MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). After a trial court has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights if it finds by a preponderance of the evidence "that termination of parental rights is in the child's best interests[.]" MCL 712A.19b(5); see *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). When addressing a child's best interests, a trial court may consider the child's need for permanence. *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991). A trial court may also consider a parent's parenting ability and the child's need for stability. *In re Olive/Metts Minors*, 297 Mich App 35, 42; 823 NW2d 144 (2012).

Here the trial court did not clearly err when it determined that termination was in the minor child's best interests. Although there was evidence that respondent mother had appropriate parenting skills, on December 19, 2012, respondent mother was sentenced to six years' imprisonment for her participation in a bank robbery. Respondent mother testified during the termination hearing that she believed that it would be two years before she would be released from prison and that when she was released from prison, she would have to complete six months to a year at a "halfway-house." There was also evidence that the child was thriving in foster care and had developed a very strong attachment

to the foster mother. On this record, the trial court did not clearly err when it found that termination was in the minor child's best interests because of the child's need for permanence and stability. MCR 3.977(K).

We conditionally reverse the trial court's order terminating respondent mother's parental rights and remand for the purpose of ICWA compliance. We do not retain jurisdiction.

O'CONNELL and K. F. KELLY, JJ., concurred with MURPHY, C.J.

CHABAD-LUBAVITCH OF MICHIGAN v SCHUCHMAN

Docket No. 312037. Submitted May 13, 2014, at Lansing. Decided May 22, 2014, at 9:00 a.m. Leave to appeal sought.

Chabad-Lubavitch of Michigan (an ecclesiastical organization) brought an action in the Oakland Circuit Court against Dov Schuchman, Ken Kohn, Dorene Sobczak, and others, including the Sara Tugman Bais Chabad Torah Center of West Bloomfield (the Center), arising out of a property dispute over property titled in the Center's name. The dispute began in 1995. Plaintiff maintained that defendants were part of the Chabad-Lubavitch religious hierarchy and that the property had to be titled in plaintiff's name pursuant to Chabad-Lubavitch religious doctrine and polity. Defendants asserted that no religious or legal doctrine required them to transfer the title of their property and that the hierarchy did not control defendants' financial or property interests. The dispute ultimately resulted in five different ecclesiastical decisions by various rabbinic panels, all of which concluded that the property should be titled in plaintiff's name and that transfer of the title should be undertaken as soon as possible. On December 24, 2009, plaintiff received permission from the highest ecclesiastical authority to file a civil lawsuit and filed the lawsuit on April 17, 2012. The court, Rae Lee Chabot, J., denied plaintiff's motion for summary disposition and granted defendants' motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff argued that the trial court erred by granting summary disposition under MCR 2.116(C)(7) on the basis of its conclusion that the applicable statutes of limitations barred plaintiff's claims. Plaintiff's complaint (1) requested specific performance of what it termed an "arbitration contract" by which defendants agreed to be bound by the decision of a rabbinic panel (6-year period of limitations), (2) requested a declaratory judgment that Chabad-Lubavitch is a hierarchical ecclesiastical body, that the Center is subordinate, and that Chabad-Lubavitch has the right to ownership and control of the property (6-year period of limitations), (3) requested a determination of interests in land under MCL 600.2932 and MCR 3.411 (15-year period of limita-

tions), and (4) alleged trespass on the basis of defendants' continued use of the property (3-year period of limitations). Under MCL 600.5827, a period of limitations runs from the time the claim accrues, which is when the wrong on which the claim is based was done regardless of the time when damage results. The doctrine of equitable tolling, however, can alter the accrual date, and at issue in this case was whether the applicable limitations periods were equitably tolled while the parties engaged in ecclesiastical dispute resolution proceedings.

2. The trial court erred by granting summary disposition in defendants' favor under MCR 2.116(C)(7). When dispute resolution procedures are mandatory, the applicable period of limitations is tolled during the exhaustion of the mandatory procedure. Specifically, Michigan caselaw has recognized the necessity of exhaustion of religious dispute resolution remedies before filing an action in the civil courts. Plaintiff was granted permission to pursue its claims in a civil court following the final decision of the highest authority within the Chabad-Lubavitch hierarchy (which plaintiff alleged was a requirement of Chabad-Lubavitch polity), and the applicable periods of limitations were tolled during the exhaustion of plaintiff's ecclesiastical remedies. The period between that time and plaintiff's filing of this suit was within the applicable limitations period for each of plaintiff's respective claims, so plaintiff's claims were timely.

3. Defendants disputed that the process was not complete until plaintiff received permission to bring its lawsuit, arguing instead that plaintiff should have sought permission earlier so it could comply with the applicable statutes of limitations. The parties' dispute regarding when the internal procedure was final, however, constituted a factual question that was not appropriate for resolution on appeal. Moreover, resolution of the parties' disagreement would have required interpretation of religious doctrine or polity, which would have been improper because the First Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest authority of a hierarchical church organization. Accordingly, it was necessary to defer to the determination of the highest Chabad-Lubavitch authority that the procedure was not final until plaintiff received permission to file a civil lawsuit.

4. While civil courts have general authority to resolve disputes over the ownership of church property, they are prohibited from resolving church property disputes on the basis of religious doctrine and practice and are required to defer to the resolution of issues of religious doctrine or polity by the highest authority of a

hierarchical church organization. This is known as the ecclesiastical abstention doctrine. When a denomination is hierarchical, Michigan courts apply the doctrine and will not use neutral principles of law to resolve the dispute. Under the doctrine, civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to the government of the religious polity. Whether a denomination is hierarchical is a factual question. A religious organization is part of a hierarchy when it is but a subordinate part of a general church in which there are superior ecclesiastical tribunals with a more or less complete power of control. A denomination is organized in a hierarchical structure if it has a central governing body that regularly acts within its powers, in contrast to denominations that are organized in the congregational structure, in which all governing power and property ownership remains in the individual churches. If a denomination's constitutional provisions are not so express that civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity, the courts must accept the interpretation provided by the denomination and not delve into the various church constitutional provisions relevant to the conclusion.

5. The trial court did not address whether Chabad-Lubavitch is a hierarchical organization. There was a genuine issue of material fact regarding whether Chabad-Lubavitch is hierarchical in regard to property matters and, therefore, whether the ecclesiastical abstention doctrine applied. Accordingly, the trial court erred by granting summary disposition because both parties presented evidence that raised questions of material fact in support of their respective positions. A remand was necessary to decide the question.

6. The trial court erred by granting summary disposition on plaintiff's trespass claim. Because plaintiff's allegations were sufficient to plead a claim for trespass, summary disposition under MCR 2.116(C)(8) was not appropriate. Similarly, summary disposition under MCR 2.116(C)(10) was also not appropriate because there was a genuine issue of material fact regarding whether plaintiff had an exclusive right to control the property. Moreover, there was also a genuine issue of material fact regarding whether plaintiff gave defendants permission to use the property in the manner that it was being used. If defendants were using the property consistently with plaintiff's permission, defendants were not trespassing.

Reversed and remanded for further proceedings.

1. LIMITATION OF ACTIONS — PERIODS OF LIMITATIONS — EQUITABLE TOLLING–EXHAUSTION OF REMEDIES — MANDATORY DISPUTE RESOLUTION PROCEDURES — RELIGIOUS DISPUTE RESOLUTION REMEDIES.

When dispute resolution procedures are mandatory, the applicable period of limitations is tolled during the exhaustion of the mandatory procedure; in the ecclesiastical context, it is necessary to exhaust religious dispute resolution remedies before filing an action in a civil court.

2. ECCLESIASTICAL ORGANIZATIONS — ECCLESIASTICAL ABSTENTION DOCTRINE — HIERARCHICAL DENOMINATIONS.

Civil courts have general authority to resolve disputes over the ownership of church property, but the ecclesiastical abstention doctrine prohibits them from resolving church property disputes on the basis of religious doctrine and practice and requires them to defer to the resolution of issues of religious doctrine or polity by the highest authority of a hierarchical church organization; under the doctrine, a civil court may not redetermine the correctness of an interpretation of canonical text or some decision relating to the government of the religious polity and may not use neutral principles of law to resolve the dispute; whether a denomination is hierarchical is a factual question; a religious organization is part of a hierarchy when it is a subordinate part of a general church in which there are superior ecclesiastical tribunals with a more or less complete power of control; a denomination is organized in a hierarchical structure if it has a central governing body that regularly acts within its powers, in contrast to a denomination that is organized in the congregational structure, in which all governing power and property ownership remains in the individual churches; if a denomination's constitutional provisions are not so express that civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity, the courts must accept the interpretation provided by the denomination and not delve into the various church constitutional provisions relevant to the conclusion regarding hierarchical organization.

Honigman Miller Schwartz and Cohn LLP (by *Norman C. Ankers* and *Brian D. Wassom*) and *Rothberger Johnson & Lyons LLP* (by *L. Martin Nussbaum*) for plaintiffs.

Barris, Sott, Denn & Driker, PLLC (by *Todd R. Mendel* and *Josh J. Joss*), for defendants.

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

HOEKSTRA, J. This case arises out of a property ownership dispute between plaintiff, Chabad-Lubavitch of Michigan,[1] and defendants. The property at the center of the dispute is currently titled in the name of defendant Sara Tugman Bais Chabad Torah Center of West Bloomfield (hereafter "Bais Chabad"). Plaintiff maintains that defendants are part of the Chabad-Lubavitch religious hierarchy and that the property must be titled in its name pursuant to Chabad-Lubavitch religious doctrine and polity and the orders of several ecclesiastical bodies. Defendants argue that no religious or legal doctrine requires them to transfer the title of their property and the hierarchy does not control their financial or property interests. The parties also dispute whether the applicable periods of limitations have expired. Plaintiff appeals the trial court's order granting summary disposition in favor of defendants and denying its motion for summary disposition. Plaintiff asks this Court to reverse the trial court and order the transfer of the property to its name consistently with the orders of the Chabad-Lubavitch hierarchy. Because we conclude that the applicable periods of limitations were tolled during the ecclesiastical dispute resolution proceedings and because there are genuine issues of material fact, we reverse the trial court's order granting summary disposition in favor of defendants and remand for further proceedings consistent with this opinion.

There are two pieces of property at issue. The first parcel was acquired by Bais Chabad in 1984 and is

[1] According to plaintiff, Congregation Beth Chabad is the former name of Chabad-Lubavitch of Michigan and the name that Chabad-Lubavitch of Michigan still operates under; however, it is not a separate entity. Accordingly, we will refer to a singular plaintiff throughout this opinion.

located at 5595 Maple in West Bloomfield. Bais Chabad built its house of worship, which it continues to operate, on this property. In 1994, Bais Chabad acquired real property located at 6624 Tamerlane in West Bloomfield. This property is an outlot near the first property that provides a walkway to access the adjacent neighborhood. The first dispute regarding the property occurred in 1995, when defendant Rabbi Elimelech Silberberg instituted judicial proceedings before a two-person rabbinic panel regarding complaints he had about Rabbi Berel Shemtov, who is the head Chabad-Lubavitch rabbi in Michigan. After Silberberg began rabbinic proceedings, Shemtov raised countercomplaints within the rabbinic proceeding regarding Silberberg, including the fact that the property was titled in Bais Chabad's name, and not in the name of Chabad-Lubavitch of Michigan. Plaintiff maintains that Chabad-Lubavitch doctrine and polity require all subordinate congregations to title property in the name of a higher authority within the religious hierarchy. Defendants disagree.

The parties do not dispute that Chabad-Lubavitch religious doctrine and polity require internal dispute resolution by means of one of various rabbinic judicial panels or courts. Permission to file a lawsuit in a civil, secular court is required before a dispute may be taken outside the religious organization. There have been five different ecclesiastical decisions made by various panels regarding the property disputes in this case. All five decisions concluded that the property at issue should be titled in plaintiff's name and that transfer of the property's title should be undertaken as soon as possible. Defendants have refused to comply with these directives, maintaining their right to independent property ownership.

Plaintiff received permission to file a civil lawsuit on December 24, 2009, and on April 17, 2012, plaintiff filed the instant lawsuit. In response, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Thereafter, plaintiff moved for summary disposition under MCR 2.116(C)(10). The trial court held a hearing on the competing motions, and following arguments by both parties, issued its opinion on the record. The trial court denied plaintiff's motion for summary disposition, granted defendants' motion in its entirety, and dismissed the case. Plaintiff now appeals as of right.

I. STATUTES OF LIMITATIONS

We first address plaintiff's argument that the trial court erred by granting summary disposition under MCR 2.116(C)(7) on the basis of its conclusion that the applicable statutes of limitations barred plaintiff's claims.

We review de novo a trial court's decision on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of the applicable statute of limitations. A motion under MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence as long as the evidence would be admissible. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The allegations set forth in the complaint must be accepted as true unless contradicted by other evidence. *Id*. "[T]he trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri*,

290 Mich App 34, 39; 801 NW2d 385 (2010). Whether an action is barred by a statute of limitations is a question of law reviewed de novo. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006).

Resolution of this issue requires us to determine when plaintiff's claims accrued. Under MCL 600.5827, the period of limitations runs from the time the claim accrues, and "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." However, the doctrine of equitable tolling can alter the accrual date. See, e.g., *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 405-406; 738 NW2d 664 (2007). At issue here is whether, under the circumstances in this case, the applicable limitations periods were equitably tolled while the parties were engaged in ecclesiastical dispute resolution proceedings.

The doctrine of equitable tolling has been recognized by Michigan courts; however it has a limited application. See, e.g., *id*.; *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590 n 65; 702 NW2d 539 (2005). Nevertheless, in *AFSCME v Highland Park Bd of Ed*, 457 Mich 74, 82; 577 NW2d 79 (1998) (opinion by CAVANAGH, J.), the Court considered whether the applicable period of limitations was tolled when the parties negotiated a dispute resolution agreement that provided for a mandatory grievance procedure ending with nonbinding arbitration. The lead opinion noted that caselaw favors exhaustion of grievance procedures before filing suit. *Id*. at 83. Ultimately, the Court held that when grievance procedures are mandatory, the applicable period of limitations is tolled during the exhaustion of the mandatory procedure. *Id*. at 90.

In this case, plaintiff specifically argues that even if the applicable periods of limitations expired before the

filing of its lawsuit, the running of the periods of limitations was tolled by the ecclesiastical dispute resolution proceedings because Chabad-Lubavitch's polity requires express permission before a lawsuit may be filed in a secular court. Moreover, it maintains that application of the First Amendment's guarantees precludes the enforcement of the statutes of limitations without considering Chabad-Lubavitch's own process for resolution of ecclesiastical disputes.

The record in this case shows that following the final decision of the highest authority within the Chabad-Lubavitch hierarchy, plaintiff was granted permission on December 24, 2009, to pursue its claims in the civil courts and thereafter filed its complaint on April 17, 2012. This intervening period was within the applicable limitations period for each of its claims.[2] *Highland*

[2] Count I of plaintiff's complaint requested specific performance of the "arbitration contract" wherein defendants agreed to be bound by the decision resulting from the din Torah (a formal proceeding before a three-member rabbinic court); actions for breach of contract or specific performance of a contract are subject to a six-year statute of limitations under MCL 600.5807(8) ("The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract."). Count II requested a declaratory judgment under MCR 2.605 declaring that Chabad-Lubavitch is hierarchical, that Bais Chabad is subordinate, and that Chabad-Lubavitch has the right to ownership and control of the property. Actions for declaratory relief derive from the underlying claim for substantive relief and are subject to the statute of limitations applicable to the underlying claim. *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 128; 537 NW2d 596 (1995). Because there is no specific statute of limitations governing the claim underlying plaintiff's request for declaratory relief, the six-year residual statute of limitations set forth by MCL 600.5813 applies ("All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."). Count III requested a determination of interests in land under MCL 600.2932 and MCR 3.411, wherein plaintiff asked the court to find that Chabad-Lubavitch has established title to the property by virtue of the religious hierarchy and is entitled to an order requiring defendants to

Park, 457 Mich at 90 (opinion by CAVANAGH, J.), held that a plaintiff's claims are tolled during the exhaustion of mandatory dispute resolution procedures. Applying this principle to the issue in this case, the applicable periods of limitations were tolled during the exhaustion of plaintiff's ecclesiastical remedies. Therefore, plaintiff's claims were timely.

Additionally, defendants dispute the date that the ecclesiastical dispute resolution process was concluded. Plaintiff maintains that the process was not complete until it received permission on December 24, 2009, to bring a lawsuit in civil court. Defendants maintain that plaintiff should have sought permission earlier so as to comply with the applicable statutes of limitations. Thus, the question becomes whether the December 24, 2009 date marks the completion of the ecclesiastical dispute resolution process. However, the parties' dispute regarding when the internal procedure was final constitutes a factual question that is not appropriate for resolution by this Court on appeal. Moreover, resolution of the parties' disagreement about when the internal dispute resolution process was final would require this Court to interpret religious doctrine or polity. Engaging in such an interpretation would be improper because the First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones v Wolf*, 443 US 595, 602; 99 S Ct 3020; 61 L Ed 2d 775 (1979). Accordingly, we are required to

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transfer title to plaintiff; actions to determine the interest in land are subject to a 15-year statute of limitations under MCL 600.5801(4). Finally, count IV alleged trespass on the basis of defendants' continued use of the property. Actions for trespass are subject to a three-year statute of limitations under MCL 600.5805(10) ("[T]he period of limitations is 3 years after the time of the . . . injury for all other actions to recover damages for . . . injury to a person or property.").

defer to the determination of the highest Chabad-Lubavitch authority that the procedure was not final until plaintiff received permission to file a civil lawsuit. See *id*. Therefore, plaintiff's complaint was timely filed.

In further support of our conclusion that the doctrine of equitable tolling applied in this case, we note that Michigan law has previously recognized the necessity of exhaustion of religious dispute resolution remedies before filing an action in the civil courts. In *Buettner v Frazer*, 100 Mich 179, 181; 58 NW 834 (1894), our Supreme Court declined to consider a dispute between a pastor and the trustees of the German Evangelical Lutheran Christus Church of Detroit until both parties had exhausted "the remedies afforded by the ecclesiastical body" because the issues raised were "of ecclesiastical cognizance." Similarly, in *Miller v McClung*, 4 Mich App 714, 722-723; 145 NW2d 473 (1966), this Court implicitly held that exhaustion of remedies within a church before seeking relief from the courts was a necessary prerequisite to civil litigation in the context of a property dispute between members of a congregation and that congregation's leadership. In *Miller*, this Court addressed the issues raised before it after concluding that the plaintiffs had exhausted their remedies within the church before seeking relief from the trial court. *Id*. at 723.

Finally, we note that the primary purposes behind the enactment of statutes of limitations "can be summarized as (1) encouraging the plaintiffs to diligently pursue claims and (2) protecting the defendants from having to defend against stale and fraudulent claims." *Wright v Rinaldo*, 279 Mich App 526, 533; 761 NW2d 114 (2008). Accordingly, the policy behind the enactment of statutes of limitations is not circumvented by applying the doctrine of equitable tolling in this case

because plaintiff has not slept on its rights and defendants are not being asked to defend a stale claim for which the evidence is long gone or forgotten. Rather, the parties have been working toward a resolution of the issues raised in this case for several years in the ecclesiastical context, and there has been very little delay between the religious dispute resolution proceedings and the instant lawsuit. Thus, this case does not present the type of circumstances that statutes of limitations are meant to prevent.

Defendants also argue that equitable tolling cannot be applied in this case because the parties were engaged in voluntary arbitration proceedings and that under *Varga v Heritage Hosp*, 139 Mich App 358, 359-360; 362 NW2d 282 (1984), which specifically held that voluntary arbitration proceedings do not toll the limitations period, the periods of limitations were not tolled. However, contrary to defendants' argument, as discussed, we conclude that the parties were not engaged in arbitration proceedings. While the parties did sign a document that was titled "arbitration contract," the document was an agreement to accept as binding the decision of the rabbinic panel that was convened to resolve the dispute under Chabad-Lubavitch's ecclesiastical procedures. Other than the title of one document, nothing about the dispute resolution process that the parties were involved in suggested that the parties were engaged in voluntary arbitration. Rather, it is plain that the parties were attempting to resolve their dispute under Chabad-Lubavitch's mandatory ecclesiastical procedure.

In summary, we conclude that the applicable periods of limitations were equitably tolled during the time that the parties were engaged in the mandatory ecclesiastical dispute resolution process. Therefore, the periods of

limitations did not begin to run until the resolution of the ecclesiastical proceedings. Accordingly, we conclude that plaintiff's claims were timely filed and the trial court erred by granting summary disposition under MCR 2.116(C)(7).

II. ECCLESIASTICAL ABSTENTION DOCTRINE

Having determined that plaintiff's claims are timely, we now consider whether summary disposition was nonetheless appropriate under MCR 2.116(C)(10) on the basis of the ecclesiastical abstention doctrine. In determining whether to grant summary disposition pursuant to MCR 2.116(C)(10), the court tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Coblentz*, 475 Mich at 567. The evidence is viewed in the light most favorable to the nonmoving party. *Id*. at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden*, 461 Mich at 120.[3]

Plaintiff argues that the trial court should have denied defendants' motion for summary disposition and instead granted its motion because under the ecclesiastical abstention doctrine courts must defer to the decision of the highest ecclesiastical tribunal within a church of hierarchical polity. In particular, plaintiff argues that because Chabad-Lubavitch is a religious

[3] We note that the trial court did not specifically address this issue in its decision granting summary disposition; however, we consider whether summary disposition was appropriate in light of the ecclesiastical abstention doctrine under MCR 2.116(C)(10) because the parties have presented evidence outside the pleadings in support of their respective arguments. See *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

hierarchy and its highest authority has declared that title to the property must be in plaintiff's name, the trial court was required to defer to the decision of the hierarchy's highest authority and enforce its order. Defendants counter that Chabad-Lubavitch is not hierarchical when it comes to property and financial matters; thus, the ecclesiastical abstention doctrine does not apply in this case.

"[T]he First and Fourteenth Amendments to the United States Constitution protect freedom of religion by forbidding governmental establishment of religion and by prohibiting governmental interference with the free exercise of religion." *Bennison v Sharp*, 121 Mich App 705, 712; 329 NW2d 466 (1982). See also US Const, Ams I and XIV; Const 1963, art 1, § 4. This Court has clearly held that "civil courts have general authority to resolve disputes over the ownership of church property." *Bennison*, 121 Mich App at 712. However, the First Amendment

> "severely circumscribes the role that civil courts may play in resolving church property disputes" by prohibiting civil courts from resolving church property disputes on the basis of religious doctrine and practice and requiring that courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. [*Id*. at 712-713, quoting *Jones*, 443 US at 602.]

In *Bennison*, citing *Watson v Jones*, 80 US (13 Wall) 679; 20 L Ed 666 (1871), this Court explained that the approach to a civil court's resolution of a dispute over church property turns on which of three "general headings" apply. *Bennison*, 121 Mich App at 713-714. The first class is "where property is purchased for the use of a religious congregation, 'so long as any existing religious congregation can be ascertained to be that congregation or its regular and legitimate successor, it is entitled to the use

of the property'." *Id*. at 714, quoting *Watson*, 80 US at 726. The second class is that in which property is held by a congregation that, " 'by nature of its organization, is strictly independent of other ecclesiastical associations' " and " 'owes no fealty or obligation to any higher authority.' " *Bennison*, 121 Mich App at 714, quoting *Watson*, 80 US at 722. If the second class applies, the dispute is governed " 'by the ordinary principles which govern voluntary associations[.]' " *Bennison*, 121 Mich App at 714, quoting Watson, 80 US at 726. The third class involves a situation in which the property is held by "a religious congregation or ecclesiastical body which 'is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization.' " *Bennison*, 121 Mich App at 714, quoting Watson, 80 US at 722-723. This third class describes hierarchical denominations. See *Lamont Community Church v Lamont Christian Reformed Church*, 285 Mich App 602, 617-620; 777 NW2d 15 (2009). "The determination of whether a denomination is hierarchical is a factual question." *Id*. at 615.

If a religious denomination is hierarchical, the ecclesiastical abstention doctrine applies. *Id*. at 616. Under this doctrine, "civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity." *Smith v Calvary Christian Church*, 462 Mich 679, 684; 614 NW2d 590 (2000) (quotation marks and citation omitted).[4] Instead, courts must "defer to the

[4] "Religious doctrine refers to ritual, liturgy of worship and tenets of the faith." *Maciejewski v Breitenbeck*, 162 Mich App 410, 414; 413 NW2d 65 (1987). "Polity refers to organization and form of government of the church." *Id*.

resolution of those issues 'by the highest court of a hierarchical church organization.' " *Lamont Community Church*, 285 Mich App at 616, quoting *Bennison*, 121 Mich App at 713. Thus, when a denomination is hierarchical, trial courts must enter a judgment that is consistent with any determinations already made by the denomination. *Lamont Community Church*, 285 Mich App at 616. Said differently, when a denomination is hierarchical, Michigan courts will apply the ecclesiastical abstention doctrine and will not use neutral principles of law to resolve the dispute. *Smith*, 462 Mich at 684; *Lamont Community Church*, 285 Mich App at 624-625; *Calvary Presbyterian Church v Presbytery of Lake Huron of the United Presbyterian Church*, 148 Mich App 105, 110; 384 NW2d 92 (1986). See also *Jones*, 443 US at 602 (holding that the First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization").

A religious organization is part of a hierarchy when it "is but a subordinate part of a general church in which there are superior ecclesiastical tribunals with a more or less complete power of control . . . ." *Bennison*, 121 Mich App at 720. In *Lamont Community Church*, 285 Mich App at 618, this Court explained further that a denomination is organized in a hierarchical structure when it has a "central governing body which has regularly acted within its powers," in contrast to denominations that are organized in the "congregational structure," which have "all governing power and property ownership remaining in the individual churches." (Quotation marks and citations omitted.)

In *Lamont Community Church*, the issue before this Court was whether the trial court properly determined that the church involved was a hierarchical denomina-

tion with respect to its property. *Id*. at 617. The trial court determined that the church was hierarchical with respect to doctrinal and spiritual matters as a matter of law, but held a fact-finding hearing to determine whether it was hierarchical regarding property. *Id*. at 610-611. This Court first noted that the trial court considered testimony that "went well beyond anything [it] should have considered." *Id*. at 617. This Court noted that "it is a violation of the First and Fourteenth amendments for courts to substitute their own interpretation of a denomination's constitution for that of the highest ecclesiastical tribunals in which the church law vests authority to make that interpretation." *Id*. (quotation marks and citations omitted). Thus, this Court explained that if a denomination's constitutional provisions "are not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity, courts must accept the interpretation provided by the denomination and not delve into the various church constitutional provisions relevant to this conclusion." *Id*. (quotation marks and citations omitted).

In this case, the trial court did not address whether Chabad-Lubavitch is a hierarchical organization. The parties dispute this issue in regard to the control of finances and property, and both sides cite decrees from Chabad-Lubavitch leaders, the articles of incorporation, the general regulations governing shluchim,[5] and the affidavits of both rabbis in support of their arguments. In particular, plaintiff argues that there is no genuine issue of material fact in regard to the hierarchical

[5] Plaintiff's complaint explains that shluchim are designated by the spiritual leader as "official representatives of the Chabad Lubavitch Organization with the mission to strengthen Judaism and disseminate Chassidic teachings within a particular geographic territory."

nature of Chabad-Lubavitch by citing its complaint wherein it claims that Chabad-Lubavitch refers to itself as a hierarchy, by referring to the 1958 resolution adopted by the Board of Trustees of Agudas Chasidei Chabad (the policymaking organization of Chabad-Lubavitch) "acting in its capacity as the Hierarchy of all Chabad activities," by describing the organizational structure of the religion, including the process by which religious leaders are selected and assigned to regions, and by referring to general regulations created in 1995 to "reaffirm" the hierarchical relationship that were signed by several shluchim, including Silberberg. Plaintiff also details the way in which the Chabad-Lubavitch organization helped to finance and support the establishment of Bais Chabad in support of its claim that Chabad-Lubavitch is a hierarchy, and plaintiff notes that Bais Chabad's articles of incorporation expressly bind it to obey the discipline and rules of the Chabad-Lubavitch hierarchy. In his affidavit, another of the shluchim, Rabbi Kasriel Shemtov, stated that Chabad-Lubavitch is a hierarchical organization and that Bais Chabad is a subordinate component of the organization, "subject to the authority and control of the hierarchy, both as to religious matters and as to matters involving ownership and use of property." Finally, plaintiff claims that defendants acknowledged their part in the hierarchy when soliciting and accepting monetary donations.

In contrast, defendants argue that they are not subordinate to a hierarchical organization in regard to finance or property matters. To support their claim, defendants cite a letter written by the Rebbe[6] that states that "each institution should be autonomous" and that the leaders of Chabad-Lubavitch are there just

[6] Plaintiff's complaint explains that Rebbes are the spiritual leaders who head the Chabad-Lubavitch organization.

to give advice, not to control individual congregations, and also a guidance written by a rabbi on behalf of the Rebbe stating that individual institutions must deal with their own finances and cannot use the institution's stationary, letters, or charter when handling their finances or collecting money. Defendants also note that in 1984, the Rebbe stated that "it is well known that the various Chabad institutions are financially completely independent of our central office." Defendants claim that plaintiff's instructions to local Chabad-Lubavitch houses show that Chabad-Lubavitch is not hierarchical in regard to property and finance because the houses were instructed to incorporate separately and hold property independently, and it was explained that plaintiff wanted no legal or financial responsibility for any property owned by separate shluchim. Defendants note that Silberberg's contract highlights his financial independence because it states that there is a hope that he will become financially independent of the institution. Defendants cite the fact that several other Chabad-Lubavitch congregations in Michigan own their own property. Defendants maintain that the language in their articles of incorporation is simply language required by the state and note that the Bais Chabad itself has never recognized a Chabad-Lubavitch hierarchy concerning its property and financial matters. In his affidavit, Silberberg states that the Bais Chabad has always been financially independent from plaintiff and that the 1995 regulations regarding the hierarchy were signed on his behalf only and have no effect on the Bais Chabad.

On the record before us, we conclude that there is a genuine issue of material fact regarding whether Chabad-Lubavitch is hierarchical in regard to property matters and, thus, whether the ecclesiastical abstention

doctrine applies in this case.[7] Accordingly, the trial court erred by granting summary disposition because, as previously detailed, both parties have presented evidence that raises questions of material fact in support of their respective positions. *Rozwood*, 461 Mich at 120. On remand, the trial court should be careful to avoid engaging in an impermissible "searching inquiry" into the doctrine and polity of Chabad-Lubavitch because courts "must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining the intent of the document." *Lamont Community Church*, 285 Mich App at 618 & n 8 (quotation marks and citation omitted).

III. TRESPASS CLAIM

Finally, plaintiff argues that the trial court should not have dismissed its trespass claim under MCR 2.116(C)(8) because its complaint adequately pleaded the prima facie elements of trespass. Plaintiff further argues that it was entitled to summary disposition under MCR 2.116(C)(10) because it has the exclusive right to possess and control the property by virtue of the rulings and decrees of the hierarchy's highest authority and defendants continue to occupy the property despite the orders to transfer title.

Again, we review de novo a trial court's decision to grant or deny a motion for summary disposition.

[7] We note that resolution of the hierarchy question may also resolve the parties' dispute regarding whether Silberberg's actions bind the congregation. If the congregation is part of a hierarchy, courts must defer to the interpretation of the highest authority within the hierarchy; accordingly, plaintiff's claim that Silberberg's actions bind the congregation would be entitled to deference. If there is no hierarchy, whether Silberberg's actions are binding on the congregation presents a question of fact in light of the evidence presented by both parties regarding the effect of Silberberg's actions.

Summary disposition pursuant to MCR 2.116(C)(8) is proper if the nonmoving party failed to state a claim on which relief can be granted. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). In reviewing a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(8), we review the pleadings alone, accepting all factual allegations in the complaint as true and construing them in a light most favorable to the nonmoving party. *Id*. A motion under MCR 2.116(C)(10) is properly granted when "the proffered evidence fails to establish a genuine issue regarding any material fact . . . ." *Maiden*, 461 Mich at 120.

This Court has explained that "[e]very unauthorized intrusion upon the private premises of another is a trespass . . . ." *Wiggins v City of Burton*, 291 Mich App 532, 555; 805 NW2d 517 (2011) (quotation marks and citations omitted) (alteration in original). Recovery for a trespass to land "is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Id*. (quotation marks and citation omitted). Moreover, it is a trespass for an easement holder to exceed the scope of the easement. *Schadewald v Brulé*, 225 Mich App 26, 40; 570 NW2d 788 (1997).

Plaintiff alleged the following in its complaint with respect to its trespass claim:

> 121. Chabad-Lubavitch of Michigan has the exclusive right to possess and control the Property.
>
> 122. To the extent that Defendants are defying the authority of Chabad-Lubavitch of Michigan, they are occupying and using the Property in a manner unauthorized by Chabad-Lubavitch of Michigan.

123. Defendants' invasion into the Property is direct, immediate, and tangible.

124. Defendants are interfering with, and intruding upon, Chabad-Lubavitch of Michigan's exclusive rights to possess and control the Property.

125. Defendants' actions in this regard have been intentional and willful at all material times.

126. Defendants' actions in this regard have been, and are, a continuing wrong.

127. Defendants are committing trespass against Chabad-Lubavitch of Michigan with respect to the property.

128. Defendants are jointly and severally responsible and liable for said trespass.

These allegations, taken as true, are sufficient to plead as a matter of law a claim for trespass; therefore, summary disposition pursuant to MCR 2.116(C)(8) was not appropriate. Similarly, summary disposition under MCR 2.116(C)(10) was also not appropriate because there is a genuine issue of material fact regarding whether plaintiff has an exclusive right to control the property. If, as plaintiff claims, it is entitled to exclusive ownership of the property, then it is possible that plaintiff could prevail on its trespass claim. Because there is a genuine issue of material fact in regard to whether plaintiff is entitled to ownership of the property, there is similarly a genuine issue of material fact regarding whether plaintiff is entitled to recover on its trespass claim. Moreover, there is also a genuine issue of material fact regarding whether plaintiff gave defendants permission to use the property in the manner that it is being used. If defendants are using the property consistently with plaintiff's permission, defendants are not trespassing. However, the record before us is not clear in regard to whether plaintiff has given

defendants permission to use the property and the scope of any permission given. Therefore, the trial court erred by granting summary disposition on plaintiff's trespass claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

STEPHENS, P.J., and METER, J., concurred with HOEKSTRA, J.

SHOTWELL v DEPARTMENT OF TREASURY

Docket No. 314860. Submitted May 14, 2014, at Lansing. Decided May 27, 2014, at 9:00 a.m. Leave to appeal sought.

The Department of Treasury assessed deficiencies against Deena Shotwell with regard to the failure of People's True Taste (PTT), a Kentucky corporation, to properly prepay the equity assessments for projected taxes relating to its sales of tobacco products. The department asserted that Shotwell was an officer of the corporation who was liable for the corporation's tax obligations. Shotwell thereafter petitioned in the Tax Tribunal, seeking cancelation of the assessments on the basis that she was not a corporate officer at the relevant time. The Tax Tribunal agreed with Shotwell and granted summary disposition in her favor. The Department of Treasury appealed.

The Court of Appeals *held*:

1. Pursuant to 2014 PA 3, effective February 6, 2014, the provisions of MCL 205.27a(5) apply to taxes related to tax assessments issued to responsible persons before January 1, 2014. The Legislature clearly expressed an intent that § 27a(5) apply retroactively. Because the statute has retroactive effect, the amendments of § 27a(5) control the resolution of whether Shotwell is personally liable for the assessments.

2. MCL 205.27a(15)(b) provides that a responsible person is an individual who controlled, supervised, or was responsible for the filing of tax returns or paying taxes during the time period of default. The "time period of default" is defined in MCL 205.27a(15)(c) as the tax period for which the business failed to file the return or pay the tax due under § 27a(5) and through the later of the date set for the filing of the tax return or making the required payment. Read together, §§ 27a(15)(b) and (c) clearly provide that an officer may only be held personally liable when he or she controlled, supervised , or was responsible for filing tax returns or paying taxes during the time period of default. An individual who did not control, supervise, or bear responsibility for filing returns or paying taxes during the relevant timeframe may not be held personally liable. An officer assuming his or her duties after taxes come due and after the date for filing the return has passed, is not a responsible person for the corporation's failures in respect to these obligations and is not

personally liable under § 27a(5). Because Shotwell's appointment as president of PTT occurred long after the date for making the tax payments at issue in this case, Shotwell cannot be held personally liable as the president of PTT.

3. Shotwell was not a de jure corporate officer before her appointment as president of PTT. Even supposing that Shotwell could be characterized as a de facto corporate officer, she would not be subject to personal liability under § 27a(5), which imposes personal liability on corporate "officers" and does not mention de facto officers. The Legislature's reference to officers refers to those individuals who hold corporate positions in truth under the law, not merely with apparent authority.

Affirmed.

1. TAXATION — STATUTES — RETROACTIVE APPLICATION.

The Legislature, in enacting 2014 PA 3, effective February 6, 2014, which modified MCL 205.27a(5) and added MCL 205.27a(14), clearly expressed an intent that § 27a(5) apply retroactively to taxes administered before January 1, 2014.

2. TAXATION — WORDS AND PHRASES — RESPONSIBLE PERSON — TIME PERIOD OF DEFAULT.

A "responsible person," as the term is used in MCL 205.27a(5), is an individual who controlled, supervised, or was responsible for the filing of "corporate tax returns or paying taxes during the time period of default"; the "time period of default" means the tax period for which the business failed to file the return or pay the tax due under § 27a(5) and through the later of the date set for the filing of the tax return or making the required payment; a corporate officer that assumes his or her position after taxes come due and after the date for filing the return has passed is not a responsible person for the corporation's failure in respect to these obligations and is not personally liable for the obligations (MCL 205.27a(15)(b) and (c)).

3. CORPORATIONS — DE JURE OFFICERS.

A de jure officer, in the corporate context, is a duly authorized corporate officer; in Michigan, a corporation's bylaws determine what officers the corporation shall have and in what manner those officers shall be appointed.

4. TAXATION — CORPORATIONS — WORDS AND PHRASES — OFFICERS.

The Legislature's reference to corporate "officers" in MCL 205.27a(5) refers to those individuals who hold corporate positions in truth under the law, not de facto officers with apparent authority.

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas* and *Brian T. Quinn*) for Deena Shotwell.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Brian G. Green*, Assistant Attorney General, for the Department of Treasury.

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM. In this litigation involving petitioner's personal liability for unpaid corporate tax obligations, respondent appeals as of right the order of the Michigan Tax Tribunal granting petitioner's motion for summary disposition under MCR 2.116(C)(10). Because petitioner cannot be held personally liable for the corporation's taxes pursuant to § 27a(5) of Michigan's revenue collection act, MCL 205.27a(5), and the tax tribunal properly granted her motion for summary disposition, we affirm.

People's True Taste (PTT) is a Kentucky corporation engaged in the manufacture and sale of tobacco products in several states, including Michigan. As a manufacturer engaged in the sale of tobacco in Michigan, PTT is subject to Michigan's Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*. Specifically, under the TPTA, certain tobacco manufacturers must prepay an "equity assessment" no later than March 1 for projected tobacco sales during the current calendar year. MCL 205.426d(5). While prepayment occurs no later than March 1 of each year, the equity assessment is then "collected and reconciled by April 15" of the following year. MCL 205.426d(4). At that time, the manufacturer is credited with any prepayment made the previous year. *Id*.

Until his death, petitioner's husband, William Shotwell, was the sole shareholder and director of PTT. William died intestate on March 17, 2007, survived by petitioner and his daughter, Suzanne Shotwell. On March 28, 2007, a Kentucky district court appointed petitioner and Suzanne coadministrators of William's estate. Shortly thereafter, on April 9, 2007, the court entered an order empowering petitioner and Suzanne to act independently on behalf of the estate and "to conduct any business that [William] could have conducted concerning" PTT. At that time, petitioner was not, however, an officer or director of PTT.

Nevertheless, empowered by the district court to act in William's stead, petitioner undertook activities on PTT's behalf. Related on PTT's tax obligations under the TPTA, on April 13, 2007, petitioner signed a Michigan Department of Treasury tobacco products tax filing for PTT listing herself as "co-owner" and checking a box indicating that her role was to "prepare tax returns." She also submitted a tobacco products license application, listing herself as "co-owner" of PTT and checking a box to confirm that all assessments, including taxes, had been paid in full.

On May 1, 2007, respondent informed PTT by letter that it had determined that a deficiency existed for the 2006 equity prepayment in the amount of $694,732.82 and it instructed PTT to pay the deficiency by May 31, 2007. In June of 2007, PTT made a partial payment of $50,000 to respondent. PTT did not appeal the 2006 assessment, and it became final on August 9, 2007. On October 23, 2007, petitioner executed a limited power of attorney, authorizing an attorney to address PTT's tax issues with respondent on PTT's behalf. On this instrument, petitioner indicated that her title was "president."

By the end of 2007, petitioner had become an official PTT employee and was receiving a salary. She still had not, however, been named as an officer or director of the corporation. Nevertheless, petitioner continued to conduct business on PTT's behalf. For example, in 2008, petitioner signed several tax filings on PTT's behalf, including a federal income tax return and a Kentucky Schedule Q on which petitioner signed as "principal officer or chief accounting officer."

William's estate closed on March 26, 2008, at which time petitioner's duties as coadministrator ended. At that time, petitioner and Suzanne each received one-half of the total shares in PTT. On April 11, 2008, PTT filed its annual report with the Kentucky Secretary of State. Although there had still been no formal appointment, the document listed petitioner as president and director of the corporation.

On March 14, 2008, respondent notified PTT that an additional assessment of $55,965.47 was due by April 15, 2008. The amount represented the reconciliation payment for PTT's 2007 tobacco sales in Michigan. PTT did not appeal this assessment and it became final on May 27, 2008.

Eventually, on October 29, 2010, petitioner and Suzanne became directors of PTT by action of the shareholders. At the same time, petitioner also became president and treasurer of PTT. Upon their appointment to these positions, petitioner and Suzanne ratified and approved their previous activities undertaken on behalf of PTT. In particular, the resolution for their appointment as directors provided that: "all acts of Deena Shotwell and/or Suzanne Shotwwell [sic] taken in their capacity as directors of the Corporation's [sic] since the death of [William] Shotwell . . . are ratified." Similarly, the resolution appointing officers provided

that "all acts of Deena Shotwell and/or Suzanne Shotwwell [sic] heretofore taken in their capacity as officers of the Corporation . . . are ratified and approved." In an e-mail sent by PTT's attorney on October 29, 2010, respondent learned of petitioner's appointment as director, president, and treasurer.

Relying on § 27a(5), on February 21, 2012, respondent assessed deficiencies against petitioner for PTT's unpaid tax assessments, asserting that petitioner was an officer liable for the corporation's tax obligations. Petitioner sought cancelation of those assessments in the Michigan Tax Tribunal, ultimately moving for summary disposition under MCR 2.116(C)(10) on the basis of the assertion that petitioner was not a corporate officer at the relevant time. The tribunal granted petitioner's motion for summary disposition, reasoning that petitioner was not an officer of PTT during the relevant period in which the taxes were due. Thus, the Tax Tribunal reasoned, she was not a responsible corporate officer for the assessment at issue. Respondent now appeals in this Court.

On appeal, respondent challenges the Tax Tribunal's grant of summary disposition pursuant to MCR 2.116(C)(10). A trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10) is a question of law reviewed de novo. *Bingham Twp v RLTD R Corp*, 463 Mich 634, 641; 624 NW2d 725 (2001). A motion under MCR 2.116(C)(10) tests the factual underpinnings of a claim, and is properly granted as a matter of law where, viewing the evidence in a light most favorable to the nonmoving party, there remains no genuine issue regarding any material fact. *Coblentz v Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). "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).

Also raised on appeal are issues that require interpretation of § 27a(5) to determine whether petitioner may be held personally liable. The interpretation and application of a statutory provision presents a question of law that we review de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002).

The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The intent of the Legislature is discerned from the plain language of the statute, affording words their common, ordinary meaning. *Veenstra*, 466 Mich at 160. If the statute is unambiguous, this Court presumes that the Legislature intended the meaning plainly expressed, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Typically, tax laws are construed against the government. *DeKoning v Dep't of Treasury*, 211 Mich App 359, 361; 536 NW2d 231 (1995). Generally, when construing a tax provision, this Court will defer to the Tax Tribunal's interpretation of the statute. *Grimm v Dep't of Treasury*, 291 Mich App 140, 145; 810 NW2d 65 (2010).

Respondent first contends that petitioner is personally liable for PTT's 2006 and 2007 taxes on the basis of her appointment as president of PTT on October 29, 2010. In making this argument, respondent relies on former § 27a(5), which, at the time of proceedings before the Tax Tribunal, provided, in part, as follows:

> If a corporation . . . liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers . . . who the department

> determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers . . . on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments.

Emphasizing that, by its plain terms, the statute holds an officer personally liable for either a corporation's failure to file a return *or* its failure to pay taxes, respondent maintains that PTT's failure to pay the outstanding tax debt after petitioner's appointment as president provides a sufficient basis for the imposition of personal liability, regardless of the fact that the tax liability was incurred before her appointment as president on October 29, 2010. That is, because the taxes continue to be "due" and petitioner is now responsible for PTT's payment of taxes, respondent asserts petitioner may be held individually liable for PTT's tax obligations. Petitioner, in contrast, argues that the statute's reference to "*the* failure" (emphasis added) denotes a specific failure to pay taxes when they come due, rather than an ongoing failure to pay on an outstanding obligation, meaning that only an officer responsible for the filing of returns or payment of taxes at the time of the initial failure to fulfill these obligations may be held personally liable for the corporation's tax obligations.

In making their arguments, neither party addresses recent amendments of § 27a(5) which, if applied retroactively, make plain that petitioner cannot be held personally liable for taxes coming due before her appointment as an officer.

Whether a statute applies retroactively presents a question of statutory interpretation that we consider de novo. *Frank W Lynch & Co v Flex Technologies, Inc*, 463

Mich 578, 583; 624 NW2d 180 (2001). In making a determination regarding whether retroactive application of a statute is appropriate, we focus on legislative intent as expressed in the plain statutory language. *Id*. However, unless a contrary intent is clearly manifested, statutes are presumed to operate prospectively. *Id*.

Relevant to the present case, among other changes, 2014 PA 3 (effective February 6, 2014) modified § 27a(5) and added § 27a(14) to Michigan's revenue collection act. Section 27a(14) provides:

> [Section 27a(5)] applies to all the following taxes administered under this act:
>
> (a) For assessments issued to responsible persons before January 1, 2014, taxes administered under this act.

By stating that § 27a(5) applies to taxes related to tax assessments issued to responsible persons *before* January 1, 2014, the Legislature clearly expressed an intent that § 27a(5) apply retroactively. Indeed, the amendments were approved by the Governor on January 30, 2014, and took effect February 6, 2014, yet they concerned, not only a prospective timeframe, but also the applicability of § 27a(5) to past tax assessments issued before the act's effective date and, more particularly, before January 1, 2014. Given this clear indication that the current version of § 27a(5) should apply to taxes administered before January 1, 2014, we conclude that the statute has retroactive effect. Consequently, the amendments of § 27a(5) control resolution of petitioner's personal liability.

In particular, owing to changes enacted by 2014 PA 3, § 27a(5) now provides, in relevant part:

> If a business liable for taxes administered under this act fails, for any reason after assessment, to file the required returns or to pay the tax due, any of its officers . . . who the

> department determines, based on either an audit or an investigation, is a responsible person is personally liable for the failure for the taxes described in subsection (14). . . . The sum due for a liability may be assessed and collected under the related sections of this act. . . . The department has the burden to first produce prima facie evidence as described in subsection (15) or establish a prima facie case that the person is the responsible person under this subsection through establishment of all elements of a responsible person as defined in subsection (15).

As used in § 27a(5), a "responsible person" is defined by § 27a(15)(b), which provides, in relevant part:

> "Responsible person" means an officer, member, manager of a manager-managed limited liability company, or partner for the business who controlled, supervised, or was responsible for the filing of returns or payment of any of the taxes described in subsection (14) during the time period of default and who, during the time period of default, willfully failed to file a return or pay the tax due for any of the taxes described in subsection (14).

By its plain terms, § 27a(15)(b) indicates that a responsible person is an individual "who controlled, supervised, or was responsible" for the filing of returns or paying taxes "during the time period of default . . . ." What constitutes the "time period of default" is set forth in § 27a(15)(c), which states:

> "Time period of default" means the tax period for which the business failed to file the return or pay the tax due under subsection (5) and through the later of the date set for the filing of the tax return or making the required payment.

Read together, these provisions clearly provide that an officer may only be held personally liable when he or she controlled, supervised, or was responsible for filing returns or paying taxes during "the time period of default," which consists of the relevant tax period extending to "the

later of the date set for the filing of the tax return or making the required payment." Conversely, it follows that an individual who did not control, supervise, or bear responsibility for filing returns or paying taxes during the relevant timeframe may not be held personally liable. Thus, an officer assuming his or her position after taxes come due and after the date for filing the return has passed, is not a responsible person for the corporation's failures in respect to these obligations and is, therefore, not personally liable under § 27a(5).

Applying this conclusion to petitioner's case, the date for the collection and reconciliation of the equity assessment owed under the TPTA is April 15 of the applicable tax year, meaning that the sums PTT owed for the 2006 and 2007 equity assessments were due on April 15, 2007, and April 15, 2008, respectively. MCL 205.426d(4). Because petitioner's appointment as president occurred in 2010, long after the date for making the required payments had passed, she cannot be held personally liable on the basis of her official appointment as president of PTT.

Next, respondent argues that petitioner may be held personally liable because she became a de jure corporate officer in 2007 when the district court entered an order authorizing her to take action on PTT's behalf commensurate with the authority William could have exercised. We disagree.

By definition, in the corporate context, a de jure officer is a "duly authorized corporate officer." *Black's Law Dictionary* (9th ed), p 1194. In Kentucky, as in Michigan, a corporation's bylaws determine what officers the corporation shall have and in what manner those officers shall be appointed. Ky Rev Stat 271B.8-400. Considering that the manner in which corporate officers become duly authorized is dictated by a corpo-

ration's bylaws, the Kentucky district court's general grant of authority to petitioner to administer the estate does not render her a de jure officer. That is, although respondent is correct that the Kentucky district court granted petitioner authority to act on PTT's behalf, this grant is not an appointment to hold a corporate office as provided for in PTT's bylaws, nor is it an appointment in the manner prescribed by PTT's bylaws. Indeed, respondent makes no effort to explain how the Kentucky district court's grant of authority comported with PTT's bylaws, or even what corporate office petitioner should be presumed to have held. Absent petitioner's appointment as an officer in accordance with PTT's bylaws, which apparently did not occur until October 2010, we cannot see that petitioner qualified as a de jure corporate officer. Consequently, respondent's argument in this regard is without merit.

Alternatively, respondent asserts that, even if not a de jure corporate officer, petitioner's conduct following William's death was of a kind or sort that she should be recognized as a de facto corporate officer and held personally liable for PTT's taxes in her capacity as a de facto officer. In contrast to a de jure officer, a de facto officer is one "acting under color of right and with apparent authority, but who is not legally a corporate officer." *Black's Law Dictionary* (9th ed), p 1194. Michigan has long acknowledged the existence of de facto corporate officers, recognizing that a corporation is bound by the acts of its officers de facto; and it need not be shown that they were regularly elected, in order to make their acts binding upon the corporation. *Cahill v Kalamazoo Mut Ins Co*, 2 Doug 124 (Mich, 1845).[1] A de facto officer has similar authority

[1] Kentucky likewise acknowledges the authority of de facto corporate officers. See, e.g., *Porter's Adm'r v Dulin Oil Co*, 242 Ky 34; 45 SW2d 495 (1932).

to a de jure officer, and enjoys the protections from personal liability generally afforded by the corporate form. See *Martin v Miller*, 336 Mich 265, 277; 57 NW2d 878 (1953). To be a de facto corporate officer, an individual "must be in possession of the office, and be exercising its duties under an appearance of right, while not being an officer . . . de jure, by reason of ineligibility or lack of qualification, or being unlawfully elected." 19 CJS, Corporations, § 560 (2007), pp 45-46 (footnotes omitted).

In this case, the facts could reasonably give rise to the conclusion that petitioner was a de facto officer of the corporation following William's death. Acting on the authority of the district court, petitioner signed numerous documents on PTT's behalf, including tax-related documents, she made decisions for PTT, and she indicated her status at various times as "co-owner," "president," and "principal officer or chief accounting officer." She also drew a salary from the corporation. When the estate was settled, petitioner and Suzanne were the only shareholders, they proceeded to formally elect themselves as directors and officers, and, tellingly, they ratified their previous conduct "heretofore taken in their capacity *as officers* . . . ." (Emphasis added.) These facts could reasonably give rise to the conclusion that petitioner qualified as a de facto officer with responsibility for PTT's taxes. Consequently, a material question of fact may have remained regarding petitioner's status as a de facto officer and her role in the preparation of PTT's taxes.

However, even accepting this possibility, we cannot conclude that petitioner may be held personally liable under § 27a(5) on this basis because to do so would require us to extend the personal liability imposed by the statute beyond its express parameters. That is, in certain circumstances, § 27a(5) imposes personal liabil-

ity on corporate "officers"; it makes no mention of "de facto officers," and we decline to read language into the statute that the Legislature did not include. See *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). Had the Legislature intended to include de facto officers as individuals who could be personally liable, it could have so specified.[2] See, e.g., MCL 456.51 (discussing trustees, both de jure and de facto); MCL 487.3335(2) (discussing duties of "officers and directors de facto" following expiration of corporate term). Absent such an indication, we are persuaded that the Legislature's reference to "officers" refers to those individuals who hold corporate positions in truth under the law, not merely with apparent authority. For this reason, even supposing that petitioner could be characterized as a de facto officer, she would not be subject to personal liability under § 27a(5).

Because no material question of fact exists regarding whether petitioner could be held personally liable pursuant to § 27a(5), the Tax Tribunal properly granted petitioner's motion for summary disposition pursuant to MCR 2.116(C)(10).

Affirmed. Petitioner, being the prevailing party, may tax costs pursuant to MCR 7.219.

STEPHENS, P.J., and HOEKSTRA and METER, JJ., concurred.

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[2] Indeed, as a general matter, corporations are creatures of statute, and it is to " 'all the world, *except the State*' " that de facto status exists. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 155; 792 NW2d 749 (2010) (emphasis added; citations omitted). The state remains free to complain when a corporation fails to comply with statutes governing corporations and their operation. See *Tisch Auto Supply Co v Nelson*, 222 Mich 196, 200; 192 NW 600 (1923). The state, not being bound by de facto statuses in the corporate context, would be expected to make clear those situations in which it will acknowledge de facto status.

ARBOR FARMS, LLC v GEOSTAR CORPORATION

Docket No. 314911. Submitted May 14, 2014, at Lansing. Decided May 27, 2014, at 9:05 a.m.

Arbor Farms, LLC, Jaswinder Grover, MD, Monica Grover, and others, brought a postjudgment collection action against GeoStar Corporation in the Isabella Circuit Court. ClassicStar, LLC, which was owned by defendant, had engaged in a fraudulent business scheme involving the leasing of thoroughbred racehorses for breeding purposes. Plaintiffs, investors in the fraudulent business, filed suit against defendant and others in the United States District Court for the Eastern District of Kentucky. In November 2011, the federal district court entered an amended judgment against defendant in the amount of $65,042,084.61. On the same day that plaintiffs filed this postjudgment collection action, they filed an ex parte motion for a restraining order under MCL 600.6116, requesting that defendant maintain the status quo and refrain from transferring any of its assets. The court, Paul H. Chamberlain, J., entered the order. Defendant moved to set aside the restraining order. At a motion hearing on November 2, 2012, the court declined to set aside the order, but modified it. The modified order applied only to defendant's Michigan assets and required that defendant provide an inventory of its business documents and a log of all documents defendant believed were subject to the attorney-client privilege. The court gave defendant 30 days to comply with the order. Plaintiffs filed a proposed order modifying the restraining order in accordance with their understanding of the court's ruling at the November 2, 2012 hearing. Defendant objected to the proposed order, and the court scheduled a hearing for January 25, 2013. At the hearing, the court indicated that it viewed defendant's arguments as an attempt to relitigate the motion to set aside the restraining order. The court concluded that defendant was in violation of its November 2, 2012 oral ruling because defendant had not yet provided the inventory of assets. Plaintiffs subsequently moved to hold defendant in contempt for failing to comply with the court's orders regarding the business records. The court agreed and held defendant in contempt for failing to produce an inventory of its Michigan assets and business records within 30 days after the court's November 2, 2012 ruling.

The court also appointed a receiver over defendant's Michigan assets, including its business documents, explaining that the receiver was to prepare the inventory for the court. Defendant appealed.

The Court of Appeals *held*:

1. In an action brought to enforce a judgment, the trial court must possess jurisdiction over the judgment debtor or the judgment debtor's property. When a judgment debtor owns property in Michigan, jurisdiction is proper in postjudgment enforcement proceedings without the necessity of demonstrating personal jurisdiction over the debtor. In this case, defendant had extensive business records in Michigan. The presence of this property was sufficient to establish the court's jurisdiction over the postjudgment collection proceedings, including discovery efforts and the award of equitable relief.

2. Contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court. Courts in Michigan have inherent and statutory, MCL 600.1701 *et seq*., power to punish contempt of court by fine, imprisonment, or both. Courts generally speak through their judgments and decrees, and not through their oral statements and written opinions. However, there are circumstances in which an oral ruling will have the same force and effect as a written order. When assessing whether an oral ruling has equal effect to that of a written order, courts consider whether the oral ruling contains indicia of formality and finality comparable to that of a written order. In this case, at the November 2, 2012 hearing, before ruling, the court stated that "this is the ruling of the Court." It then stated that it was modifying the restraining order to require the preservation of defendant's Michigan assets, to require the creation of an inventory of defendant's Michigan assets and a privilege log, and that defendant had 30 days to create the inventory and privilege log. These statements reflected a formal resolution of the issue. And defendant's own subsequent actions—including submitting a statement to the court discussing the court's oral instructions—demonstrated defendant's understanding of the formal and final nature of the ruling. Nor did the trial court clearly err by determining that it was possible for defendant to comply with the November 2, 2012 order. The cost and difficulty of creating an inventory of the records did not make compliance impossible. Because defendant did not provide an inventory and a privilege log within 30 days after the court's order and had not made any effort to do so, the trial court did not abuse its discretion by holding defendant in contempt of court.

ers in all cases in which appointment is allowed by law. In general, a receiver should only be appointed in extreme cases, but a party's past unimpressive performance may justify the trial court in appointing a receiver. In cases in which a money judgment has entered, a circuit court has statutory authority to appoint a receiver of any property the judgment debtor has or may thereafter acquire, MCL 600.6104(4), and equitable authority to make such appointment when other approaches have failed to bring about compliance with the court's orders. In this case, given defendant's complete failure to comply with the court's orders, and plaintiffs' concern that defendant's accountant had already liquidated some of defendant's Michigan assets, the appointment of a receiver to preserve defendant's records and to create an inventory of those records and a privilege log was a proper exercise of the court's equitable and statutory power to appoint a receiver. And, contrary to defendant's assertions, the appointment of a receiver posed no danger to defendant's interests or privileges, did not interfere with the federal court's jurisdiction over the underlying suit, did not implicate defendant's right to be free from unreasonable searches and seizures, and was not tantamount to improper execution on property without monetary value. Therefore, the trial court did not abuse its discretion in appointing a receiver.

Affirmed.

1. JURISDICTION — POSTJUDGMENT ENFORCEMENT PROCEEDINGS — PROPERTY IN MICHIGAN.

When a judgment debtor owns property in Michigan, jurisdiction is proper in postjudgment enforcement proceedings without the necessity of demonstrating personal jurisdiction over the debtor.

2. JUDGMENTS — ORAL RULINGS — EFFECT.

Courts generally speak through their judgments and decrees, and not through their oral statements and written opinions; there are circumstances, however, in which an oral ruling will have the same force and effect as a written order; when assessing whether an oral ruling has equal effect to that of a written order, courts consider whether the oral ruling contains indicia of formality and finality comparable to that of a written order.

3. ACTIONS — POSTJUDGMENT ENFORCEMENT PROCEEDINGS — RECEIVERS — APPOINTMENT.

Under MCL 600.2926, circuit court judges may appoint receivers in all cases in which appointment is allowed by law; in cases in which a money judgment has entered, a circuit court has statutory authority to appoint a receiver of any property the judgment debtor has or may thereafter acquire, MCL 600.6104(4), and equitable authority to

make such appointment when other approaches have failed to bring about compliance with the court's orders.

Hoenig & Barham (by *Lesley A. Hoenig*) and *Vincent E. Mauer* for plaintiffs.

Silverman & Morris, PLLC (by *Thomas R. Morris*), for defendant.

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

HOEKSTRA, J. In this postjudgment collection action to enforce a foreign money judgment, defendant appeals by right the trial court's civil contempt order. Because the trial court had jurisdiction over defendant's property in Michigan and did not abuse its discretion by appointing a receiver over defendant's Michigan property or by holding defendant in contempt for its failure to comply with a court order, we affirm.

Between 2001 and 2005, ClassicStar, LLC, which was owned by defendant during this period, engaged in a Ponzi scheme that involved the leasing of thoroughbred racehorses for breeding purposes. In 2006, plaintiffs, who are individuals and entities that had invested in this scheme, filed suit against defendant and others in the United States District Court for the Eastern District of Kentucky, asserting claims of breach of contract, fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC 1961 *et seq*. Ultimately, plaintiffs prevailed on a motion for summary disposition, and, in November 2011, the federal district court entered an amended judgment against defendant in the amount of $65,042,084.61.

On May 17, 2012, plaintiffs began a postjudgment collection action against defendant in Michigan by filing a notice of entry of a foreign judgment in the Isabella

Circuit Court. That same day, plaintiffs filed an ex parte motion for a restraining order pursuant to MCL 600.6116,[1] requesting that defendant maintain the status quo and refrain from transferring its assets, including but not limited to exercising its rights as sole shareholder of CBM Resources, defendant's wholly owned Michigan subsidiary. That same day, granting plaintiffs' request, the trial court entered a restraining order that read as follows:

> IT IS HEREBY ORDERED that:
>
> A. GeoStar Corporation ("GeoStar") is ordered to maintain the *status quo* and is hereby restrained from transferring, encumbering, distributing or otherwise disposing of any assets pursuant to MCL 600.6116, including, but not limited to exercising its rights as the sole shareholder of CBM Resources.
>
> B. GeoStar is further ordered to hold any amounts, including but not limited to any distributions, due and owing to GeoStar from CBM Resources, in escrow for the benefit of Plaintiffs. This provision applies to amounts which are due and owing as of the date of this Order or which become due and owing during the time this Order remains in effect.
>
> C. GeoStar is further ordered to provide, within thirty (30) days of the date of this Order, a complete accounting of all transfers, encumbrances, distributions and dispositions within six (6) years prior to entry of this Order.

On two occasions thereafter, defendant moved to set aside the restraining order, asserting in part that the

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[1] MCL 600.6116(1) provides as follows:

> An order for examination of a judgment debtor may contain a provision restraining the judgment debtor from making or suffering any transfer or other disposition of, or interference with any of his property then held or thereafter acquired by or becoming due to him not exempt by law from application to the satisfaction of the judgment, until further direction in the premises, and such other provisions as the court may deem proper.

trial court lacked personal jurisdiction over defendant. Plaintiffs responded that jurisdiction was proper because defendant continued to conduct business in Michigan through the control of its Michigan subsidiaries and, even if personal jurisdiction did not exist, jurisdiction was proper over defendant's assets located in Michigan, including extensive business records located in two storage lockers in Mt. Pleasant, Michigan. Eventually, at a motion hearing on November 2, 2012, the trial court denied defendant's motion to set aside the May 17, 2012 restraining order. However, the court modified the restraining order to apply only to defendant's Michigan assets and gave defendant 30 days to comply with the restraining order's provisions. In addition, the trial court ordered the creation of an inventory of defendant's business documents and a "privilege log" for all documents defendant believed were subject to the attorney-client privilege.

A week later, plaintiffs provided defendant notice of submission of an order modifying the court's May 17, 2012 restraining order under the "seven-day rule," see MCR 2.602(B)(3). Defendant objected to the proposed order, asserting that it inaccurately set forth the trial court's November 2, 2012 ruling. Specifically, defendant argued that while the trial court limited its ruling to defendant's Michigan assets, the proposed order referred to assets generally; and further, while the trial court's ruling required defendant to "inventory" all of defendant's Michigan assets generally, the proposed order required defendant to "produce" all records remaining in storage and in possession of defendant's accountant. The trial court did not sign the proposed order and instead scheduled a hearing for January 25, 2013.

Three days before that hearing, on January 22, 2013, defendant filed an accounting, in which defendant

maintained that it has no real or personal property in Michigan "with any market value." It further indicated that it ceased doing business in Michigan on October 1, 2011, and that business records (including computers and papers) had been placed in storage. Defendant then stated that the records were "too voluminous to be itemized," indicating that it would take two 40-foot semitrailers to move the records, and that many of these documents, particularly those in the possession of its accountant, were privileged.

At the January 25, 2013 hearing on defendant's objection to the proposed order, defendant again argued that the trial court lacked personal jurisdiction and also that plaintiffs sought to execute against business records which were not subject to execution and to impermissibly use a judgment to gain access to those records. Viewing defendant's arguments as an attempt to relitigate the earlier motion to set aside the restraining order, the trial court declined to revisit the matter and noted that it would not tolerate defendant's efforts at delay or its "papering the court and opposing party with a bunch of paperwork." The hearing ended with the trial court concluding that defendant was in violation of the trial court's November 2, 2012 ruling because the inventory of assets was due by December 3, 2012. Ultimately, the trial court signed plaintiffs' proposed order modifying the May 17, 2012 restraining order.

In early February 2013, defendant moved for reconsideration, and thereafter plaintiffs moved to hold defendant and its counsel in contempt of court for failing to comply with the court's orders regarding the business records. In response, defendant again asserted that the trial court lacked jurisdiction and that the business records were not subject to execution. Defen-

dant further asserted that the requirements for a finding of contempt had not been met because no valid order existed given the court's lack of jurisdiction over defendant, and that no willful disregard of the January 25, 2013 restraining order had occurred.

On February 19, 2013, the trial court denied defendant's motion for reconsideration and found defendant in contempt of court for failing to produce, within the allotted time, an inventory of assets and documents located in Michigan. To remedy defendant's refusal to comply, the trial court appointed a receiver over defendant's Michigan assets, including documents, explaining that "the receiver is to take control of the assets and documents located in Michigan and to prepare an inventory for the court that includes electronic documents as well as non-electronic documents." In response to arguments from defense counsel that the restraining order mandated discovery of the storage locker contents, the trial court clarified that it was not ordering production of the records at that time, but simply preservation. To this effect, the trial court entered an order modifying the January 25, 2013 restraining order by omitting the reference to "production" of documents, and indicating that defendant must "preserve" all records located in storage facilities and in the possession of defendant's accountant. That same day, the trial court entered an order holding defendant (but not defense counsel) in contempt of the court's November 2, 2012 ruling and the January 25, 2013 order as amended. Defendant now appeals as of right.

On appeal, defendant first argues that the trial court lacked personal jurisdiction over defendant and, for this reason, could not order discovery or injunctive relief. In response, plaintiffs maintain that, in the context of this postjudgment collection action, personal jurisdiction

was not required because defendant owned property in Michigan.[2] We agree with plaintiffs.

Our review of jurisdictional questions is de novo. *Electrolines, Inc v Prudential Assurance Co*, 260 Mich App 144, 152; 677 NW2d 874 (2003). Pursuant to the Full Faith and Credit Clause, US Const, art IV, § 1, a judgment entered in another state is "presumptively valid and subject to recognition in Michigan . . . ." *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 216; 813 NW2d 752 (2011) (quotation marks and citation omitted). The statutory procedure for obtaining enforcement of foreign judgments is controlled by the Uniform Enforcement of Foreign Judgments Act (UEFJA), MCL 691.1171 *et seq*., which Michigan adopted in 1997. *Electrolines*, 260 Mich App at 157. According to the UEFJA, a foreign judgment "has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of [a Michigan court] and may be enforced or satisfied in like manner." MCL 691.1173.

When a party seeks enforcement of a foreign judgment in Michigan, there exists a foundational jurisdictional requirement that must be satisfied with regard to the judgment debtor's person or property. *Electrolines*, 260 Mich App at 160. As we explained in *Electrolines*, "in an action brought to enforce a judgment, the trial court must possess jurisdiction over the judgment debtor or the judgment debtor's property." *Id*. at 163. This jurisdictional rule is notably "wider" than that applicable in other civil actions, in that jurisdiction is

[2] Plaintiffs also argue that the trial court in fact had personal jurisdiction over defendant. Because we conclude that the trial court's jurisdiction over defendant's property sufficed in this postjudgment collection action, we need not reach the question of the trial court's personal jurisdiction over defendant.

proper in an enforcement action when the defendant owns property in Michigan, without the necessity of establishing personal jurisdiction over a judgment debtor or of demonstrating that the property in question relates to the underlying controversy. *Id*. at 161-163. More fully, the wider jurisdiction applicable in enforcement actions as compared to other actions may be explained as follows:

> Whereas "a state has jurisdiction to adjudicate a claim on the basis of presence of property in the forum only where the property is reasonably connected with the claim, an action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum." [*Id*. at 161, quoting 1 Restatement Foreign Relations Law of the United States, 3d, part IV, ch 8, subch A, § 481, comment *h*, p 597 (1986).]

The reason for this wider jurisdiction can be found in *Shaffer v Heitner*, 433 US 186, 210 n 36; 97 S Ct 2569; 53 L Ed 2d 683 (1977), wherein the Court explained:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Stated differently, it would be inequitable and irrational to propose that a debtor could avoid enforcement of a judgment merely "by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him." *Id*. at 210. See also *Lenchyshyn v Pelko Electric, Inc*, 723 NYS2d 285, 291-292; 281 AD2d 42 (2001) (holding that assets are not immune from execution or restraint simply because a judgment debtor absents himself from the

state). Following this rationale, consistent with *Electrolines*, we conclude that, when a judgment debtor owns property in Michigan, jurisdiction is proper in postjudgment enforcement proceedings without the necessity of demonstrating personal jurisdiction over the debtor.[3] See *Electrolines*, 260 Mich App at 163.

In the present case, defendant concedes ownership of personal property in Michigan in the form of extensive business records located within the state. Given the presence of defendant's property in Michigan, plaintiffs were not required to demonstrate the existence of the trial court's personal jurisdiction over defendant. Rather, the presence of defendant's property within the state was, on its own, sufficient to establish jurisdiction in this postjudgment collection proceeding. Cf. *id*. (concluding that a showing of personal jurisdiction was required because the plaintiff failed to identify any property in Michigan owned by the defendants).

Despite its ownership of property in Michigan, defendant nonetheless maintains that personal jurisdiction was required because the trial court essentially ordered discovery of the business records in question as well as equitable relief in the form of an injunction. More broadly, defendant's argument involves the assertion that the jurisdictional requirements in postjudgment enforcement proceedings must vary depending on the

[3] Defendant provides no authority, nor are we aware of any, for the proposition that, despite a debtor's ownership of property in the state, a court may not enforce a foreign judgment because personal jurisdiction over the debtor is lacking. On the contrary, multiple jurisdictions rely on footnote 36 of *Shaffer* to hold that personal jurisdiction is not required to enforce a foreign judgment against a nonresident defendant. See, e.g., *Lenchyshyn*, 723 NYS2d 289-292; *Koh v Inno-Pacific Holdings, Ltd*, 114 Wash App 268, 274-275; 54 P3d 1270 (2002); *Williamson v Williamson*, 247 Ga 260, 262-263; 275 SE2d 42 (1981). See also *Livingston v Naylor*, 173 Md App 488, 512-514; 920 A2d 34 (2007) (providing a supporting list of authorities from numerous jurisdictions).

type of enforcement sought. However, the authorities defendant offers in support of its argument do not lend support to defendant's contentions. Specifically, defendant relies on *Ann Arbor Bank v Weber*, 338 Mich 341, 345-346; 61 NW2d 84 (1953), for the proposition that personal jurisdiction is required when discovery is ordered and on *Ciotte v Ullrich*, 267 Mich 136, 138; 255 NW 179 (1934), for the proposition that an injunction may be granted only when a court possesses personal jurisdiction over the individual in question. Neither case, however, involved postjudgment action, meaning that those cases, unlike the present dispute, did not implicate the wider jurisdiction applicable to enforcement proceedings.

Recognizing the wider jurisdiction applicable in enforcement actions, and cognizant of the rationale for this broad jurisdiction, we reject defendant's contention that jurisdictional requirements must differ in postjudgment proceedings based on the nature of the enforcement sought. Indeed, to follow defendant's rationale would, contrary to the rationale espoused in *Shaffer*, 433 US at 210 n 36, encourage a debtor to evade his or her creditors and avoid or delay enforcement proceedings by secreting assets, including business records, in jurisdictions where personal jurisdiction does not exist over the debtor. We know of no basis for this unsound rule defendant urges us to adopt and, instead, following *Shaffer*'s reasoning, we conclude that the presence of a debtor's property in Michigan provides the trial court with jurisdiction in postjudgment collection proceedings, which proceedings may include discovery and injunctive or other equitable relief related to property in Michigan.[4] In sum, having chosen to

[4] As noted, MCL 691.1173 indicates that a foreign judgment filed in a Michigan court "has the same effect . . . as a judgment of [a Michigan

store business records in Michigan, defendant has rendered that property subject to Michigan's jurisdiction in this postjudgment collection action, including discovery efforts and equitable relief, without regard for the trial court's personal jurisdiction over defendant.

Next, defendant challenges the trial court's contempt order, arguing that there was no proof that defendant willfully disregarded or disobeyed the order.[5] In particular, defendant maintains that the trial court's verbal order on November 2, 2012, did not become effective until the entry of a written order on January 25, 2013, at which time compliance was impossible because the order had a retroactive deadline of December 3, 2012. Defendant also argues that compliance with the inventory and privilege-log requirements could not be achieved because of the voluminous number of business records at issue. We disagree.

This Court reviews a trial court's contempt order for an abuse of discretion, while the underlying factual findings are reviewed for clear error. *Davis v Detroit Fin Review Team*, 296 Mich App 568, 623; 821 NW2d 896 (2012). A trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "The clear-error standard requires us to give deference to the lower court and find clear error only if we are never-

court] and may be enforced or satisfied in like manner." Thus, a Michigan court with jurisdiction in an enforcement proceeding concerning a foreign judgment may compel discovery of property, prevent transfer of property, order satisfaction of the judgment out of the property, appoint a receiver over the property, or take other action as the court may, in its discretion, deem appropriate. See MCL 600.6104.

[5] To the extent defendant contends no valid order existed because the trial court lacked personal jurisdiction, these jurisdictional contentions are without merit for the reasons already explained in this opinion.

theless 'left with the definite and firm conviction that a mistake has been made.' " *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008) (citation omitted).

Contempt of court is defined as a "wilful act, omission, or statement that tends to impair the authority or impede the functioning of a court." *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). Courts in Michigan have inherent and statutory power to punish contempt of court by fine or imprisonment. *Id*.; MCL 600.1701 *et seq*. The purpose of this power is to preserve the effectiveness and sustain the power of the courts. *In re Contempt of Dudzinski*, 257 Mich App 96, 108; 667 NW2d 68 (2003). Accordingly, "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Id*. at 110 (quotation marks and citation omitted). Relevant in this case, MCL 600.1701(g) grants trial courts the authority to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, including "[p]arties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court." See also *Davis*, 296 Mich App at 623 (recognizing a trial court's inherent authority to enforce its orders).

In this case, on November 2, 2012, the trial court verbally ordered the creation of an inventory and a privilege log related to defendant's Michigan assets within 30 days. The trial court order in this regard was a verbal one, and it is a settled maxim that courts generally speak through their judgments and decrees, and not their oral statements or written opinions.

Tiedman v Tiedman, 400 Mich 571, 576; 255 NW2d 632 (1977). However, there are circumstances in which "[a]n oral ruling has the same force and effect as a written order," as when, for example, an oral ruling clearly communicates the finality of the court's pronouncement. *McClure v H K Porter Co*, 174 Mich App 499, 503; 436 NW2d 677 (1988). See also *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). When assessing whether an oral ruling has equal effect to that of a written order, we consider whether the oral ruling contains indicia of formality and finality comparable to that of a written order. See *People v Vincent*, 455 Mich 110, 125; 565 NW2d 629 (1997).

We conclude that such indicia are present in this case. At the November 2, 2012 hearing, before ruling, the trial court unequivocally indicated that "this is the ruling of the Court." It then stated that it was modifying the May 17, 2012 restraining order "to simply restrain transfer or destruction and require preservation of all assets in Michigan that belong to the Defendant." It stated that an inventory of assets in Michigan was to be created, as well as a privilege log, and that defendant had 30 days to do so. These statements reflect a formal resolution, not a tentative conclusion or merely loose impressions of the matter. Indeed, although it is not for a party to determine the validity of a court's order, *Davis*, 296 Mich App at 624, we note that defendant's own actions after the November 2, 2012 ruling demonstrated its understanding of the formal and final nature of the ruling. That is, defendant submitted a statement to the trial court pursuant to the November 2, 2012 ruling, discussing the trial court's oral instructions and claiming it could not comply with the court's order to create an inventory and a privilege log because the documents were too voluminous to be

itemized. Given the formality of the court's oral ruling and defendant's own recognition of its applicability, defendant's contention that the order was not final until January 25, 2013, is unpersuasive and appears disingenuous. The order at issue came into being on November 2, 2012, allowing defendant 30 days to comply with its directives.

Further, we discern no clear error in the trial court's determination that it was not impossible for defendant to comply with the November 2, 2012 order. At the contempt hearing in February 2013, defense counsel conceded that, despite knowing full well that the trial court had ordered the creation of an inventory and a privilege log, defendant had taken no action to comply with this order because defendant believed that compliance was impossible given the voluminous number of records. The cost or difficulty of inventorying these records, however, did not make compliance truly impossible and did not excuse defendant's unequivocal disregard of the order. Cf. *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40-41; 585 NW2d 290 (1998) (setting aside an order of contempt when compliance was truly impossible because the relevant event had already occurred). Because defendant did not provide an inventory and a privilege log by December 3, 2012, or by the time of the contempt hearing on February 19, 2013, and had not made any effort to do so, the trial court did not abuse its discretion by holding defendant in contempt of court.

Lastly, defendant contends that the trial court's appointment of a receiver was an abuse of discretion. In particular, defendant asserts that appointment of a receiver was not warranted under MCL 600.2926, and that, by appointing a receiver, the trial court: (1) interfered with the jurisdiction of the Kentucky district

court, (2) prejudiced defendant's rights in relation to an ongoing federal investigation and the privileges recently recognized by the Ninth Circuit Court of Appeals, (3) violated defendant's constitutional rights, including the right against unreasonable search and seizure, and (4) impermissibly allowed execution against documents that have no market value.

This Court reviews for an abuse of discretion the trial court's decision to appoint a receiver. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 523; 730 NW2d 481 (2007). Likewise, whether a court should defer to an alternative, foreign forum is reviewed for an abuse of discretion. *Hare*, 291 Mich App at 214-215. As noted, a trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388. To the extent defendant's arguments involve constitutional concerns, our review of constitutional questions is de novo. *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 649; 698 NW2d 350 (2005).

MCL 600.2926 permits "[c]ircuit court judges in the exercise of their equitable powers, [to] appoint receivers in all cases pending where appointment is allowed by law." Under this provision, a circuit court has "broad jurisdiction" to appoint a receiver in appropriate cases. *Reed v Reed*, 265 Mich App 131, 161; 693 NW2d 825 (2005). As this Court has previously explained:

> [MCL 600.2926] has been interpreted as authorizing a circuit court to appoint a receiver when specifically allowed by statute and also when no specific statute applies but the facts and circumstances render the appointment of a receiver an appropriate exercise of the trial court's equitable jurisdiction. The purpose of appointing a receiver is to preserve property and to dispose of it under the order of the court. In general, a receiver should only be appointed in

> extreme cases. But a party's past unimpressive performance may justify the trial court in appointing a receiver. [*Reed*, 265 Mich App at 161-162 (quotation marks and citations omitted).]

Thus, in cases where a money judgment has entered, a circuit court has the statutory authority to appoint a receiver of any property the judgment debtor has or may thereafter acquire, MCL 600.6104(4), and the equitable authority to make such an appointment when other approaches have failed to bring about compliance with the court's orders, see *Shouneyia v Shouneyia*, 291 Mich App 318, 326-327; 807 NW2d 48 (2011).

In this case, the trial court did not abuse its discretion by appointing a receiver over defendant's property located in Michigan. The original restraining order was entered in May 2012 and more than nine months later, in February 2013, defendant still had not made any effort to comply with the trial court's orders, instead continuing to argue that the records were too voluminous to inventory. Given defendant's complete failure to comply with the court's orders, and plaintiffs' concern that defendant's accountant had already liquidated some of defendant's Michigan assets, the appointment of a receiver to preserve defendant's records and to create an inventory and a privilege log of those records was a proper exercise of the court's equitable and statutory power to appoint a receiver. MCL 600.6104(4). See also *Reed*, 265 Mich App at 161-162 (noting that unimpressive past performance justifies receivership). On these facts, there is also no record support for defendant's assertion that the trial court's appointment was unreasonable, unprincipled, or motivated by bias against defendant.

In protesting the appointment of a receiver, defendant further argues that the appointment of a receiver

over property in Michigan interferes with the federal district court's jurisdiction over discovery matters in violation of the principles of comity. Relevant to defendant's claim, it has long been recognized that "when a court of competent jurisdiction becomes possessed of a case, its authority continues until the matter is finally and completely disposed of, and no court of co-ordinate authority is at liberty to interfere with its action." *Detroit Trust Co v Manilow*, 272 Mich 211, 214; 261 NW 303 (1935). However, contrary to defendant's arguments, at the time that the trial court entered its orders in the present case, the only action of the federal court relating to discovery pertained to the underlying litigation, not to an ancillary and subsequent enforcement proceeding involving property in Michigan. In other words, the trial court's efforts to preserve and identify property within its jurisdiction pursuant to the enforcement of a foreign judgment, see MCL 691.1173, did not constitute interference with the federal court's jurisdiction over the underlying suit.

Defendant's remaining arguments regarding the receiver misconstrue the receiver's role, as well as what plaintiffs are asking for in this postjudgment collection action. First, defendant protests that it will suffer prejudice because the receivership will deprive it of its ability to defend against other creditors in a related federal criminal investigation, and would also destroy its privilege over certain documents. The receiver, however, is an arm of the court and is not intended to benefit either of the parties but "to protect and benefit both parties equally." *Ypsilanti Fire Marshal*, 273 Mich App at 528. The receiver, as an officer of the court, remains unbiased and impartial such that "a receiver's possession of assets and property is tantamount to possession by the court itself." *Id*. Acting in this impartial capacity, the receiver's purpose in the present case

is to preserve defendant's Michigan business records and inventory them in order to ultimately identify potential assets; the receiver's role is not to provide privileged documents or other evidence to federal investigators or other creditors. In short, the appointment of a receiver posed no danger to defendant's interests or privileges.

Second, defendant asserts that appointment of a receiver violates its right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. In support, defendant cites *Rosenthal v Muskegon Circuit Judge*, 98 Mich 208, 210, 215-217; 57 NW 112 (1893), wherein a writ of attachment was used as a search warrant to obtain evidence for use in a subsequent proceeding, a practice which the Court found to be in violation the defendant's right to be free from unreasonable searches and seizures. However, unlike *Rosenthal*, the present case involves the appointment of a receiver to preserve and inventory property for the benefit of all concerned. There is no indication that the business records in the present case are going to be used as evidence against defendant in a subsequent action. Rather, the discovery and appointment of a receiver in this postjudgment collection action are specifically provided for by statute pursuant to MCL 600.6104(1) and (4), and, there being a valid final judgment entitling judgment creditors like plaintiffs to defendant's assets, defendant's Fourth Amendment rights simply are not implicated by the appointment of a receiver in this case.

Finally, defendant also contends that the receivership is tantamount to an execution on its business records contrary to the principle that property must have some monetary value to merit execution on that property. See *Berar Enterprises, Inc v Harmon*, 93 Mich App 1, 8; 285

NW2d 774 (1979) (indicating that only personal property with some "salable worth" is subject to garnishment, which does not include "pieces of paper"). Contrary to defendant's argument, plaintiffs are not seeking to execute on defendant's business records; they are attempting to determine whether defendant has any assets of monetary value and to execute on those assets. Such discovery efforts are permissible in an action to enforce a judgment. See MCL 600.6104(1). Thus, on the whole, the trial court did not abuse its discretion in appointing a receiver and defendant is not entitled to relief on appeal.

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

STEPHENS, P.J., and METER, J., concurred with HOEKSTRA, J.

ASSOCIATED BUILDERS AND CONTRACTORS v CITY OF LANSING

Docket No. 313684. Submitted January 15, 2014, at Lansing. Decided May 27, 2014, at 9:10 a.m. Leave to appeal granted, 497 Mich ___.

The Associated Builders and Contractors brought an action in the Ingham Circuit Court against the city of Lansing, challenging defendant's enactment of a prevailing wage ordinance applicable to contracts, agreements, or other arrangements for construction on behalf of the city. The trial court, Clinton Canady III, J., citing *Attorney General, ex rel Lennane v Detroit*, 225 Mich 631 (1923), which held that the setting of wage rates was a matter of state concern into which a city could not intrude, granted summary disposition in favor of plaintiff. Defendant appealed.

The Court of Appeals *held*:

1. Because the reasoning employed in *Lennane* has subsequently been rejected by amendments of the Michigan Constitution and by changes in Michigan caselaw, *Lennane* is inapplicable to the case at bar. Since *Lennane* was decided, the Constitution and Michigan's courts have interpreted the authority granted to cities in a much more liberal manner. The recognition of this broad authority differs significantly from the manner in which the Court in *Lennane* viewed the authority granted to cities in light of the law at that time.

2. After the *Lennane* decision was issued, Michigan's courts have recognized an expansion in the police power granted to cities that is contradictory to the limited view of a city's police power on which the holding in *Lennane* rested. The Supreme Court has continued to recognize that the state's police power permits the Legislature to enact regulations concerning wages but Michigan's courts have recognized that unless expressly limited by statute or our Constitution, the police power possessed by cities is of the same scope as the police power possessed by the state.

3. The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinances do not conflict with the Michigan Constitution or general laws. Ordinances exercising police powers are presumed to be constitutional and the burden is on the challenger to prove otherwise.

4. Absent a showing that state law expressly provides that the state's authority to regulate is exclusive, that the nature of the subject matter regulated calls for a uniform state regulatory scheme, or that the relevant ordinance permits what statutes prohibit or prohibits what the state permits, the mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.

5. The reasoning employed in *Lennane* is no longer valid. The police power of Lansing, as a home rule city, is of the same general scope and nature as that of the state. The foundation upon which *Lennane* stood has been rejected by the Supreme Court, therefore, the reasoning employed in *Lennane* should not be applied in this case. The doctrine of stare decisis is not applicable where the controlling authorities have changed.

6. A home rule city possesses the authority to exercise the police power to control wages and salaries for those employed by the city. The police power relates to matters of financial concern. The enactment of a prevailing wage ordinance is a valid exercise of defendant's police power under the Michigan Constitution and the Home Rule City Act, MCL 117.1 *et seq*.

7. Defendant's prevailing wage ordinance does not directly conflict with state law, nor does state law completely occupy the field that defendant's ordinance attempts to regulate. The decision of the trial court is reversed and the matter is remanded to the trial court for entry of summary disposition in favor of defendant.

Reversed and remanded.

SAWYER, J., dissenting, disagreed with the determination of the majority that there has been a sufficient change in the law since *Lennane* was decided to warrant not following the *Lennane* decision. No constitutional or statutory provision that represents a change in law after the *Lennane* ruling expressly grants a city the authority to enact the type of ordinance at issue. The broad grant of authority to cities, which is to be "liberally construed" in favor of the cities pursuant to Const 1963, art 7, § 34, is the authority to regulate matters of municipal concern. Pursuant to *Lennane*, the type of ordinance involved in this matter involves issues of state concern. That conclusion has not been overruled.

1. MUNICIPAL CORPORATIONS — POLICE POWERS.

Unless expressly limited by statute or the Michigan Constitution,

the police power possessed by home rule cities is of the same scope as the police power possessed by the state.

2. MUNICIPAL CORPORATIONS — POLICE POWERS.

The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinances do not conflict with the Michigan Constitution or general laws.

3. MUNICIPAL CORPORATIONS — POLICE POWERS — CONSTITUTIONAL LAW.

Ordinances exercising police powers are presumed to be constitutional; the burden is on the challenger to prove otherwise.

4. MUNICIPAL CORPORATIONS — POLICE POWERS — CONSTITUTIONAL LAW — PREEMPTION.

The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements absent a showing that state law expressly provides that the state's authority to regulate is exclusive, that the nature of the subject matter regulated calls for a uniform state regulatory scheme, or that the ordinance permits what the state statute prohibits or prohibits what the state statute permits; the fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.

5. STARE DECISIS — CHANGES IN CONTROLLING AUTHORITIES.

The doctrine of stare decisis may be found to be inapplicable to a Supreme Court decision when the controlling authorities on which the Supreme Court relied have changed and bear no resemblance to those presented in the prior decision.

6. MUNICIPAL CORPORATIONS — HOME RULE CITIES — POLICE POWERS — FINANCIAL CONCERNS.

A home rule city possesses the authority to exercise the police power to control wages and salaries for those employed by the city; the police power relates to matters of financial concern.

7. MUNICIPAL CORPORATIONS — PREVAILING WAGE RATES.

Neither the Minimum Wage Law nor the Michigan prevailing wage act prohibits cities from setting prevailing wage rates for contracts or agreements for construction on behalf of cities; neither act provides that the state's authority to regulate in the area of the

wages to be paid for construction contracts entered into by public entities for construction projects is to be exclusive (MCL 408.381 *et seq.*; MCL 408.551 to 408.558).

8. MUNICIPAL CORPORATIONS — PREVAILING WAGE RATES.

Nothing in the plain language of the Michigan prevailing wage act indicates that the statute's regulatory scheme is so pervasive as to inhibit a city from establishing a prevailing wage for contracts for construction involving the city (MCL 408.551 to 408.558).

Masud Labor Law Group (by *Kraig M. Schutter*) for plaintiff.

Plunkett Cooney (by *Michael S. Bogren*) for defendant.

Amicus Curiae:

McKnight, McClow, Canzano, Smith & Radtke, PC (by *John R. Canzano* and *Patrick J. Rorai*), for the Michigan Building and Construction Trades Council.

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

BECKERING, J. Defendant, city of Lansing, appeals as of right the trial court's order granting summary disposition in favor of plaintiff, Associated Builders and Contractors, under MCR 2.116(C)(10). We reverse and remand.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant enacted a prevailing wage ordinance and plaintiff challenged the ordinance as an unconstitutional and ultra vires act. The ordinance at issue provides as follows:

(a) No contract, agreement or other arrangement for construction on behalf of the City and involving mechanics and laborers, including truck drivers of the contractor and/or subcontractors, employed directly upon the site of

> the work, shall be approved or executed by the City unless the contractor and his or her subcontractors furnish proof and agree that such mechanics and laborers so employed shall receive at least the prevailing wages and fringe benefits for corresponding classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing area by such Department.
>
> (b) Any person, firm, corporation or business entity, upon being notified that it is in violation of this section and that an amount is due to his, her or its employees, shall have 30 days from the date of the notice to pay the deficiency by paying such employee or employees, whichever is appropriate, the amounts due. If the person, firm, corporation or business entity fails to pay within the 30-day period, he, she or it shall be subject to the penalty provided in Section 206.99.
>
> (c) The provisions of this section shall be inserted in all bid documents requiring the payment of prevailing wages.
>
> (d) The enforcement agency for this section shall be as determined by the Mayor. [Lansing Code of Ordinances, § 206.18.]

In deciding whether the ordinance was valid, the trial court cited *Attorney General, ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923), and determined that defendant did not have the authority to enact the ordinance. The trial court reasoned that it was bound by *Lennane* despite defendant's "compelling arguments," and granted summary disposition to plaintiff.[1]

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[1] Plaintiff originally challenged defendant's proposed living wage ordinance in addition to the prevailing wage ordinance. In ruling on plaintiff's motion for summary disposition, the trial court declined to address the living wage ordinance because it "was never enacted and is therefore not at issue here." Plaintiff asks this Court to rule on the matter. We decline to do so. Initially, we decline to consider this matter because plaintiff failed to file a cross-appeal with respect to this issue. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993). Further, because the ordinance has not been enacted, the claim is not ripe for review. *Huntington Woods v Detroit*,

II. MUNICIPAL POWERS AND A CITY'S POLICE POWER

We review de novo a trial court's decision on a motion for summary disposition. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when the moving party is able to demonstrate that there are no genuine issues of material fact. *Coblentz v City of Novi*, 475 Mich 558, 568; 719 NW2d 73 (2006).

A. *LENNANE*

In *Lennane*, 225 Mich at 633-634, our Supreme Court considered whether the city of Detroit could, consistent with the Constitution of 1908 and the home rule act,[2] enact a minimum prevailing wage ordinance similar to the ordinance in the case at bar. The ordinance at issue in *Lennane* provided as follows:

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279 Mich App 603, 615-616; 761 NW2d 127 (2008) (quotation marks and citations omitted) ("A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

[2] The home rule act is now known as the Home Rule City Act, (HRCA). See MCL 117.1a. "The [HRCA] is intended to give cities a *large measure* of home rule." *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 254; 566 NW2d 514 (1997) (emphasis added). The authority of a home rule city to enact ordinances is set forth in MCL 117.4j(3), which provides as follows:

> For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

This same authority was granted to home rule cities at the time *Lennane* was decided. See 1915 CL 3307(t).

"SEC. 1. The service day for all employees of the city of Detroit during which they shall be required to work shall consist of eight consecutive hours in any one day of twenty-four hours. No employee shall be required or permitted to work for more than this eight-hour service day, except in case of any emergency which would result in serious loss, damage, or impairment of the city's service, unless the same employee or employees were required to remain continuously at work for a longer period, in which case, during the continuance of the emergency, the provision requiring the eight-hour service day may be suspended by the department head or proper subordinate in whose department the emergency shall have arisen.

"SEC. 2. No employee shall be required to work for more than six service days in any consecutive seven days of twenty-four hours each, except in case of any emergency which would result in serious loss, damage, or impairment of the city's service, unless the same employee or employees were required to remain at work in excess of the six-day service week, in which case during the continuance of the emergency the provision requiring a six-day service week may be suspended by the departmental head or proper subordinate in whose department the emergency shall have arisen.

"SEC. 3. The common council shall by ordinance provide for the proper re-adjustment of service time and for the proper excess of the regular service day or the regular service week [which] shall have been required in the case of any emergency as herein provided. But the common council shall provide for a rate of compensation for excess service which shall be for Sundays and other holidays not less than twice the regular rate of compensation, and for other days not less than one and one-half times the regular rate of compensation.

"SEC. 4. No employee doing common labor shall receive compensation in a sum less than two dollars and twenty-five cents per diem for an eight-hour service day. No employee doing work of a skilled mechanic shall receive compensation in a sum less than the highest prevailing wage in that particular grade of work. Whenever practi-

> cable the per diem plan of employing common labor shall be in force. All wages and all salaries shall be paid weekly. Any employee who shall receive compensation for service rendered at a rate less than the minimum fixed herein may by an action for debt recover from the city the balance due him hereunder with costs.
>
> "SEC. 5. No contract for any public work shall be let which shall not, as a part of the specification on which contractors shall make their bids, require contractor or subcontractor to pay all persons in his employ doing common labor and engaged in the public work contracted for not less than two dollars and twenty-five cents per diem, to pay all persons in his employ doing the work of a skilled mechanic and engaged on the public work the highest prevailing wage in that particular grade of work, and to require of such employees the same service day and service week required herein of all city employees. Any contractor who shall have entered into such contract with the city and shall have violated any provision of this section as made a part of his contract shall be debarred from any further contracts for public work, and any contract let to him contrary to this provision shall be void. Whenever it shall appear that any employee of any contractor for public work engaged thereon shall have received less than the compensation herein provided, the common council may cause to be paid to him such deficit as shall be due him and shall cause the amount so paid to be deducted from the balance due to the contractor from the city." [*Id*. at 633-635.]

In ruling that the ordinance at issue was invalid, the *Lennane* Court examined the authority granted to cities at that time and considered whether the ordinance exceeded that authority. *Id*. at 636-641. In interpreting the authority granted to cities under the Michigan Constitution, the Court, *id*. at 637-638, relied on §§ 20 and 21 of Article 8 of the Constitution of 1908, which provided:

> Sec. 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their

> rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.
>
> Sec. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state.

The Court concluded that neither the Constitution nor the home rule act granted cities the general exercise of police power. Rather, the Court concluded that "[t]he police power rests in the State." *Lennane*, 225 Mich at 638. The Court explained that "[u]nless delegated in some effective way the police power remains in the State." *Id*. The Court also noted "a popular misunderstanding" about home rule cities and "a widely spread notion that lately, in some way, cities have become possessed of greatly enlarged powers, the right to exercise which may come from mere assertion of their existence and the purpose to exercise them." *Id*. at 639 (quotation marks and citation omitted). The Court reasoned that cities possessed a very narrow scope of inherent police power, but beyond that narrow scope, "the police power, like any other power conferred on a municipality, must be expressly delegated by the Constitution or legislature of the State." *Id*. at 639-640 (quotation marks and citation omitted).

Nevertheless, despite characterizing the notion that cities possessed broad authority as a "popular misunderstanding," the Court assumed, without deciding, that a city "may fix a public policy applicable to its matters of *local* and *municipal* concern . . . ." *Id*. at 636 (emphasis added). See also *id*. at 641. The Court then framed the issue in the case as whether "the power of

the city to declare a public policy appli[es] to matters of *State concern*." *Id*. at 636 (emphasis added). The Court concluded that the defendant's attempt to set wage rates in that case was impermissible because it was an attempt by the defendant to interfere with a matter of *state concern*. *Id*. at 641. In reaching this conclusion, the Court noted:

> Attempts of the State to meddle with the purely local affairs of a municipality have been promptly checked by this court, and attempts of municipalities to arrogate to themselves power possessed by the State alone in its sovereign capacity must meet a like check at the hands of this court. Neither may trench upon the power possessed by the other alone. [*Id*. at 636.]

Therefore, the Court concluded that even if the defendant had a broad grant of authority to legislate with regard to matters of local concern, its actions in that case were invalid because it attempted to exercise police power over matters of state concern. *Id*. at 641. In pertinent part, the Court explained:

> In the provisions under consideration the city has undertaken to exercise the police power not only over matters of municipal concern but also over matters of State concern; it has undertaken not only to fix a public policy for its activities which are purely local but also for its activities as an arm of the State. The provisions apply alike to local activities and State activities. If we assume, as we have for the purposes of the case, without deciding the question, that the city possesses such of the police power of the State as may be necessary to permit it to legislate upon matters of *municipal concern*, it does not follow that it possesses all the police power of the sovereign so as to enable it to legislate generally in fixing a public policy in matters of *State concern*. This power has not been given it either by the Constitution or the home-rule act. [*Id*. at 640-641 (emphasis added).]

Consequently, the crux of the Court's holding in *Lennane* was its conclusion that setting wage rates was a matter of state concern, and that a city, even assuming it had broad authority to legislate on matters of local concern, did not possess the authority to exercise the police power over a matter of state concern. *Id*. Significantly absent from the Court's decision was any discussion as to why the setting of wage rates was a matter of state concern. Further, the Court provided little analysis and cited no authority for its conclusion that the setting of wage rates was a matter of state concern into which the city could not intrude.

In the case at bar, the trial court concluded that *Lennane* addressed the validity of a prevailing wage ordinance that was similar to the ordinance at issue and found that *Lennane* was binding and that it compelled the result in this case. The rule of stare decisis requires this Court to follow the decisions of the Michigan Supreme Court. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008). For the reasons discussed later in this opinion, because we find that the reasoning employed in *Lennane* has subsequently been rejected by amendments of our Michigan Constitution and by changes in our caselaw, we find that *Lennane* is inapplicable to the case at bar.

B. SUBSEQUENT LIBERAL CONSTRUCTION OF AUTHORITY GRANTED TO CITIES

Since the Supreme Court's decision in *Lennane*, our Constitution and our courts have interpreted the authority granted to cities in a much more liberal manner. Notably, in 1963, our Constitution was revised to provide:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and

> amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Const 1963, art 7, § 22.]

The convention comment to this section states that this provision is a revision of Const 1908, art 8, § 21, and that it "reflect[ed] Michigan's successful experience with home rule. The new language is a more positive statement of municipal powers, giving home rule cities and villages full power over their own property and government, subject to this constitution and law." 2 Official Record, Constitutional Convention 1961, p 3393. The broad authority granted to cities is further illustrated by Const 1963, art 7, § 34, which provides:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

In accordance with this constitutional provision, this Court has recognized that we are to liberally construe statutes and constitutional provisions that grant authority to cities, townships, municipalities, and villages. *Hughes v Almena Twp*, 284 Mich App 50, 61-62; 771 NW2d 453 (2009).

In light of these subsequently enacted constitutional provisions and the liberal construction of a city's authority, our Courts have consistently recognized the broad grant of authority given to cities. See, e.g., *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695

(2003) (quotation marks and citation omitted) ("We have held that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied."); *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 270; 566 NW2d 514 (1997) (recognizing that both the Michigan Constitution and the HRCA provide a broad grant of authority to cities); *Mich Coalition for Responsible Gun Owners v Ferndale*, 256 Mich App 401, 406-407; 662 NW2d 864 (2003). This broad grant of authority is subject only to certain restrictions enumerated in statutes or the Michigan Constitution. *Rental Prop Owners Ass'n*, 455 Mich at 253; *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994). As explained in *City of Taylor v Detroit Edison Co*, 475 Mich 109, 116; 715 NW2d 28 (2006), quoting Const 1963, art 7, § 22:

> [T]he authority reserved to local units of government to exercise reasonable control over the enumerated subject areas is explicitly made subject to the other provisions of the Constitution. One such provision is art 7, § 22, which empowers cities and villages "to adopt resolutions and ordinances *relating to* [*their*] *municipal concerns*, property and government, *subject to the constitution and law.*"

The recognition of this broad authority differs significantly from the manner in which the Court in *Lennane* viewed the authority granted to cities in light of the law at that time. Indeed, as previously discussed, the Court in *Lennane* took a much more conservative view of the authority possessed by cities and found that the authority granted to cities had to be expressly granted by statute or constitution.

C. RECOGNITION OF A CITY'S EXPANDED POLICE POWER

In addition to recognizing a broad grant of authority to cities, our courts have, after the issuance of *Lennane*,

recognized an expansion in the police power granted to cities that is contradictory to the limited view of a city's police power on which the holding in *Lennane* rested. Our Supreme Court has continued to recognize that the state's police power permits the Legislature to enact regulations concerning wages. See, e.g., *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 536; 565 NW2d 828 (1997) (explaining that the Legislature, through the exercise of the police power, has the authority to regulate wages and conditions of employment); *People v Murphy*, 364 Mich 363, 368; 110 NW2d 805 (1961) ("The police power relates not merely to the public health and public physical safety but, also, to public financial safety."). However, in a significant contradiction to the reasoning employed in *Lennane*, our courts have recognized that unless expressly limited by statute or our Constitution, the police power possessed by cities is of the same scope as the police power possessed by the state. See, e.g., *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 481; 666 NW2d 271 (2003). As explained in *People v Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945):

> Except as limited by the Constitution or by statute, the police power of Detroit as a home rule city is of the same general scope and nature as that of the State. Therefore, authorities relating to the police power of the State are equally applicable in relation to the police power of the city.

This conclusion is directly antithetical to the approach adopted by the Court in *Lennane*, which held that a city's police power was not of the same scope as the state's police power. The conclusion that our courts now recognize an expanded view of a city's police power different from the view espoused in *Lennane* is buttressed by cases that have upheld a city's authority to enact ordinances pertaining to wages. See, e.g., *Brim-*

mer v Village of Elk Rapids, 365 Mich 6, 12-13; 112 NW2d 222 (1961) (declaring that salaries paid by municipalities are a matter of local concern); *Gildersleeve v Lamont*, 331 Mich 8, 12; 49 NW2d 36 (1951); *Kane v City of Flint*, 342 Mich 74, 77-78; 69 NW2d 156 (1955); *Olson v Highland Park*, 312 Mich 688, 695; 20 NW2d 773 (1945).[3]

Consequently, our review of relevant post-*Lennane* caselaw reveals a fundamentally different framework with which our courts now evaluate the authority granted to cities and the scope of a city's ability to enact ordinances pursuant to its police power. Consistent with the recognition of the broad authority granted to cities by statute and the Michigan Constitution, our Supreme Court has adopted the following test for determining whether an action taken by a city is a valid exercise of the city's authority:

> The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police

[3] In *Olson*, 312 Mich at 695, our Supreme Court upheld a city's regulation of overtime compensation for certain city employees. In reaching this conclusion, the Court found "no conflict between the statutes on the subject and the provisions of the charter[.]" *Id*. The Court then cited *Lennane* for the proposition that where a city ordinance does not violate state law, the ordinance is valid. In *Olson*, the Court cited *Lennane*, but did not apply *Lennane*'s holding—that an attempt by a city to regulate wages was impermissible because it interfered with a matter of state concern. Rather, the *Olson* Court appeared to recognize that a city ordinance, including one regulating wages, was valid as long as the ordinance did not conflict with state law. As discussed in detail later in this opinion, this approach is consistent with the approach our Supreme Court has subsequently employed to determine whether an ordinance is a valid enactment of the police power granted to cities and other municipalities. See *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998) (quotation marks and citation omitted) ("The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws.").

> powers as long as the ordinance does not conflict with the constitution or general laws. Further, ordinances exercising police powers are presumed to be constitutional, and the burden is on the challenger to prove otherwise. [*Rental Prop Owners Ass'n*, 455 Mich at 253 (citations omitted).]

As explained in *Detroit v Qualls*, 434 Mich 340, 361-362; 454 NW2d 374 (1990), quoting 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409:

> Absent a showing that state law expressly provides that the state's authority to regulate is exclusive, that the nature of the subject matter regulated calls for a uniform state regulatory scheme, or that the ordinance permits what the statute prohibits or prohibits what the state permits,
>
> > "*The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. . . . The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.*" [Emphasis added; citations omitted.]

D. *LENNANE*'S REASONING HAS BEEN REJECTED

In light of these changes to our Constitution and our caselaw, we find that the reasoning employed in *Lennane* has been rejected. Regarding changes to our Constitution, Const 1963, art 7, § 34 now requires this Court to construe the law concerning cities "liberally . . . in their favor." Such a provision did not exist at the time the Court decided *Lennane*. Moreover, as already discussed, our courts have, after *Lennane*, declared that a city's police powers are consistent with those of the state, unless limited by the Constitution or statute. *Sell*, 310 Mich at 315; *Belle Isle Grill Corp*, 256

Mich App at 481. Therefore, the reasoning employed in *Lennane*, i.e., that the city could not exercise its police power to enact a prevailing wage ordinance because wages owed to employees are purely a matter of state concern, is no longer valid. Thus, contrary to *Lennane* and consistent with *Sell*, 310 Mich at 315, we conclude that "the police power of [Lansing] as a home rule city is of the same general scope and nature as that of the State." Further, our Supreme Court has, after the issuance of *Lennane*, found that cities have the authority to regulate wages. See, e.g., *Brimmer*, 365 Mich at 13, citing *Gildersleeve*, 331 Mich at 12 (emphasis added) ("In upholding the salaries paid, this Court was, of course, treating with a matter of *purely local character*."); *Kane*, 342 Mich at 77-78; *Olson*, 312 Mich at 695. The view espoused in *Brimmer* and *Gildersleeve*, that salaries paid by municipalities are a matter of local concern, is directly contradictory to the linchpin of *Lennane*'s holding. Consequently, the foundation upon which *Lennane* stood has been rejected by our Supreme Court. We find that the reasoning employed in *Lennane* should not be applied in the case at bar. See *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 690; 600 NW2d 339 (1999). In *Adams Outdoor Advertising*, this Court recognized that a relevant Michigan Supreme Court decision had not been expressly overruled, but declined to apply the decision in that case because the rationale for the decision "has been superseded by . . . subsequent Supreme Court decisions . . . ." *Id*. at 689. We recognize that "this Court is bound by the rule of stare decisis to follow the decisions of our Supreme Court." *Tenneco Inc*, 281 Mich App at 447. Thus, we emphasize that we neither overrule *Lennane* nor deviate from the rule of stare decisis. Instead, we recognize that the controlling authorities "bear no resemblance to those presented in" *Lennane*,

and recognize that the doctrine of stare decisis is not applicable when the controlling authorities have changed after the Supreme Court issued its decision in *Lennane*. *In re Nestorovski Estate*, 283 Mich App 177, 196 n 6; 769 NW2d 720 (2009). Indeed, "[b]ecause the differences between this case and [*Lennane*] are plain and substantial, our decision does not contemplate doing the impossible, which would be to overrule [*Lennane*] or disregard it when it was binding precedent." *People v Pfaffle*, 246 Mich App 282, 304; 632 NW2d 162 (2001).[4]

III. WHETHER DEFENDANT'S ORDINANCE IS INVALID

Having concluded that *Lennane* does not compel the outcome in this case, we examine defendant's ordinance to determine whether the ordinance conflicts with our Constitution or statutes. *Rental Prop Owners Ass'n*, 455 Mich at 253 ("The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws."); *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 555; 711 NW2d 442 (2006).

A. CONSTITUTIONAL AUTHORITY OF HOME RULE CITIES

"Home rule cities have broad powers to enact ordinances for the benefit of municipal concerns under the Michigan Constitution." *Rental Prop Owners Ass'n*, 455 Mich at 253. Additionally, the HRCA "is intended to

[4] We note that a prior panel of this Court criticized *Lennane* but concluded that it remained binding authority. *Rudolph v Guardian Protective Servs, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2009 (Docket No. 279433). For the reasons already discussed, we conclude that we are not compelled to apply *Lennane* in the case at bar.

give cities a large measure of home rule." *Id*. at 254. As already discussed, a home rule city possesses the authority to exercise the police power to control wages and salaries for those employed by the city. See *Brimmer*, 365 Mich at 12-13; *Kane*, 342 Mich at 77-78. Moreover, the police power relates to matters of financial concern. *Murphy*, 364 Mich at 368. Therefore, the enactment of a prevailing wage ordinance is a valid exercise of defendant's police power under the Michigan Constitution and the HRCA.

B. PREEMPTION

The next step in our inquiry concerns whether defendant's prevailing wage ordinance conflicts with, and therefore is preempted by, state law. *Czymbor's Timber, Inc*, 269 Mich App at 555. "State law preempts a municipal ordinance in two situations: (1) where the ordinance directly conflicts with a state statute or (2) where the statute completely occupies the field that the ordinance attempts to regulate." *Id*. "A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id*. We review de novo whether state law preempts an ordinance. *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 510; 838 NW2d 915 (2013).

We find that defendant's prevailing wage ordinance does not directly conflict with state law, nor does state law completely occupy the field that defendant's ordinance attempts to regulate. Initially, regarding conflict preemption, we note that the Minimum Wage Law, MCL 408.381 *et seq*. (MWL), and the Michigan prevailing wage act, MCL 408.551 to 408.558 (PWA), regulate minimum wages. Defendant's ordinance does not directly conflict with either of these statutes because

neither law prohibits cities or municipalities from setting prevailing wage rates for contracts or agreements for construction on behalf of cities. Therefore, we must determine whether field preemption applies.

Concerning field preemption, we consider four factors in determining whether a statute completely occupies a field:

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.
>
> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. [*Maple BPA, Inc*, 302 Mich App at 511, quoting *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977) (quotation marks and citations omitted).]

Applying these factors to the case at bar, we find that defendant's prevailing wage ordinance has not been preempted by state statute. Regarding the first factor, neither the MWL nor the PWA expressly provides that the state's authority to regulate in the area of the wages to be paid for construction contracts entered into by public entities for construction projects is to be exclusive. First, concerning the MWL, the statute only sets forth a statewide minimum wage and does not prohibit wages in excess of the statewide minimum wage. See MCL 408.413 ("An employer shall not pay any employee at a rate that is less than prescribed in this act.").

Nothing in the plain language of the statute expressly forecloses the ability of a city to set a higher standard for construction projects. Thus, the MWL clearly does not preempt the ordinance at issue in this case.

We also find that the ordinance is not preempted by the PWA. Although the PWA sets a prevailing wage for contractors working on state projects, we find that nothing in the plain language of the PWA expressly provides that the state's authority to regulate in the area of prevailing wages paid to contractors is exclusive. In pertinent part, the PWA provides:

> Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics, other than those subject to the jurisdiction of the state civil service commission, *and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed.* [MCL 408.552 (emphasis added).]

As used in the statute, a "contracting agent" "means any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor." MCL 408.551(c). Cities are not included within the definition of "contracting agent[s]." Nothing in the express language of the statute provides that the state's authority to regulate in the field of prevailing wages for construction contracts is to be exclusive.

The second factor in a field preemption analysis concerns whether field preemption may be inferred

from a statute's legislative history. *Maple BPA, Inc*, 302 Mich App at 511. Our Supreme Court has explained that the PWA reflects the policy concern of protecting local wage standards by preventing contractors on state projects from using wages in bids that are lower than those prevailing in the area and by giving local labor a fair opportunity to participate. *Western Mich Univ Bd*, 455 Mich at 535-536. See also *West Ottawa Pub Sch v Director, Dep't of Labor*, 107 Mich App 237, 245; 309 NW2d 220 (1981) ("The Legislature has declared as the policy of this state that construction workers on public projects are to be paid the equivalent of the union wage in the locality."). The legislative history of this act shows that as originally enacted, the PWA was not intended to affect construction contracts entered into by local units of government. This Court's decision in *Bowie v Coloma Sch Bd*, 58 Mich App 233, 236; 227 NW2d 298 (1975), overruled in part on other grounds *Western Mich Univ Bd*, 455 Mich at 546, contains a discussion of the legislative history of the PWA. As originally passed by the House of Representatives, the PWA defined a contracting agent as "any officer, board or commission of the state, *or political subdivision thereof* or any state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or perform the same by the direct employment of labor." *Bowie*, 58 Mich App at 236 (quotation marks and citation omitted). After the House of Representatives passed its version of the PWA, members of the House of Representatives expressed concern that the language contained in the PWA was too broad and that the statute would intrude "into the local areas . . . ." *Id*. at 237 (quotation marks and citation omitted). Thereafter, when the Senate passed its version of the act, the language "or political subdivision thereof" was omitted from the act. In conference, the

House adopted the act as passed by the Senate. *Id*. at 236-237. On the basis of this history, and the intent of the Legislature in enacting the PWA, we conclude that we may not infer field preemption from the legislative history of the PWA. Indeed, in direct response to the legislative concerns about the PWA intruding "into the local areas," the Legislature enacted the Senate's version of the PWA to prevent such intrusion. In light of such action, we find that this factor does not support a finding of field preemption.

The third factor identified in *Maple BPA, Inc*, 302 Mich App at 511, requires us to consider the pervasiveness of the state regulatory scheme at issue. Here, nothing in the plain language of the PWA compels the conclusion that the statute's regulatory scheme is so pervasive as to inhibit a city from establishing a prevailing wage for contracts for construction involving the city. Indeed, by its express language the PWA applies to "state project[s]" that are "sponsored or financed in whole or in part by the state . . . ." MCL 408.552. Furthermore, the statute applies only when a "contracting agent," as used in the statute, authorizes the construction at issue. In pertinent part, a "contracting agent" under the statute is "any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project . . . ." MCL 408.551(c). Notably absent from this definition is any reference to cities or municipalities of any kind. Given the limited scope of the PWA's application, we do not find that the regulatory scheme is so pervasive as to preclude all local regulation. See *Rental Prop Owners Ass'n*, 455 Mich at 261 (declining to find that the regulatory scheme at issue was so pervasive that it precluded all local regulation when "[t]he statute does not inhibit municipalities from providing alternative

and consistent means" to regulate in the area in question); *Fraser Twp v Linwood-Bay Sportsman's Club*, 270 Mich App 289, 295; 715 NW2d 89 (2006). Cf. *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220, 239; 826 NW2d 736 (2012) (quotation marks and citation omitted) (finding that a district library, as a unit of local government, did not have authority to regulate in the field of firearms possession when the state "statutory scheme includes a broad, detailed, and multifaceted attack on the possession of firearms.").

The fourth factor in a field preemption analysis requires us to consider whether the nature of the regulated subject matter demands exclusive state regulation in order to achieve the uniformity necessary to serve the state's purpose or interest. *Maple BPA, Inc*, 302 Mich App at 511. Concerning this last factor, "where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld." *Llewellyn*, 401 Mich at 324-325. The nature of the subject matter in this case—wages paid to construction workers—clearly does not demand exclusive state regulation and is instead suitable to supplementary local regulation. Indeed, the establishment of prevailing wages is particularly amenable to local regulation because prevailing wages are to be set equal to prevailing wages *in the relevant locality*. See *West Ottawa Pub Sch*, 107 Mich App at 245. Further, the PWA allows for local regulation in this area because cities are not included within the definition of "contracting agent." Therefore, the subject matter in this case is well suited to local regulations, such as the prevailing wage ordinance in the case at bar. See *McNeil v Charlevoix Co*, 275 Mich App 686, 703; 741

NW2d 27 (2007). Cf. *Capital Area Dist Library*, 298 Mich App at 239-240 (finding that the nature of the regulated subject matter in that case—firearm possession—"undoubtedly calls for . . . exclusive state regulation" because a system of localized regulation could lead to confusing and conflicting regulations, thereby creating a great deal of uncertainty).

In light of the foregoing, we find that defendant's prevailing wage ordinance is a valid exercise of municipal power because it does not conflict with the Michigan Constitution or state law. *Rental Prop Owners Ass'n*, 455 Mich at 253 ("The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws."). We also find that the holding in *Lennane*, which was premised on subsequently altered authority, does not compel our decision in this case. Accordingly, we reverse the decision of the trial court and remand for entry of summary disposition in favor of defendant.

Reversed and remanded. We do not retain jurisdiction.

SHAPIRO, J., concurred with BECKERING, J.

SAWYER, P.J. (*dissenting*). I respectfully dissent.

The majority seems to recognize that the ordinance at issue is invalid under the Supreme Court's ruling in *Attorney General, ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923). And the majority acknowledges that we are required to follow the decisions of the Supreme Court. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008). But the majority argues that there has been a sufficient change

in the law in the 90 years following the *Lennane* decision to warrant this Court ignoring it. I disagree.

The majority looks to a phrase in Const 1963, art 7, § 34 not contained in the 1908 Constitution, which states that provisions of the Constitution and law concerning cities "shall be liberally construed" in the favor of the city. The majority also looks to various decisions of this Court and the Supreme Court that reiterate that principle. I certainly have no basis to disagree with that general principle. But what is lacking is any provision in the Constitution or statutes that expressly grants a city the authority to enact the type of ordinance at issue here that represents a change in law after the ruling in *Lennane*. That is, there is no particular reason to believe that the people, in enacting the 1963 Constitution, had any disagreement with the holding in *Lennane*. Nor has the Legislature seen fit to amend the Home Rule City Act, MCL 117.1 *et seq.* (HRCA), to explicitly grant the authority that *Lennane* concluded that cities lack. Indeed, the majority acknowledges in footnote 2 of its opinion that the statutory grant of authority to cities to enact ordinances, MCL 117.4j(3), reads the same today as it did at the time of *Lennane*. See 1915 CL 3307(t).

What the majority overlooks is that the broad grant of authority to cities, which authority is to be "liberally construed" in favor of the city, is the authority to regulate matters of "municipal concern" and that *Lennane* held that the type of ordinance at issue in that case and in the case at bar involves issues of *state* concern. *Lennane*, 225 Mich at 641. The Supreme Court in *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115-116; 715 NW2d 28 (2006), reiterated that a municipality derives its authority from either a grant by the Legislature or the Michigan Constitution itself. But

both the Constitution and the HRCA only grant cities the authority to legislate over issues of municipal concern. Const 1963, art 7, § 22; MCL 117.4j(3). Indeed, in discussing the various cases that state that cities enjoy a broad grant of authority, the majority conveniently omits the fact that those cases make that statement in the context of the cities' power over municipal concerns. See, e.g., *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 270; 566 NW2d 514 (1997) ("the home rule cities act afford[s] home rule cities broad power to act on behalf of municipal concerns").

Furthermore, this principle is not contradicted by the majority's observation that a home rule city's police power "is of the same general scope and nature as that of the State." *People v Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945). Rather, cities possess such broad police powers within the area of authority granted to them by the Constitution or statutes. Indeed, *Sell* found that the ordinance at issue there was within the powers granted by statute.[1]

And the Court's conclusion in *Lennane* that this is a matter of state concern has never been overruled. Therefore, even if we apply a "liberal construction" to defendant's powers, they do not extend to this ordinance until and unless the Supreme Court revisits its conclusion in *Lennane*, or the Legislature explicitly grants cities the power to adopt prevailing wage ordinances.

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[1] Interestingly, it also found that, because the ordinance at issue was part of an emergency war-time measure to assist the federal government in the war effort, "this ordinance should not be judged by the same tests as those applied to an ordinance enacted in peace time." *Id*. at 319. Accordingly, we should not look too closely at *Sell* for any general legal principle.

In sum, while it may be time for the Supreme Court to revisit *Lennane* and determine whether the principles set forth in that decision remain applicable today, it is within the province of the Supreme Court to do so, not this Court. That is, even if I were to accept all of the majority's arguments why the ordinance in this case is within defendant's authority to adopt were it not for the holding in *Lennane*, I would nevertheless be compelled to conclude that, because of *Lennane*, this Court would lack the authority to uphold the ordinance. To do so would overstep our bounds. It is not for us to reject the continued viability of *Lennane*. It is for defendant to persuade the Supreme Court to do so.

I would affirm.

AUTODIE LLC v CITY OF GRAND RAPIDS

Docket No. 314553. Submitted May 6, 2014, at Lansing. Decided May 27, 2014, at 9:15 a.m. Leave to appeal denied, 497 Mich ___.

Autodie LLC, a wholly owned subsidiary of Chrysler Group, LLC, filed a petition in the State Tax Commission after the Grand Rapids tax assessor concluded that Autodie had improperly used Form 4798, which automobile manufacturers may use to report their personal property, in calculating its 2011 taxes. Autodie asked the Commission to require Grand Rapids to correct its assessment roll, refund its excess tax payments, and declare that Autodie was entitled to use Form 4798. The Commission dismissed Autodie's petition after concluding that it did not have subject-matter jurisdiction. Autodie petitioned the Tax Tribunal for review, contending that its use of Form 4798 was an issue of incorrectly reported or omitted property over which the Commission had subject-matter jurisdiction under MCL 211.154. Additionally, Autodie asserted that the Commission had jurisdiction to review the assessor's decision as an improper assessment under MCL 211.150(3). The Tax Tribunal, Kimbal R. Smith III, granted the Department and Commission's motion to be dismissed as parties, affirmed the Commission's decision, and granted summary disposition to Grand Rapids. Autodie appealed.

The Court of Appeals *held*:

1. Whether the assessor's failure to use Form 4798 constituted an improper assessment under MCL 211.150(3) was not decided because Autodie did not preserve the issue for review.

2. The Tax Tribunal correctly determined that the case did not concern omitted property under MCL 211.154 because the assessor determined the value of Autodie's personal property, even though it rejected Autodie's use of Form 4798.

3. The Tax Tribunal properly concluded that the State Tax Commission lacked subject-matter jurisdiction under MCL 211.154 to review the assessor's determination that Autodie was not qualified to report its property as automotive manufacturing equipment using Form 4798. This determination did not constitute an incorrect report under MCL 211.154 because taxpayers, not assessors, report property under that provision. An interpretation of MCL 211.154 that would allow both the taxpayer and the assessor to incorrectly report would

not be consistent with the statute as a whole given that the Legislature used the phrase "incorrectly reported" in MCL 211.154 while using "improperly assessed" in MCL 211.150(3), which indicated that these terms had different meanings.

Affirmed.

TAXATION — PERSONAL PROPERTY — REPORTING — ASSESSING — AUTOMOTIVE MANUFACTURING EQUIPMENT — STATE TAX COMMISSION — JURISDICTION.

The State Tax Commission lacks subject-matter jurisdiction under MCL 211.154 to review an assessor's determination regarding whether a taxpayer's property qualifies as automotive manufacturing equipment; the assessor's determination does not constitute a report under MCL 211.154.

Dykema Gossett PLLC (by *Carl Rashid, Jr.*, *Douglas J. Fryer*, and *Shaun M. Johnson*) for Autodie LLC.

Kristen Rewa, Assistant City Attorney, for the city of Grand Rapids.

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

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

PER CURIAM. Petitioner, Autodie LLC, appeals as of right the Tax Tribunal's order granting summary disposition in favor of respondent, the city of Grand Rapids, under MCR 2.116(I)(1), and dismissing respondents Department of Treasury (the Department) and State Tax Commission (the Commission) from the case. We affirm.

I. FACTS

A. BACKGROUND FACTS

The parties do not dispute the facts of this case. Automobile manufacturers may use Form 4798, which

the Department issues, to report their personal property. Form 4798 uses lower valuation multipliers than assessors use for other types of personal property, and its use results in a lower true cash value for the personal property.

Autodie is a wholly owned subsidiary of Chrysler Group, LLC, that manufactures dies for use by Chrysler. In 2011, Autodie used Form 4798 to submit its personal property statement to the Grand Rapids assessor. The assessor concluded that Autodie was not entitled to use Form 4798, rejected the form, and independently calculated the value of Autodie's personal property.

B. PROCEDURAL HISTORY

1. AUTODIE'S PETITION TO THE STATE TAX COMMISSION

In October 2011, Autodie filed a petition with the Commission, asserting that the Commission had subject-matter jurisdiction under MCL 211.154 because its personal property was "incorrectly reported or omitted[.]" Autodie asserted that the Grand Rapids assessor had "incorrectly reported and/or omitted from the 2011 Grand Rapids Assessment rolls, the personal property belonging to Autodie LLC, as not being eligible for Form 4798 . . . ." Autodie asked the Commission to require Grand Rapids to correct its assessment roll regarding Autodie's personal property, to refund its excess tax payments, and to declare that Autodie was entitled to use Form 4798.

On October 2, 2012, the Commission dismissed Autodie's petition. The Commission concluded that it did not have subject-matter jurisdiction over Autodie's petition. Reasoning that "it is clear that no part of the real property in question has been omitted from assessment

and it is also clear that the assessor did not base his or her assessment on an incorrect taxpayer report," the Commission determined that Autodie was actually challenging the assessor's determination of the personal property's value. Because the Tax Tribunal has exclusive jurisdiction to review final determinations of value, the Commission concluded that it lacked subject-matter jurisdiction to hear Autodie's petition.

2. AUTODIE'S PETITION TO THE MICHIGAN TAX TRIBUNAL

On November 5, 2012, Autodie filed a petition in the Tax Tribunal. Autodie asked the Tax Tribunal to review the Commission's decision, contending that the Commission erred by dismissing its petition. Autodie contended that the assessor's "complete disregard or misinterpretation" of its status as a qualified automobile manufacturer, and subsequent rejection of Form 4798, was "an incorrectly reported or omitted property issue" over which the Commission had subject-matter jurisdiction. Additionally, Autodie asserted for the first time that the Commission had jurisdiction to review the assessor's decision as an improper assessment under MCL 211.150(3).

On December 4, 2012, the Department and the Commission moved to be dismissed from the petition, asserting that they were not necessary parties to the action. Autodie responded that the Commission was a necessary party because the Grand Rapids assessor acted on its advice and because it sought to bind the Commission to the Tax Tribunal's decision.

3. THE TAX TRIBUNAL'S DECISION

On January 15, 2013, the Tax Tribunal granted the Department and Commission's motion to be dismissed as parties. The Tax Tribunal reviewed and affirmed the

Commission's decision that it lacked subject-matter jurisdiction over Autodie's petition:

> If the State Tax Commission determines that property subject to the collection of taxes under the General Property Tax Act has been incorrectly reported or omitted[,] the state tax commission shall place the corrected assessment value for the appropriate years on the appropriate assessment roll. Here, the State Tax Commission properly determined that the issue did not relate to whether the property was omitted or incorrectly reported; rather, the State Tax Commission determined "the assessment was based on the independent determination of value made by the assessor that was not affected by the omission of property components from the valuation process." As such, the Michigan Tax Tribunal, and not the State Tax Commission, was the proper venue to raise its claim because the issue was a disagreement relating to the true cash value of assessable property.

The Tax Tribunal then sua sponte granted Grand Rapids summary disposition after determining that it did not have original jurisdiction to resolve Autodie's valuation dispute because Autodie had not timely filed its petition. Autodie did not appeal this determination.

II. SUBJECT-MATTER JURISDICTION

A. STANDARD OF REVIEW

This Court's review of a decision by the Tax Tribunal is limited.[1] When a party does not dispute the facts or allege fraud, we review whether the Tribunal "made an error of law or adopted a wrong principle."[2] This Court reviews de novo the interpretation and application of tax statutes.[3]

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[1] *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012).

[2] *Id*. at 527-528.

[3] *Id*. at 528; *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

B. STATUTORY INTERPRETATION

When interpreting a statute, our goal is to give effect to the intent of the Legislature.[4] The language of the statute itself is the primary indication of the Legislature's intent.[5] If the language of the statute is unambiguous, we must enforce the statute as written.[6] This Court reads the provisions of statutes "reasonably and in context," and reads subsections of cohesive statutory provisions together.[7]

1. THE TAX TRIBUNAL'S JURISDICTION

This case concerns the interplay between statutes that grant subject-matter jurisdiction over property tax disputes to two distinct bodies: the Commission and the Tax Tribunal. The Tax Tribunal "has *exclusive* and original jurisdiction" over proceedings involving "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."[8] The Legislature has vested the Tax Tribunal with "jurisdiction over matters previously heard by the State Tax Commission *as an appellate body*."[9] Thus, the Tribunal has jurisdiction to hear appeals from the decisions of the Commission.[10]

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

[5] *Id*. at 13.

[6] *Id*.

[7] *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

[8] MCL 205.731(a) (emphasis added).

[9] *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 632; 765 NW2d 31 (2009), quoting *Jefferson Sch v Detroit Edison Co*, 154 Mich App 390, 398; 397 NW2d 320 (1986) (quotation marks omitted). See also *Emmet Co v State Tax Comm*, 397 Mich 550, 553-555; 244 NW2d 909 (1976).

[10] *Superior Hotels*, 282 Mich App at 632.

2. THE COMMISSION'S JURISDICTION

Because the Legislature has granted the Tax Tribunal exclusive appellate jurisdiction over decisions related to assessment, the Commission no longer has power to hear such cases an as appellate body.[11] However, the Commission retains jurisdiction to hear and decide claims as an administrative agency that it had initially heard and investigated before the Tax Tribunal was created.[12] Two statutes confer authority on the Commission to hear and decide claims as an agency: MCL 211.150(3) and MCL 211.154.[13] MCL 211.150(3) provides that the Commission has a duty to

> receive all complaints as to property liable to taxation that has not been assessed or that has been fraudulently or improperly assessed, and to investigate the same, and to take such proceedings as will correct the irregularity complained of, if any is found to exist.

MCL 211.154 provides that the Commission may correct assessment values if it determines that "property subject to taxation . . . has been incorrectly reported or omitted . . . ."

Thus, there are four areas in which the Commission has original subject-matter jurisdiction to initially hear and investigate petitions: property fraudulently assessed under MCL 211.150(3), property improperly assessed under MCL 211.150(3), property omitted under MCL 211.154, and property incorrectly reported under MCL 211.154.

C. APPLYING THE STATUTES

1. PROPERTY FRAUDENTLY ASSESSED UNDER MCL 211.150(3)

Autodie did not assert that the assessor in this case

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[11] See *Jefferson Sch*, 154 Mich App at 398.

[12] *Id*.

[13] *Superior Hotels*, 282 Mich App at 632-633.

fraudulently assessed the property. Therefore, this ground for jurisdiction does not apply.

2. PROPERTY IMPROPERLY ASSESSED UNDER MCL 211.150(3)

On appeal, Autodie asserts that the assessor's failure to use Form 4798 was an improper assessment under MCL 211.150(3). We decline to review this unpreserved issue.

One of the administrative functions that the Commission retains is "exercising general supervision over the assessing officers of this state . . . ."[14] A party may petition the Commission to initiate an investigation of alleged improper assessment.[15] The Commission has original jurisdiction over claims of improper assessment, and *initially* hears and investigates these claims.[16] But "[g]enerally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal."[17]

In this case, Autodie did not raise MCL 211.150(3) before the Commission. Autodie instead asserted only that the assessor omitted or incorrectly reported its property under MCL 211.154. Autodie did not ask the Commission to investigate whether an assessor's decision to reject Form 4798 when the taxpayer submitting the form is a wholly owned subsidiary of an automobile manufacturer is improper. And the Commission did not investigate that issue or render a decision on it.

Autodie raised this issue for the first time before the Tax Tribunal. However, the Tax Tribunal was acting as

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[14] *Richland Twp v State Tax Comm*, 210 Mich App 328, 335; 533 NW2d 369 (1995) (quotation marks and citation omitted).

[15] *Jefferson Sch*, 154 Mich App at 399.

[16] *Id*. at 398-399.

[17] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

an appellate body reviewing the Commission's decision. The Tax Tribunal did not address Autodie's argument under MCL 211.150(3), likely because the Commission had not made any decision on that ground for it to review. We conclude that the Tax Tribunal properly declined to address this unpreserved issue.

Similarly, we decline to address this unpreserved issue on appeal. This Court will generally decline to address unpreserved issues unless "a miscarriage of justice will result from a failure to pass on them, . . . the question is one of law and all the facts necessary for its resolution have been presented, or [it is] necessary for a proper determination of the case."[18] While this is a question of law for which the necessary facts have been presented, to properly address this issue, this Court would need to address issues that the parties did not raise or argue either below or on appeal. These include whether the Commission could correct the allegedly improper assessment under MCL 211.150(3) and whether MCL 211.150(3) and MCL 205.731(a) conflict. We have neither the benefit of a decision by the Commission or the Tax Tribunal nor sufficient briefing by the parties. We therefore decline to review the issue.

3. PROPERTY OMITTED UNDER MCL 211.154

Autodie contends that the Tribunal should have determined that this case concerned omitted property. Grand Rapids contends that this suit did not involve an omission. We agree with Grand Rapids.

We conclude that this Court's decision in *Superior Hotels, LLC v Mackinaw Township* does not support Autodie's contention that the assessor's decision to

[18] *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007) (quotation marks and citations omitted).

reject Form 4798 resulted in omitted property. In *Superior Hotels*, a taxpayer had built a new motel on its property. The township assessor calculated the property's taxable value in 2001, 2002, and 2003 on the basis of the taxable value that had been established when the construction was only half completed. However, construction had been completed in 1999. The State Tax Commission adjusted the property's value upward for the tax years at issue. The Tax Tribunal ruled that the Commission did not have jurisdiction to do so under MCL 211.154 because it reasoned that the property had not been incorrectly reported or omitted.[19]

This Court reversed the Tax Tribunal's judgment.[20] We reasoned that the additional 50% of the construction that was completed constituted an addition.[21] Additions included omitted property that was discovered after the tax roll was complete, and construction that was not previously in existence.[22] The assessor failed to add the value of the addition to the assessment.[23] We concluded that the addition was therefore omitted property, and the Commission had jurisdiction to correct the assessment.[24]

We conclude that the facts in *Superior Hotels* are distinguishable from the facts in this case. In *Superior Hotels*, the assessor failed to count 50% of the taxpayer's property. Here, the assessor counted all of Autodie's personal property. Autodie does not contend that the assessor's rejection of Form 4798 resulted in the assessor's failing to count or consider any of its personal property.

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[19] *Superior Hotels*, 282 Mich App at 623-624.

[20] *Id*. at 624.

[21] *Id*. at 638.

[22] *Id*. at 636-637, citing MCL 211.34d(1)(b).

[23] *Id*. at 639.

[24] *Id*. at 638-639.

Property is not omitted when an assessor determines a property's value.[25] In this case, the assessor *did* determine the value of Autodie's personal property, even though it rejected Autodie's use of Form 4798. We conclude that Autodie's personal property was not omitted within the meaning of MCL 211.154.

4. PROPERTY INCORRECTLY REPORTED UNDER MCL 211.154

Autodie contends that its property was incorrectly reported under MCL 211.154 because the assessor incorrectly reported the property's type (disqualifying it as automotive manufacturing equipment) by rejecting Form 4798. Grand Rapids contends that an assessor cannot incorrectly report property because the *taxpayer* reports the property, not the assessor. We agree with Grand Rapids. An assessor does not "report" under MCL 211.154, and therefore the property was not incorrectly reported.

In sum, we agree with the Tax Tribunal's succinct statement, "[t]he taxpayer 'reports' and the taxing authority 'assesses.' "[26] We afford an agency's interpretation of the statutes that it executes respectful consideration, if its interpretation does not conflict with the plain language of the statute.[27] We conclude that the Tax Tribunal's interpretation faithfully interprets the statute's language.

The statutory scheme for taxing personal property assigns distinct duties to taxpayers and assessors. Personal property located in Michigan is subject to prop-

[25] See *Orion Twp v State Tax Comm*, 195 Mich App 13, 18; 489 NW2d 120 (1992).

[26] *SSAB Hardtech, Inc v State Tax Comm*, 13 MTT 164, 174 (Docket No. 288672), issued March 30, 2004.

[27] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008); *Superior Hotels*, 282 Mich App at 629-630.

erty taxes.[28] This property must be assessed annually.[29] The person who possesses or owns the property makes a statement of his or her personal property.[30] The assessor is not bound by the taxpayer's personal property statement.[31] The assessor determines the property to be assessed and "in estimating the value of that property . . . shall exercise his or her best judgment."[32] The assessor then makes and completes the assessment roll.[33]

Autodie contends that the assessor's action is a report. When the Legislature has not defined a statute's terms, we may consider dictionary definitions to aid our interpretation.[34] Considering only the dictionary definition of the word "report," Autodie's interpretation is a plausible interpretation. The verb "report" has many definitions, several of which fit this context: "to relate, as the results of one's observation or investigation," "to give a formal account or statement of," "to make known the presence, absence, condition, etc., of," and "to relate, tell."[35] It is plausible that an assessor might incorrectly observe, account, make known, or relate a taxpayer's personal property. Thus, considering only the dictionary definition, an assessor's action appears to be a report.

We have also considered whether *both* the taxpayer *and* the assessor may incorrectly report under MCL 211.154, and we conclude that this interpretation would

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[28] MCL 211.1; *Ford Motor Co*, 475 Mich at 444.

[29] MCL 211.10(1); *Ford Motor Co*, 475 Mich at 444.

[30] MCL 211.19(2); *Ford Motor Co*, 475 Mich at 445.

[31] MCL 211.24(f); *Ford Motor Co*, 475 Mich at 446.

[32] MCL 211.24(f).

[33] MCL 211.24(f). See *Ford Motor Co*, 475 Mich at 445.

[34] *Oakland Co Bd of Co Rd Comm v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998).

[35] *Random House Webster's College Dictionary* (2005), defs 10, 11, 13, and 16.

not be consistent with the statute as a whole. The use of different terms within the same statute indicates that the terms have different meanings.[36] In drafting the General Property Tax Act,[37] the Legislature used the phrase "incorrectly *reported*" in MCL 211.154, but used the phrase "improperly *assessed*" in MCL 211.150(3). Because the Legislature used different terms, we conclude that incorrectly reporting and improperly assessing are distinctly different activities.

The difference between reporting, which is the activity of the taxpayer, and assessing, which is the activity of the assessor, becomes clear when we read and consider the statutory scheme as a whole. Under the act, it is clear that the assessor's duty is more specific than simply making a statement of the taxpayer's personal property. The assessor must also estimate the property's value and make and complete the assessment roll. To put it another way, the assessor does not simply give a formal account of the personal property or make it known, but also processes the information and applies his or her judgment to determine the property's true cash value. In contrast, the taxpayer's only duty in this regard is to make the property known by making a statement of the property. The taxpayer's duty activity adheres much more closely to the common meaning of "report."

Considering the statute's plain language, the statute as a whole, and the Legislature's use of different terms, we conclude that the Legislature intended MCL 211.154 to apply to situations in which the *taxpayer* incorrectly reported its personal property on a personal property statement.

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[36] *US Fidelity & Guarantee Co*, 484 Mich at 14.

[37] MCL 211.1 *et seq*.

We also conclude that Autodie's allegations did not involve incorrect reporting under MCL 211.154. Autodie did not contend that it—the taxpayer—had incorrectly submitted its personal property statement. Autodie instead contended that the assessor had incorrectly reported its personal property by rejecting the form on which it made that statement. But the assessor does not report: the assessor assesses. Because there is no indication that Autodie's allegations involved an incorrect report, we conclude that the Commission properly determined that it lacked jurisdiction under MCL 211.154.

III. AUTODIE'S ADDITIONAL ISSUES

Autodie raises several additional arguments in its statement of issues presented. Autodie premises these arguments on its assertion that the Tax Tribunal improperly affirmed the Commission's decision to reject Autodie's petition. Because we have concluded that the Tax Tribunal properly affirmed the Commission's decision, we do not reach these additional issues.

IV. CONCLUSION

We conclude that the Tax Tribunal properly affirmed the Commission's decision to dismiss Autodie's petition because it lacked subject-matter jurisdiction. The assessor's rejection of Form 4798 was not an issue of omitted or incorrectly reported property under MCL 211.154. It may have been an issue of improperly *assessed* property under MCL 211.150(3), but Autodie did not raise that issue or argue it before the Tax Commission, and we decline to review it. We do not reach the remainder of Autodie's issues on appeal because the Tax Tribunal properly dismissed Autodie's case for lack of subject-matter jurisdiction.

We affirm.

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

In re WANGLER

Docket No. 318186. Submitted April 8, 2014, at Detroit. Decided May 27, 2014, at 9:20 a.m. Leave to appeal sought.

The Department of Human Services petitioned in the Sanilac Circuit Court, Family Division, asking the court to take jurisdiction over respondent's three minor children. The court, John R. Monaghan, J., ordered the parties to participate in mediation. Following mediation, the parties entered into an agreement that provided that respondent would enter a plea of admission to certain allegations in the petition in order to confer jurisdiction over the children, but the actual adjudication would be held in abeyance for a period of six months during which time respondent would participate in services and supervised visitation. Several review hearings were held over the course of the following 11 months. Petitioner ultimately asserted that reunification was not possible given respondent's lack of progress and her failure to comply with the ordered services. At petitioner's urging, following a January 2013 review hearing, the court entered an order on February 4, 2013, indicating that it was taking formal jurisdiction over the children in accordance with the mediation agreement. Petitioner then filed a supplemental petition seeking termination of respondent's parental rights. Following a termination hearing on June 26, 2013, the court entered an order terminating respondent's parental rights to all three children. Respondent appealed, challenging the trial court's exercise of jurisdiction over the children.

The Court of Appeals *held*:

During the adjudicative stage of termination proceedings, the family division of a circuit court determines whether it has jurisdiction over the minor child by determining whether, under MCL 712A.2(b)(2), the respondent's conduct has created a situation in which the child's home or environment—by reason of neglect, cruelty, drunkenness, criminality, or depravity—is an unfit place for the juvenile to live in. The dispositional phase of the proceedings concerns the consequences arising from the fact of adjudication. Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights. Therefore, a respondent may not challenge the trial court's initial

exercise of jurisdiction if the court has subsequently ordered termination in a dispositional order following the filing of a supplemental petition for termination. However, if termination occurs at the initial dispositional hearing as a result of a request for termination contained in the original or an amended petition for jurisdiction, then an attack on adjudication is direct, and not collateral, as long as the appeal is from the initial order of disposition and that order contains both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court. In this case, the mediation agreement authorized the start of dispositional proceedings before formal adjudication, which did not occur until the court entered its formal order of adjudication on February 4, 2013. The same order was also a dispositional order because it placed the children under petitioner's supervision, which made the order appealable as of right under MCR 3.993(A)(1). Because that order was appealable as of right, respondent was required to raise her jurisdictional challenges in an appeal of that order. Respondent, however, waited until after the later order terminating her parental rights entered before challenging the court's exercise of jurisdiction. Therefore, her challenges to the trial court's exercise of jurisdiction constituted an impermissible collateral attack.

Affirmed.

GLEICHER, J., dissenting, would have held that the trial court never obtained jurisdiction and would have vacated the order terminating respondent's parental rights and remanded the case for a new hearing. The June 26, 2013 hearing constituted the initial dispositional hearing following adjudication. Accordingly, respondent's appeal of the adjudication was not collateral, and respondent was entitled to challenge the adjudication as well as the termination on appeal. In order to safeguard parents' due process rights, before a court may exercise jurisdiction on the basis of a parent's plea, under MCR 3.971(C)(1) the court must satisfy itself that the parent knowingly, understandingly, and voluntarily waived certain rights. In this case, no dialogue took place between the court and the parent, and the mediation procedure employed as a substitute for an adjudicative trial improperly bypassed the due process protections enshrined in the court rules. Further, under MCR 3.977(E)(3), termination may only occur at the initial dispositional hearing if the court's findings are based on legally admissible evidence. Termination in this case took place at the initial dispositional hearing. Assuming that a valid adjudication took place, the circuit court also erred by relying on hearsay evidence in terminating respondent's parental rights.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — ADJUDICATION — COLLATERAL ATTACKS.

During the adjudicative stage of termination proceedings, the family division of a circuit court determines whether it has jurisdiction over the minor child by determining whether, under MCL 712A.2(b)(2), the respondent's conduct has created a situation in which the child's home or environment—by reason of neglect, cruelty, drunkenness, criminality, or depravity—is an unfit place for the juvenile to live in; the dispositional phase of the proceedings concerns the consequences arising from the fact of adjudication; an adjudication cannot be collaterally attacked following an order terminating parental rights unless the termination occurred at the initial dispositional hearing such that the appellant's challenge to the trial court's exercise of jurisdiction is a direct appeal; a court order that constitutes both a formal order of adjudication and a dispositional order placing the child under the supervision of the Department of Human Services is appealable as of right under MCR 3.993(A)(1), and any jurisdictional challenges must be raised in an appeal of that order; a party who fails to raise a jurisdictional challenge in an appeal of that order may not do so later in an appeal of a subsequent termination order.

James V. Young, Prosecuting Attorney, and *Eric G. Scott*, Assistant Prosecuting Attorney, for petitioner.

Brandon R. McNamee for respondent.

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

HOEKSTRA, P.J. Respondent appeals as of right the trial court's order terminating her parental rights to three minor children pursuant to MCL 712A.19b(3)(a)(*ii*) (child's parent deserted the child), (c)(*i*) (conditions that led to adjudication continue to exist), and (*g*) (failure to provide proper care or custody). On appeal, respondent challenges only the validity of the trial court's exercise of jurisdiction over the minor children. Because respondent's challenge is an impermissible collateral attack on the trial court's exercise of jurisdiction, we affirm.

On January 11, 2012, petitioner, the Department of Human Services (DHS), requested that the trial court take jurisdiction over the minor children after investigating respondent in response to a complaint that she was using heroin and was involved in a domestic violence incident with her boyfriend. Petitioner alleged that respondent continued to test positive for heroin and could not provide a safe environment for the minor children. On January 13, 2012, the trial court entered an order following a preliminary hearing placing the children under petitioner's supervision. It also ordered the parties to participate in mediation. On February 10, 2012, respondent consented to the placement of one of the minor children with that child's father. Mediation occurred on February 28, 2012. Following mediation, the parties entered into an agreement that provided that respondent would plead to certain allegations in the petition in order to confer jurisdiction over the minor children; however, the actual adjudication would be held in abeyance for a period of six months during which time she would participate in services and supervised visitation. The agreement further set forth the consequences of a plea of admission. The agreement was signed by respondent. On February 28, 2012, the trial court accepted the mediation agreement and adopted it as an order of the court.

Thereafter, petitioner provided services to respondent consistent with the service plan that was set forth by the mediation agreement, including drug treatment services and supervised visitation with the children. Dispositional review hearings were held on May 3, 2012, August 2, 2012, and November 1, 2012. Respondent did not appear at any of the hearings, but her attorney was present at all three. Following each hearing, the trial court continued its prior orders without formally accepting respondent's plea and taking juris-

diction over the minor children. Following the dispositional review hearing on May 3, 2012, another one of the minor children was placed with that child's father. The remaining minor child was placed with his grandparents following the August 2, 2012 dispositional review hearing.

The next dispositional review hearing was held on January 31, 2013, and respondent was again not present. At this hearing, a DHS employee stated that reunification was no longer a viable option in light of respondent's lack of progress, and noted that the court still had not formally entered an order of adjudication taking jurisdiction over the children. Petitioner noted that the parties entered into a mediation agreement, and that respondent had not continued to comply with the ordered services; therefore, pursuant to the agreement, the trial court could accept respondent's plea and take jurisdiction over the minor children. Respondent's attorney agreed that the mediation agreement empowered the trial court to take jurisdiction over the children. The trial court then stated on the record that it was taking "formal jurisdiction" and authorized petitioner to file a supplemental petition asking for termination of respondent's parental rights.

Consistent with the trial court's statements on the record, an "order following dispositional review" was entered on February 4, 2013. The order noted that the children had been removed from respondent's care, that reasonable efforts to finalize the court-approved permanency plan of reunification were made, and that the children would continue to remain under petitioner's care and supervision. An additional document was attached to the order wherein the trial court formally entered an adjudication order. The order stated that "based upon the stipulated mediation resolution, the

court takes formal jurisdiction of the minor children . . . ." The order further noted that it was "contrary to the best interest of the children to be in the mother's home based on the content of the petition." Finally, the order gave petitioner discretion to file a supplemental petition requesting termination of respondent's parental rights.

On March 13, 2013, petitioner filed a supplemental petition seeking termination of respondent's parental rights. A termination hearing was held on June 26, 2013, and on July 16, 2013, an order terminating respondent's parental rights and the trial court's written opinion were entered. Thereafter, this appeal ensued.

On appeal, respondent argues that the written plea that was incorporated into the mediation agreement was invalid, and therefore, it could not form a basis for the trial court to take jurisdiction over the minor children. Further, respondent argues that the trial court's exercise of jurisdiction over the minor children was invalid because she was not present at the hearing following which the trial court formally exercised its jurisdiction over the minor children. Respondent acknowledges in her brief on appeal that jurisdiction cannot be collaterally attacked; however, she argues that because the termination hearing immediately followed the court's order of adjudication, her jurisdictional challenge should not be considered a collateral attack.

MCL 712A.2(b)(2) provides a court with jurisdiction in proceedings regarding a minor child found within the county "[w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent . . . is an unfit place for the juvenile to live in." The determination whether a court

has jurisdiction over a minor child begins with the court's preliminary proceeding following the filing of a petition. *In re Hatcher*, 443 Mich 426, 433; 505 NW2d 834 (1993). The petition sets forth the charges against the parent, and at the preliminary hearing the court must determine whether there is probable cause to substantiate the facts alleged in the petition and whether the facts alleged in the petition, if proved, would fall under MCL 712A.2(b)(2). *In re Hatcher*, 443 Mich at 434-345. If the court authorizes the petition for jurisdiction during the preliminary hearing, it will generally issue a preliminary order specifying a plan for temporary placement. *Id*. at 435.

Generally, the adjudicative phase will follow the preliminary hearing. *Id*. During the adjudicative phase, the court determines "whether the child is neglected within the meaning of [MCL 712A.2(b)(2)] and then orders the disposition or placement that comports with the child's best interests." *Id*. at 435-436. As explained by this Court in *In re SLH*, 277 Mich App 662, 669 n 13; 747 NW2d 547 (2008):

> Some, but not all, courts issue an Order of Adjudication following the plea or a trial at which jurisdiction was found. Other courts, however, do not issue an Order of Adjudication but only an order of disposition that includes the statement that "[a]n adjudication was held and the child(ren) was/were found to come within the jurisdiction of the court." MCR 3.993(B) provides that an Order of Adjudication may only be appealed by leave granted, whereas an initial order of disposition is the first order appealable as of right. Accordingly, because an initial order of disposition is the first order appealable as of right, an appeal of the adjudication following the issuance of an initial dispositional order is not a collateral attack on the initial adjudication, but a direct appeal, notwithstanding that a termination of parental rights may have occurred at the initial dispositional hearing.

MCR 3.993(A)(1) provides that an order of disposition placing a minor under the supervision of the court or removing the minor from the home" is appealable by right; MCR 3.993(B) provides that all orders not listed in subrule (A) are appealable by leave.

Therefore, during the adjudicative stage, the court merely determines whether it has jurisdiction over the minor child by determining whether the respondent's conduct created a situation in which the child's "home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity . . . is an unfit place for the juvenile to live in," under MCL 712A.2(b)(2). An adjudication finding that the court may take jurisdiction over a minor child does not involve an order authorizing any specific consequences for the respondent. The dispositional phase of the proceedings concerns the consequences arising from the fact of the adjudication. During the dispositional phase of the proceedings, the court can order placement of a minor child, visitation, services, or any other specific action involving the respondent and the minor child that is under the court's jurisdiction.

"Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights." *In re SLH*, 277 Mich App at 668. See also *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005). Said differently, a respondent may not challenge the trial court's adjudication, meaning its exercise of jurisdiction, "when a termination occurs following the filing of a supplemental petition for termination after the issuance of the dispositional order." *In re SLH*, 277 Mich App at 668. However,

> [i]f termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the

> adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court. [*Id*. at 668-669.]

Accordingly, the issue we must resolve is whether termination occurred at the initial disposition such that respondent's attack on the trial court's exercise of jurisdiction is a direct appeal or whether there was an order of disposition that respondent was required to appeal as of right in order to challenge the trial court's exercise of jurisdiction.

In this case, contrary to the typical order of proceedings, the trial court ordered the parties to engage in mediation immediately after the preliminary hearing wherein it found probable cause to authorize the petition and ordered temporary placement of the minor children. During mediation, the parties negotiated an agreement that was signed by all participants, including respondent. The agreement first sets forth the consequences of the court's acceptance of respondent's plea of admission. The agreement then states that respondent admits several paragraphs of the petition. Further, the agreement states that respondent's plea of admission and the court's exercise of jurisdiction would "be held in abeyance," while respondent participated in services. Accordingly, the agreement authorized dispositional proceedings to begin before formal adjudication. Specifically, respondent agreed to comply with a service plan including residential treatment, outpatient services, random drug screens, and a no contact order. The agreement also provided for supervised parenting time. As the case progressed, it became clear that respondent was not making significant progress, and eventually, the trial court accepted respondent's plea of

admission and took formal jurisdiction over the minor children following a dispositional review hearing held on January 31, 2013.

The order following the dispositional review hearing dated February 4, 2013, constituted the trial court's formal order of adjudication because it was the first order wherein the trial court formally exercised its jurisdiction pursuant to the mediation agreement. The same order also constituted an "order of disposition placing a minor under the supervision of the court or removing the minor from the home," under MCR 3.993(A)(1). The order noted that the minor children were removed from respondent's care, that reasonable efforts to finalize the court-approved permanency plan of reunification were made, and that the children would continue to remain under the care and supervision of petitioner. It also authorized petitioner to file a supplemental petition requesting termination of respondent's parental rights. Therefore, because under the February 4, 2013 order the trial court formally exercised its jurisdiction over the minor children and placed the minor children under the supervision of petitioner, it constituted an order that was appealable as of right under MCR 3.993(A)(1). As a result, respondent was required to raise her jurisdictional challenges in an appeal of the February 4, 2013 order. Because respondent instead waited until after the filing of a supplemental petition seeking termination, a termination hearing, and an order terminating her parental rights before challenging the trial court's exercise of jurisdiction, her challenges on appeal to the trial court's exercise of jurisdiction constitute an impermissible collateral attack and we will not consider the merits of her argument. See *In re SLH*, 227 Mich App at 668 (explaining that an adjudication cannot be collaterally attacked when a termination occurs following the filing of a supplemental petition for termination after the issu-

ance of the initial dispositional order); *In re Gazella*, 264 Mich App at 680 (holding that the respondent lost her right to challenge the court's exercise of jurisdiction because she failed to appeal the original order of disposition).

Affirmed.

SAWYER, J., concurred with HOEKSTRA, P.J.

GLEICHER, J. (*dissenting*). Because child protective proceedings implicate constitutionally protected liberty interests, our Supreme Court promulgated court rules designed to safeguard parents' due process rights. One rule, MCR 3.971, addresses the procedures that control a court's assumption of jurisdiction over the child when the respondent makes a plea of admission or no contest. Before a court may exercise jurisdiction based on a parent's plea, it must satisfy itself that the parent knowingly, understandingly, and voluntarily waived certain rights. MCR 3.971(C)(1). Here, no dialogue between court and parent took place. The mediation procedure employed as a substitute for an adjudicative trial improperly bypassed the due process protections enshrined in the court rules. Thus, in my view the court never obtained jurisdiction.

After ignoring due process requirements for pleas of admission, the circuit court sidestepped MCR 3.977(E)(3), which provides that when termination occurs at the initial disposition hearing, only legally admissible evidence may be introduced. And because termination occurred at initial disposition, respondent's appeal does not qualify as a collateral attack. Accordingly, I respectfully dissent from the majority's contrary conclusions and would vacate the termination order.

I. BACKGROUND

In January 2012, the Department of Human Services (DHS) filed a petition to remove the respondent-mother's three children from her custody based on respondent's heroin addiction and her violent relationship with her live-in boyfriend. At the preliminary hearing, respondent conceded that probable cause existed to take her children into care and to continue their foster placement. The family court referee ordered the parties to participate in a pilot mediation program.

Mediation occurred on February 28, 2012. A signed "mediation resolution" provided that "[b]ased on the agreement of all parties, the mother's Plea of Admission and the issue of jurisdiction will be held in abeyance for a period of six months." Respondent stipulated to a case service plan, that visitation with the children would be supervised at the discretion of the DHS, and that the court would schedule a "review hearing" within 90 days. The family court judge assigned to the matter signed the agreement with the notation, "This Mediation Agreement is the order of the Court."

That same day, the parties placed into the court record a document titled, "Entry of plea pursuant to MCR 5.971 as part of mediation."[1] The document provided:

> 3. I am a participant in this mediation; I understand the allegations in the petition regarding the child(ren) identified on this document and I waive (give up) my right to have those allegations read to me on the record or stated to me in writing; I have read the petition.
>
> 4. I understand I have the right to an attorney at this mediation and every other hearing this matter.

[1] MCR 5.971 was superseded by MCR 3.971 in 2003, nine years before this plea was entered.

5. If the Court accepts my plea of admission or no contest, I understand I will give up the following rights:

a) To have a trial before a judge or a jury;

b) To have the petitioner prove the allegations in the petition by a preponderance of the evidence (more than half);

c) To have witnesses against me appear and testify under oath at the trial;

d) To cross-examine (meaning "to question") the witnesses;

e) To have the court order to come to the trial any witnesses I believe could testify in my favor, or to subpoena them.

* * *

7. I understand the plea, if accepted by the court, could later be used to terminate my parental rights to the child(ren) identified on this document.

8. I know I do not have to offer this plea; I have made up my own mind to do it.

9. I have thought about everything that might happen if the court accepts this plea.

10. I understand everything in this document.

11. Nothing has been promised to me unless a plea bargain has been described on the attached mediation report form.

On the plea form, respondent admitted the allegations in paragraphs 8 through 14 of the DHS's January 11, 2012 petition. Specifically, respondent admitted that a Children's Protective Services case was opened in November 2011, due to domestic violence and drug abuse. Respondent conceded that she had agreed to services at that time but those services insufficiently protected the children from continuing harm. Respondent admitted that she had not maintained contact with her

caseworker, rendering him or her unable to monitor the children's safety. Respondent also admitted that she had supplied no verification that she was receiving treatment for her substance abuse and had tested positive for opiates and cocaine at her random drug screens. She further admitted the domestic violence incident between her and her boyfriend.

Respondent provided no testimony in conjunction with the mediation and no evidence of record suggests that the court made inquiry to ascertain whether she intelligently and voluntarily agreed to the plea-abeyance procedure, or whether the plea was accurate.[2]

Over the next several months, the DHS provided services to respondent consistent with the case service plan. Respondent was generally uncooperative. The court conducted periodic "dispositional review" hearings that respondent failed to attend. At a January 31, 2013 hearing, the caseworker indicated that the agency wanted to proceed toward termination given respondent's lack of progress. The court noted that no adjudication order had been entered:

> [I]f there hasn't been an established jurisdictional level, based on the mediation, *I will take at this point, formal jurisdiction as an Act 87 ward*. I think there probably is an order or something to that effect in the file, but if there's not, there will be as of today based . . . on the stipulated mediation results. That's the purpose, my understanding, of the mediation was to avoid the need for a Jury trial and findings and putting people through that. Now, the failure to comply since August . . . by the mother is a post-mediation event, so I think that I can go back and say that

[2] The lower court docket sheet indicates that a dispositional review hearing occurred on February 29, 2012. No such hearing took place. Rather, the court recorded receipt of the mediation agreement and accompanying document on that date.

> we have a basis for jurisdiction, we have a basis for placement. [Emphasis added.]

The court "ma[d]e a finding" that respondent had "absented herself." The court then approved the DHS's request to file an amended petition seeking termination of parental rights.

On February 4, 2013, the court formally entered an "order following dispositional review/permanency planning hearing" An attached page provided, "Based upon the stipulated Mediation Resolution, the court takes formal jurisdiction of the minor children as an Act 87 Ward" and "DHS may file a supplemental pleading setting forth termination of parental rights of any of the three parents, if warranted. Court is not ordering DHS to file the petition."

On March 13, 2013, the DHS filed a supplemental petition. The petition described the mediation agreement and the offered services, as well as respondent's failure to comply with and benefit from her case service plan and her disappearance from the proceedings. The DHS alleged that respondent had not rectified the conditions that led to adjudication and had deserted her children, a new ground supporting termination. The DHS sought termination pursuant to MCL 712A.19b(3)(a)(*ii*) (desertion), (c)(*i*) (failure to remedy the conditions leading to adjudication and inability to do so within a reasonable time), and (g) (failure to provide proper care and custody).

The court conducted neither an initial dispositional hearing nor any dispositional review hearings between the January 2013 adjudication and the June 26, 2013 termination hearing. After taking testimony from the DHS caseworker and hearing argument from the parties, the court took a termination ruling under advisement. The court thereafter found termination sup-

ported under all cited factors and determined that termination served the children's best interests.

II. IMPROPER ADJUDICATION

I respectfully disagree with the majority's determination that respondent's attack on the adjudication order qualifies as collateral. As stated by the majority, a trial court's jurisdictional decision cannot be attacked collaterally following the termination of parental rights. *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008).

> That is true, however, only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order. If termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court. [*Id.* at 668-669.]

The court did not take jurisdiction over the children until February 2013, when it entered the plea secured during the mediation session. No hearing occurred on that date. The court then "proceeded to determine at the initial dispositional hearing whether respondent['s] parental rights should be terminated." *In re VanDalen*, 293 Mich App 120, 131; 809 NW2d 412 (2011). The June 26, 2013 hearing constituted the initial dispositional hearing following adjudication. Therefore, respondent is free to challenge the adjudication as well as the termination.

The majority holds that the February 4, 2013 order through which the court took jurisdiction qualified as

the initial dispositional hearing, and triggered respondent's right to appeal the adjudication as of right pursuant to MCR 3.993(A)(1).[3] However, the court rules provide that unless the initial dispositional hearing "is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." MCR 3.973(B). No evidence supports that the court properly noticed or ever actually scheduled a dispositional hearing. Nor did the court ever enter an order of disposition as required under MCR 3.973(F)(1), which would have started the clock for appellant's appeal as of right regarding the adjudication.

Moreover, the process by which the court took jurisdiction over the children contravened the court rules. A court may take jurisdiction over a child only if "at least one statutory ground for jurisdiction contained in MCL 712A.2(b)" is proven at an adjudicative trial under MCR 3.972, or following a plea to the allegations in the jurisdictional petition obtained pursuant to the procedures detailed in MCR 3.971. *In re SLH*, 277 Mich App at 669. Participation in mediation is not an invitation to circumvent due process. Here, the court lacked the authority to take jurisdiction over the children because it did not follow the procedures mandated by the court rules.

MCR 3.971 provides for the acceptance of pleas of admission or no contest to court jurisdiction. Subrule (B) demands the court to advise a respondent of various rights before accepting a plea. That advice must be "on

[3] Notably, the DHS disagrees with this analysis. The DHS contends that the adjudication occurred in February 2012, contemporaneous with the mediation. According to the DHS, the hearing that followed the mediation in May 2012, "was docketed and noticed on [sic] as a Review Hearing, although it probably should have been called a disposition hearing."

the record or in a writing that is made a part of the file[.]" MCR 3.971(B). MCR 3.971(C) places duties on the court that simply cannot be extinguished by mediation:

> (1) *Voluntary Plea*. The court shall not accept a plea of admission or of no contest *without satisfying itself* that the plea is knowingly, understandingly, and voluntarily made.
>
> (2) *Accurate Plea*. The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, *preferably by questioning the respondent unless the offer is to plead no contest*. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate. [Emphasis added.]

There is no record that the court satisfied itself that respondent's plea was voluntary or accurate. In February 2012, the court memorialized the agreement without taking testimony. According to the county prosecutor, it was common practice to simply fax the mediation agreement and any plea to the court. This practice violates the court rules. The court conducted no analysis to "satisfy[] itself" that the plea was voluntary as mandated by MCR 3.971(C)(1). The court replicated this error in February 2013, when it entered the plea with no consideration of its voluntariness. The court also made no attempt to test the accuracy of the plea, either when the agreement was reached or when the court entered the order. MCR 3.971(C)(2) clearly forbids a court from entering a plea without determining its accuracy.

The court's action even violated the mediation agreement. The agreement provided that the plea of admission would be held in abeyance. The agreement did not

state that the plea would be deemed accurate at a remote time when the plea was accepted as entered by the court. The agreement did not grant permission to avoid court rule procedures adopted to protect a parent's fundamental rights.

The court compounded its errors after the 2012 filing of the mediation agreement. MCR 3.973(A) provides for dispositional hearings only after the child is "properly within [the court's] jurisdiction . . . ." In my view, the children never properly came within the court's jurisdiction, and the court lacked authority to conduct any dispositional review hearings in the interim.

III. TERMINATION BASED ON INADMISSIBLE EVIDENCE

Assuming that a valid adjudication took place, termination of respondent's parental rights was accomplished at an initial dispositional hearing. Under MCR 3.977(E)(3), the court was required to find by "clear and convincing legally admissible evidence" that termination was supported by at least one statutory ground. And because the prosecutor sought termination based on a supplemental petition, legally admissible evidence was required. *In re DMK*, 289 Mich App 246, 257-258; 796 NW2d 129 (2010). Respondent claims, and I agree, that termination was based on hearsay evidence in violation of these rules.

Jessica Holtrop was the sole witness at the termination hearing. Holtrop was the Sanilac County caseworker assigned in May 2012, four months after the children's removal from their mother's care. The children had since been moved—the younger two into the care and custody of their fathers, one in Ogemaw County, and the eldest into the care of his stepgrandparents. Respondent had also moved—she was incarcerated briefly in Wayne County and remained

there after her release. Accordingly, "courtesy" caseworkers were assigned in Ogemaw and Wayne counties. The prosecutor elected against presenting any other caseworker's testimony at the hearing and also chose not to present the testimony of any service provider. As a result, Holtrop provided secondhand reports.

In relation to respondent's drug-testing requirement, the court improperly allowed Holtrop to testify about a positive drug screen before she was assigned to the case. Holtrop had acquired personal knowledge since her involvement, however, that respondent's participation in required drug screens had been poor. She testified that respondent had failed to call in or appear when under court order to be tested twice a week and had appeared only four times during a period when daily testing was required.

Holtrop admitted that she had no personal knowledge regarding respondent's performance in substance abuse treatment. She reported information relayed by the provider that respondent had completed intake procedures in June 2012. Thereafter respondent attended only three appointments and the provider discharged her for noncompliance. Holtrop was able to testify from personal experience that respondent provided no information indicating that she had found alternative substance abuse treatment. Holtrop suspected that respondent had transportation issues that impeded her participation in services. Accordingly, in the fall of 2012, Holtrop referred respondent to various outreach services that traveled to the client. Holtrop testified that the outreach substance abuse treatment provider indicated that it cancelled services on January 24, 2013, because respondent failed to call in to make appointments and the provider could not reach her. Holtrop claimed that

she did not make additional referrals after that point because respondent had not contacted her and was not returning her calls.

Holtrop also testified regarding respondent's participation in a parental education and counseling outreach program. Respondent allegedly took part in five sessions, but the counselor reported that respondent showed "minimal involvement." After these five sessions, respondent stopped participating. The counselor informed Holtrop that respondent either was not home or did not answer her door when they came. Holtrop admitted she had no personal knowledge of respondent's participation during her in-home parenting classes. Rather, she repeated the counselor's report that respondent "presented as very frustrated and unwilling to work on the issues that needed to be worked on."

Holtrop testified that respondent was permitted supervised visitation with her children between January 11 and August 2, 2012. Only five visits occurred during that time, despite that respondent was allowed weekly parenting time. Three of the visits occurred before Holtrop was assigned the case. Moreover, Holtrop did not supervise the visits—the eldest child's step-grandparents who served as his foster placement, supervised visitation with the children. They reported to Holtrop that respondent was "very distracted" during the visits and did not "interact with the children as fully as a mother should." She also testified that the middle child's courtesy worker in Ogemaw County repeated the child's report that he did not want to return to his mother's care and custody because of her drug use. Holtrop was aware that respondent had telephone contact with her eldest son, but she was uncertain regarding the frequency of those contacts. Holtrop also testified, "I was told that

she did send [the children] letters when she was incarcerated" in September 2012. Holtrop further testified that she knew respondent had failed to attend several supervised parenting-time sessions because they took place in West Branch and she was living in Decker and then Wayne County, with no transportation to the distant visits.

Respondent's conduct was far from commendable. Nevertheless, the court rules required that legally admissible evidence support the grounds for terminating her parental rights. The vast majority of petitioner's evidence was hearsay from Holtrop regarding the statements and reports of others. Because of the irregular and improper manner in which the court took jurisdiction, the prosecutor incorrectly believed that such hearsay evidence would suffice. I would vacate the order terminating respondent's parental rights and remand for a new hearing at which respondent would face admissible evidence in support of petitioner's claims.

WORKERS' COMPENSATION AGENCY DIRECTOR v
MACDONALD'S INDUSTRIAL PRODUCTS, INC
(ON RECONSIDERATION)

Docket No. 311184. Submitted October 9, 2013, at Lansing. Decided March 27, 2014. Approved for publication May 29, 2014, at 9:00 a.m. Leave to appeal denied, 497 Mich ___.

The Director of the Workers' Compensation Agency brought an action in the Ingham Circuit Court in August 2007 against MacDonald's Industrial Products, Inc., and the Creditor Trust and Security Agreement of MacDonald's Industrial Products, Inc., seeking to enjoin MacDonald's from liquidating its assets and requesting the appointment of a receiver for MacDonald's. MacDonald's owned various industrial facilities, and the State Tax Commission had issued an industrial facilities exemption certificate in 1999 for a facility on 44th Street in the city of Kentwood. The certificate exempted MacDonald's from certain real and personal property taxes from December 30, 1999, to December 30, 2007, permitting it to pay a lower tax. The commission issued MacDonald's a second exemption certificate in 2004 that ran from December 31 2004, to December 30, 2005. MacDonald's ceased operations in 2006. The city then requested that the commission revoke the certificates, which it did at a November 29, 2006 meeting. The commission notified MacDonald's that if it did not request a hearing, the commission would enter an order revoking the certificates, effective December 30, 2006. MacDonald's did not request a hearing, and the commission entered the order on February 5, 2007, informing MacDonald's that its certificates had been revoked effective December 30, 2006. After the workers' compensation director filed this action, the court, Paula J. M. Mandefield, J., appointed Thomas E. Woods as receiver. Numerous parties intervened, including the city of Kentwood and Kent County. In March 2008, Woods sought permission to sell some of MacDonald's property in Grand Rapids. The court granted permission to sell the property free and clear of mortgages, liens, and other encumbrances, but required him to pay all outstanding property tax liabilities. Woods sold the property and paid the unpaid property taxes, interest, and penalties out of the proceeds of the sale. In March 2011, Woods sought permission to sell the

44th Street property. The court again permitted him to sell the property free and clear of mortgages, liens, and other encumbrances, but required him to pay the property's real property taxes and escrow statutory interest, fees, and penalties. In October 2011, Woods moved to recover assets of the receivership and distribute proceeds. In part, he asserted (1) that the city of Kentwood and Kent County had impermissibly included interest and penalties in their tax liens and (2) that the commission had improperly revoked the exemption certificates. The court denied Woods's motion in part, concluding (1) that Woods was not entitled to reimbursement because the tax liens in 2006 and summer 2007 had included the interest and penalties and were perfected before he took possession of the property and (2) that the commission could retroactively revoke the exemption certificates. Woods appealed. The Court of Appeals, SERVITTO, P.J., and WHITBECK and OWENS, JJ., affirmed in an unpublished opinion per curiam, issued January 28, 2014 (Docket No. 311184). Woods moved for reconsideration. The Court of Appeals granted the motion and vacated its prior opinion in an unpublished order, entered March 27, 2014.

On reconsideration, the Court of Appeals *held*:

1. The taxes were assessed against the 44th Street property before the circuit court appointed Woods as receiver, and the circuit court properly determined that Woods took the property subject to the 2006 and summer 2007 tax liens. MCL 211.44(3) authorizes municipalities to add late penalty charges, administration fees, and interest to uncollected taxes. MCL 211.40 and MCL 211.44a provide that unpaid taxes become liens. Accordingly, the amount assessed, including interest and charges, is part of the lien against a property on which taxes remain unpaid.

2. The commission erred when it revoked MacDonald's exemption certificates retroactively because doing so was outside the commission's statutory authority. MCL 207.565(4) provides that a commission order revoking an exemption certificate is effective on the December 31 that follows the date of the order. Under MCL 209.105, all orders must be signed by the chair of the commission and sealed with the commission's seal. Nothing in the relevant statutes empowers the commission to make its revocation orders effective retroactively. Because the commission's chair signed the revocation order on February 5, 2007, the effective date of the order was December 31, 2007, and it revoked any exemption for 2008 onward.

3. MacDonald's failed to appeal the commission's revocation order in the circuit court within 60 days, as required by MCL 207.570 and MCL 24.304(1), and Woods's later challenge consti-

tuted a collateral attack on the order. Because the commission acted outside its statutory authority, both the commission's and the circuit court's decisions concerning retroactivity were wrong. A wrong decision is not void, however, but is merely voidable. Collateral attack is permissible only if the decision was void because of a lack of personal or subject-matter jurisdiction. Once a tribunal has subject-matter jurisdiction, it has jurisdiction to make an incorrect decision. That is, there is a difference between a court's having no jurisdiction to take an action and having no legal right to take the action. Because the commission had subject-matter jurisdiction over the type of case before it, the commission's decision was not subject to collateral attack, but was only subject to direct attack on appeal.

4. Woods also contended that the circuit court should have granted a form of equitable relief and declined to hold him liable for the interest and penalties on the taxes because his failure to pay the taxes was in good faith, given that he had no assets with which to pay them. MCL 600.5251, however, provides that the circuit court must first distribute the proceeds of a receivership to pay all taxes legally due and owing to municipalities. Therefore, the circuit court did not have the discretion to vary this statutory mandate by resorting to equity, and the court properly declined to forgive the interest and penalties.

Affirmed.

Allan Falk, PC (by *Allan Falk*), for Thomas E. Woods.

Bloom Sluggett Morgan, PC (by *Crystal L. Morgan*), for the city of Kentwood.

Varnum LLP (by *Marla Schwaller Carew*) for Kent County.

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

PER CURIAM. Thomas E. Woods, receiver of defendant MacDonald's Industrial Products, Inc., appeals as of right the circuit court's order denying in part Woods's motion to recover property taxes that Woods paid to intervening appellees, the city of Kentwood (Kentwood) and Kent County. We affirm.

I. FACTS

A. EXEMPTION CERTIFICATES

MacDonald's was an automotive parts supplier. In 1999, the State Tax Commission (the Commission) issued MacDonald's an industrial facilities exemption certificate for its facility located on 44th Street in Kentwood. In pertinent part, the certificate exempted MacDonald's from certain real and personal property taxes from December 30, 1999, to December 30, 2007, and permitted it to instead pay a lower tax known as the industrial facilities tax.[1] The Commission conditioned the exemption certificate on MacDonald's creating and retaining jobs at its 44th Street property, and the certificate was subject to revocation if the jobs were not created or maintained. In 2004, the Commission issued MacDonald's a second certificate, under substantially similar conditions, that was to run from December 31, 2004, to December 30, 2005.

MacDonald's ceased operations in 2006. In October 2006, Kentwood requested that the Commission revoke the exemption certificates. In a letter dated December 1, 2006, the Department of Treasury notified MacDonald's that the Commission had revoked its certificates at a meeting held on November 29, 2006, and that if MacDonald's did not request a hearing on the matter, the Commission would issue an order revoking its certificates, effective December 30, 2006. MacDonald's did not request a hearing, and the Commission issued an order on February 5, 2007, informing MacDonald's that its certificates had been revoked, effective December 30, 2006.

B. SALE OF THE PROPERTIES

On August 22, 2007, at the request of the Workers'

[1] MCL 207.551 *et seq*.

Compensation Agency, the circuit court appointed Woods as receiver of MacDonald's business and property. In March 2008, Woods sought permission to sell MacDonald's property on Oak Industrial Drive in Grand Rapids. The circuit court granted him permission to sell the property free and clear of mortgages, liens, and other encumbrances, but required him to pay "all outstanding property tax liabilities." Woods sold the property and paid the property's unpaid property taxes, interest, and penalties out of the proceeds of the sale.

In March 2011, Woods sought permission to sell MacDonald's 44th Street property. The circuit court's order permitted him to sell the property free and clear of mortgages, liens, and other encumbrances, but required him to pay the property's "real property taxes" and escrow "[s]tatutory interest, fees and penalties." Woods sold the property in compliance with the order.

C. MOTION TO RECOVER ASSETS

On October 10, 2011, Woods moved to recover assets of the receivership and distribute proceeds. In parts pertinent to this appeal, Woods asserted that (1) Kentwood and Kent County had impermissibly included interest and penalties in the tax liens and (2) the Commission had improperly revoked MacDonald's exemption certificates. The circuit court denied Woods's motion in part, concluding that (1) Woods was not entitled to reimbursement because the tax liens in 2006 and summer 2007 included the interest and penalties and were perfected before he possessed the property and (2) the Commission could retroactively revoke the exemption certificates.

II. THE TAX LIENS

A. STANDARD OF REVIEW

This Court reviews de novo questions of law, including questions involving the statutory priority of payments involved in a receivership.[2] We review de novo questions of statutory interpretation.[3] We review for clear error a circuit court's factual findings and review de novo its legal conclusions.[4]

B. LEGAL STANDARDS

MCL 211.44(3) authorizes localities to add late penalty charges, administration fees, and interest to uncollected taxes. MCL 211.40 provides that unpaid taxes become liens:

> The amounts assessed for state, county, village, or township taxes on any interest in real property shall become a lien on the real property on December 1, on a day provided for by the charter of a city or village, or on the day provided for in [MCL 211.40a]. The lien for those amounts, and for all interest and charges on those amounts, shall continue until paid.

Concerning summer taxes, MCL 211.44a similarly provides that "[t]axes authorized to be collected shall become a lien against the property on which assessed" on July 1.[5]

C. PENALTIES AND INTEREST

Woods contends that the first sentence in the portion of MCL 211.40 quoted above creates a lien for property

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[2] *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 218; 821 NW2d 503 (2012).

[3] *Id*.

[4] *Id*.

[5] MCL 211.44a(3) and (4).

taxes but does not create a lien for penalties and interest and that the second sentence quoted does not actually create any liens but merely provides that liens on interest and charges will continue until paid. We cannot adopt Woods's reading of this statute.

When interpreting a statute, our goal is to give effect to the intent of the Legislature.[6] The language of the statute is the primary indication of the Legislature's intent.[7] If the language of the statute is unambiguous, we must enforce it as written.[8] This Court reads the provisions of statutes "reasonably and in context."[9] We will not expand the scope of a tax law through forced construction, and we construe doubtful tax laws in favor of the taxpayer.[10]

As already stated, the plain language of MCL 211.40 provides that

> [t]he amounts assessed for state, county, village, or township taxes on any interest in real property shall become a lien on the real property on December 1, on a day provided for by the charter of a city or village, or on the day provided for in [MCL 211.40a]. *The lien for those amounts, and for all interest and charges on those amounts*, shall continue until paid.[11]

Considering the provisions of this statute reasonably and in context, we conclude that the lien that the statute creates in the first sentence quoted includes the amounts, interest, and charges in the lien that it mentions "shall

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

[7] *Id*.

[8] *Id*.

[9] *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

[10] *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008).

[11] Emphasis added.

continue" in the second sentence. Woods's proposed interpretation of the statute—that the Legislature meant to *continue* a lien for interest and charges that it had not actually *created*—is not reasonable. Reading the sentences together, the only reasonable interpretation is that the Legislature meant to indicate that interest and charges are included, along with amounts assessed, in the lien that it created. We conclude that the plain meaning of MCL 211.40 is that the amount assessed, including interest and charges, is part of the lien against a property on which taxes remain unpaid.

D. 2006 AND 2007 TAX LIENS BEFORE WOODS'S APPOINTMENT

Woods contends that the circuit court erred when it required him to pay taxes that were assessed in 2006 and 2007, before the circuit court appointed him as the receiver for MacDonald's. We disagree.

We conclude that Woods took the property subject to the liens. In *In re Dissolution of Ever Krisp Food Products Co*, the Michigan Supreme Court held that in a receivership, "a receiver takes property subject to *prior* and *existing* liens . . . ."[12] Unpaid property taxes automatically become liens on the real property on the first of December, for winter taxes, and the first of July, for summer taxes.[13]

The 2006 and summer 2007 tax liens attached to the property before Woods's appointment as receiver. Because these liens were created before Woods's appointment and they continued to exist when he took the property, Woods took the property subject to the liens. We conclude that the circuit court properly determined

[12] *In re Dissolution of Ever Krisp Food Prods Co*, 307 Mich 182, 196; 11 NW2d 852 (1943).

[13] MCL 211.40; MCL 211.44a(3) and (4).

that Woods took the 44th Street property subject to the 2006 and summer 2007 tax liens.

Woods also contends that the Michigan Supreme Court modified its prior decision in *Ever Krisp* with its holding in *In re Rite-Way Tool & Manufacturing Co*.[14] We disagree.

In *Rite-Way Tool*, the receiver operated the business for three years before the trial court authorized him to liquidate the business's assets.[15] During that time, the trial court's order required the receiver to pay the business's taxes.[16] The city of Detroit attempted to argue that the taxes were an " 'expense of administration' " of the receivership, which had first priority of distribution under the trial court's order.[17]

The Michigan Supreme Court held that the taxes were administration expenses of the receivership because the taxes were assessed while the receiver was conducting the business.[18] The Court distinguished its prior decision in *Ever Krisp* on the basis that, in *Ever Krisp*, the taxes were assessed against the owner of the property before the receiver was appointed.[19]

Rite-Way Tool involved a case in which the state assessed the tax against the receivership.[20] But *Ever Krisp* involved a case in which the state assessed the taxes against the owner of the property, before the trial court appointed the receiver.[21] The Court in *Rite-Way Tool*

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[14] *In re Rite-Way Tool & Mfg Co*, 333 Mich 551; 53 NW2d 373 (1952).

[15] *Id*. at 553.

[16] *Id*. at 554.

[17] *Id*.

[18] *Id*. at 556.

[19] *Id*. at 557.

[20] *Id*. at 554.

[21] *Ever Krisp*, 307 Mich at 188-189, 196.

specifically referred to its prior decision in *Ever Krisp* and determined that *Ever Krisp* was "not controlling of decision in the case at bar because there is a controlling factual difference . . . ."[22] Thus, the Court did not *modify* its holding in *Ever Krisp*. Rather, the Court *distinguished* that decision. We conclude that the Michigan Supreme Court's decision in *Rite-Way Tool* did not modify its holding in *Ever Krisp*.

Woods also contends that *Rite-Way Tool*—not *Ever Krisp*—applies to the facts in this case, and thus the trial court erred by applying the holding in *Ever Krisp*. We disagree.

The taxes were assessed against the 44th Street property before the circuit court appointed Woods as receiver. Unlike in *Rite-Way Tool*, Kentwood did not assess the taxes while Woods was operating the business. Thus, we conclude that the circuit court did not err by applying *Ever Krisp* because *Rite-Way Tool* does not apply to the facts in this case.

III. REVOCATION OF EXEMPTION CERTIFICATES

A. STANDARD OF REVIEW

This Court reviews de novo issues of the interpretation and application of statutes.[23] If the plain and ordinary meaning of a statute's language is clear, we enforce the statute's language as written.[24] When interpreting a statute, our goal is to give effect to the intent of the Legislature.[25] The language of the statute itself is the primary indication of the Legislature's intent.[26]

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[22] *Rite-Way Tool*, 333 Mich at 557.

[23] *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010).

[24] *United States Fidelity*, 484 Mich at 12-13.

[25] *Id*. at 13.

[26] *Id*.

B. THE POSITIONS OF THE PARTIES

Woods contends that the Commission improperly revoked the exemption certificates retroactively to December 2006 and that the circuit court erred by concluding that the Commission could revoke those certificates retroactively. Woods contends that since the Commission did not actually enter a signed revocation order until February 5, 2007, according to the statute that order became effective for taxes arising only on and after December 31, 2007. Thus, Woods argues, the Commission's revocation of the certificates had no valid effect on the exemptions for 2006 (since the revocation was not signed and did not become effective before December 31, 2006) or for 2007 (since the revocation only became effective for taxes arising on or after December 31, 2007). Simply put, it is Woods's position that the Commission's revocation of the certificates is void with respect to 2006 and 2007 taxes.

Kentwood contends on appeal, as it argued below, that even if the Commission erred by retroactively revoking the exemption certificates, Woods's challenge is improper. According to the city, because MacDonald's failed to appeal the Commission's decision to the circuit court within 60 days as provided by law,[27] his later challenge is an impermissible collateral attack on that decision. We conclude that Woods's challenge is an impermissible collateral attack.

C. STATUTORY PROVISIONS

MCL 207.565(4) provides that

> [t]he order of the commission revoking the certificate shall be effective on the December 31 next following the date of

[27] MCL 207.570; MCL 24.304(1).

> the order and the commission shall send by certified mail copies of its order of revocation to the holder of the certificate, to the local legislative body, to the assessor of the assessing unit in which the facility is located, and to the legislative body of each taxing unit which levies taxes upon property in the local governmental unit in which the facility is located.

MCL 207.565(4) thus provides that an order revoking an exemption certificate "shall be effective on the December 31 next following the date of the order . . . ." We also note that all orders made or issued by the Commission must be signed by the chairman and sealed with the seal of the Commission.[28] A taxpayer aggrieved by the Commission's decision to revoke an exemption certificate may appeal the order in the circuit court within 60 days.[29]

D. THE EFFECTIVE DATE OF THE REVOCATION ORDER

Our first task in unraveling this issue is to determine the effective date of the Commission's revocation order. If the action that the Commission took at its meeting on November 29, 2006, to revoke the certificates and the Department of Treasury's notification to MacDonald's of this action on December 1, 2006, are valid, then December 31, 2006, is the date "next following" the revocation and the notification. Therefore, under this view, December 31, 2006, is the effective date of the Commission's revocation order. And, it follows, this revocation order would revoke the exemption certificates for 2007 onward.

However, if no valid action of the Commission took place until February 5, 2007, the date that the chairperson of the Commission actually signed the revoca-

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[28] MCL 209.105.

[29] MCL 207.570; MCL 24.304(1).

tion order, December 31, 2007, is the date "next following" that signature. Therefore, under this view, December 31, 2007, is the effective date of the Commission's revocation order. And, it follows, this revocation order would revoke the exemption certificates for 2008 onward.

We conclude that the latter formulation is the correct one. Construing MCL 207.565(4) and MCL 209.105 together, we conclude that the effective date of the Commission's revocation order is December 31, 2007.

We first note that this conclusion comports with the plain language of the two statutes. The plain language of MCL 207.565(4) precludes retroactive revocation by providing a specific time, *after the date of the order*, when that revocation becomes effective. By definition, therefore, the effective date of revocation order must be *after* the entry date of the order; that is, on the December 31 "next following" the date of the revocation order. And the word "shall" in MCL 209.105 *requires* that the chairman of the Commission sign all orders that the Commission issues.[30] Again, by definition, the orders are not valid until the chairman signs them.

Secondly, this conclusion is in accordance with more general jurisprudential principles. It is blackletter law, as Woods points out, that when a court makes a ruling and later enters an order effectuating that ruling, the order is only effective when the judge signs it and it is entered.[31] And, as Woods again points out, courts cannot automatically enter an order *nunc pro tunc* as of the

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[30] See *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) (stating that use of the world "shall" indicates something that is mandatory).

[31] See *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977) ("The rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions. Generally, a judgment

date of a particular ruling.[32] It follows that administrative agencies enjoy no broader power than do courts to give retroactive effect to their actions.

Thirdly, this conclusion is also in accord with principles of administrative law. As Woods points out, administrative agencies are creatures of statute. They have only the powers the statutes expressly grant, and we must strictly construe any statute claimed to supply such powers.[33] Similarly, the Commission possesses only those powers the statutes confer and has no implied powers whatsoever. As held in *Topps of Warren, Inc v City of Warren, Inc*,

> Plaintiff contends that the jurisdiction of the State Tax Commission is purely statutory, that the statutes must be strictly construed, and that if the commission had jurisdiction it lost it through the passage of time. We agree. The State Tax Commission possesses only those powers conferred on it by statute. *Detroit Edison Co. v. City of Detroit* (1941), 297 Mich 583 [298 NW 290]. These statutes must be strictly construed. In *In re Dodge Brothers* (1928), 241 Mich 665, 669 [217 NW 777], the Court said, "The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer."[34]

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or order is reduced to written form . . . ; until reduced to writing and signed, the judgment did not become effective . . . .") (citations omitted).

[32] See *Shifferd v Gholston*, 184 Mich App 240, 243; 457 NW2d 58 (1990) ("An entry nunc pro tunc is proper to supply an omission in the record of action really had, but omitted through inadvertence or mistake."); *Freeman v Wayne Probate Judge*, 230 Mich 455, 460; 203 NW 158 (1925) (stating that the purpose of entering an order *nunc pro tunc* is not to supply an action omitted by a trial court).

[33] *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 155-156; 596 NW2d 126 (1999).

[34] *Topps of Warren, Inc v City of Warren*, 27 Mich App 59, 61-62; 183 NW2d 310 (1970). See also *Grand Rapids Bd of Ed v State Tax Comm*, 291 Mich 50, 54-58; 288 NW 331 (1939).

Rather obviously, there is nothing in the relevant statutes that empowers the Commission to make its revocation orders effective retroactively. Indeed, the plain language of MCL 207.565(4) precludes such retroactive revocation. And it is only a semantic half-step to conclude that therefore, the Commission's attempted retroactive revocation of the exemption certificates is a nullity,[35] despite the trial court's conclusion to the contrary. Reaching this conclusion, however, only begins, not ends, our inquiry.

E. COLLATERAL ATTACK

1. WHETHER WOODS'S ATTACK IS COLLATERAL

Having determined that the trial erred by concluding that the Commission could retroactively revoke the exemption certificates, our second task is to determine whether Woods's position in this proceeding is a collateral attack.

It is well established in Michigan that, assuming competent jurisdiction, a party cannot use a second proceeding to attack a tribunal's decision in a previous proceeding:

> "The final decree of a court of competent jurisdiction made and entered in a proceeding of which all parties in interest have due and legal notice and from which no appeal is taken cannot be set aside and held for naught by the decree of another court in a collateral proceeding commenced years subsequent to the date of such final decree."[36]

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[35] See *Deadwyler v Consolidated Paper Co*, 260 Mich 130, 132; 244 NW 484 (1932).

[36] *Dow v Scully*, 376 Mich 84, 88-89; 135 NW2d 360 (1965), quoting *Loesch v First Nat'l Bank of Ann Arbor*, 249 Mich 326, 330; 228 NW 717 (1930).

There is no question that the Commission had the authority to revoke the exemption certificates.[37] MacDonald's could have appealed that decision in the circuit court.[38] MacDonald's also could have contested the tax assessment itself before the local board of review, claiming an exemption, or before the Tax Tribunal or the circuit court.[39] MacDonald's had notice of the proceeding, but elected not to request a hearing or take an appeal. In other words, the Commission had the requisite general authority to revoke the exemption certificates and MacDonald's had legal notice and elected not to take an appeal. But Woods is now challenging the Commission's decision—years later—in this new proceeding. We conclude that Woods's attack on the Commission's decision is a collateral attack.

2. PROPRIETY OF COLLATERAL ATTACK

Having determined that Woods's attack on the Commission's decision in this case is a collateral attack, our third task is to determine whether Woods's collateral attack can succeed. This requires us to answer two questions. First, did the Commission have the *authority* to revoke the tax exemption certificates retroactively? As outlined above, we conclude that it did not. Second, did the Commission have subject-matter *jurisdiction* to revoke the tax exemption certificates? Clearly it did.

Woods contends not that the Commission lacked the general authority to revoke the exemption certificates, but that the Commission acted outside its statutory authority in making its order retroactive. As we have outlined, we agree with that contention. But we still

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[37] MCL 207.565.

[38] See MCL 207.570; MCL 24.304(1).

[39] MCL 205.735(1); *Parkview Mem Ass'n v City of Livonia*, 183 Mich App 116, 118-120; 454 NW2d 169 (1990).

must consider whether an action outside an agency's authority is subject to collateral attack at any time, even after the expiration of the relevant direct appeal period, or whether it may only be attacked by way of a direct appeal.

We start with the proposition that a wrong decision is not void; it is merely voidable.[40] And only void decisions are subject to collateral attack.[41] Again, as we have outlined, we conclude that the Commission's and the trial court's retroactivity decisions were wrong. But this conclusion does not directly address the contention that the Commission's decision was void (and subject to collateral attack at any time), rather than merely voidable (and therefore subject to attack only by direct appeal).

In *Lake Township v Millar*, the plaintiffs sought to declare drain proceedings "fraudulent and void."[42] The drain in that case did not fall within the statutory definition of a drain, but was instead a sewer.[43] The defendants contended that "plaintiffs not having attacked the regularity of the proceedings here involved by certiorari, are estopped from questioning their regularity in this proceeding."[44] The Michigan Supreme Court disagreed on the grounds that the drain commissioner lacked legal authority to construct a sewer and therefore his actions exceeded his authority under the statute.[45] It therefore determined that the drain commissioner's collateral-estoppel arguments had no merit because

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[40] *Morris v Barker*, 253 Mich 334, 337; 253 NW 174 (1931).

[41] *Id.*; *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935).

[42] *Lake Twp v Millar*, 257 Mich 135, 137; 241 NW 237 (1932).

[43] *Id.* at 139.

[44] *Id.* at 141.

[45] *Id.* at 141-142.

> [t]he rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but an entire want of jurisdiction may be taken advantage of at any time. The drain commission had no jurisdiction to construct a sewer any more than to construct a Covert road. . . . The proceedings are void for want of jurisdiction.[46]

This case is somewhat similar to the proceedings in *Millar*. As stated above, the Commission did not have statutory authority to issue a retroactive decision and its actions did not fall within its statutory authority. This conclusion, however, still does not end our inquiry. A collateral attack "is permissible only if the court never acquired jurisdiction over the persons or the subject matter."[47] In a somewhat analogous situation, the Supreme Court in *Bowie v Arder* held that "while an error in the *exercise* of a court's jurisdiction is not subject to collateral attack, *want of jurisdiction* renders a judgment void."[48] Thus, collateral attack is proper only against those decisions that are void *because of* a lack of personal or subject-matter jurisdiction.

A tribunal's subject-matter jurisdiction depends on the kind of the case before it, not on the particular facts of the case:

> Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the

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[46] *Id*. at 142.

[47] *Edwards v Meinberg*, 334 Mich 355, 358; 54 NW2d 684 (1952); see also *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992).

[48] *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992) (emphasis added); see also *Jackson City Bank*, 271 Mich at 545 ("Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked.") (quotation marks and citation omitted).

> particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts.[49]

Once a tribunal has subject-matter jurisdiction, it has jurisdiction to make an incorrect decision.[50] There is a difference between a court's having no *jurisdiction* to take an action and having no *legal right* to take the action.[51]

At the commencement of the action, the Commission had the abstract power to determine whether to revoke MacDonald's exemption certificates. There is no question that the Commission has the power generally to determine whether to revoke exemption certificates. However, the Commission then erred in its *exercise* of that jurisdiction: it determined that it had the legal right to revoke the exemption certificates retroactively when it actually had no right to do so. This, however, did not render the Commission's decision void for lack of subject-matter jurisdiction. Because the Commission had subject-matter jurisdiction over this type of case, its decision is not subject to collateral attack.

We conclude that the Commission's decision—incorrect, improper, and outside its statutory authority to issue—was subject to direct attack on appeal, but was not properly the subject of a collateral attack because the Commission had subject-matter jurisdiction. Since Woods's appeal is a collateral attack, it cannot succeed.

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[49] *Altman*, 197 Mich App at 472 (citations omitted).

[50] *Id*. at 473.

[51] See *Bowie*, 441 Mich at 40; *Buczkowski v Buczkowski*, 351 Mich 216, 222; 88 NW2d 416 (1958).

3. ULTRA VIRES

On reconsideration, Woods contends that when the Tax Tribunal exceeded its jurisdiction, its act was ultra vires and therefore void rather than voidable. We note that Woods did not raise this argument in his original brief on appeal but, because it is an extension of his argument regarding the Tax Tribunal's authority, we will address it here briefly in the interests of completeness.

Put simply, "ultra vires" means "beyond the scope of power allowed or granted . . . by law."[52] As stated above, we agree that the Tax Tribunal's action was not within the scope of its authority. However, simply because the action was beyond the scope of its authority does not mean that Woods can collaterally attack that action in a separate proceeding.

The federal cases Woods cites are not persuasive on the issue of collateral attack. They all concern cases in which an appellate court was directly reviewing a decision in the same case, even if the review was not timely. In *City of Arlington v Federal Communications Commission*, the city petitioned for review of a declaratory ruling by the commission.[53] The United States Supreme Court held that, unlike a court, an agency's power to act is not independent of whether its decision is proper.[54] However, in *Arlington*, the United States Supreme Court was reviewing the decision of the United States Court of Appeals for the Fifth Circuit regarding the district court's decision upholding the declaratory ruling.[55] Thus, the case was on direct, not collateral, review.

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[52] *Black's Law Dictionary* (9th ed).

[53] *City of Arlington v Fed Communications Comm*, 569 US ___; 133 S Ct 1863, 1867; 185 L Ed 2d 941 (2013).

[54] *Id*. at ___; 133 S Ct at 1869.

[55] *Id*. at ___; 133 S Ct at 1868-1869.

Similarly, in *Anderson v Holder*, as well as filing a habeas corpus petition, Anderson moved to reopen his Board of Immigration Appeals case.[56] The United States Court of Appeals for the Ninth Circuit was directly reviewing Anderson's motion to reopen his case before the board.[57] Because the Board of Immigration Appeals had exceeded its authority, its order of removal was invalid.[58] Therefore, again, the case was on direct, if untimely, review.

Further, *Anderson* is similar to the Michigan Supreme Court's decision in *Bowie*, in which the Court reviewed the aggrieved parties' motion to reopen the original proceedings.[59] These cases all held that a tribunal acted outside its authority and overturned the original order, but they all concerned direct reviews of the original cases between the original parties. None of these cases overturned an order issued in a separate proceeding. Thus, these cases do not persuade us that while the Commission's retroactive revocation was an incorrect exercise of its authority—and therefore ultra vires—such a revocation can be the subject of a collateral attack.

IV. CONSIDERATION OF THE EQUITIES

A. STANDARD OF REVIEW

This Court reviews de novo a court's decision concerning whether equitable relief is appropriate under specific facts and reviews for clear error the court's factual findings.[60]

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[56] *Anderson v Holder*, 673 F3d 1089, 1093 (CA 9, 2012).

[57] *Id.* ("Anderson's timely petition for review of this decision . . . is the second of those consolidated here.").

[58] *Id.* at 1094.

[59] *Bowie*, 441 Mich at 56.

[60] *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008); *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004).

B. LEGAL STANDARDS

Funds from a receivership are first distributed to pay "[a]ll taxes legally due and owing by the assignor to the United States, state, county or municipality"[61] and are only then distributed to pay "[t]he cost of administration[.]"[62] "When the Legislature has prescribed the order of priority, our courts may not vary it by resort to equity."[63]

C. APPLYING THE STANDARDS

Relying on *In re Wagner Estate (After Remand)*,[64] Woods contends that the circuit court should have declined to hold him liable for the interest and penalties on the taxes as a form of equitable relief because his failure to pay the taxes was in good faith since he had no assets as receiver with which to pay the taxes. We disagree.

In *Wagner Estate*, this Court affirmed a trial court's decision to waive penalties and interest related to an estate tax.[65] The Michigan Estate Tax Act[66] granted the probate court the right to determine all questions arising under that act's provisions.[67] Thus the probate court had the authority to review the Department of Treasury's decision not to waive the plaintiff's penalties and interest on the late tax payments.[68]

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[61] MCL 600.5251(1)(a).

[62] MCL 600.5251(1)(b).

[63] *South Francis Rd Receivership*, 492 Mich at 224 n 37; cf. *Stokes v Millen Roofing Co*, 466 Mich 660, 673; 649 NW2d 371 (2002) (stating that equitable relief cannot defeat a statutory ban on compensation).

[64] *In re Wagner Estate (After Remand)*, 224 Mich App 400; 568 NW2d 693 (1997).

[65] *Id*. at 402.

[66] MCL 205.201 *et seq*.

[67] *Id*. at 401; MCL 205.210.

[68] *Wagner Estate*, 224 Mich App at 401.

Wagner Estate is distinguishable because this case does not involve a provision of the Michigan Estate Tax Act and the statute at issue here does not provide the circuit court any discretion regarding the order of priority for payments from a receivership distribution. As discussed above, MCL 600.5251(1)(a) provides that the circuit court must first distribute the proceeds of a receivership to pay "[a]ll taxes legally due and owing" to municipalities. Further, MCL 600.5251(1) uses the word "shall." The word "shall" indicates a requirement and "expresses a directive, not an option."[69] Thus, the circuit court did not have the discretion to vary this statutory mandate by resorting to equity. We conclude that the circuit court properly declined to forgive the interest and penalties as a form of equitable relief.

V. CONTEMPT OF COURT

Generally, a party must raise an issue before the trial court to preserve it for our review.[70] "[P]roceedings for contempt committed outside the presence of the court must be initiated pursuant to the procedure set forth at MCR 3.606."[71] MCR 3.606 provides that contempt proceedings are initiated by a motion. Woods did not move the circuit court to hold Kentwood or Kent County in contempt for violating its orders. Therefore, this issue is unpreserved.

This Court may review an unpreserved issue "if it presents a question of law and all the facts necessary for

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[69] *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 561; 777 NW2d 1 (2009).

[70] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

[71] *In re Contempt of McRipley*, 204 Mich App 298, 301; 514 NW2d 219 (1994).

its resolution are before the Court."[72] A court must follow a particular process before sanctioning a party for contempt.[73] This process includes making findings of fact at a contempt hearing in order to determine whether a party committed contempt.[74] Kentwood's and Kent County's alleged contempt took place outside the presence of the court, but the circuit court has not held a contempt hearing and thus there are no findings of fact available on the record. We conclude that we cannot review this unpreserved issue because not all the facts that would be necessary for our review are available to this Court.

VI. CONCLUSION

We conclude that the circuit court properly denied Woods's motion to exclude the 2006 and summer 2007 taxes, including penalties and interest, from its distribution to Kentwood and Kent County. We also conclude that the Commission erred when it determined that it could revoke MacDonald's exemption certificates retroactively. Its decision to do so was outside its statutory authority. However, because the Commission had subject-matter jurisdiction to determine whether to revoke MacDonald's exemption certificates, this decision was not subject to collateral attack. The remainder of Woods's assertions lack merit.

We affirm.

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

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[72] *Macatawa Bank v Wipperfurth*, 294 Mich App 617, 619; 822 NW2d 237 (2011).

[73] *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 713; 624 NW2d 443 (2000).

[74] See *id*. at 712-713.

PEOPLE v QUINN

Docket No. 309600. Submitted November 13, 2013, at Lansing. Decided May 29, 2014, at 9:05 a.m.

Arthur J. Quinn was convicted by a jury of resisting and obstructing a police officer, MCL 750.81d(1), after he allegedly refused to identify himself to a patrolling sergeant who had followed him and his son from a parking lot into an apartment building. The officer testified that she attempted to arrest defendant's son on the landing of a stairway when he broke away and followed defendant into an apartment. The officer called for backup, placed her foot in the door to prevent it from being closed, and sprayed pepper spray into the apartment. When backup arrived, defendant was handcuffed and arrested. Defendant filed a pretrial motion to suppress, arguing that the officer's actions were unlawful and violated his Fourth Amendment rights. The trial court, James C. Kingsley, J., denied the motion on the basis of *People v Ventura*, 262 Mich App 370 (2004), which held that a person could be convicted of violating MCL 750.81d regardless of whether the arrest was lawful. After defendant was convicted and sentenced, the Supreme Court overruled *Ventura* in *People v Moreno*, 491 Mich 38 (2012). Defendant moved for a posttrial directed verdict of acquittal or for a new trial on the basis of *Moreno*, among other grounds. The court denied the motion, ruling that the arrest was lawful and that *Moreno* did not apply retroactively. Defendant appealed.

The Court of Appeals *held*:

1. The trial court erred by concluding that *Moreno* does not apply retroactively. The purpose of the new rule announced in *Moreno* was to reestablish the common-law rule that a person may resist an unlawful arrest. This rule applies retroactively to cases in which a defendant raises the issue on appeal and either preserved it in the trial court or can demonstrate plain error affecting the defendant's substantial rights.

2. Defendant was not entitled to a directed verdict in his favor because the evidence submitted at trial, when viewed in the light most favorable to the prosecution, could persuade a rational trier

of fact to conclude that the officer had acted lawfully with respect to defendant on the basis of a reasonably articulable suspicion that criminal activity was afoot.

3. Defendant was entitled to a new trial because the jury was not instructed to determine whether the officer's actions were lawful.

Reversed and remanded for a new trial.

CRIMINAL LAW — RESISTING OR OBSTRUCTING PERSONS PERFORMING DUTY — RIGHT TO RESIST ILLEGAL POLICE CONDUCT.

The holding in *People v Moreno*, 491 Mich 38 (2012), that a person may resist illegal police conduct applies retroactively to cases in which a defendant charged with violating MCL 750.81d raises the issue on appeal and either preserved it in the trial court or can demonstrate plain error affecting the defendant's substantial rights.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Marc Crotteau*, Assistant Prosecuting Attorney, for the people.

Law Offices of Michael Skinner (by *Michael Skinner*) for defendant.

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

WILDER, J. Defendant, Arthur J. Quinn, appeals as of right his jury trial conviction of resisting or obstructing a police officer, MCL 750.81d(1). Consistent with *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012), we reverse and remand for a new trial.

I. FACTS AND PROCEDURAL HISTORY

On June 7, 2011, at about 1:00 a.m., Debra Novar, a sergeant with Emmet Township Department of Public Safety, was on "random patrol." A severe storm had passed through the area during the previous week, and

many areas suffered storm damage. Additionally, several power lines were down, some areas remained without power, and there had been several thefts in the area. Novar testified that, mindful of the storm and recent thefts, she noticed a truck parked outside a salon and went to investigate why someone was parked there at that hour. As Novar approached the salon, she realized that the truck was not parked in the salon's lot, but in a parking lot belonging to an adjacent apartment building—the Eisenhower Apartments. Novar testified that she looked in the direction of the apartments and noticed two people, later identified as defendant and his son Brian Quinn, in a dark carport in the apartment lot. Novar testified that she did not know what they were doing, but she wanted to find out.

Novar got out of her vehicle and twice yelled for them to come toward her. Someone inside the carport said, "No, you come over here," and then said, "See you later." Both defendant and Brian then left the carport and appeared to be walking quickly up the sidewalk toward the apartments. Novar radioed for assistance and ran to catch up with the men. Defendant and Brian entered through a door in the rear of the building and the door closed behind them. Novar testified that, while still in pursuit, she opened the door and saw the men standing on a landing area at the top of the steps. Novar testified that she asked to see their identification and asked if they lived at the apartments. According to Novar, each denied living there and refused to show Novar their identification. Novar maintained that she then attempted to place Brian under arrest, but Brian broke free and followed defendant into an apartment. Novar recalled that she placed her foot inside the apartment door to prevent the door from being closed. Novar eventually deployed her pepper spray inside the apartment and kept her foot inside the door until

backup assistance arrived, at which time she pushed on the door with her shoulder and the door opened. Officers informed defendant that he was under arrest, but defendant pulled away and said he did not need to go to jail. One officer used an "arm bar" to force defendant onto the ground, handcuffed him, and placed defendant under arrest.

Defendant lived in Saginaw, but he testified that he was staying at the Eisenhower Apartments with Brian to perform some work for the owner, his father-in-law. Defendant testified that, at about 1:00 a.m., they went outside to defendant's truck to make sure that it was locked and that he had not left any tools in the vehicle. Defendant testified that the parking area was very dark and he noticed a vehicle, with no lights on, pull into the salon parking lot next door. Defendant heard someone say, "Hey, you guys, come here." Brian replied, "No, come over here." Defendant testified that he saw a flashlight come on. Defendant was "terrified"; he told Brian that they should go inside and call 9-1-1. Defendant testified that he and Brian then walked quickly toward the apartment building.

Defendant testified that he and Brian entered the apartment building and walked quickly up the stairs to the apartment they were using during their stay. Defendant entered the apartment, grabbed his telephone from the kitchen table to call 9-1-1, and then noticed that Brian had not entered the apartment with him. Defendant testified that, as he walked back toward the door to get Brian, the front door opened "violently" and knocked the telephone out of his hand. Defendant testified that he saw Brian sprayed with pepper spray and that he was sprayed as well. Defendant testified that he was afraid, thought someone was attempting to harm him, pushed against the door to prevent any

further attack, and yelled for Brian to call 9-1-1. Defendant testified that he was still unaware that a police officer was attempting to enter the apartment. He testified that he did not see Novar at the top of the steps because he was already inside the apartment when she entered the building. According to defendant, Novar never asked him for his identification and never identified herself.

Defendant testified that, after someone sprayed him with pepper spray and he attempted to shut the door, he picked up his telephone, went into the kitchen, and sat at the table. Defendant tried to use the telephone but was unable to see because of the pepper spray. While he was attempting to make a call, someone came into the kitchen, "flung" him onto the floor, and handcuffed him. Defendant testified that it was at that point that he realized that officers were in his apartment and involved in the incident. Defendant denied dragging his feet or being uncooperative on the way to the police car.

Relevant to the issue raised on appeal, defendant filed a pretrial motion to suppress, arguing that Novar's actions were unlawful and violated his Fourth Amendment rights. Relying on *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004), the trial court denied his motion because, under *Ventura*, the lawfulness of an arrest was not an element of resisting arrest in a prosecution alleging a violation of MCL 750.81d(1).

After the trial court sentenced defendant, the Supreme Court decided *Moreno*, which overruled *Ventura*. Defendant moved for a posttrial directed verdict of acquittal and, in the alternative, for a new trial, on the basis of *Moreno*. Defendant argued that he was entitled to a directed verdict because his detainment and arrest were unlawful and, under *Moreno*, defendant had the common-law right to resist unlawful police action. In

the alternative, defendant requested that the trial court grant him a new trial because (1) the great weight of the evidence indicated that defendant was innocent and (2) defendant was denied his constitutional rights to present a defense, to a properly instructed jury, and to be confronted with the witnesses against him because he was not allowed to argue the unlawfulness of the arrest. The trial court denied the motion for the reasons that the arrest was lawful and *Moreno* was not retroactive.

II. ANALYSIS

On appeal, defendant first argues that the trial court erroneously determined that *Moreno* is not retroactive. We agree. "The retroactive effect of a court's decision is a question of law that this Court reviews de novo." *Johnson v White*, 261 Mich App 332, 336; 682 NW2d 505 (2004). Generally, judicial decisions establishing a new rule of law are given full retroactive effect. *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006). A court may limit the retroactive effect of a judicial decision, or give it prospective effect only, if "injustice might result from full retroactivity." *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). The Michigan Supreme Court has considered the following three factors when deciding whether a decision should not be given retroactive application: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id*.

In *People v Marrow*, 210 Mich App 455; 534 NW2d 153 (1995), this Court held that a defendant must lawfully possess a pistol in order to use the dwelling-house exception in the statute that governs the carrying of a concealed weapon, MCL 750.227(2). Our Supreme

Court overruled *Marrow* in *People v Pasha*, 466 Mich 378, 382-383; 645 NW2d 275 (2002), concluding that *Marrow* added a lawful-possession requirement that did not exist in the statute. In determining whether to apply the new rule regarding lawful possession retroactively, the Court stated: "Prosecutors and courts have relied on *Marrow* in deciding whether to charge or convict a defendant of CCW. Full retroactive application of our holding would undermine the interest in finality of convictions and disrupt the effective administration of justice." *Id*. at 384. Given these considerations, the Court gave the new rule limited retroactive effect to cases where the defendant raised the issue involving the new rule on appeal and either preserved the issue in the trial court or relief was warranted under *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). *Pasha*, 466 Mich at 384.

The purpose of the new rule announced in *Moreno* was to reestablish the common-law rule that a person may resist an unlawful arrest, which was deemed abrogated by this Court in *Ventura*. Just as in *Pasha*, prosecutors and courts relied on *Ventura* and full retroactivity could upset the public's interest in the finality of convictions. Therefore, we conclude that the new rule in *Moreno* should be given limited retroactive effect to cases in which a defendant raised the issue on appeal and the defendant either preserved it in the trial court or can demonstrate plain error affecting substantial rights under *Carines*.[1]

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[1] This Court considered the retroactive application of *Moreno* in *City of Westland v Kodlowski*, 298 Mich App 647, 653; 828 NW2d 67 (2012), but our Supreme Court vacated that portion of the opinion because, given that probable cause existed to effectuate the defendant's arrest on the basis of facts the defendant admitted, the retroactive effect of the new rule in *Moreno* was not before this Court. *City of Westland v Kodlowski*, 495 Mich 871 (2013).

In this case, defendant preserved the issue of whether Novar's conduct was lawful by raising it in his pretrial motion to suppress. Defendant thereafter preserved the issue of whether *Moreno* applies retroactively to his case in his posttrial motion for a directed verdict or new trial. Finally, defendant raises these issues again on appeal. We therefore hold that, under the facts of this case, *Moreno* applies retroactively.

Next, defendant argues that he should be granted a directed verdict or a new trial on the basis of *Moreno*. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The elements of resisting or obstructing a police officer under MCL 750.81d(1) are: "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010).

Additionally, according to *Moreno*, 491 Mich at 52, "the prosecution must establish that the officers' actions were lawful" as an element of resisting or obstructing a police officer under MCL 750.81d. We note that in *Moreno*, our Supreme Court did not explicitly state, in so many words, that the lawfulness of the officers' actions is an "element" of resisting or obstructing a police officer. However, it was clear from context and the Court's discussion of the

history of the right to resist unlawful arrest that such lawfulness had been considered an "element" before *Ventura*. Furthermore, cases before *Ventura* explicitly held that the lawfulness of the arrest was an "element." See, e.g., *People v Dalton*, 155 Mich App 591, 598; 400 NW2d 689 (1986). Consequently, it is clear that under *Moreno*, as at common law, the prosecution must establish that the officers acted lawfully as an actual element of the crime of resisting or obstructing a police officer under MCL 750.81d.

Defendant does not argue on appeal that the prosecution failed to show that he resisted and obstructed Novar, or that he knew or had reason to know that Novar was an officer. But the third element—whether Novar's actions were lawful—was not an element of the charged offense at the time of the trial, and the prosecutor did not specifically offer evidence to show beyond a reasonable doubt that Novar's actions were lawful.

"Generally, seizures are reasonable for purposes of the Fourth Amendment only if based on probable cause." *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). However,

> [u]nder certain circumstances, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest. A brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances. A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior. [*People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005) (citations and quotation marks omitted).]

Our review of the evidence submitted at trial, when viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that Novar's actions were lawful. Specifically, a rational trier of fact could conclude that the fact that two individuals were outside in the parking lot of an apartment building at 1:00 a.m., in an area where there had been recent thefts, coupled with the fact that they walked quickly away from Novar into the apartment building and up the stairs to the second-floor landing, and indicated that they did not live in the apartments, created circumstances sufficient to warrant a brief detention. Accordingly, when viewed in a light most favorable to the prosecution, a rational trier of fact could conclude that Novar had a reasonably articulable suspicion that criminal activity was afoot and that her repeated requests to defendant and Brian to produce their identification, and her request to defendant to exit the apartment, were lawful. Therefore, we decline to grant a directed verdict.[2]

Defendant argues, in the alternative, that he should be granted a new trial. On this point, we agree. A "criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

Here, the jury was instructed as follows:

> [I]n this case the defendant is charged with the crime of resisting and obstructing a police officer who was performing her duties. To prove this charge the prosecutor must

[2] In our view, whether reasonable suspicion existed turns on whether Novar believed defendant lived at the apartment complex. The evidence presented at trial regarding this issue was not undisputed. Although Novar testified that, on the landing, both defendant and Brian said they did not live at the apartment complex, defendant testified that he had no such encounter with Novar on the landing and that he was already inside the apartment when she entered the building.

> prove each of the following two elements beyond a reasonable doubt: first, that the defendant resisted or obstructed or opposed a police officer for Emmett Township; to wit, Deb Novar. Obstruct includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command. The defendant must have actually resisted by what he said or did, but physical violence is not necessary.
>
> Second, that the defendant knew or had reason to know that the person the defendant resisted, obstructed, and/or opposed was a police officer performing her duties at the time.

These instructions were consistent with the law at the time of the trial, before *Moreno* was decided. See *Corr*, 287 Mich App at 503. However, after *Moreno*, under the common-law rule, the "prosecution must establish that the officers' actions were lawful" as an element of resisting or obstructing a police officer under MCL 750.81d. *Moreno*, 491 Mich at 51-52. "[T]he long-recognized principle in Michigan caselaw [is] that questions of law in criminal cases are for the trial judge to decide, whereas questions of fact are for the jury." *People v Jones*, 301 Mich App 566, 573; 837 NW2d 7 (2013). While the lawfulness of an arrest is generally a question of law to be decided by the trial court, if the lawfulness of the arrest is an element of a criminal offense, it becomes a question of fact for the jury. *Id*. at 574, citing *Dalton*, 155 Mich App at 598.

As discussed, the lawfulness of Novar's actions is an element of the charged crime and therefore a question of fact for the jury. The jury was not instructed to determine whether Novar's actions were lawful or how to do so. Because the jury was not instructed on all three elements of the offense of resisting or obstructing a police officer according to *Moreno*, and because defen-

dant has the right to a properly instructed jury, *Mills*, 450 Mich at 80-81, we remand for a new trial.

Because we agree with defendant that the jury was not properly instructed, and thus, reversal is required, it is unnecessary for this Court to consider the alternative grounds for a new trial presented by defendant.

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

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

HUNTINGTON NATIONAL BANK v DANIEL J. ARONOFF LIVING TRUST

Docket No. 309761. Submitted January 8, 2014, at Detroit. Decided March 27, 2014. Approved for publication June 3, 2014, at 9:00 a.m. Leave to appeal denied, 497 Mich ___.

Huntington National Bank brought an action in the Oakland Circuit Court against the Daniel J. Aronoff Living Trust, Daniel J. Aronoff, Arnold Y. Aronoff, and others, seeking to enforce several notes, letters of credit, and guaranties. Daniel and Arnold Aronoff owned several businesses and financed their business activities in part through loans from plaintiff. In response to plaintiff's lawsuit, defendants claimed that plaintiff had breached a $5 million loan commitment made to them in October 2007. Defendants asked the court to offset plaintiff's claims by the amount that defendants would have been able to repay if not for that alleged breach. The court, Nanci J. Grant, J., determined that MCL 566.132(2) barred any defense premised on an attempt to enforce plaintiff's alleged oral promise to loan defendants money on terms other than those that the parties later reduced to writing in February 2008. The court granted summary disposition in favor of plaintiff and denied, in part, defendants' motion for reconsideration. The court agreed with defendants that the court's original order should not have included an award of attorney fees because no hearing had been held on the reasonableness of the fees. The parties came to an agreement concerning the amount of attorney fees and filed a stipulation with the court. The court then entered an amended judgment. Defendants appealed.

The Court of Appeals *held*:

1. The proponents of a loan commitment have the burden to prove its existence. In order for there to be an enforceable agreement between the parties, there must be mutual assent to be bound. Courts judge whether there was a meeting of the minds from the objective evidence. Under MCL 566.132(2), no one may bring an action against a financial institution if the action seeks to enforce a promise or commitment to lend money by the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution. By requiring that the promise or commitment, as opposed to some other document, must be in

writing and have an authorized signature, it is evident that the Legislature intended to provide financial institutions with a greater degree of protection than that afforded generally under MCL 566.132(1). Accordingly, the party seeking to enforce a promise or commitment by a financial institution must present evidence that the promise or commitment itself was reduced to writing and properly signed. It is not sufficient to show that the financial institution memorialized a portion of the agreement or reduced a preliminary understanding to writing and then later orally agreed to proceed under that framework, nor is it sufficient to present a series of documents—some signed and others not signed—that together purport to be the agreement; rather, the proponent must present evidence that the financial institution actually agreed to the essential terms of the promise or commitment, and each of those essential terms must be accompanied by the required signature. In this case, defendants presented evidence that suggested that plaintiff had reached a preliminary agreement in October 2007 to loan them $5 million, but the evidence also showed that the parties never finalized that agreement because plaintiff decided not to proceed with the closing as originally discussed. Because defendants did not provide any evidence that plaintiff executed a written agreement, with an authorized signature, to provide a loan under the terms that they claimed were negotiated in October 2007, the trial court did not err when it concluded that their defense amounted to an action to enforce a promise or commitment to loan money that was barred under MCL 566.132(2).

2. A grant of summary disposition might be premature if the party opposing the motion has not had a reasonable opportunity to conduct discovery. Whether summary disposition is premature depends on whether further discovery stands a fair chance of uncovering factual support for the litigant's position. Defendants asserted that further discovery might reveal that plaintiff had prepared internal documents for the October 2007 loan commitment that might satisfy MCL 566.132(2). But the trial court correctly determined that internal documents could not satisfy the statute because an internal document could not have induced reliance. The trial court's grant of summary disposition was not premature, and defendants' other assertions of error do not warrant relief.

Affirmed.

STATUTE OF FRAUDS — PROMISES OR COMMITMENTS BY FINANCIAL INSTITUTIONS — ENFORCEMENT.

Under MCL 566.132(2), no one may bring an action against a financial institution if the action seeks to enforce a promise or

commitment to lend money by the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution; the party seeking to enforce a promise or commitment by a financial institution must present evidence that the promise or commitment itself was reduced to writing and properly signed; internal documents cannot be used to satisfy the statute because an internal document cannot induce reliance; an affirmative defense may constitute an action to enforce a promise or commitment to loan money to which MCL 566.132(2) applies.

Plunkett Cooney (by *Jeffrey C. Gerish*, *Douglas C. Bernstein*, and *Kenneth M. Mattson*) for plaintiff.

Allan Falk, PC (by *Allan Falk*), for defendants.

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

M. J. KELLY, J. In this suit to enforce several notes, letters of credit, and guaranties, defendants Daniel J. Aronoff; Arnold Y. Aronoff; their related trusts, the Daniel J. Aronoff Living Trust and the Arnold Aronoff Revocable Trust; and their business entities, Eagle Park Associates Limited Partnership, Tampa Associates Limited Partnership, The Star Group, Inc., Edison Farms, Inc., and Strategic Equities, Inc.,[1] appeal by right the trial court's judgment granting plaintiff Huntington National Bank's motion for summary disposition. On appeal, Daniel Aronoff, Arnold Aronoff, and the Aronoff entities argue that the trial court erred by granting Huntington's motion for summary disposition and, in the alternative, erred by failing to explicitly include a provision for adjusting interest on the unpaid debt in the judgment. Because we conclude there were no errors warranting relief, we affirm.

[1] For convenience, we shall collectively refer to the trusts, partnerships, and corporations as the Aronoff entities.

I. BASIC FACTS

Daniel and Arnold Aronoff own and operate various businesses. They financed their business activities in part through loans from Huntington. Eagle Park obtained a loan from Huntington for more than $14 million in December 2001, which Arnold Aronoff, his trust, Tampa Associates, and Strategic Equities guaranteed. Tampa Associates, under its former name, obtained a loan of more than $7 million from Huntington in December 2003. Arnold Aronoff, his trust, Eagle Park, and Strategic Equities guaranteed that loan. Daniel and Arnold Aronoff and their trusts took out a loan for more than $13 million from Huntington in February 2009. Tampa Associates, Eagle Park, The Star Group, Glades Enterprises, and Edison Farms each guaranteed that loan. Arnold Aronoff and Tampa Associates secured a standby letter of credit from Huntington in favor of the City of Novi. The City of Novi drew on the letters of credit in January 2010 and Arnold Aronoff and Tampa Associates became liable to Huntington for the outstanding balance.

After defaults on the notes and letters of credit, Huntington demanded payment from the obligors and guarantors of each note and letter of credit, but was unable to obtain full payment on the debts. In May 2010, Huntington sued Daniel Aronoff, Arnold Aronoff, and the Aronoff entities. By May 2011, it had amended its complaint to include all the outstanding notes and letters of credit involved. In its second amended complaint, Huntington asked the trial court to enter a judgment of more than $27 million each against Arnold Aronoff, his trust, Eagle Park, Tampa Associates, and Strategic Equities. It also asked for a judgment of almost $15 million each against Daniel Aronoff, his trust, the Star Group, Glades Enterprises, and Edison

Farms. Huntington also asked the trial court to award it interest, costs, and attorney fees.

In answer to Huntington's claims, defendants alleged numerous affirmative defenses. In relevant part, they alleged that Huntington's claims were barred because it was impossible to perform after the advent of "unprecedented and unforeseen economic conditions" affecting business in Michigan and Florida. They also alleged that Huntington "reneged" on a $5 million loan commitment that it made to them in October 2007. They explained that Huntington's failure to meet its commitment placed them in a "distressed economic position and near insolvency." Had Huntington fulfilled the loan commitment, they further stated, the debt would have been significantly reduced. For that reason, they asked the trial court to offset Huntington's claims by the amount that they would have been able to repay had Huntington not "breach[ed]" its obligations under the October 2007 loan commitment. They also claimed that Huntington's actions with regard to the October 2007 loan commitment amounted to fraud or misrepresentation, which negated their own liability under the notes, letters of credit, and guaranties.

In June 2011, Huntington moved for summary disposition under MCR 2.116(C)(9) and (10). Huntington argued that it was undisputed that defendants executed the notes, letters of credit, and guaranties at issue and failed to make the required payments under those agreements. Huntington also argued that the affirmative defenses that defendants alleged in their answer could not serve as a bar to Huntington's claims. It noted that the loan commitment allegedly made in October 2007 predated one loan and predated the amendments to others. For that reason, whatever effect that loan commitment might have had, it was superseded by

subsequent agreements. Huntington also argued that MCL 566.132(2) barred any defense arising from the alleged October 2007 loan commitment because the loan commitment was not in writing and signed by someone authorized to act on Huntington's behalf. Finally, Huntington argued that a downturn in economic conditions did not amount to a defense to the required payments. Because the undisputed evidence showed that defendants were liable for the payments required under the notes, letters of credit, and guaranties, and had no valid defense to the claims, Huntington asked the trial court to grant summary disposition and enter judgment in its favor.

In response to Huntington's motion, defendants did not directly contest the validity and amounts due under the notes, letters of credit, and guaranties. Instead, they presented evidence and argued that their inability to pay under those agreements arose from Huntington's wrongful conduct.

They presented evidence that Daniel Aronoff began to negotiate a $5 million line of credit with Huntington in June 2007. The line of credit was to be secured by the proceeds from financial institutions in Florida that Daniel and Arnold Aronoff were in the process of acquiring. Huntington purportedly approved the line of credit in a letter dated July 2007 and the parties were to close on the line of credit by the end of October 2007. However, Huntington failed to close the loan. Despite reassurances that the closing would occur and that the loan documents were being drafted, Huntington still had not closed on the line of credit by November 2007. Finally, in December 2007, Huntington informed the Aronoffs that it would not fund the loan.

Defendants claim that Huntington's refusal to close the loan led to financial distress; they were even unable

to meet their January 2008 payroll. They stated that Huntington then used their financial distress to compel them to accept a modified loan deal. The new loan was for $4.3 million rather than $5 million and required them to pledge their remaining assets as security for the loan. The parties agreed to the new loan in February 2008. Defendants presented evidence that, because they pledged the additional property as collateral for the new loan, they were unable to take advantage of other loan and sale offers.

In their answer to Huntington's motion for summary disposition, defendants argued that Huntington's refusal to meet the $5 million loan agreement in October 2007 was wrongful and proximately caused significant losses. They maintained that MCL 566.132(2) did not apply because that statute applied only to "actions" and not defenses. In any event, they explained, the documents and e-mails circulated before the proposed closing on the original commitment were sufficient to satisfy MCL 566.132(2). Because their "lender liability defense" would "fully defeat" Huntington's right to recover under the notes, letters of credit, and guaranties, they asked the trial court to deny Huntington's motion for summary disposition. Finally, in the alternative, defendants argued that summary disposition was premature because the parties had not yet concluded discovery.

In November 2011, the trial court issued its opinion and order granting Huntington's motion. The trial court first noted that defendants did not "dispute the existence of the loans, the terms, the payments, or that they are in default." Instead, the court explained, they argued that they would not have defaulted but for Huntington's failure to abide by its promise to loan them an additional $5 million in October 2007. The trial

court, however, determined that MCL 566.132(2) barred any defense premised on an attempt to enforce Huntington's oral promise to loan them money on terms other than those that the parties ultimately reduced to writing in February 2008. The trial court examined the evidence and concluded that, before February 2008, Huntington had not obligated itself to make the disputed loan in a properly signed promise or commitment:

> To be sure, these documents suggest that the parties negotiated a $5 million loan in 2007, and that [Huntington's] representatives orally committed to closing the loan. The documents do not, however, constitute a written "promise or commitment" sufficient to satisfy the statute of frauds. The July 18 letter, for example, explicitly notes that [Huntington] is only "prepared to discuss a possible extension of credit for your operation," and that "the terms outlined above are not all-inclusive, but merely reflect our discussions to date, are subject to change and will be supplemented by our standard loan requirements and documentation." Thus, that document does not constitute a "promise or commitment" by [Huntington] to lend money, as it suggests only that [Huntington] was willing to consider such a loan, but had not yet committed to it. Nor could the November 29 "closing checklist" be considered a "promise or commitment" by [Huntington] to lend money, as it does not even describe the transaction in question, much less identify its terms. Rather, that document is simply a list of items that [the borrowers] must provide before a closing can occur. Finally, the closing documents themselves do not satisfy the statute since they are not signed by an authorized representative of [Huntington].

Because the undisputed evidence showed that Huntington never actually committed to make the disputed loan in writing, the trial court concluded that defendants could not rely on the loan negotiations to establish a defense to Huntington's claims.

The trial court also rejected the contention that MCL 566.132(2) does not apply to defenses. The trial court determined that it would elevate form over substance to allow a party to indirectly enforce an oral agreement as a defense when the statute of frauds would preclude that party from directly enforcing the oral promise in a claim. The trial court similarly rejected the notion that a grant of summary disposition would be premature, ruling that there was no reason to believe that further discovery would reveal documents beyond those already discussed. After discussing the arguments and evidence, the trial court concluded that the undisputed evidence showed that defendants had breached the agreements at issue and were liable to Huntington in the amounts established in Huntington's motion for summary disposition.

The trial court entered its order and judgment in favor of Huntington in December 2011. The judgment provided that Arnold Aronoff, his trust, Eagle Park, Tampa Associates, and Strategic Equities had to pay Huntington approximately $28.5 million and that Daniel Aronoff, his trust, the Star Group, Glades Enterprises, and Edison Farms had to pay Huntington approximately $15.3 million. The judgment further stated a collective maximum amount of liability for defendants and ordered that their individual liability must be reduced by the amount of any payment or collateral that Huntington received from any of them toward the debt for the underlying note or letter of credit. The judgment also provided for costs and attorney fees.

In January 2012, defendants moved for reconsideration of the trial court's judgment. They argued that the trial court palpably erred when it rejected their defense as barred under MCL 566.132(2) and when it deter-

mined that there was no fair likelihood that further discovery would yield support for their defense. They also argued that the judgment should have included a provision that adjusted the amounts owed by reducing the interest on the debt for amounts paid before the judgment and that the trial court should have given them an opportunity to amend their answer. Finally, they argued that the trial court erred when it ordered them to pay attorney fees without first granting them a hearing to determine whether the fees were reasonable.

Later that same month, the trial court denied the motion for reconsideration in part. The trial court rejected defendants' efforts to revisit the evidence that they submitted to establish that Huntington had committed to loan them $5 million in October 2007 and to raise new evidence and new claims or defenses. It did, however, consider the potential that summary disposition may have been premature. The trial court indicated that it wanted to further consider their argument that the statute of frauds could be satisfied through "internal documents which were never shared with the other party . . . ." It also invited Huntington to respond to their argument that the judgment should have included a provision for adjusting interest and should not have included attorney fees without first conducting a hearing.

In March 2012, the trial court entered its final order resolving defendants' motion for reconsideration. The trial court first examined MCL 566.132(2) and noted that it required a written promise or commitment in contradistinction to the requirements stated under MCL 566.132(1), which can be satisfied with a memorandum. Because a promise is a manifestation of an intent by the promisor that justifies reliance by the promisee, the trial court concluded

that MCL 566.132(2) requires proof that that the party seeking to enforce the promise or commitment actually received the writing signed by an authorized person. Accordingly, further discovery to see if Huntington generated an internal document signed by an authorized person would not be of use to defendants. The trial court also determined that the judgment adequately permitted defendants to seek adjustments to the interest owed. Finally, the trial court agreed that the judgment should not have included an award of attorney fees given that the trial court had not yet held an evidentiary hearing on the reasonableness of the fees. For these reasons, the trial court denied the motion for reconsideration as to every issue except the amount of attorney fees to be included in the final judgment.

The parties later came to an agreement on the amount of attorney fees and filed a stipulation with the trial court. In April 2012, the trial court entered an order amending the judgment to reflect the stipulated amount.

Defendants then appealed in this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

Defendants first argue that the trial court erred when it granted Huntington's motion for summary disposition. Specifically, they contend that the trial court erred when it determined that MCL 566.132(2) barred their defense premised on Huntington's allegedly wrongful refusal to abide by the terms of the loan negotiated in October 2007. In the alternative, they argue that the trial court's decision was premature because there was a fair likelihood that further discovery would have established their defense. Finally, they

argue that the trial court should have permitted them to amend their answer to revise their defense or add a defense or counterclaim premised on the October 2007 loan commitment.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court "correctly selected, interpreted, and applied the relevant statutes." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

B. LENDER LIABILITY DEFENSE

When in the trial court, defendants did not contest the validity of the agreements underlying Huntington's claims against them. Instead, they argued that those claims were unenforceable as a result of, or should be offset by, Huntington's "lender liability" arising from its failure to abide by the terms of a loan that they negotiated with Huntington in October 2007. It is not clear that Michigan recognizes a defense whereby a borrower can avoid liability under a lawfully made note by pleading and proving that the lender engaged in wrongful conduct unrelated to that note. From their allegations, however, it is clear that defendants' "lender liability" defense is more aptly characterized as a breach of contract counterclaim framed as an affirmative defense. That is, defendants alleged and argued that Huntington entered into a valid and binding agreement to loan them $5 million in October 2007 and that Huntington's breach of that agreement caused losses that nearly or fully offset their obligations under the notes, letters of credit, and guaranties at issue in Huntington's complaint. Thus, in order to establish this

"defense," defendants must be able to prove that the October 2007 loan commitment amounted to a legally enforceable agreement.

As the proponents of this alleged loan commitment, defendants have the burden to prove its existence. *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). In order for there to be an enforceable agreement between the parties, there must be "mutual assent" to be bound—that is, the parties must have a "meeting of the minds" on all the essential elements of the agreement. *Goldman v Century Ins Co*, 354 Mich 528, 535; 93 NW2d 240 (1958) ("To say, as we do, that a contract requires a 'meeting of the minds' is only a figurative way of saying there must be mutual assent."); *Dodge v Blood*, 307 Mich 169, 176; 11 NW2d 846 (1943) (stating that a contract is not valid unless the parties have a meeting of the minds on all essential points of the agreement). Courts judge whether there was a meeting of the minds from objective evidence: from "the expressed words of the parties and their visible acts." *Goldman*, 354 Mich at 535. Moreover, when negotiating the terms, the acceptance of the final offer must be substantially as made; if the purported acceptance includes conditions or differing terms, it is not a valid acceptance—it is a counteroffer and will not bind the parties. See *Harper Bldg Co v Kaplan*, 332 Mich 651, 655-656; 52 NW2d 536 (1952). And Michigan courts will not lightly presume the existence of an enforceable contract because, "regardless of the equities in a case, the courts cannot make a contract for the parties when none exists." *Hammel*, 359 Mich at 400.

In addition to these basic elements of a contract claim, defendants had to comply with the applicable statute of frauds. The Legislature long ago provided that certain types of agreements, contracts, or promises

are "void" unless in writing and signed by the party to be charged with the agreement. See MCL 566.132(1). Typically, a party can meet the requirements of a statute of frauds by presenting a written document or documents that individually or collectively summarize the essential elements of the alleged agreement. See *Fothergill v McKay Press*, 361 Mich 666, 676; 106 NW2d 215 (1960) ("Normally a memorandum need be only that. It is sufficient if the obligations of each party may be determined from it. It need not have the minutiae of a contract."). Consequently, under MCL 566.132(1), the party seeking to enforce an agreement need not produce a written copy of the agreement, as long as the party can produce some written evidence that establishes the agreement's essential terms. Although a party might normally be able to satisfy the requirements of MCL 566.132(1) by presenting a written summary of an otherwise oral agreement, even though the proponent does not have an actual written agreement, the case at issue here does not involve the requirements provided under MCL 566.132(1). Rather, it involves the requirements stated under MCL 566.132(2).

In 1992, Michigan's Legislature decided to provide greater protection to financial institutions from potentially fraudulent or spurious claims by disgruntled borrowers. See 1992 PA 245. To that end, the Legislature provided that no one may bring an "action" against "a financial institution" if the action seeks to "enforce" a promise or commitment by the financial institution "unless the promise or commitment is in writing and signed with an authorized signature by the financial institution." MCL 566.132(2). This provision applies to a "promise or commitment"—as alleged here—to "lend money." MCL 566.132(2)(a). Although this Court has operated on the assumption that a memorandum may be sufficient to meet the requirements stated under

MCL 566.132(2), it has not directly construed the requirements stated under MCL 566.132(2). See *Barclae v Zarb*, 300 Mich App 455, 470-471; 834 NW2d 100 (2013) (stating that the statute of frauds can generally be satisfied with "a writing" in light of admitted facts and extrinsic evidence, but then concluding that the evidence was insufficient because it did not establish that there was mutuality of agreement, which is not normally a contractual term).[2]

As the trial court recognized, it is noteworthy that the Legislature did not provide that a party may meet the writing requirement of MCL 566.132(2) with evidence of a "note or memorandum of the agreement, contact, or promise", as it did under MCL 566.132(1). Instead, it barred any "action" to enforce a promise or commitment to lend money unless the "promise or commitment" is in writing and signed with an authorized signature. MCL 566.132(2). By requiring that the "promise or commitment"—as opposed to some other document—must be in writing and have an authorized signature, it is evident that the Legislature intended to provide financial institutions with a greater degree of protection than that afforded generally under MCL 566.132(1). See *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 550; 619 NW2d 66 (2000) (construing MCL 566.132(2) and concluding that the Legislature's use of the term "action" was meant to provide an "unqualified and broad ban" to protect financial institutions from any action to enforce a covered promise or commitment, however labelled). Accordingly, the party seeking to enforce a promise or

[2] The court in *Barclae* did not construe MCL 566.132(2), but instead assumed that the caselaw construing MCL 566.132(1) applied equally to the facts of *Barclae*. It then determined that the evidence was insufficient to satisfy the statute of frauds because the evidence failed to establish mutuality of agreement. Given these limitations, we find it inapposite.

commitment must present evidence that the promise or commitment itself was reduced to writing and properly signed. It is not, therefore, sufficient to show that the financial institution memorialized a portion of the agreement or reduced a preliminary understanding to writing and then later orally agreed to proceed under that framework, nor is it sufficient to present a series of documents—some signed and others not signed—that together purport to be the agreement; rather, the proponent must present evidence that the financial institution actually agreed to the essential terms of the promise or commitment, and each of those essential terms must be accompanied by the required signature.

Here, defendants presented evidence that tended to suggest that Huntington had reached a preliminary agreement to loan them $5 million in about October 2007. However, the undisputed evidence also showed that the parties never finalized that agreement because Huntington decided not to proceed with the closing as originally discussed. Instead it renegotiated the terms and ultimately provided the loan that the parties agreed to in February 2008. Because defendants did not provide any evidence that Huntington executed a written agreement, with an authorized signature, to provide a loan under the terms that they claimed were negotiated in October 2007, the trial court did not err when it concluded that their "lender liability" defense amounted to an "action" to enforce a promise or commitment to loan money that was barred under MCL 566.132(2).

Even assuming that defendants could meet the requirements stated under MCL 566.132(2) with memoranda and other documentary evidence tending to show that Huntington agreed to loan them money under terms that were different from those found in the

February 2008 agreement, the trial court still did not err when it concluded that the written evidence presented to the court was insufficient to establish the essential terms of the agreement. Under MCL 566.132(1), the proponent's written evidence must still be sufficient to establish the terms without the need to fill in gaps with oral testimony: "Basically, such a writing must contain all of the essential terms of the contract with the degree of certainty which would obviate any necessity for parol evidence. There should be no cause for inquiring beyond the writing to identify the terms and conditions of the agreement." *Ass'n of Hebrew Teachers v Jewish Welfare Federation*, 62 Mich App 54, 59; 233 NW2d 184 (1975).

Here, defendants relied heavily on the checklist prepared by Huntington for the proposed closing in October 2007. While this closing checklist refers to documents that would presumably contain the terms for the proposed loan, it plainly does not include sufficient detail to satisfy the statute of frauds by itself. The checklist does not define the interest rate, does not provide for periodic payments, does not specify the term of the loan, and does not indicate whether it refers to a revolving line of credit or a fixed loan. Indeed, the checklist clearly identifies several critical documents—including the loan agreement itself—as being in the draft stage. Similarly, as the trial court correctly noted, the July 2007 letter from Huntington cannot serve to fill in these missing gaps because it clearly identifies the terms as proposals for discussion on a *possible* extension of credit. And defendants did not present any other signed documents that might establish these missing elements. In addition, despite claiming that the primary difference between the proposed loan commitment from October 2007 and the agreement entered into in February 2008 involved the collateral requirements, defen-

dants did not provide a signed document to establish the collateral requirements required under the terms of the loan that the parties purportedly agreed to in October 2007. Because defendants failed to establish the essential terms of the October 2007 loan commitment, the trial court properly determined that MCL 566.132(2) barred them from trying to enforce that commitment in the present action.

C. FURTHER DISCOVERY AND CONTRACT CLAIMS

Defendants also argue that, even if the checklist and other evidence that they presented in response to Huntington's motion for summary disposition did not satisfy the requirements stated under MCL 566.132(2), summary disposition was nevertheless premature because further discovery might have disclosed evidence that would satisfy the statute. As this Court recently reiterated, a grant of summary disposition may be premature if the party opposing the motion has not had a reasonable opportunity to conduct discovery. See *Thomai v MIBA Hydramechanica Corp*, 303 Mich App 196, 215-216; 842 NW2d 417 (2013). "Whether a motion for summary disposition under this rule would be premature depends on 'whether further discovery stands a fair chance of uncovering factual support for the litigant's position.' " *Id*. at 216, quoting *Crider v Borg*, 109 Mich App 771, 772-773; 312 NW2d 156 (1981).

The trial court initially determined that defendants had been given sufficient time to conduct discovery before Huntington's motion. However, on reconsideration, defendants argued that further discovery might reveal that Huntington prepared internal documents for the original loan closing, which might satisfy MCL 566.132(2). We, however, agree with the trial court's

determination that such internal documents cannot satisfy the statute. With MCL 566.132(2), the Legislature limited a party's ability to enforce a "promise or commitment" by a financial institution to those situations when the promise or commitment is in writing and signed with an authorized signature. By referring to a promise or commitment that is itself in writing and signed, the Legislature plainly intended to limit enforcement to a promise or commitment that was actually made. A purely internal document cannot satisfy the requirements stated under MCL 566.132(2) because such a document could not induce reliance. See *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008) (stating that a promise is a manifestation of an intent to act or refrain from acting that justifies the promisee in understanding that a commitment has been made). Consequently, we agree with the trial court's determination that extending discovery to permit defendants to try to discover an internal document to establish the elements of their "lender liability" defense would not aid them in establishing their factual position. See *Thomai*, 303 Mich App at 216. The trial court's grant of summary disposition was not premature.

For similar reasons, we also agree with the trial court's determination that defendants would not benefit from an opportunity to amend their answer to better allege their "lender liability" defense or allege a counterclaim. In both cases they rely on Huntington's purported breach of the October 2007 loan commitment, but, as already explained, they failed to present any evidence that the October 2007 loan commitment met the requirements stated under MCL 566.132(2). Because that statute would bar any defense or counterclaim premised on the October 2007 loan commitment,

the proposed amendments would be futile. See *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

The claim made by defendants—that Huntington's February 2008 loan of $4.3 million lacked adequate consideration—also necessarily fails. Their argument presupposes that the October 2007 loan commitment for $5 million was enforceable and, for that reason, the subsequent loan constitutes a modification of that loan without adequate consideration. Even assuming that parties cannot modify an existing agreement without additional consideration, see *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 11; 708 NW2d 778 (2005) ("The fact that parties consider it to their advantage to modify their agreement is sufficient consideration."), in the absence of evidence that the terms negotiated in October 2007 actually bound the parties, this claim cannot be sustained; the agreement to loan $4.3 million to defendants clearly constituted adequate consideration for their promise to repay and pledge of collateral.

The trial court did not err when it granted Huntington's motion for summary disposition.

III. RECONSIDERATION

Defendants further maintain that the trial court erred when it refused to amend the judgment to more specifically provide for the adjustment of interest after their motion for reconsideration. This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.).

In order to establish the right to relief, the party bringing the motion for reconsideration must establish that the trial court made a palpable error and a different disposition would result from correction of the error. *Luckow Estate v Luckow*, 291 Mich App 417, 426; 805 NW2d 453 (2011); MCR 2.119(F)(3). The trial court examined the interest issue and determined that it did not warrant reconsideration because the judgment adequately covered this eventuality. Defendants have not presented any evidence that the failure to include a provision to adjust the interest has actually prejudiced them or might prejudice them in the future—that is, they did not demonstrate that the failure to include the requested provision constituted palpable error. Indeed, they acknowledge that Huntington has stated that such an interest adjustment would be appropriate under the current judgment, but nevertheless argue that the judgment must be amended because they would rather not rely on Huntington's "good graces" in the event of a dispute. Given that the trial court has retained jurisdiction to enforce the judgment and presumably handle any such disputes, we cannot conclude that the trial court abused its discretion when it refused to amend the judgment to proactively address potential future disagreements over the application of credits. See *Smith*, 481 Mich at 526.

IV. DUE PROCESS

Defendants finally argue that the trial court's decision to grant summary disposition must be reversed because the trial court violated their rights to due process by treating them unfairly. Specifically, they contend that the trial court demonstrated its bias by allowing Huntington to file briefs that exceeded the page limit; by allowing Huntington to file an extra brief,

which even included new exhibits, while criticizing their own lawyer for doing the same; by allowing Huntington to amend its complaint, but refusing to allow them to amend their answer; and generally by maligning their lawyer.

On appeal, defendants claim that this evidence of bias constitutes structural error. However, they do not support this claim of error by meaningful discussion of the authorities and record—they merely cite a few federal criminal cases establishing a criminal defendant's right to a fair trial and list the trial court's actions that they feel show evidence of bias. By failing to properly address this issue on appeal, defendants have abandoned this claim of error. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

In any event, after having examined the record, we conclude that defendants have not established bias warranting relief. Generally, this Court will presume that the trial judge is impartial and the party asserting otherwise bears a heavy burden to overcome that presumption. *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). The primary evidence of bias in this case concerns the trial court's exercise of its discretion to control the proceedings and the trial court's rulings, neither of which can generally be used to establish bias even if erroneous. See *id*. Further, a trial judge's remarks, which are hostile to or critical of the parties, their cases, or their counsel, ordinarily will not establish a disqualifying bias. *Id*. at 566-567. The record here simply does not establish that this case is one of those extreme cases warranting relief. See *id*. at 567.

V. CONCLUSION

The trial court did not err when it concluded that the undisputed evidence showed that Huntington was en-

titled to summary disposition; defendants did not dispute their liability under the terms of the notes, lines of credit, and guaranties and failed to support their proposed "lender liability" defense with evidence that Huntington breached a written agreement to loan them $5 million in order to extort more favorable terms at a later date. In addition, the trial court did not err when it determined that defendants would not benefit from further discovery or be able to cure the deficiencies in their position through amendment of their answer. Finally, there were no other errors warranting relief.

Affirmed. As the prevailing party, Huntington may tax its costs. MCR 7.219(A).

STEPHENS, P.J., and RIORDAN, J., concurred with M. J. KELLY, J.

LANDIN v HEALTHSOURCE SAGINAW, INC

Docket No. 309258. Submitted February 4, 2014, at Detroit. Decided June 3, 2014, at 9:05 a.m. Leave to appeal sought.

Roberto Landin, a licensed practical nurse, brought an action in the Saginaw Circuit Court against his former employer, Healthsource Saginaw, Inc., alleging wrongful discharge from employment in violation of public policy. Plaintiff claimed that his employment was terminated because he reported negligence by a coworker to a supervisor. He alleged that the coworker's negligence had directly led to the death of a patient. The court, Janet M. Boes, J., denied defendant's motions for summary disposition, holding that Michigan law recognizes a cause of action for wrongful termination in violation of the public policy exhibited by MCL 333.20176a(1)(a). The matter proceeded to trial and the jury reached a verdict in favor of plaintiff. Defendant appealed the denial of its motions for summary disposition, a directed verdict, judgment notwithstanding the verdict, a new trial, or remittitur. Defendant also alleged error with regard to the court's rulings on several discovery and evidentiary issues.

The Court of Appeals *held*:

1. Michigan law generally presumes that employment relationships are terminable at the will of either party. There is an exception to the at-will employment doctrine based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. The three public policy exceptions that have been recognized entail an employee's exercising a right guaranteed by law, executing a duty required by law, or refraining from violating the law. The three exceptions concern (1) explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty, (2) where the alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course of employment, and (3) where the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment.

2. Courts may only derive public policy from objective sources.

3. The trial court did not err by denying defendant's motions for summary disposition because the statutory basis for plaintiff's

public policy claim, MCL 333.20176a, could support a public-policy-based wrongful discharge claim.

4. The trial court did not err by denying defendant's motion for summary disposition that alleged that plaintiff's claim fell within the provisions of the Michigan Whistleblowers' Protection Act, MCL 15.362, and was subject to the exclusive remedies provided by that act. Because plaintiff did not allege a violation of the Public Health Code, the provision of the Public Health Code providing protection under the Whistleblowers' Protection Act for certain persons who report a violation of Article 17 of the Public Health Code or a rule promulgated under Article 17 was not applicable.

5. The trial court properly determined that a question of fact existed for the jury regarding whether there was a causal connection between plaintiff's protected activity and the termination of his employment. A question of fact existed regarding the reasons for the termination.

6. The trial court did not abuse its discretion by denying defendant's motion to compel plaintiff to return certain confidential medical records of nonparties. Given the circumstances, the court's grant of a protective order and the redaction of patient names was appropriate.

7. The fact that front pay damages may be speculative should not exonerate a wrongdoer from liability. The trial court did not err by denying defendant's claim that front pay damages should be disallowed as being unduly speculative.

8. The trial court appropriately submitted the issue of mitigation of damages to the jury. The issue was one of fact for the jury to decide.

9. Because a question of fact existed on the issue, the trial court did not err by submitting to the jury the issue whether, regardless of what had transpired before plaintiff's discharge, defendant would have fired plaintiff in any event when it learned that he had removed and copied confidential patient records.

10. The trial court properly held that evidence concerning plaintiff's coworker's actions, testimony from witnesses regarding the deceased patient's medical records, and the argument by plaintiff's counsel regarding whether plaintiff's coworker should have been dismissed was relevant and admissible. Evidence of the coworker's performance history was also relevant.

11. The trial court did not abuse its discretion by excluding certain evidence offered by defendant that allegedly absolved the coworker. The trial court properly determined that the evidence was irrelevant.

12. The trial court did not err by admitting testimony that plaintiff's supervisor allegedly falsified documents.

13. Defendant, by expressing satisfaction with the jury instructions given by the trial court, waived any error resulting from the trial court's denial of defendant's request for an instruction concerning the measure of damages as it related to health insurance.

14. The trial court did not abuse its discretion by denying defendant's motions for judgment notwithstanding the verdict and a new trial. Defendant failed to establish that remittitur was warranted with respect to the award for emotional damages. The trial court did not abuse its discretion by denying defendant's motion for remittitur.

15. The jury's verdict regarding plaintiff's economic loss was not excessive and was supported by the evidence.

16. The jury's verdict was not based on unfair and prejudicial evidence.

Affirmed.

Hurlburt, Tsiros & Allweil, PC (by *Mandel I. Allweil*), for plaintiff.

Miller, Canfield, Paddock and Stone, PLC (by *Richard W. Warren* and *M. Misbah Shahid*), for defendant.

Before: JANSEN, P.J., and K. F. KELLY and SERVITTO, JJ.

SERVITTO, J. Defendant appeals as of right the trial court's denial of its motions for summary disposition. Defendant also appeals the trial court's rulings on several discovery and evidentiary issues and its denial of defendant's motions for a directed verdict, judgment notwithstanding the verdict, a new trial, or remittitur. We affirm.

Plaintiff is a licensed practical nurse. He began working for defendant, a nonprofit community hospital, in March 2001 as an at-will employee and his employment was terminated in April 2006. Plaintiff asserts that he was terminated because he reported negligence

by a coworker, which negligence he believed directly led to the death of a patient, to a supervisor. Plaintiff alleged that after he reported the believed negligence, he was retaliated against by defendant and the retaliation ultimately culminated in his termination. In his complaint against defendant, plaintiff alleged wrongful discharge in violation of public policy.

Defendant initially moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that plaintiff's public policy claim was preempted by § 2 of the Michigan Whistleblowers' Protection Act, MCL 15.362. The trial court denied the motion. Defendant later moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff had identified no public policy on which his claim was grounded and that plaintiff could not and did not identify any law or policy under which his claim could survive. The trial court again denied defendant's motion for summary disposition. The trial court did not initially identify any specific law or public policy that would support plaintiff's cause of action but, in an October 13, 2011, opinion and order, the trial court stated that it was holding, as matter of law, that "Michigan law recognizes a cause of action for wrongful termination in violation of the public policy exhibited by MCL 333.20176a(1)(a) . . . ." Defendant thereafter filed a renewed emergency motion for summary disposition based primarily on its assertion that the statute cited by the trial court provided no basis for plaintiff's public policy claim. The trial court again denied the motion and the matter proceeded to trial, at the conclusion of which the jury reached a verdict in favor of plaintiff.

Defendant first argues on appeal that the trial court committed error requiring reversal by failing to apply the proper analysis and law to defendant's second and

third motions for summary disposition and thereafter committed error requiring reversal by denying defendant's motions. We disagree.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). A motion under "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under subrule (C)(8) is appropriate "if no factual development could justify the plaintiff's claim for relief." *Id*. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

Michigan law generally presumes that employment relationships are terminable at the will of either party. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998). There is, however, an exception to the at-will employment doctrine "based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982).

In *Suchodolski*, the plaintiff began working for Michigan Consolidated Gas Company in September 1972 as a senior auditor and was discharged in January 1976. He sued his former employer in 1978, stating various theories of recovery in a six-count complaint. Relevant to the instant action, the plaintiff alleged that during his employment he discovered and reported poor internal management of the defendant corporation, that he was fired for attempting to report and correct questionable management procedures, and that his firing was retaliatory and against the public policy of Michigan. *Id*. at 693-694. The trial court granted summary disposition in favor of the defendant with regard to all six of the counts and the Court of Appeals affirmed with regard to five of the counts, including the count relevant to this action. Our Supreme Court, in affirming the Court of Appeals, opined that the only grounds that have been recognized as so violative of public policy that they serve as an exception to the general rule of at-will employment are: (1) explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty (e.g., the Civil Rights Act, MCL 37.2701; the Whistleblowers' Protection Act, MCL 15.362; the Persons With Disabilities Civil Rights Act, MCL 37.1602), (2) where the alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course of employment (e.g., refusal to falsify pollution reports; refusal to give false testimony before a legislative committee; refusal to participate in a price-fixing scheme), and (3) where the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment (e.g., retaliation for filing workers' compensation claims). *Suchodolski*, 412 Mich at 695-696. The Supreme Court determined that

the matter before it involved only a corporate management dispute and that the dispute lacked "the kind of violation of a clearly mandated public policy that would support an action for retaliatory discharge." *Id*. at 696.

"Our Supreme Court's enumeration [in *Suchodolski*] of 'public policies' that might forbid termination of at-will employees was not phrased as if it was an exhaustive list." *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 573; 753 NW2d 265 (2008). This does not mean, however, that trial courts have unfettered discretion or authority to determine what may constitute sound public policy exceptions to the at-will employment doctrine. As observed in *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002):

> In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. . . .
>
> In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. See *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931). The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy.

Consistent with this observation, the *Terrien* Court noted that as a general rule, making social policy is a job for the Legislature, not the courts, *id*. at 67, and found

instructive the United States Supreme Court's mandate: " 'Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. As the term "public policy" is vague, there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy.' " *Id*. at 68, quoting *Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945). Thus, courts may only derive public policy from objective sources. *Kimmelman*, 278 Mich App at 573.

Notably, the three public policy exceptions recognized in *Suchodolski* entail an employee's exercising a right guaranteed by law, executing a duty required by law, or refraining from violating the law. *Id*. These three recognized circumstances remain the only three recognized exceptions and the list of exceptions has not been expanded. While the *Suchodolski* Court's enumeration of public policies that might forbid termination of at-will employees may not have been phrased as if it were an exhaustive list (*id*. at 573), our courts have yet to find a situation meriting extension beyond the three circumstances detailed in *Suchodolski*.

Defendant asserts that the trial court erred by failing to apply *Suchodolski*. In denying defendant's motion for summary disposition, the trial court detailed the rule in Michigan concerning at-will employment and also stated that plaintiff's claim against defendant was based on an exception to the rule, as stated in *Suchodolski*. The trial court further explicitly stated the three specific exceptions set forth in *Suchodolski*, indicating its familiarity with and intention to evaluate the claims under such exceptions. The trial court noted that plaintiff relied on MCL 333.17201, MCL 600.2922, and MCL 750.321 as the statutory bases for his claim. Noting an

unfortunate dearth of published binding caselaw on the precise issue "whether a termination of a medical professional's employment violates public policy where the claimant can prove that the firing was in response to an internal complaint relative to concerns about patient safety," the trial court then indicated that it was going to have to make its own "judgment call" and relied on out-of-state cases to conclude: "The life and health of hospital patients depend upon the skill and competency of the professional medical staff—physicians, registered nurses, and licensed practical nurses, like plaintiff Landin and Nurse Johnson. To hold that Landin has no claim against the Defendant, is in essence, to hold that no good deed shall go unpunished. That cannot be the law. The Court therefore denies the motion to dismiss."

The trial court did not, in fact, articulate whether plaintiff's claim fell under any of the specified exceptions of *Suchodolski*, nor did it initially identify any objective source from which to hold that plaintiff had a public policy claim, such as a particular statute (including any of those it cited as relied on by plaintiff). Because courts may only derive public policy from objective sources, *Kimmelman*, 278 Mich App at 573, and controlling law has as yet only identified three groups of public policy exceptions that serve as the basis for wrongful termination claims, the trial court erred by initially failing to apply controlling Michigan law and instead simply looking to cases outside our jurisdiction and to their factual similarity to justify its ruling.[1]

[1] The three statutory bases plaintiff cited for his claims, MCL 333.17201, MCL 600.2922, and MCL 750.321, would likely not survive a *Suchodolski* analysis in any event. MCL 333.17201 *et seq*. governs the practice of nursing and who may obtain a nursing license. MCL 600.2922 governs civil wrongful death actions that may be maintained by the deceased's spouse, children, descendants, parents, or other persons to

However, in an opinion issued only one month later, the trial court stated that it was holding, as matter of law, that "Michigan law recognizes a cause of action for wrongful termination in violation of the public policy exhibited by MCL 333.20176a(1)(a)." At that time, then, the trial court set forth an objective basis for plaintiff's public policy claim. While it still did not indicate which of the exceptions cited in *Suchodolski* that plaintiff's claim fell within, plaintiff has not alleged that the reason for his discharge was his failure or refusal to violate a law in the course of employment—exception (2) under *Suchodolski*. Thus, we presume that the trial court found plaintiff's claim "for wrongful termination in violation of the public policy exhibited by MCL 333.20176a(1)(a)" fell within exception (1) or (3).

MCL 333.20176a concerns health facilities and agencies and provides, in part:

> (1) A health facility or agency shall not discharge or discipline, threaten to discharge or discipline, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee or an individual acting on behalf of the employee does either or both of the following:
>
> (a) In good faith reports or intends to report, verbally or in writing, the malpractice of a health professional or a violation of this article, article 7, article 8, or article 15 or a rule promulgated under this article, article 7, article 8, or article 15.

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whom the decedent's estate would pass under the laws of intestate succession. MCL 750.321 is the criminal statute defining and describing the punishment for manslaughter. None of these statutes contain any explicit legislative statements concerning a statutory right or duty, let alone a prohibition of the discharge or other adverse treatment of employees who act in accordance with any statutory right or duty, nor do they concern a right conferred by well-established legislative enactment.

In order to serve as a basis for plaintiff's complaint, plaintiff must establish that the above statute meets exception (1) in *Suchodolski*, in that it contains an explicit legislative statement prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty, or exception (3), when the reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment. *Suchodolski*, 412 Mich at 695-696. As to exception (1), MCL 333.20176a contains an explicit legislative statement prohibiting discharge or discipline of an employee for specified conduct. It could also be argued that the specified conduct was that of acting in accordance with a statutory right or duty.

Exception (1) has been found to apply to the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. *Suchodolski*, 412 Mich at 695 n 2. The WPA was enacted to encourage employees to assist law enforcement and to protect those who engaged in "whistleblowing" activities. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997). "Whistleblowing" activities include reporting (or being about to report) an employer's violations of law, regulation, or rule to a public body and participation in an investigation held by a public body or in a court action. *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999).

Exception (1) has also been found to apply to the Michigan Civil Rights Act, MCL 37.2101 *et seq*. *Suchodolski*, 412 Mich at 695 n 2. The Civil Rights Act (CRA) was enacted for the purpose of promoting and protecting a specified public policy: it is "aimed at 'the prejudices and biases' borne against persons because of their membership in a certain class, and seeks to eliminate

the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v CA Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984) (citations omitted). The CRA states that the opportunity to obtain employment, housing, and the full and equal use of public accommodations, among other things, are "declared to be a civil right." MCL 37.2102(1).

It is well established that the purpose of the statutes regulating health care professionals, including those set forth in the Public Health Code (under which MCL 333.20176a falls), is to safeguard the public health and protect the public from incompetence, deception, and fraud. *Mich Ass'n of Psychotherapy Clinics v Blue Cross & Blue Shield of Mich (After Remand)*, 118 Mich App 505, 522; 325 NW2d 471 (1982). In enacting MCL 333.20176a, the Legislature clearly expressed a desire to further that policy by prohibiting retaliation against an employee who reports malpractice. And the right to report alleged acts of negligence (malpractice) is consistent with and implicit in the purposes of the Public Health Code and its statutory regulations governing health care professionals.

For the same reason, exception (3) in *Suchodolski*, 412 Mich at 695-696 (where the reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment) could also apply to MCL 333.20176a. We recognize that the only situation to which (3) has been applied thus far is the termination of an employee in retaliation for filing a workers' compensation claim. In describing this exception, however, *Suchodolski* cited *Sventko v Kroger Co*, 69 Mich App 644; 245 NW2d 151 (1976), wherein a panel of this Court noted that the purpose of the Worker's Disability Compensation Act, as set forth in its title, was " 'to promote the welfare of the people of

Michigan relating to the liability of employers for injuries or death sustained by their employees. The legislative policy is to provide financial and medical benefits to the victims of work-connected injuries in an efficient, dignified, and certain form.' " *Id*. at 647-648, quoting *Whetro v Awkerman*, 383 Mich 235, 242; 174 NW2d 783 (1970). The *Sventko* Court held that "[d]iscouraging the fulfillment of this legislative policy by use of the most powerful weapon at the disposal of the employer, termination of employment, is obviously against the public policy of our state." *Sventko*, 69 Mich App at 648.

The workers' compensation statutes and MCL 333.20176a share the same underlying purpose—to promote the welfare of the people of Michigan as it concerns health and safety. While the workers' compensation statutes were admittedly enacted specifically in the context of protecting employees who are injured in the workplace, it could be argued that reporting malpractice in the context of a medical workplace would have even more of a direct impact on the health and welfare of our citizens and that the right to report alleged malpractice in one's workplace without fear of repercussion is of at least equal, if not of greater, significance than benefitting and protecting victims of work-related injuries. Those employed in the health and medical fields would be best situated to report alleged acts of malpractice to the benefit of the public as a whole. And, if employers in those fields are permitted to terminate employees who report the malpractice of coworkers or others, they, like employers in workers' compensation cases, would be given free rein to use the most powerful tool at their disposal to attempt to deflect their potential liability, but to the detriment of the public and in direct violation of the purpose of the Public Health Code and regulatory statutes governing

the medical profession. Thus, because the statutory basis for plaintiff's public policy claim could support a public-policy-based wrongful discharge claim, the trial court did not err by denying defendant's motions for summary disposition.

Defendant further contends that plaintiff's claim falls squarely within the WPA and that it was thus plaintiff's exclusive remedy so that summary disposition was appropriate in defendant's favor. We disagree.

The Public Health Code provides, at MCL 333.20180(1):

> A person employed by or under contract to a health facility or agency or any other person acting in good faith who makes a report or complaint including, but not limited to, a report or complaint of a violation of this article or a rule promulgated under this article; who assists in originating, investigating, or preparing a report or complaint; or who assists the department in carrying out its duties under this article is immune from civil or criminal liability that might otherwise be incurred and is protected under the whistleblowers' protection act, 1980 PA 469, MCL 15.361 to 15.369. A person described in this subsection who makes or assists in making a report or complaint, or who assists the department as described in this subsection, is presumed to have acted in good faith. The immunity from civil or criminal liability granted under this subsection extends only to acts done pursuant to this article.

If plaintiff was simply reporting a violation of an article or rule under the Public Health Code, defendant's argument would succeed, given that the remedies provided by the WPA are exclusive and not cumulative. *Shuttleworth v Riverside Osteopathic Hosp*, 191 Mich App 25, 27; 477 NW2d 453 (1991). However, plaintiff did not originate a report or complaint alleging a violation of the Public Health Code, he accused a coworker of malpractice. To establish a cause of action for medical malpractice "a plaintiff must establish four

elements: (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). There is no requirement that in order to establish a claim of malpractice, one must necessarily allege a violation of the Public Health Code. The trial court did not err by denying defendant's motion for summary disposition based on the WPA.

Defendant next asserts that the trial court erred when it concluded that a genuine issue of material fact existed regarding the reasons for plaintiff's termination. We disagree.

To establish a prima facie case of unlawful retaliation plaintiff must show (1) that he engaged in a protected activity, (2) that this was known by defendant, (3) that defendant took an employment action adverse to plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. See, e.g., *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). For purposes of this argument, only Element (4) is at issue.

Defendant presented evidence that its policy for medication administration was for the nurse to watch the patient swallow the medication and then initial that the medication was given. Defendant also presented evidence concerning its discipline policies, including that termination could be a possible method of discipline for even a first offense of falsifying documents. Evidence was also presented that plaintiff admitted that he had violated the medication policy on two occasions, by signing his initials indicating that he had

administered medications when he had not, in fact, watched the patient swallow the medications, before the third incident that led to his termination.

Plaintiff presented evidence that he had regularly violated the medication policy without consequences while in another department in defendant's employ. Plaintiff presented further evidence that the coworker about whom he had filed a report was the individual who initiated the complaints regarding his failure to comply with the medication policy and had initiated the complaints only after she was aware of his accusations against her. Plaintiff presented evidence that the complaints were made within a short time after plaintiff filed his report, that the coworker had never filed a complaint against another employee, that defendant called him to the human resources department when it was discovered that he was speaking to the deceased patient's widow and questioned plaintiff about whether the widow was considering legal action against defendant, and that the coworker had violated defendant's policies on several occasions, which could also subject her to termination under defendant's discipline policy, yet she was not fired.

On the basis of the above evidence, the trial court properly determined that a question of fact existed for the jury regarding whether there was a causal connection between the protected activity and the adverse employment action.

Defendant next argues that the trial court erred by denying its motion to compel plaintiff to return confidential medical records of nonparties that he either stole or inadvertently received without patient authorization. We disagree.

This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion. *Shinkle v*

Shinkle (On Rehearing), 255 Mich App 221, 224; 663 NW2d 481 (2003). The issue of privilege has a bearing on whether materials are discoverable, MCR 2.302(B)(1) ("[p]arties may obtain discovery regarding any matter [that is] not privileged"). The interpretation and application of the physician-patient privilege is a legal question that is reviewed de novo by this Court. *Meier v Awaad*, 299 Mich App 655, 663; 832 NW2d 251 (2013). Once we determine whether the privilege is applicable to the facts of this case, we can determine whether the trial court's order was an abuse of discretion. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000). See *Dorris v Detroit Osteopathic Hosp Corp*, 220 Mich App 248, 250; 559 NW2d 76 (1996), aff'd 460 Mich 26 (1999).

As thoroughly explained in *Meier*, 299 Mich App at 666:

> The scope of the physician-patient privilege is governed entirely by the statutory language, as the privilege was not recognized under the common law. *Dorris*, 460 Mich [26, 33; 594 NW2d 455 (1999)]. "It is well established that the purpose of the statute is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make a full disclosure of symptoms and condition." *Id*. Because the privilege of confidentiality belongs solely to the patient, it can only be waived by the patient. *Id*. at 34, citing *Gaertner v Michigan*, 385 Mich 49, 53; 187 NW2d 429 (1971). "A patient may intentionally and voluntarily waive the privilege." *Dorris*, 460 Mich at 39. As reflected in the express language of MCR 2.302(B)(1), which governs the scope of discovery, the protection of privileged information supersedes even the liberal discovery principles that exist in Michigan. *Id*. at 37.

The physician-patient privilege statute provides, in pertinent part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any

> information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. [MCL 600.2157.]

The physician-patient privilege is an absolute bar that prohibits the unauthorized disclosure of patient medical records, including when the patients are not parties to the action. *Baker*, 239 Mich App at 463.

In this matter, plaintiff admitted copying the deceased patient's medical records and removing them from the hospital. In its motion to compel the return of confidential, nonparty documents, defendant sought the return of those documents as well as documents that defendant had "inadvertently" produced in response to plaintiff's discovery requests. Clearly, then, defendant's employees, other than plaintiff, took and copied patient records as well. Defendant then used the records during depositions and in its defense to try to establish that the accused coworker complied with protocol and that plaintiff was fired for a valid reason (by showing that he did not give medications per defendant's policy or falsified medication documents).

This is not a case similar to those cited by defendant wherein a party sought to compel the production of privileged information and was refused. Instead, this is a case wherein defendant sought to unring a bell. The materials were already disclosed and used by both parties, for better or worse. As indicated by the trial court, defendant was aware of plaintiff's possession of the records for well over a year before contending that they were protected by privilege and seeking their return. In addition, plaintiff and defendant placed the reason for plaintiff's termination at issue. The reason for his termination would be proved only by reference to

patient records showing whether plaintiff did, in fact, sign his initials indicating that he gave medications when he did not and the patients' complaints (or lack thereof) about receiving medications from plaintiff. Given those circumstances, the trial court's denial of defendant's motion for the return of confidential records and, instead, the grant of a protective order and the redaction of patient names was appropriate. The trial court did not abuse its discretion by denying defendant's motion to return confidential records.

Next, defendant raises several issues concerning the trial court's rulings on plaintiff's damages. Defendant first asserts that whether front pay was available and, if so, the amount recoverable were issues for the trial court to determine as a matter of law, not the jury. We disagree.

"Front pay" is defined as "a monetary award that compensates victims of discrimination for lost employment extending beyond the date of the remedial order." *Rasheed v Chrysler Corp*, 445 Mich 109, 117 n 8; 517 NW2d 19 (1994) (quotation marks and citation omitted). By extension, such pay would compensate victims of unlawful termination for lost employment extending beyond the date of a remedial order. Defendant primarily cites *Riethmiller v Blue Cross & Blue Shield of Mich*, 151 Mich App 188; 390 NW2d 227 (1986), in support of the proposition that front pay issues are not submissible to the jury and, we presume, our Supreme Court's statement in that case that "the trial court should have discretion in deciding, based on circumstances of each case, whether to award future damages." *Id*. at 201. This is not, however, a proclamation that whether front pay is to be awarded is an issue of law for the trial court to decide. The *Riethmiller* Court was reviewing decisions made by the trial court *in a*

bench trial and the issue whether such damages were awardable *at all*, as opposed to a defendant's remedy being limited simply to reinstatement.

Even if the determination whether future damages should be awarded is an issue for the trial court to decide, the trial court in this matter implicitly found such damages to be available. The trial court allowed plaintiff's expert to testify regarding plaintiff's lost wages as a result of his termination. And the allowance of an award of front pay damages is, according to *Riethmiller*, within the discretion of the trial court. Defendant has not claimed that the trial court abused its discretion.

Defendant further claims that the trial court should have disallowed front pay damages as being unduly speculative. The *Riethmiller* Court, however, unequivocally stated with reference to front pay that "[t]he fact that such damages may be speculative should not exonerate a wrongdoer from liability." *Id*. at 201. Thus, this argument fails.

Next, defendant contends that, because plaintiff had a duty to mitigate his damages, the trial court should have limited plaintiff's damages for front pay to the period up to when he quit the first job he obtained after being terminated by defendant (March 2008) or when he was fired from the next job he obtained (July 2008). We disagree.

Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing. *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). Specifically, when one has committed a legal wrong against another, the latter has an obligation to use reasonable means under the circumstances to avoid or minimize his or her damages and cannot recover for damages that could thus have been avoided.

Id. In the case of a wrongful discharge, the victim of the wrongdoing must make reasonable efforts to find employment after the discharge.

The defendant bears the burden of proving that the plaintiff failed to make reasonable efforts to mitigate damages. *Id*. The question whether the plaintiff's efforts to mitigate damages were reasonable under the circumstances is one for the trier of fact. *Id*. at 270-271. As stated in *Morris*, 459 Mich at 271:

> Determining the "reasonableness" of a job search is a fact-laden inquiry requiring thorough evaluation of, for example, the earnestness of a plaintiff's motivation to find work and the circumstances and conditions surrounding his job search, as well as the results of it. The extent to which a plaintiff continues his job search once he has found employment is simply one of many factors in this fact-laden determination of reasonableness. Much of this inquiry depends upon determinations of credibility, which are far more within the competence of the trial court than within the competence of appellate judges reading dry records.

"The plaintiff's back-pay award, if he succeeds at trial, is then reduced by the amount that he earned in mitigation." *Id*. at 264. Thus, contrary to defendant's assertion otherwise, the trial court appropriately submitted the issue of mitigation of damages to the jury. As clearly held in *Morris*, the issue was one of fact for the jury to decide.

Finally, defendant asserts that the trial court should have determined whether, regardless of what had transpired before plaintiff's firing, defendant would have fired plaintiff in any event when it learned that he had removed and copied confidential patient records (the after-acquired-evidence doctrine). Defendant asserts that this issue is to be determined as a matter of law and should not be submitted to the jury for resolution. Again, we disagree.

In *Wright v Restaurant Concept Mgt, Inc*, 210 Mich App 105; 532 NW2d 889 (1995), a panel of this Court held that where after-acquired evidence of misconduct by the employee was presented as well as evidence that the employer would have terminated the employee had it known of the misconduct, the employee was still not barred from all relief as a matter of law in his claim of wrongful discharge against his employer, but that any wrongdoing on his part could be reflected in the nature of the relief awarded to him. *Id*. at 112. It concluded that this approach "precludes the exoneration of either wrongdoer while preserving the statutory goal of deterring discrimination." *Id*. at 113. The *Wright* Court further held that the effect of after-acquired evidence of employee misconduct on an action would vary with the facts but that, generally, neither reinstatement nor front pay would be an appropriate remedy; however, a good starting point for determining back pay was to calculate back pay from the date of the unlawful discharge to the date that the employee's misconduct was discovered. *Id*. at 113 n 1.

Horn v Dep't of Corrections, 216 Mich App 58, 68; 548 NW2d 660 (1996), followed *Wright* and noted that in the factual situation before it, "the trial court appropriately determined that no genuine factual issues remained regarding whether defendant would have dismissed plaintiff for [the misconduct disclosed in the after-acquired evidence]." Thus, it can be concluded from *Horn* that the preliminary issue concerning whether the defendant would have terminated the plaintiff on the basis of the after-acquired evidence is a factual question. If the trial court found that no factual issue existed, the trial court could make the determination whether the employer would have dismissed the employee on the basis of the after-acquired evidence, if the trial court found that fac-

tual issues existed on the issue, the trial court would properly submit the issue to the jury.

In this matter, defendant stated that it would have terminated plaintiff had it known that he had copied and removed the deceased patient's (and, apparently a few other patients') medical records. However, aside from defendant's self-serving statement, there is no evidence that it would have done so. The fact that there was a policy in place prohibiting such conduct is of no consequence, given the evidence concerning other policies in place, employee's violations of the same, and defendant's failure to terminate other employees for violating its policies. Because a question of fact existed on this issue, the trial court did not err by submitting the issue to the jury.

Defendant next claims that the trial court erroneously denied its motions in limine and thereafter admitted evidence at trial in violation of the rules of evidence, precluded relevant testimony, and abused its discretion by the admission or preclusion of other specific evidence. A trial court's evidentiary decisions, preserved for review, are reviewed for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Unpreserved evidentiary issues are reviewed to determine whether there was plain error affecting a party's substantial rights. *Hilgendorf v St John Hosp and Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001). Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of a party is affected or unless failure to do so would be inconsistent with substantial justice. MRE 103(a); MCR 2.613(A).

MRE 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the

> Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Defendant contends that evidence concerning plaintiff's coworker's actions, testimony from witnesses regarding the deceased patient's medical records, and the argument by plaintiff's counsel regarding whether plaintiff's coworker should have been terminated was irrelevant and thus inadmissible because it had no bearing on whether plaintiff was terminated for exercising a right in violation of public policy. However, under the statute relied upon by the trial court to find that plaintiff had a viable public policy cause of action, plaintiff would be protected if he were reporting the malpractice of a health care professional. Thus, whether that health care professional engaged in what could be deemed malpractice would be relevant. Thus, evidence regarding the coworker's actions/inactions, other witnesses' reviews of the deceased patient's medical records and what type of care they thought he received from the coworker and what type of care they thought he should have received, as well as the argument by counsel, if supported by the evidence, that the coworker should have been terminated, was relevant under MRE 401 and thus admissible under MRE 402.

Similarly, evidence of the coworker's performance history would be relevant. This evidence would not only be relevant to support plaintiff's claim of malpractice and his report that he was concerned that the coworker was a danger, but also to establish that the stated cause for his termination was a pretext. Because plaintiff was able to show that his coworker violated defendant's medication policy and violated other policies that listed termination as a possible punishment on several occasions without, in fact, being terminated, the evidence was relevant to his claim of pretext since he was allegedly terminated for the same actions.

Defendant further contends that the trial court abused its discretion by prohibiting evidence that absolved the coworker, such as defendant's internal death review committee's report concerning the deceased patient's death, the Bureau of Health Professions' report finding that defendant and plaintiff's supervisor had engaged in no wrongdoing, and the fact that the deceased patient's widow did not file any lawsuit against defendant, despite the fact that she had his medical records. The Bureau of Health Professions' report would be irrelevant and thus inadmissible because there was no assertion that the supervisor or defendant engaged in malpractice associated with the deceased patient's death. Plaintiff's allegation in his report was solely against his coworker. His protected activity, then, was to report the malpractice of his coworker. Therefore, a report finding that defendant and the supervisor engaged in no wrongdoing would have no bearing on that issue.

An internal report generated by defendant that plaintiff's coworker engaged in no wrongdoing would be of limited value given that the report was generated as a result of plaintiff's report that, he claims, led to his

termination. And, even if we were to find that this document should have been admitted, given the remaining evidence presented to the jury, it cannot be said that the exclusion of this singular document affected defendant's substantial rights. The fact that the deceased patient's widow did not sue defendant is of no consequence to the ultimate issue as framed by the trial court—whether plaintiff was terminated in violation of public policy for reporting the malpractice of a healthcare employee. The lack of a lawsuit does not equate with a lack of malpractice.

Finally, the trial court did not err by admitting testimony that plaintiff's supervisor allegedly falsified documents. Testimony was presented that the supervisor had received an e-mail from a now-deceased nurse concerning a prior incident with plaintiff. The date that the e-mail was received was a matter of contention, as were notations made on the e-mail. The questions concerning the e-mail's date and its authentication were brought out during examination of the supervisor, who gave her explanation concerning the date and her notations. Issues of witness credibility are for the jury to decide. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Because the alleged author of the e-mail could not verify the meaning of the e-mail or the date it was sent, the jury was free to believe the supervisor's explanation or not. The trial court did not err by allowing plaintiff to bring the somewhat confusing issue before the jury for its determination.

Defendant next argues that the trial court failed to properly instruct the jury on the proper measure of damages for loss of medical benefits. We review properly preserved challenges to the jury instructions de novo on appeal. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). However, this Court reviews

unpreserved claims of instructional error for plain error that affected substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Pursuant to MCR 2.512(C), "[a] party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict . . . stating specifically the matter to which the party objects and the grounds for the objection." A party is deemed to have waived a challenge to the jury instructions when the party has expressed satisfaction with, or denied having any objection to, the instructions as given. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). A waiver extinguishes any instructional error and appellate review is precluded. *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007).

Defendant requested an instruction concerning the measure of damages as it related to health insurance, and the trial court denied the request. When the trial court asked if there was any objection to the instructions as read (which did not include the proposed instruction), defendant indicated that it had no objection. Affirmatively expressing satisfaction with the instructions, defendant has waived any instructional error on appeal and we need not review its allegation of error.

Defendant next argues that the trial court erred by denying its motion for judgment notwithstanding the verdict (JNOV), a new trial, or remittitur. We review de novo a court's decision on a motion for JNOV. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005) (opinion by TAYLOR, C.J.). When reviewing a motion for JNOV, a court must "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a

claim as a matter of law, should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

The grant or denial of a motion for a new trial or remittitur is reviewed for an abuse of discretion. *Shaw v Ecorse*, 283 Mich App 1, 16-17; 770 NW2d 31 (2009). When reviewing such motions, this Court views the evidence in the light most favorable to the nonmoving party, giving due deference to the trial court's decision because of its ability to evaluate the credibility of the testimony and evidence presented to the jury. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 629-630; 769 NW2d 911 (2009).

Defendant asserts that its motion for JNOV or a new trial should have been granted for all of the reasons set forth in its prior arguments. As already addressed, defendant's arguments fail.

With regard to remittitur, MCR 2.611(E)(1) provides that if the court finds that the only error in the trial was the excessiveness or the inadequacy of the verdict, it may deny a motion for a new trial on condition that within 14 days, the nonmoving party consents to the entry of a judgment in an amount found by the court to be the highest (if the verdict was excessive) or the lowest (if the verdict was inadequate) amount the evidence will support. In determining whether remittitur is appropriate, the proper consideration is whether the jury award was supported by the evidence. *Clemens v Lesnek*, 200 Mich App 456, 464; 505 NW2d 283 (1993); MCR 2.611(E)(1). This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989). The reviewing court should limit its consideration to:

> [(1)] whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; [(2)] whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and [(3)] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. [*Id*. at 532-533.]

If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989).

In reviewing motions for remittitur, courts must be careful not to usurp the jury's authority to decide what amount is necessary to compensate the plaintiff. *Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009). Analysis of this issue thus must necessarily start with the principle that the adequacy of the amount of the damages is generally a matter for the jury to decide. *Kelly v Builders Square*, *Inc*, 465 Mich 29, 35; 632 NW2d 912 (2001). When reviewing the trial court's decision, we must also afford due deference to the trial court's ability to evaluate the jury's reaction to the evidence, and only disturb the trial court's decision if there has been an abuse of discretion. *Palenkas*, 432 Mich at 532.

Courts should exercise the power of remittitur with restraint. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 522; 780 NW2d 900 (2009). "A verdict should not be set aside simply because the method of computation used by the jury in assessing damages cannot be determined, unless it is not within the range of evidence presented at trial." *Diamond v Witherspoon*, 265 Mich App 673, 694; 696 NW2d 770 (2005).

Defendant asserts that damages for emotional distress were not proven in this case, at least to the extent awarded, and that remittitur was appropriate. We disagree.

First, defendant did not assert that the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact and we do not see that it was. Second, defendant claims that the award was supported by only minimal, subjective evidence, but does not allege that the verdict was beyond the limits of what reasonable minds would deem just compensation for the injury sustained or that it was beyond that awarded in similar cases both within the state and in other jurisdictions. Defendant has thus not asserted that any of the factors to be considered under *Palenkas*, 432 Mich at 532-533, warrant granting remittitur.

In addition, while plaintiff's assertions that he suffered depression and was unable to support his family, was embarrassed by his termination, and was terminated from the first job he got after the termination because of the termination were subjectively reported, a plaintiff may testify regarding his or her own subjective feelings to place emotional damages at issue. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 464; 750 NW2d 615 (2008). In *Wilson v Gen Motors Corp*, 183 Mich App 21, 40; 454 NW2d 405 (1990), a panel of this Court upheld an award of $375,000 in emotional damages when the plaintiff submitted "only testimony as to her own subjective feelings" after being terminated on the basis of race or gender. *Id*. The *Wilson* Court recognized that the trial court was in the best position to make an informed decision regarding the excessiveness, or lack thereof, of the award because it could observe the witnesses and the jury at trial. *Id*. We give

the same recognition and find that defendant has failed to establish that remittitur was warranted with respect to the award for emotional damages.

Defendant also asserts that the jury's verdict regarding plaintiff's economic loss was excessive and not supported by the evidence. According to defendant, the jury completely adopted the approach taken by plaintiff's counsel and awarded plaintiff a windfall.

The future damages awarded to plaintiff were $235,666.53 in wages. Plaintiff's expert presented a method for determining the award and testimony supporting this award. Defendant presented no testimony, expert or otherwise, to refute the method employed. Thus, the fact that the jury adopted the method for determining this award was of no surprise and the award did not, as claimed by defendant, exceed the amount supported by the evidence. Finally, defendant asserts that the jury verdict was premised on unfair and prejudicial evidence. As previously indicated, the trial court made no erroneous evidentiary rulings. Thus, this argument fails.

Affirmed.

JANSEN, P.J., and K. F. KELLY, J., concurred with SERVITTO, J.

In re FILIBECK ESTATE

Docket No. 315107. Submitted May 13, 2014, at Marquette. Decided June 5, 2014, at 9:00 a.m. Leave to appeal sought.

Heidi J. Filibeck, as personal representative of the estate of her deceased husband Stephen R. Filibeck, brought an action in the Menominee Circuit Court, Family Division, against Laura J. Beal, Stephen Filibeck's daughter from a previous marriage, seeking to recover funds that Beal had helped raise to pay her father's medical bills when he was diagnosed with cancer shortly after losing his job and his health insurance. With Stephen Filibeck's approval, Beal had put these funds in a separate personal account in her own name with her sister, Lisa Filibeck, named as the beneficiary. Before his death, however, Stephen Filibeck's employment was briefly reinstated so that he could retire with full medical benefits. As a result of this and of Beal's negotiations to have her father's medical bills reduced, most of the funds she had raised were not necessary to cover his medical costs. In accordance with her father's stated wishes and at his direction, she used some of the money to pay off her father's mortgage and other bills, then split the remainder between herself and her sister. The court, William A. Hupy, J., ruled that Stephen Filibeck did not have the power to give his daughters the money because it had been raised to help with his medical expenses and therefore was not his to give. The court imposed a constructive trust on the funds and ordered Beal to pay them to the estate. Beal appealed.

The Court of Appeals *held*:

1. The court did not clearly err by finding that the funds at issue were donations raised for the specific purpose of covering Stephen Filibeck's medical treatments rather than profit derived from payments for goods or services. Although the form of the fundraising campaign resulted in some participants' receiving consideration in exchange for their money, the goods or services they received had been donated, and the participants intended for the money they gave to defray the decedent's medical costs. Accordingly, the trial court correctly imposed a constructive trust on the funds.

2. The trial court did not clearly err by finding that Stephen Filibeck had directed Beal to divide the funds between herself and her sister. However, the funds could not be considered a valid gift because the funds were not his to give and they had been neither actually nor constructively delivered.

Affirmed.

Lynette L. Erickson for Heidi J. Filibeck.

Gerald Mason for Laura Beal.

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM. Laura J. Beal appeals by right the probate court's order that imposed a constructive trust on funds kept in her name that had been raised to pay the medical bills of decedent Stephen R. Filibeck and requiring her to pay those funds to the estate of Stephen J. Filibeck. We affirm.

For the most part, the facts in the instant matter are undisputed. Stephen R. Filibeck had been employed by the state of Michigan, but was laid off as a result of budget cuts and lost his health insurance, among other things, as a result. Several months later, he was diagnosed with cancer, which would require extensive and expensive medical treatment. Laura J. Beal, one of Stephen's daughters from a prior marriage, spearheaded a fundraising campaign for the purpose of defraying Stephen's medical expenses. The campaign largely consisted of a benefit dinner that, through the efforts of Laura and numerous other people, raised approximately $45,000, which was deposited in an account in Laura's name. However, Stephen later regained his health benefits when he was reclassified as a retiree. Stephen directed that a sum of money from the fund be used to pay off his mortgage, and some other

funds were withdrawn on an as-needed basis for various unchallenged purposes. Upon Stephen's death, approximately $30,000 remained in the account.

Stephen died intestate, survived by his wife, Heidi J. Filibeck, who is the personal representative of his estate; Laura; and his other child from the former marriage, Lisa Filibeck. According to Laura, shortly before his death, Stephen directed that the approximately $30,000 remaining in the account be divided equally between Laura and Lisa. Laura's theory was that she raised the funds, so they should belong to her, and in any event, Stephen had given the money to his daughters during his lifetime. Heidi contends that the money remaining in the account properly belonged in Stephen's estate, and further notes that some medical expenses remained outstanding and unpaid by Stephen's insurance. Heidi's theory was that the donations were meant to help with decedent's medical and other bills, and were not for the daughters' personal use. Some testimonial evidence supported the factual underpinnings for both parties' positions. The trial court concluded that although Stephen had in fact instructed Laura to divide the funds between herself and Lisa, Stephen had no power to do so because he was not the owner of the funds at the time; therefore, the court imposed a constructive trust on the funds because they were donated for the purpose of Stephen's medical treatment.

A constructive trust is an equitable remedy created not by intent or by agreement, but by the operation of law. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). The imposition of a constructive trust " 'makes the holder of legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest.' " *Id.*, quoting *Arndt v Vos*, 83

Mich App 484, 487; 268 NW2d 693 (1978). A constructive trust may be imposed when "necessary to do equity or to prevent unjust enrichment[.]" *Kammer Asphalt Paving Co*, *Inc v East China Twp Schools*, 443 Mich 176, 188, 504 NW2d 635 (1993) (citations and quotation marks omitted). This Court reviews equitable decisions of the probate court de novo, but overturns any underlying factual findings only upon a finding of clear error. *In re Temple Marital Trust*, 278 Mich App 122, 141-142; 748 NW2d 265 (2008). The Court is also mindful that equity is a matter of grace and discretion applied to the particular circumstances of each particular case. *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947).

We see no clear error in the trial court's finding that the funds at issue were raised for the purpose of covering Stephen's medical treatments, rather than more generally for whatever Stephen might wish. Furthermore, there is no clear error in finding that the funds were donated rather than, as Laura contends on appeal, essentially profit derived from payments for goods or services. Although the form of the fundraising campaign did indeed involve some of the participants receiving some kind of consideration in exchange for their monies, the testimony unambiguously shows that the "consideration" was itself donated and that the form was merely an entertaining pretext. The Court takes notice that such fundraising campaigns—raffling off donated goods or services, charging to partake of donated food and drink, and the like—are common, and it is well established that courts look to the substance of things rather than superficialities. There is no doubt in the record that the money that ended up in the fund came to be there because the people who parted with the money intended to make donations for the purpose of defraying Stephen's medical costs. Furthermore,

although it is undisputed that Laura spearheaded the effort and expended considerable personal resources in doing so, the record does not show her to have done so singlehandedly.

The instant case is in many ways similar to *Babcock v Fisk*, 327 Mich 72; 41 NW2d 479 (1950). In that case, a four-year-old girl lost both arms in a terrible accident, whereupon "a number of sympathetic people" undertook to raise funds for her needs, an effort that ultimately raised significantly more than the girl needed. *Id*. at 75. The fundraisers formed a committee to determine how to administer the funds; however, the girl's father disagreed with the committee's proposal and sought possession of the money as her guardian. *Id*. at 75-76. Although in that case an explicit trust was formed, our Supreme Court nevertheless considered the intent of the donors to be dispositive; if they intended the money to be an outright gift, it would belong to the girl, but if they intended the money to be used on her behalf, it would belong to the trust. *Id*. at 77-78. "Determination of this issue, under the circumstances and conditions attending the instant case, should be made primarily in the light of that which motivated the contributors, rather than what might have been the concept, desire or thought of some of the solicitors, or of those indirectly beneficially interested in the contributions." *Id*. at 79. The Court found it "quite inconceivable that the donors designed a direct and absolute gift of so large a sum of money to a 5-year-old girl, without contemplating that some plan for the preservation, control and use of the fund would be adopted; and that the perfecting of such a plan would be accomplished by those who solicited the contributions." *Id*. at 82.

As in *Babcock*, the donors of the funds at issue unambiguously did not intend to make them an outright gift. Rather, they were intended for a particular purpose, and the necessary implication is that those funds would in some way be administered to effectuate that purpose. Although no explicit trust was set up here, we conclude that the unavoidable consequence of the circumstances is the same: that "the solicitors of the fund here involved acted as agents of the donors" and as a consequence they "now occupy the position of trustees[.]" *Babcock*, 327 Mich at 83. We agree with the trial court that equity compels the same result here: the money Laura received was not for her benefit. Although the money was kept in her name, apparently with Stephen's approval, the trial court correctly concluded that her role was essentially that of a fiduciary, and so the trial court did not err by imposing a constructive trust on the funds.

Nonetheless, also as in *Babcock*, the funds raised for the beneficiary's needs ultimately turned out to vastly exceed what was necessary to carry out that purpose, which raises the question as to what, under the circumstances of this case, is the scope of the trustees' duties. *Babcock*, 327 Mich at 83. Again, we see no clear error in the trial court's finding that Stephen actually directed Laura to divide the funds between herself and Lisa. However, Stephen was not the owner of the funds and could not make a gift thereof. Additionally, Laura argues that the only possible beneficiary of the constructive trust must be Stephen, and it does not appear entirely proper to frustrate his expressed wishes.[1] She

[1] We recognize Laura's argument that expending a portion of the fund toward Stephen's mortgage may not have been in keeping with the intended purpose of the fund. However, although Heidi may have incidentally benefited because she lived in the residence, paying off Stephen's mortgage was to his benefit and did involve paying a bill, albeit

notes further that Stephen was an adult, whereas the beneficiary of the trust in *Babcock* was a child.

However, Laura's own testimony shows that even she did not believe the money in the account was Stephen's to use in any way he wished. She withdrew the funds from the account a few days before Stephen's death, when it was apparent that he would not live much longer, but she indicated that had Stephen miraculously survived, the money would have remained intended for his benefit. Furthermore, although the testimony is not entirely clear, it appears that Stephen did not direct that Laura immediately consider the money to be hers and her sister's, but rather that they should keep the remainder at some undefined point in the future.

In any event, a gift, whether *inter vivos* or *causa mortis*, requires not only intent to convey something and acceptance by the intended recipient, but also delivery or at least written instructions to make a delivery. See *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965); *Lumberg v Commonwealth Bank*, 295 Mich 566, 568; 295 NW 266 (1940). Gifts *causa mortis* may even be upheld on a constructive trust theory as long as *some* kind of delivery or written instruction has been made. See *In re Freedland Estate*, 38 Mich App 592, 607-608; 197 NW2d 143 (1972). The trial court found the requisite intent, and Laura's actions prove acceptance. Unfortunately, Stephen left no written instruction to that effect and there is no evidence that Stephen made any kind of delivery, not even an arguable constructive delivery. That being the case, we must conclude that there was no valid gift. Laura, as constructive trustee of the funds and there-

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not a medical one. Consequently, we are not persuaded that it falls into the same class of ultra vires acts as a trustee's paying out a portion of a trust to him- or herself.

fore a fiduciary, could not simply pay the remainder of the trust to herself under the circumstances.

We therefore affirm the trial court. Plaintiff, being the prevailing party, may tax costs. MCR 7.219(A).

BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ., concurred.

BEDFORD PUBLIC SCHOOLS v BEDFORD EDUCATION ASSOCIATION, MEA/NEA

Docket No. 314153. Submitted April 1, 2014, at Lansing. Decided June 10, 2014, at 9:00 a.m. Leave to appeal sought.

The Bedford Education Association (BEA) filed an unfair-labor charge with the Michigan Employment Relations Commission against Bedford Public Schools (respondent), alleging that the parties had entered into a collective-bargaining agreement that expired on June 30, 2010. The parties had begun negotiating a new agreement, but the negotiations were unsuccessful, and the BEA filed its unfair-labor charge on December 8, 2011. The BEA charged that respondent had violated MCL 423.210(1)(a) by interfering with public employees' rights and MCL 423.210(1)(e) by refusing to bargain collectively under the public employment relations act (PERA), MCL 423.201 *et seq*., and that respondent had violated MCL 423.215b by failing to increase the wages of teachers who had acquired additional education before the 2011-2012 school year. Under the expired agreement, a teacher's salary could be raised by a "step increase" based on the teacher's years of work for the employer or by a "lane change" based on how much graduate education the teacher had completed. The BEA asserted that MCL 423.215b(1), which was added by 2011 PA 54, effective June 8. 2011, only prohibits step increases, not lane changes, while negotiations for a new collective-bargaining agreement are ongoing. The hearing officer agreed, reasoning that MCL 423.215b(1) explicitly refers to step increases but not lane changes. MERC, however, ruled that MCL 423.215b does prohibit lane changes in the absence of an effective collective-bargaining agreement, that respondent had acted in compliance with MCL 423.215b, and that respondent had consequently not violated its duty to bargain under MCL 423.210(1)(e). MERC dismissed the BEA's unfair-labor charge in its entirety, and the BEA appealed by right.

The Court of Appeals *held*:

1. MCL 423.215b unambiguously prohibits a public employer from paying any wage increases in the absence of an effective

collective-bargaining agreement. MCL 423.215b(1) provides that after a collective-bargaining agreement expires, a public employer must pay and provide wages and benefits at levels and amounts no greater than those in effect when the collective-bargaining agreement expired until a successor agreement is in place. The statute states that the prohibition includes increases that would result from wage step increases. The BEA argued that the explicit reference to step increases but not lane changes in MCL 423.215b(1) meant that the Legislature intended to allow lane changes during negotiations for a successor collective-bargaining agreement. "Lane change" is a term of art specific to public school teachers, however, and PERA applies to all public employees. By its plain language, then, the limitation in MCL 423.215b(1) must also include lane changes. MCL 423.215b(3) further provides that for collective-bargaining agreements that expired before June 8, 2011, the requirements of MCL 423.215b apply to limit wages and benefits to the levels and amounts in effect on that date. Therefore, MCL 423.215b unambiguously prohibited respondent from paying increased wages on the basis of lane changes accrued after 2011 PA 54 became effective on June 8, 2011.

2. The BEA also asserted that MCL 423.215b was unconstitutional, contending that the teachers had accrued a vested right in receiving lane changes at the beginning of the 2011-2012 school year and that as applied by MERC, MCL 423.215b retroactively deprived them of that accrued, vested right. MCL 423.215b, however, was not retroactively applied to the teachers, but was instead applied prospectively from its effective date of June 8, 2011. The teachers did not have a vested right under their contract because there was no collective-bargaining agreement in effect on that date. Rather, they had no more than a mere expectation that the prior law, under which a public employer was obligated to continue the wage terms of the expired collective-bargaining agreement until an impasse in negotiation occurred, would continue. The Legislature has the right to extinguish statutory rights that are not vested rights, and it enacted MCL 423.215b to prohibit public employers from increasing wages under the terms of an expired collective-bargaining agreement. MCL 423.215b did not unconstitutionally deprive the teachers of any vested right.

Affirmed.

PUBLIC EMPLOYMENT — TEACHERS — COLLECTIVE-BARGAINING AGREEMENTS — EXPIRATION — PAYMENT OF STEP INCREASES AND LANE CHANGES.

MCL 423.215b(1), which provides that after a collective-bargaining agreement expires, a public employer must pay and provide wages and benefits at levels and amounts no greater than those in effect when the collective-bargaining agreement expired until a succes-

> sor agreement is in place, prohibits a public employer from paying any wage increases in the absence of an effective collective-bargaining agreement; the prohibition includes increases that would result from wage step increases, which are based on years of work for the employer, i.e., seniority, but also includes increases that would result from lane changes, which are based on how much graduate education a teacher has completed; for collective-bargaining agreements that expired before June 8, 2011, the effective date of the act that added MCL 423.215b , the statute limits the payment of wages and the provision of benefits to the levels and amounts in effect on that date.

Collins & Blaha, PC (by *Gary J. Collins* and *John C. Kava*), for the Bedford Public Schools.

White, Schneider, Young & Chiodini, PC (by *Michael M. Shoudy* and *William C. Camp*), for the Bedford Education Association, MEA/NEA.

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

PER CURIAM. The charging party, the Bedford Education Association (BEA), appeals by right the order of the Michigan Employment Relations Commission (MERC) determining that MCL 423.215b(1) prohibits a public-school employer, "after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place," from increasing a public-school employee's salary on the basis of additional educational achievement. We conclude that MCL 423.215b does not unconstitutionally deprive public employees of any vested right and that MERC correctly applied the statute. Accordingly, we affirm.

I. FACTS AND PROCEEDINGS

On December 8, 2011, the BEA filed its charge against respondent, Bedford Public Schools (hereinafter, "the board"), alleging that the parties had entered a

collective-bargaining agreement (CBA) effective July 1, 2007, that expired on June 30, 2010. The BEA also alleged that in May 2010 the parties began negotiating for a new CBA but that the negotiations continued to be unsuccessful. The BEA charged that the board had violated MCL 423.210(1)(a) by interfering with public employees' rights and MCL 423.210(1)(e) by refusing to bargain collectively under the public employment relations act (PERA), MCL 423.201 *et seq*. The BEA also charged that the board had violated § 15b of PERA, MCL 423.215b, by failing to increase the wages of teachers who had acquired additional education before the 2011-2012 school year.

According to the expired CBA, a teacher's salary could be raised by a "step increase" based on years of work for the employer, i.e., seniority, or by a "lane change" based on how much graduate education the teacher had completed. A lane change is also occasionally referred to as a "rail increase." A teacher's salary would be determined from a table in the CBA, with the vertical axis being years of work experience and the horizontal axis accounting for the extent of the teacher's graduate education.

Under previous Michigan law, when a CBA expired and a new CBA had not been reached, a public-school employer was obligated to pay its teachers both step increases and lane changes in accordance with the terms of the expired CBA while negotiations were ongoing and an impasse had not yet been reached. But 2011 PA 54, which became effective on June 8, 2011, added § 15b to PERA. The added section provides in relevant part:

> (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in

> place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date. The public employer is authorized to make payroll deductions necessary to pay the increased costs of maintaining those benefits.
>
> (2) Except as provided in subsection (3), the parties to a collective bargaining agreement shall not agree to, and an arbitration panel shall not order, any retroactive wage or benefit levels or amounts that are greater than those in effect on the expiration date of the collective bargaining agreement.
>
> (3) For a collective bargaining agreement that expired before the effective date of this section, the requirements of this section apply to limit wages and benefits to the levels and amounts in effect on the effective date of this section. [MCL 423.215b.]

The BEA argued that MCL 423.215b(1) only prohibits step increases, not lane changes, while negotiations for a new CBA are ongoing. The BEA notes that in previous decisions, MERC stated that step increases and lane changes are distinguishable components of wages. On the other hand, the board argued that MCL 423.215b(1) prohibits paying all wage increases while negotiations are ongoing.

The hearing officer presiding over the case issued a decision and recommendation that concluded that MCL 423.215b(1) does not prohibit lane changes in the absence of an effective CBA, resulting in the board having breached its duty to bargain, MCL 423.210(1)(e), by unilaterally altering existing terms

and conditions of employment when it withheld lane changes for the 2011-2012 school year. The hearing officer reasoned that MCL 423.215b(1) explicitly refers to step increases but not lane changes; consequently, lane changes were not within the statute's scope. The hearing officer also reasoned that the purpose of MCL 423.215b is to pressure public employees to reach a new CBA without undue delay. The hearing officer further reasoned that this purpose was advanced by prohibiting step increases because nearly all public employees receive step increases. On the other hand, prohibiting lane changes would not pressure all public employees because relatively few earn lane changes.

The board timely filed exceptions to the hearing officer's recommended order, and MERC ruled that MCL 423.215b does prohibit paying lane changes in the absence of an effective CBA. MERC first determined that MCL 423.215b is unambiguous. It then explained that according to its previous decisions, both step increases and lane changes are contractually mandated terms that the employer has no discretion in paying to the employee. In addressing the ultimate issue, MERC reasoned that in its prior decisions it had "treated lane changes or rail increases as a type of step increase" and that under principles of statutory construction, the Legislature must be presumed to have been aware of these prior rulings. Consequently, MERC concluded that "Act 54 prohibits the payment of step increases whether based on increased years of service or educational advancement."

On the basis of this reasoning, MERC ruled that the board had acted in compliance with MCL 423.215b when it refrained from making lane-change wage adjustments. Consequently, the board had not violated its duty to

bargain under MCL 423.210(1)(e). MERC therefore dismissed the BEA's unfair labor charge in its entirety. The BEA now appeals by right.

II. ANALYSIS

A. STANDARD OF REVIEW

MERC's findings of fact are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole. MCL 423.216(e); Const 1963, art 6, § 28. "Legal rulings of an administrative agency are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law." *Amalgamated Transit Union v Southeastern Mich Transp Auth*, 437 Mich 441, 450; 473 NW2d 249 (1991). We review de novo whether an error of law has occurred, and, if so, whether it is substantial and material. *Macomb Co v AFSCME Council 25 Locals 411 & 893*, 494 Mich 65, 77; 833 NW2d 225 (2013). We also review de novo issues of statutory interpretation. *Id*.

The primary purpose of statutory interpretation is to identify and effectuate the intent of the Legislature. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217; 801 NW2d 35 (2011). When the language of a statute is clear and unambiguous, judicial construction is neither permitted nor required, and the statute must be enforced as written. *Mt Pleasant Pub Sch v Mich AFSCME Council 25*, 302 Mich App 600, 608; 840 NW2d 750 (2013). "As far as possible, effect should be given to every phrase, clause, and word in the statute." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Only when the statutory language is ambiguous is it "proper for a court to go beyond the statutory text to ascertain legislative intent." *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223

(2013). A provision of a statute is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007).

B. DISCUSSION

We conclude that the plain language of MCL 423.215b unambiguously prohibits a public employer from paying any wage increases in the absence of an effective CBA. Therefore, we affirm without adopting MERC's reasoning.

"The PERA governs the relationship between public employees and governmental agencies." *Macomb Co*, 494 Mich at 77-78. Michigan's judiciary traditionally accords deference to MERC's interpretation of PERA. See *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 176-177; 445 NW2d 98 (1989). Although not bound by an agency's determination on a question of law, this Court will respectfully consider the agency's construction of a statute and provide cogent reasons for construing the statute differently. *Pontiac Sch Dist v Pontiac Ed Ass'n*, 295 Mich App 147, 152; 811 NW2d 64 (2012).

The BEA argues—as it did in the proceedings before MERC—that the Legislature's explicit reference to "step increases" in MCL 423.215b(1) but not "lane changes" or "rail increases" means that the Legislature intentionally allowed for lane changes during negotiations for a successor CBA.[1] Although much of the parties' argument addresses whether and to what ex-

[1] The term "step increase" refers to an employee's wage increase based on years of service. See *Jackson Community College Classified & Technical Ass'n v Jackson Community College*, 187 Mich App 708, 710; 468 NW2d 61 (1991). The term "lane change" refers to a wage

tent lane changes are included within the scope of MCL 423.215b, the statute plainly addresses all public employees, not just public-school teachers. The Legislature would have no apparent reason to use technical terms that are specific to public-school teachers when drafting a statute that applies to all public employees.

The first sentence of MCL 423.215b(1) provides that when a CBA expires and before a successor CBA is reached, "a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement." Subsection (3) provides that with respect to CBAs that expired before the effective date of 2011 PA 54, June 8, 2011, "the requirements of this section apply to limit wages and benefits to the levels and amounts in effect on the effective date of this section." MCL 423.215b(3). The word "level" is relevantly defined as "a position or plane in a graded scale of value[s]." *Random House Webster's College Dictionary* (1997). The word "amount" is relevantly defined as "quantity; measure[.]" *Id*.[2] Thus, the first sentence of Subsection (1) and Subsection (3) of MCL 423.215b, read together, provide that the board may pay its teachers no more than the quantity of wages and benefits of the wage scale applicable on the effective date of 2011 PA 54. Logically, this limitation on quantity and scale of wages would include lane changes, as lane changes increase both wage quantity and wage scale.

The second sentence of MCL 423.215b(1) provides that "[t]he prohibition in this subsection includes in-

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increase based on the extent of graduate education. See *Ed Minnesota-Greenway, Local 1330 v Indep Sch Dist No 316*, 673 NW2d 843, 846 n 1 (Minn App, 2004).

[2] When a statute does not expressly define a term, a court may consult dictionary definitions for its common and accepted meaning. *Mt Pleasant Sch*, 302 Mich App at 608.

creases that would result from wage step increases." But the word "includes" may be used by the Legislature as a term of enlargement or of limitation, so the word in and of itself is not determinative of how it is intended to be used. *Frame v Nehls*, 452 Mich 171, 178-179; 550 NW2d 739 (1996). In some cases, the word "includes" may limit the pertinent category. *Id*. at 179. But in other cases the context of its use demonstrates that the term "includes" refers to nonexclusive examples of the pertinent class. See *Sharp v Benton Harbor*, 292 Mich App 351, 356; 806 NW2d 760 (2011); *Attorney General ex rel Dep't of Natural Resources v Huron Co Rd Comm*, 212 Mich App 510, 518; 538 NW2d 68 (1995), lv den 451 Mich 909, 909-910 (1996) (nullifying the precedential effect of the Court of Appeals' opinion).

The BEA argues that if MCL 423.215b(1) is construed as prohibiting lane changes in the absence of a new CBA, the sentence "The prohibition in this subsection includes increases that would result from wage step increases" would be rendered nugatory. But this argument lacks merit if the phrase "includes increases that would result from wage step increases" is intended as illustrative rather than exhaustive. We conclude that the board correctly argues that if MCL 423.215b(1) is construed as allowing lane changes before a new CBA is reached, it would conflict with the statute's command that "a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement." Thus, the BEA's argument fails in light of the statute's plain language that limits all wage and benefit increases in the absence of a new CBA. This reading of the statute is also confirmed by the last two sentences of MCL 423.215b(1), which requires public employees receiving nonwage benefits to "bear any increased cost of maintaining those ben-

efits that occurs after the expiration date" of a CBA and before a new CBA is reached.

MCL 423.215b(1) states, "Except as otherwise provided in this section, . . . a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement." The introductory clause, "Except as otherwise provided in this section," establishes that the levels and amounts of wages and benefits may only increase when explicitly provided for in MCL 423.215b or when a new CBA is reached. So with respect to insurance benefits, MCL 423.215b(1) and (4)(b) permit a public employer to pay for and provide increased insurance benefits when a public employee's marital or dependent status changes. Yet there is no language in MCL 423.215b to provide for lane changes as a permissible wage increase. So, concluding that lane changes are allowed in the absence of an effective CBA would conflict with the introductory clause of MCL 423.215b(1).

The fallacy of the BEA's argument is further demonstrated by its logical extension: all wage increases that are not step increases, such as cost of living adjustments, would be permitted under the statute. But the plain language indicates that the Legislature intended the phrase "levels and amounts" to limit all "wages and benefits" "[e]xcept as otherwise provided in this section." MCL 423.215b(1).

For these reasons, we conclude that the language of MCL 423.215b unambiguously prohibits the board from paying increased wages on the basis of lane changes accrued after 2011 PA 54 became effective on June 8, 2011, and before a successor CBA was reached. Because the statute's language is clear and unambiguous and no further judicial construction is required or permitted,

Mt Pleasant Sch, 302 Mich App at 608, we decline to address the BEA's additional arguments regarding statutory construction and MERC's reasoning.

Finally, we reject the BEA's argument that MCL 423.215b is unconstitutional. The BEA contends that at the beginning of the 2011-2012 school year its members had accrued a vested right in receiving lane changes and that as applied by MERC, MCL 423.215b retroactively deprived its members of the accrued, vested right of lane changes. We conclude that MCL 423.215b did not unconstitutionally deprive the teachers of any vested right.

MCL 423.215b was not retroactively applied to the teachers. MCL 423.215b was applied prospectively from its effective date of June 8, 2011, as MCL 423.215b(3) states that "[f]or a collective bargaining agreement that expired before the effective date of this section, the requirements of this section apply to limit wages and benefits to the levels and amounts in effect on the effective date of this section." In other words, MERC correctly applied MCL 423.215b to limit wages and benefits to the levels and amounts in effect on June 8, 2011, not the levels and amounts in effect on June 30, 2010. The BEA teachers did not have a vested right under their contract because there was no CBA in effect at the time the statute became effective. See *Ottawa Co v Jaklinski*, 423 Mich 1, 7; 377 NW2d 668 (1985) (holding that rights subject to bargaining do not survive the expiration of a CBA). For the reasons explained below, the teachers had no vested right under PERA.

"[A] vested right is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or

future enjoyment of property, or to the present or future enforcement of a demand . . . ." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 370-371; 803 NW2d 698 (2010) (citations and quotation marks omitted). Under prior law, a public employer was obligated to continue the wage terms of the expired CBA until an impasse in negotiation occurred. See *Jackson Community College Classified & Technical Ass'n v Jackson Community College*, 187 Mich App 708, 712; 468 NW2d 61 (1991). A public employer was obligated to grant step increases in wages under the terms of the expired CBA. *Id*. at 712-713. This obligation arose under PERA, which provides that a public employer must bargain in good faith on mandatory subjects of "wages, hours, and other terms and conditions of employment . . . ." MCL 423.215(1); *Amalgamated Transit*, 437 Mich at 450 n 4. But the Legislature enacted MCL 423.215b to prohibit public employers from increasing wages under the terms of the expired CBA. The Legislature has the right to extinguish statutory rights that are not vested rights as defined above. See *Morgan v Taylor Sch Dist*, 187 Mich App 5, 12; 466 NW2d 322 (1991).

In the present case, the teachers did not have a vested right that lane changes under an expired CBA would continue to apply as they did under PERA before June 8, 2011, the effective date of MCL 423.215b. Rather, the teachers had no more than a mere expectation that the prior law would continue. *Gen Motors*, 290 Mich App at 370-371. Because the expectation that the prior law would continue was not a vested right, the Legislature could validly extinguish it by amending PERA. *Morgan*, 187 Mich App at 12. Further, because it is undisputed that the teachers are seeking lane changes that accrued after June 8, 2011, MCL 423.215b was not unconstitutionally applied.

We affirm. No taxable costs under MCR 7.219, a question of public policy being involved.

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

FOREST HILLS COOPERATIVE v CITY OF ANN ARBOR

Docket Nos. 305194 and 306479. Submitted January 9, 2014, at Lansing. Decided June 12, 2014, at 9:00 a.m. Leave to appeal sought.

Forest Hills Cooperative filed a petition in the Tax Tribunal to challenge the city of Ann Arbor's assessments of eight parcels for tax year 2000. Seven parcels had residential buildings used for nonprofit cooperative housing units and one parcel was vacant land zoned for commercial purposes. Tax years 2001 through 2009 were eventually added to Forest Hills' petition, and the case was heard by a hearing officer. The hearing officer entered a proposed opinion and judgment. He used a cost-less-depreciation approach to value the property and recommended a partial uncapping of the taxable value of each parcel when a unit was transferred. He also recommended affirming the assessed value of the vacant parcel because Forest Hills had not offered evidence that could be used to determine the value. Both Forest Hills and the city filed exceptions to the hearing officer's proposed opinion and judgment, which the tribunal adopted in its opinion and order. Forest Hills appealed in Docket No. 305194.

While its Tax Tribunal petition was still pending, Forest Hills filed a complaint in the Washtenaw Circuit Court against the city and the Ann Arbor City Assessor, seeking a declaration that MCL 211.27 was unconstitutional as applied to value its property or a declaration that MCL 211.27 required the use of Forest Hills' actual income or stock prices to determine the value of its property. Forest Hills also alleged that the statute violates due process and equal protection, claimed violations of 42 USC 1983, and sought injunctive relief. The city and the city assessor moved for summary disposition under MCR 2.116(C)(4) on the ground that the Tax Tribunal had exclusive jurisdiction to consider Forest Hills' challenge to the valuation method used to determine its property taxes. Forest Hills argued that it had the right to establish that the statute was facially invalid on the basis of the facts pleaded in its complaint. The court, David S. Swartz, J., determined that it had jurisdiction to consider whether the statute was unconstitutional as applied and pleaded but did not have jurisdiction to consider the 42 USC 1983 and injunctive claims. The court held the case in

abeyance pending the tribunal's final decision on Forest Hills' petition. Following that decision, Forest Hills moved for summary disposition, seeking a declaration that MCL 211.27(4) required the use of either the capitalization of its actual income or the values for the transfer of shares in order to value Forest Hills' property or, in the alternative, a declaration that MCL 211.27(4) was unconstitutional. The city and the city assessor also sought summary disposition, asserting that the court could accept the allegations in the complaint as true for purposes of the motion, but should hold that it lacked subject-matter jurisdiction to address Forest Hills' claim because it was nothing more than a challenge to a property tax assessment framed in constitutional terms. The court denied Forest Hills' motion for summary disposition and granted summary disposition in favor of the city and the city assessor. Forest Hills appealed in Docket No. 306479, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Const 1963, art 9, § 3 requires use of the true cash value of property to determine property taxes. MCL 211.27(1) defines "true cash value" in part as the usual selling price at the location where the property is at the time of the assessment, being the price that could be obtained for the property at private sale and not at auction or forced sale. Although the Tax Tribunal should consider different approaches in determining true cash value, its duty is to determine an approach that most accurately reflects the property's value. The tribunal may reject both parties' theories of valuation in making this determination. It may not automatically accept a respondent's assessment in a property-tax proceeding, but it may adopt the assessed valuation on the tax rolls as its independent finding of true cash value when competent and substantive evidence supports doing so, as long as the tribunal does not afford the original assessment presumptive validity.

2. Forest Hills argued that the Tax Tribunal violated its statutory duty to make an independent determination of the true cash value of the property by instead simply rubber-stamping the true cash value on the tax rolls. The hearing officer decided that a cost-less-depreciation approach was the most accurate valuation method for the improved parcels. Under the cost-less-depreciation approach, true cash value is derived by adding the estimated land value to an estimate of the current cost of reproducing or replacing improvements and then deducting the loss in value from depreciation in structures, that is, physical deterioration and functional or economic obsolescence. Functional obsolescence refers to a loss of value brought about by failure or inability of the assessed property

to provide full utility. Economic obsolescence refers to a loss of value occasioned by outside forces. The measure of allowable obsolescence is a subjective determination that demands an exercise of judgment. Economic obsolescence should be calculated in light of the property's highest and best use. The hearing officer found it possible that functional or economic obsolescence should be estimated in applying this approach, but also determined that there was insufficient evidence to allow for an independent estimate of depreciation from those sources. By his express determination that he could not make an independent estimate of functional or economic obsolescence, the hearing officer partially violated the rule against according presumptive validity to an assessment. Moreover, the tribunal subsequently stated that economic obsolescence did not exist. Because the tribunal was therefore operating under a misconception about the hearing officer's findings and failed to address economic obsolescence itself, it committed an error of law. Accordingly, remanding the case to the Tax Tribunal was necessary for it to make an independent determination of the amount of functional and economic obsolescence, if any, to be used in determining the true cash value of the improved parcels under the cost-less-deprecation approach.

3. Considering the hearing officer's express determination that he could not make an independent determination of the true cash value of the vacant parcel, the Tax Tribunal committed an error of law by adopting the hearing officer's proposed opinion regarding this parcel and remand was also necessary for the tribunal to make an independent determination of the true cash value of the vacant parcel.

4. Forest Hills additionally argued that the Tax Tribunal made an error of law in applying MCL 211.27 by failing to use a capitalization-of-income approach to value. This approach is based on the premise that a property's value is related to how much income the property can earn. It measures the present value of the future values of the future benefits of property ownership by estimating the property's income stream and its resale value and then developing a capitalization rate that is used to convert the estimated future benefits into a present lump-sum value. Forest Hills argued that the Legislature intended to establish special rules for determining the true cash value of a nonprofit cooperative when it amended MCL 211.27 in the face of two Supreme Court decisions regarding the determination of true cash value for rental properties. MCL 211.27(1), however, does not require that assessments be based on a particular valuation method. Because the Legislature did not direct that specific methods be used, the

task of approving or disapproving specific valuation methods or approaches falls to the courts, and the material question in this case was whether the tribunal adopted a wrong principle by rejecting Forest Hills' proposed approach for the improved parcels. Forest Hills failed to establish that the tribunal applied any wrong principle in concluding that the cost-less-depreciation approach rather than the capitalization-of-income approach provided the most accurate determination of value. Forest Hills also failed to establish that the tribunal adopted a wrong principle by not using Forest Hills' proposed transfer-value approach, which was based on a formula related to the purchase of a membership in the cooperative. The consideration paid by Forest Hills to an occupant moving out of a unit did not measure the benefits of home ownership associated with the unit, and transfer value was therefore not equivalent to fair market value.

5. MCL 211.27a(2) and (3) place a cap on the taxable value of a property so that, on the basis of the previous year's taxable value, any yearly increase in taxable value is limited to either the rate of inflation or 5%, whichever is less. That cap on taxable value applies only to the current owner of the property, and the property's taxable value is uncapped when the property is transferred. The uncapped taxable value for the year after the transfer sets a new baseline value that is subject to a new cap. MCL 211.27a(6)(j) defines "transfer of ownership" as including the conveyance of an ownership interest in a cooperative housing corporation except for the portion of the property not subject to the ownership interest conveyed. Forest Hills argued that the Tax Tribunal violated MCL 211.27a(6)(j) by prorating the uncapped taxable value associated with the transfer of a unit in the housing cooperative to units that did not transfer, contending that the increase in taxable value had to be confined to the transferred unit and, therefore, that separate parcel numbers had to be assigned to each unit. Forest Hills, however, was the only owner of the parcels of real property at issue in this case. MCL 211.27a(6)(j) does not address transfers of ownership of parcels of real property, but only addresses transfers of an ownership interest in the cooperative housing corporation itself. The tribunal therefore did not err in its application of MCL 211.27a(6)(j)

6. The circuit court lacked jurisdiction to consider Forest Hills' request for declaratory relief. A challenge to the circuit court's subject-matter jurisdiction may be raised at any time, including for the first time on appeal. Forest Hills' motion for summary disposition was based on MCR 2.116(C)(10), which tests the factual support for a claim. The city and city assessor's response to Forest

Hills' motion was based on MCR 2.116(C)(4), which provides that summary disposition may be granted when the court lacks jurisdiction of the subject matter. An appellate court will review a trial court's summary disposition ruling under the correct rule, and MCR 2.116(C)(4) provided the proper standard for considering the city and city assessor's challenge to the circuit court's subject-matter jurisdiction. Although MCR 2.605(A)(1) permits a court to grant declaratory relief in a case of actual controversy, it does not limit or expand the court's subject-matter jurisdiction. MCL 205.731(a) provides that the Tax Tribunal has exclusive and original jurisdiction over a proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state. The tribunal has no jurisdiction to hold statutes invalid or to consider constitutional matters; only the circuit court may do so. Thus, if a challenge to a tax assessment rests solely on an argument that the tax assessment was made under the authority of an illegal statute, the circuit court would have jurisdiction over the matter. Merely couching a challenge to an assessment in constitutional terms, however, does not deprive the tribunal of its exclusive jurisdiction to consider a claim that the assessment was arbitrary or without foundation. Although Forest Hills did not directly challenge any particular assessment, it challenged the method the city assessor used to determine the assessments. In essence, Forest Hills' claim was an attempted appeal of its tax assessments, and the circuit court lacked jurisdiction to consider it. Although it did so for the wrong reason, the circuit court properly granted summary disposition in favor of the city and the city assessor.

Docket No. 305194 affirmed in part, reversed in part, and remanded to the Tax Tribunal for further proceedings.

Docket No. 306479 affirmed.

WHITBECK, P.J., concurring in part and dissenting in part, agreed with the majority in all respects except its determination regarding the Tax Tribunal's true-cash-value determination because he concluded that the tribunal adequately addressed the issue of economic obsolescence. In particular, he disagreed with the majority's characterization of the tribunal's finding concerning economic obsolescence. Whether the tribunal properly or improperly interpreted the hearing officer's determination of this issue was irrelevant because the Court of Appeals reviews only the tribunal's decision, not the hearing officer's. The tribunal's statement that the hearing officer correctly found that there was no economic

obsolescence, read in conjunction with relevant caselaw, was in fact a finding that there was no economic obsolescence, and competent evidence supported that finding. Judge WHITBECK concluded that remand on this point was unnecessary, but agreed with the rest of the majority's disposition of the appeals.

1. TAXATION — PROPERTY TAX — ASSESSMENTS — TRUE CASH VALUE — TAX TRIBUNAL DETERMINATION.

Const 1963, art 9, § 3 requires use of the true cash value of property to determine property taxes; MCL 211.27(1) defines "true cash value" in part as the usual selling price at the location where the property is at the time of the assessment, being the price that could be obtained for the property at private sale and not at auction or forced sale; although the Tax Tribunal should consider different approaches in determining true cash value, its duty is to determine an approach that most accurately reflects the property's value; the tribunal may reject both parties' theories of valuation in making this determination; it may not automatically accept the respondent's assessment in a property-tax proceeding, but it may adopt the assessed valuation on the tax rolls as its independent finding of true cash value when competent and substantive evidence supports doing so, as long as the tribunal does not afford the original assessment presumptive validity.

2. JURISDICTION — PROPERTY TAX — TAX TRIBUNAL — EXCLUSIVE JURISDICTION OVER ASSESSMENT CHALLENGES.

MCL 205.731(a) provides that the Tax Tribunal has exclusive and original jurisdiction over a proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state; the tribunal has no jurisdiction to hold statutes invalid or to consider constitutional matters; if a challenge to a tax assessment rests solely on an argument that the assessment was made under the authority of an illegal statute, the circuit court has jurisdiction over the matter; merely couching a challenge to an assessment in constitutional terms, however, does not deprive the tribunal of its exclusive jurisdiction to consider a claim that the assessment was arbitrary or without foundation.

Hoffert & Associates, PC (by *Myles B. Hoffert*, *David B. Marmon*, *Gregory M. Elliott*, and *Paige R. Harley*), for Forest Hills Cooperative.

Steven K. Postema, Corporation Counsel, and *Kristen D. Larcom*, Assistant Corporation Counsel, for the city of Ann Arbor and the Ann Arbor City Assessor.

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

FITZGERALD, J. These consolidated cases involve property tax assessments for nonprofit cooperative housing units located in the city of Ann Arbor (City) and owned by petitioner/plaintiff Forest Hills Cooperative. In Docket No. 305194, Forest Hills appeals as of right the June 1, 2011 judgment of the Michigan Tax Tribunal concerning the property tax assessments for tax years 2000 through 2009. In Docket No. 306479, Forest Hills appeals as of right the September 28, 2011 circuit court order granting summary disposition pursuant to MCR 2.116(I)(2) in favor of defendants—the City and the Ann Arbor City Assessor (City Assessor)—with respect to Forest Hills' constitutional claim concerning the property tax assessments.

I. FACTS AND PROCEDURAL HISTORY

A. DOCKET NO. 305194—TAX TRIBUNAL ACTION

The nonprofit housing cooperative property underlying this tax dispute consists of 39 residential buildings, one building with an office and meeting rooms, and one service and maintenance building on 30.78 acres in the City. The property is divided into eight parcels, each with an assigned number, for the purposes of assessing property taxes. One parcel is vacant land zoned for commercial uses.

Forest Hills obtained mortgage financing for the property through a federally subsidized program under

the National Housing Act of 1959 known as "Section 236." To obtain the financing, Forest Hills was required to enter into regulatory agreements with the United States Department of Housing and Urban Development (HUD).

In June 2000, Forest Hills filed a petition in the Tax Tribunal to challenge the assessments on the eight parcels for tax year 2000. Forest Hills alleged that the assessments were based on a true cash value of $7,622,000 for the eight parcels, but that the true cash value should be no more than $7,232,000. On September 29, 2000, the tribunal entered an order holding the case in abeyance until after the tribunal decided another factually similar case. The similar case was ultimately subject to an appeal in this Court. In 2007, this Court affirmed the tribunal's determinations in that case regarding the property tax assessments for a housing cooperative for tax years 1984 to 2002. See *Branford Towne Houses Coop v City of Taylor*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 265398). In pertinent part, this Court rejected the petitioner's argument that the capitalization-of-income method for assessing property must be used to assess nonprofit housing cooperatives. *Id*. at 6.

On March 27, 2008, the Tax Tribunal entered an order removing this case from abeyance. By the time this case was heard by a hearing officer on January 12, 2010, and February 17, 2010, tax years 2001 through 2009 had been added to Forest Hills' petition. A stipulation of facts and exhibits were submitted to the hearing officer.

A supervising project manager employed by HUD testified that Section 236 housing is intended to create affordable housing for individuals with low or moderate

income by subsidizing the owner's mortgage payments for the property. In exchange for the subsidy, a mortgagor is required to sign a regulatory agreement that gives HUD various rights to inspect financial records, inspect the property, and approve alterations of the buildings. If the mortgage is paid off early, the mortgagor is required to sign a use agreement to preserve the restrictions on the property for the original term of the mortgage. If the property is sold, the restrictions would still apply. Although HUD would expect the property to be sold as a nonprofit housing cooperative, HUD would consider a transfer to a for-profit purchaser if a nonprofit purchaser could not be located.

The project manager testified that the mortgagor is also required to use an occupancy agreement, approved by HUD, for individuals to pay carrying charges to live in units of the housing cooperatives. If any individual leaves, some housing cooperatives buy back the individual's membership, while others require the individual to continue making payments until another acceptable person moves into the unit.

The managing agent at Forest Hills testified that Forest Hills repurchases units when a member leaves the housing cooperative. At the time of the hearing, 15 units were vacant, which represented a vacancy rate of approximately 5%. During past periods, a waiting list existed for residential units. The agent testified that each of the five mortgages for the Forest Hills property had a 40-year term with a due date in 2012 and that one mortgage was paid off in accordance with its amortization schedule in 2008. Another mortgage was paid off in 2009 according to its amortization schedule. The maturity dates for the five mortgage loans were in September 2008, October 2009, May 2010, February 2012, and May 2012. The federal subsidy to reduce the interest rate on

the mortgage notes from 7% to 1% was $287,186. HUD approved a request by Forest Hills in 2006 to retain excessive income in order to build a fund to replace aluminum siding. Forest Hills also obtained a flexible subsidy loan through HUD in 1999 for major structural repairs and replacements, payable on the maturity date of the mortgage notes.

Ernest Gargaro, an expert in accounting functions, testified that he prepared Forest Hills' proposed valuations using two methods that are purely computational in nature. One method used by Gargaro was a computation of the annual "transfer values" for particular types of residential units at Forest Hills, using Forest Hills' bylaws and occupancy agreements to obtain the subscription price for an individual to become a member of the housing cooperative and the value of the occupancy agreement. The other method used revenue from "tenants" and expenses in Forest Hills' annual, audited financial statements to arrive at Forest Hills' net operating income. Gargaro then applied a capitalization rate to the annual net operating income to arrive at a capitalization-of-income valuation for the individual tax parcels.

The City Assessor testified as an expert property appraiser and assessor. He concluded that the highest and best use of the property would be (1) a market-rate housing cooperative or (2) a conversion to condominiums. He opined that the cost of converting the property to a market-rate housing cooperative would be minimal and that Forest Hills was not prohibited from prepaying its mortgage loans. The City Assessor testified that he did not use an income approach to value the property on the basis of his determination that housing cooperatives are not typically held for investment. He found a cost approach inappropriate

on the basis of his determination that a typical buyer would not "take into consideration what something would cost initially to build or currently to build minus depreciation."

The City Assessor determined that ample sales data for housing cooperatives existed to allow use of a market approach to value most of the property, except that he made a deduction for his estimate of the cost of converting the property to a market-rate housing cooperative. He valued the "interest of the individual co-op interest and then basically summ[ed] that value of the individual units to come up with a value for the whole." If a "move-in" had occurred during the prior year, he considered this to have been a transfer and, accordingly, used the same amount for the taxable value and the assessed value of that residential unit during the following year. He believed that Michigan law allowed this "uncapping" of taxable value for partial transfers of the ownership of a housing cooperative. He valued the vacant parcel, which was zoned for commercial use, separately using a market approach to value.

The City Assessor indicated that the property had been assigned more than one parcel number for property tax assessment purposes because of the manner in which the property was bisected by streets. He testified that parcels typically are not contiguous across streets. Separate parcel numbers were not assigned to individual residential units because the property has only one owner and individual ownership interests are not generally "tracked." Additionally, the use of separate parcel numbers would be contrary to the manner in which Forest Hills allocates taxes to its members.

Following the hearing, the hearing officer determined the true cash values, assessed values, and taxable values for the property in a proposed opinion and judgment dated July 1, 2010. The hearing officer determined that shareholders and members of Forest Hills are residents of the units and that the highest and best use of the property was its current use. A cost-less-depreciation approach was used to value the property, as set forth in the City's property record cards for the developed property, and the hearing officer recommended a partial uncapping of the taxable value of each parcel when a unit is transferred. The assessed value of the vacant parcel was affirmed because Forest Hills did not offer any evidence that could be used to determine the value. The hearing officer determined values for each of the eight parcels for each of the disputed tax years. The parties were given notice that they had 20 days from entry of the proposed opinion to notify the Tax Tribunal in writing if they disagreed with the proposed opinion and the reason for any exceptions.

Both Forest Hills and the City filed exceptions to the hearing officer's proposed opinion and judgment. In an opinion and order dated July 1, 2011, the Tax Tribunal adopted the hearing officer's proposed opinion and judgment, except that a chart summarizing the "current values" of all the parcels that the hearing officer had prepared before making his determination regarding the values was amended to correctly reflect the true cash values for tax years 2007 and 2008.

B. DOCKET NO. 306479—CIRCUIT COURT ACTION

On October 7, 2009, Forest Hills filed a complaint against the City and the City Assessor in circuit court. In Count I, Forest Hills sought a declaration

that MCL 211.27 is unconstitutional as applied to value its property and other similar property. Alternatively, Forest Hills sought a declaration that MCL 211.27 requires that its actual income or stock prices be used to determine the value of its property. Count I also included Forest Hills' constitutional claim, as set forth in ¶ 17 of the complaint, that "[i]f MCL 211.27 permits the procedures employed by the City Assessor, for the purpose of valuing the Forest Hills Property, then that statute violates Plaintiff's rights of due process and equal protection in contravention of U.S. Const. Amendment 14 and MCL [sic] Const. Art. 1, § § 1 and 17 . . . ." In Count II, Forest Hills alleged that the failure of the City and the City Assessor to use a valuation method that properly accounts for the effect of its regulatory agreement with HUD violates 42 USC 1983. In Count III, Forest Hills sought injunctive relief.

On October 27, 2009, the City and the City Assessor filed a joint motion for summary disposition under MCR 2.116(C)(4) on the ground that the Tax Tribunal had exclusive jurisdiction to consider Forest Hills' challenge to the valuation method used to determine its property taxes. At a hearing on November 18, 2009, Forest Hills' counsel argued that Forest Hills should have a right to establish that the statute is facially invalid on the basis of the facts pleaded in the complaint. The circuit court determined that it had jurisdiction to consider whether the statute was unconstitutional as applied and pleaded in Count I of the complaint, but not to consider Counts II and III. The circuit court also held the case in abeyance pending a final decision by the tribunal regarding Forest Hills' petition.

After the Tax Tribunal rendered its decision regarding the valuation of the Forest Hills property, Forest

Hills moved for summary disposition under MCR 2.116(C)(10) on September 1, 2011, seeking a declaration that MCL 211.27(4)[1] requires the use of either the capitalization of its actual income or "share transfer values" to value its property. Alternatively, Forest Hills sought a determination that MCL 211.27(4) is unconstitutional, at least as applied to it and other similarly situated properties.

In a response filed on September 21, 2011, the City and the City Assessor sought summary disposition in their favor under MCR 2.116(C)(4) and (I)(2). They asserted that the circuit court could accept the allegations in the complaint as true for purposes of the motion, but should hold that it lacks subject-matter jurisdiction to address Forest Hills' claim because it is nothing more than a challenge to a property tax assessment framed in constitutional terms. At a hearing on September 28, 2011, the circuit court denied Forest Hills' motion for summary disposition and granted summary disposition in favor of the City and the City Assessor under MCR 2.116(I)(2).

II. TRUE CASH VALUE

A. ISSUE PRESERVATION

Initially, we note that it is unclear from Forest Hills' principal brief whether it is challenging the hearing officer's proposed opinion and judgment or the Tax Tribunal's decision to adopt the hearing officer's opinion and judgment, as corrected, as the final opinion and judgment. From Forest Hills' reply brief, it appears that Forest Hills' concern is with the hearing officer's pro-

[1] The relevant subsection is now MCL 211.27(5). See MCL 211.27, as amended by 2013 PA 162, effective November 12, 2013. The text of the subsection was not changed. Throughout this opinion we will refer to the provision as MCL 211.27(4).

posed opinion and judgment. The relevant decision in this case, however, was rendered by the Tax Tribunal because it was required to make its own de novo determinations. To the extent that Forest Hills' argument is directed at the hearing officer's proposed opinion, the argument is not preserved for appeal because Forest Hills failed to file an exception to the proposed opinion on the ground that it essentially rubberstamped the "true cash value" on the assessment tax roll. See *Attorney General v Pub Serv Comm #1*, 136 Mich App 52, 56; 355 NW2d 640 (1984). Although this Court need not address an unpreserved issue, it may overlook preservation requirements when, as in this case, the issue involves a question of law and the facts necessary for its resolution have been presented. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010).

B. STANDARD OF REVIEW

Const 1963, art 6, § 28, cl 2 provides:

> In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

An "error of law" occurs within the meaning of this constitutional provision if the Tax Tribunal's decision is not supported by competent, material, and substantial evidence on the whole record. *Great Lakes Div of Nat'l Steel Corp v Cit of Ecorse*, 227 Mich App 379, 388; 576 NW2d 667 (1998). Stated otherwise, "[t]he Tax Tribunal's factual findings are final if they are supported by competent, material, and substantial evidence on the whole record." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012). If there is no

factual dispute and fraud is not alleged, appellate review is limited to whether the Tax Tribunal made an error of law or adopted a wrong legal principle. *Id*. at 527-528. When an issue of statutory construction is involved, appellate review is de novo. *Id*. at 528.

C. ANALYSIS

Forest Hills argues that the Tax Tribunal violated its statutory duty to make an independent determination of the true cash value of the property by instead simply rubber-stamping the "true cash value" on the tax roll.

Const 1963, art 9, § 3 requires that the "true cash value" be used to determine property taxes. *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 434; 830 NW2d 785 (2013). In general, true cash value is synonymous with fair market value. *Id*. It is statutorily defined, in part, as "the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale." MCL 211.27(1). Although the Tax Tribunal should consider different approaches in determining true cash value, "correlating, reconciling, and weighing the values derived under various approaches," the tribunal's duty is to determine an approach that most accurately reflects the value of the property. *Pontiac Country Club*, 299 Mich App at 435. The Tax Tribunal is free to reject both parties' theories of valuation in making this determination. *Great Lakes*, 227 Mich App at 390.

The Tax Tribunal may not automatically accept a respondent's assessment in a property-tax proceeding. *Id*. at 409. Nonetheless, "the Tribunal may adopt the assessed valuation on the tax rolls as its independent

finding of true cash value when competent and substantive evidence supports doing so, as long as it does not afford the original assessment presumptive validity." *Pontiac Country Club*, 299 Mich App at 435-436. "Substantial evidence must be more than a scintilla of the evidence, although it may be substantially less than a preponderance of the evidence." *Great Lakes*, 227 Mich App at 388-389. This Court has stated that competent and substantial evidence will support the Tax Tribunal's decision if the decision is within the range of valuations in evidence. *Pontiac Country Club*, 299 Mich App at 436.

The petitioner has the burden of establishing the property's true cash value. MCL 205.737(3); *Pontiac Country Club*, 299 Mich App at 435. The burden of proof encompasses both the burden of persuasion, which never shifts during the course of the hearing, and the burden of going forward with evidence, which may shift to the opposing party. *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 631; 806 NW2d 342 (2011). In a property tax dispute, the petitioner must prove by the greater weight of the evidence that the disputed assessment was too high on the basis of the Tax Tribunal's findings of true cash value. *Great Lakes*, 227 Mich App at 409-410.

1. THE HEARING OFFICER'S PROPOSED OPINION AND JUDGMENT

In this case, the hearing officer decided that a cost-less-depreciation approach was the most accurate valuation method for the improved parcels after rejecting other approaches proposed by the parties and reviewing the property cards that contained the City's cost information. The hearing officer found it "possible that functional or economic obsolescence should be estimated" in applying this approach, but also determined

that there was "insufficient evidence in this case to allow for an independent estimate of depreciation from these sources." He also determined that "where the vacancy rate has varied between 0% and 5% for the years at issue, this suggests that the cost approach could be used with no economic obsolescence applied."

The hearing officer affirmed the assessments for the vacant parcel because Forest Hills had not offered proofs specific to the vacant parcel and, therefore, he had no evidence from which to make an independent determination regarding the value. The hearing officer found the City's proofs insufficient for him to make an independent determination. The property cards for this parcel were introduced at the hearing. As with the hearing officer's proposed opinion, the property cards indicated a significant increase in true cash value, which increased from $45,200 in 2004 to $611,800 in 2005, although the taxable value in 2005 was only $15,031. The hearing officer addressed the property record cards in his opinion by noting that the cards set forth the cost-less-depreciation approach, which the assessor relied on to determine the true cash value of the parcels, to determine the assessed values. The City Assessor testified at the hearing that the vacant parcel was "grossly under assessed" before 2005. The assessor arrived at a valuation of $824,000 for each year under the market approach to valuation for purposes of the proceedings in the Tax Tribunal.

2. THE TAX TRIBUNAL'S OPINION AND JUDGMENT

The Tax Tribunal adopted the hearing officer's proposed opinion and judgment with respect to its determinations of the true cash values for each parcel. Although the Tax Tribunal was not presented with the specific issue raised in this appeal, it did consider an

issue raised by Forest Hills regarding the hearing officer's failure to make any adjustment for obsolescence. The tribunal stated:

> The [hearing officer] utilized the cost approach in valuing the subject property. The parties stipulated that the vacancy rate from 2004 through 2009 was approximately 5%, but that there were years when the rate was 0 and there was a waiting list. Given this, the [hearing officer] was correct in finding that, under *Meadowlanes* [*Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473; 473 NW2d 636 (1991)], there was no economic obsolescence.

3. ANALYSIS—IMPROVED PARCELS

The cost-less-depreciation approach underlying the valuation for the improved parcels is, in reality, a type of comparative or market-data approach to value, which generally considers the land to be unimproved, requires the development of a replacement cost for improvements, and makes adjustments for depreciation to reflect the fact that an old or used property is usually less valuable than a new one. *Antisdale v City of Galesburg*, 420 Mich 265, 276 n 1; 362 NW2d 632 (1984). It is not necessary that there be an actual market for the property because "valuation can be determined strictly on a hypothetical basis, with the hypothetical buyer looking at the costs of building a new facility to determine the usual price of an existing facility even if a real buyer would not consider building such a facility." *Great Lakes*, 227 Mich App at 403. In *Meadowlanes*, 437 Mich at 484 n 18, our Supreme Court described the cost-less-depreciation approach as follows:

> Under the cost approach, true cash value is derived by adding the estimated land value to an estimate of the current cost of reproducing or replacing improvements and then

> deducting the loss in value from depreciation in structures, i.e., physical deterioration and functional or economic obsolescence.

Functional obsolescence refers to "a loss of value brought about by failure or inability of the assessed property to provide full utility." *Meijer, Inc v City of Midland*, 240 Mich App 1, 4 n 4; 610 NW2d 242 (2000). For instance, a poor floor plan can cause functional obsolescence, although it is possible that the use of a replacement-cost approach might eliminate the need to consider some sources of functional obsolescence. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 755-756; 378 NW2d 590 (1985). Economic obsolescence refers to a "loss of value occasioned by outside forces." *Fisher-New Ctr Co v State Tax Comm*, 380 Mich 340, 362; 157 NW2d 271 (1968), vacated on other grounds on reh 381 Mich 713 (1969). The measure of allowable obsolescence is a subjective determination that demands an exercise of judgment. *Fisher-New Ctr*, 380 Mich at 362-363. "Even a slight variation in the percentage of depreciation or of obsolescence may produce a considerable difference in valuation." *Id*. at 369.

In *Meadowlanes*, 437 Mich at 503, the Supreme Court indicated that when using the cost-less-depreciation approach, economic obsolescence should be calculated in light of the property's highest and best use.[2] The highest and best use of the property in that case was a federally subsidized housing complex financed under Section 236, which also provided rental assistance subsidies to tenants. *Id*. at 477. Considered in the context of this highest and best use, our Supreme Court determined:

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[2] The highest-and-best-use concept recognizes that "the use to which a prospective buyer would put the property will influence the price that the buyer would be willing to pay for it." *Great Lakes*, 227 Mich App at 408.

> If there is a market for subsidized housing at the location where it is built and a sufficient number of individuals who can afford to pay the rent required, then there will be little economic obsolescence under this approach. [*Id*. at 503.]

The hearing officer in this case appropriately considered the economic obsolescence principles in *Meadowlanes* in his proposed opinion. But unlike the Tax Tribunal, and contrary to the tribunal's characterization of the hearing officer's opinion on this issue, the hearing officer did not find that economic obsolescence did not exist. As indicated previously, he found that "[w]hile it is possible that functional or economic obsolescence should be estimated, there is insufficient evidence in this case to allow for an independent estimate of depreciation from these sources." And while the hearing officer's determinations regarding true cash value were within the valuation evidence ranges, considering his express determination that he could not make an independent estimate of functional or economic obsolescence, we conclude that the hearing officer partially violated the rule against according presumptive validity to an assessment.

Arguably, the Tax Tribunal corrected this error when it determined that the evidence regarding the minimal vacancy rate supports a finding of "no economic obsolescence" because a Tax Tribunal's review of a proposed opinion is de novo. *President Inn*, 291 Mich App at 635-636. And while all relevant circumstances that tend to affect value should be considered, "there is no rule of law that requires the Tax Tribunal to quantify every possible factor affecting value." *Great Lakes*, 227 Mich App at 398-399.

But considering that the Tax Tribunal was operating under a misconception of the hearing officer's ultimate

finding, failed to address the issue of functional obsolescence, and ultimately adopted the hearing officer's proposed opinion and judgment, with the exception of a correction that did not relate to the hearing officer's determination regarding obsolescence, we conclude that the Tax Tribunal committed an error of law. Accordingly, we remand this case to the Tax Tribunal for the purpose of making an independent determination of the amount of functional and economic obsolescence, if any, to be used in determining the true cash value of the improved parcels under the cost-less-deprecation approach and for other proceedings consistent with this determination. If necessary, the Tax Tribunal may reopen the proofs to resolve this issue and make legally supportable determinations regarding functional and economic obsolescence. See *Great Lakes*, 227 Mich App at 433, and *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 357; 483 NW2d 416 (1992).

4. ANALYSIS—VACANT PARCEL

The hearing officer expressly determined that he had insufficient evidence to make an independent determination of value, and the Tax Tribunal adopted the hearing officer's proposed opinion without addressing this issue. As indicated in *Pontiac Country Club*, 299 Mich App at 435, even when a petitioner fails to show that an assessment was too high, the Tax Tribunal is required to make an independent determination of true cash value using the approach that most accurately reflects the value of the property.

Considering the hearing officer's express determination that he could not make an independent determination of the true cash value of the vacant parcel, the Tax Tribunal committed an error of law by adopting the proposed opinion regarding this parcel. Accordingly, the

case is remanded to the Tax Tribunal for the purpose of making an independent determination of the true cash value of the vacant parcel and for other proceedings consistent with this determination. If necessary, the Tax Tribunal may reopen the proofs to resolve this issue and make legally supportable determinations regarding the vacant parcel. See *Great Lakes*, 227 Mich App at 433, and *Jones & Laughlin*, 193 Mich App at 357.

III. APPROACH TO VALUE

Forest Hills argues that the Tax Tribunal made an error of law in applying MCL 211.27. This issue largely concerns whether there is evidence that could be used by the tribunal to apply a capitalization-of-income approach to value, which is one of the three most common approaches to value. *Great Lakes*, 227 Mich App at 390. This approach to value is based on the premise that a property's value is related to how much income the property can earn. *Antisdale*, 420 Mich at 276 n 1. Because the main benefit to the owner is the future net income that the property can earn, the property's worth is largely based on the income, although the net amount receivable from the property when the ownership is terminated is also a benefit. *Id*. The capitalization-of-income approach "measures the present value of the future benefits of property ownership by estimating the property's income stream and its resale value (reversionary interests) and then developing a capitalization rate which is used to convert the estimated future benefits into a present lump-sum value." *Meadowlanes*, 437 Mich at 485 n 20.

This issue requires an interpretation of property tax laws. In general, a court's goal in construing a statute is to give effect to the Legislature's intent. *Mich Props*, 491 Mich at 528. "When considering the correct inter-

pretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme." *Id*. (citation omitted). Unambiguous statutory language is enforced as written. *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 699; 714 NW2d 392 (2006). But "courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

While an ambiguity in a tax statute is construed in favor of the taxpayer, *Kelly Servs, Inc v Dep't of Treasury*, 296 Mich App 306, 311; 818 NW2d 482 (2012), tax exemptions are narrowly construed in favor of the taxing authority because they reduce the amount of tax imposed, *ONE's Travel Ltd v Dep't of Treasury*, 288 Mich App 48, 55; 791 NW2d 521 (2010). Statutory language is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *ONE's Travel*, 288 Mich App at 54-55.

Forest Hills argues that the Legislature intended to establish special rules for determining the true cash value of a nonprofit cooperative when it amended MCL 211.27 after our Supreme Court issued decisions regarding the determination of true cash value for rental properties in *CAF Investment Co v State Tax Comm*, 392 Mich 442; 221 NW2d 588 (1974) (*CAF I*), and *CAF Investment Co v Saginaw Twp*, 410 Mich 428; 302 NW2d 164 (1981) (*CAF II*).

At the time the Court decided *CAF I*, MCL 211.27 defined "cash value" as follows for purposes of determining "true cash value":

> " 'Cash value', means *the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained for the property at private sale, and not at forced or auction sale*. Any sale or other disposition by the state or any agency or political subdivision of lands acquired for delinquent taxes or any appraisal made in connection therewith shall not be considered as controlling evidence of true cash value for assessment purposes. In determining the value the assessor shall also consider the advantages and disadvantages of location, quality of soil, zoning, existing use, *present economic income* of structures, including farm structures and present economic income of land when the land is being farmed or otherwise put to income producing use, quantity and value of standing timber, water power and privileges, mines, minerals, quarries, or other valuable deposits known to be available therein and their value." [*CAF I*, 392 Mich at 448-449, quoting MCL 211.27(1), as amended by 1973 PA 109.]

The phrase "present economic income" was not statutorily defined, but the Supreme Court determined that it meant "actual income." *CAF I*, 392 Mich at 454. When applying a capitalization-of-income approach to value rental property, this meant that consideration must be given to actual rental income, rather than some hypothetical rental income, although it would still be appropriate to make adjustments to the actual income for such factors as current market conditions. *Id*. at 455. It was also possible to conclude, on the basis of the particular facts of the case, that a capitalization-of-income approach was not a reliable indicator of value. *Id*. at 456. The Supreme Court explained:

> We point out that "consideration" of the enumerated factors under MCLA 211.27; MSA 7.27 does not require that the taxing authority determine projected income under the income capitalization approach upon any one or all of the enumerated factors ("economic" or actual income being one of those factors) so long as the valuation com-

> ports with the statute's definition of true cash value as "usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained for the property at private sale, and not at forced or auction sale." "Consideration" of the various factors may well indicate that the application of some or all enumerated factors is inappropriate. For example, in the event lease rental (in statutory parlance a component of "economic income") were not arrived at on the basis of arm's length bargaining or in other respects had no relationship to "usual selling price", as statutorily defined, it would be appropriate for the taxing authority to ignore lease rental as a component of valuation. It is only because in this case the record indicates that long-term lease rental fairly reflects economic circumstances at the outset of the lease term and bears a demonstrable relation to true cash value that we require its consideration. [*Id*. at 456 n 6.]

In 1981, our Supreme Court again determined in *CAF II*, 410 Mich at 458, that actual income must be used when applying the capitalization-of-income approach to value property.

In 1982 PA 539, effective March 30, 1983, the Legislature established a statutory definition of "present economic income" in MCL 211.27(4) for leased or rented property. This Court indicated in *Carriage House Coop v City of Utica*, 172 Mich App 144, 149; 431 NW2d 406 (1988), that the amendment was an apparent attempt to abrogate *CAF I* and *CAF II*. The amended statute provided:

> "As used in subsection (1), 'present economic income' means *in the case of leased or rented property* the ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values. The actual income generated by the lease or rental of property shall not be the

controlling indicator of its cash value in all cases." [*Id*., quoting MCL 211.27(4), as amended by 1982 PA 539 (emphasis added).]

1983 PA 254, effective December 29, 2003, amended MCL 211.27(4) to add the following three sentences to the end of the subsection:

"This subsection shall not apply to property when subject to a lease entered into prior to January 1, 1984 for which the terms of the lease governing the rental rate or tax liability have not been renegotiated after December 31, 1983. This subsection shall not apply to a nonprofit housing cooperative when subject to regulatory agreements between the state or federal government entered into prior to January 1, 1984. As used in this subsection, "nonprofit cooperative housing corporation" means a nonprofit cooperative housing corporation which is engaged in providing housing services to its stockholders and members and which does not pay dividends or interest upon stock or membership investment but which does distribute all earnings to its stockholders or members." [*Carriage House*, 172 Mich App at 149-150, quoting MCL 211.27(4), as amended by 1983 PA 254 (emphasis omitted).]

MCL 211.27 was subject to several additional amendments after 1983, including an amendment during the tax years of 2000 through 2009 at issue in this case that changed the phrase "cash value" to "true cash value." As amended by 2002 PA 744, effective December 30, 2002, MCL 211.27 provided, in pertinent part:

(1) *As used in this act, "true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale*. The usual selling price may include sales at public auction held by a nongovernmental agency or person if those sales have become a common method of acquisition in the jurisdiction for the

class of property being valued. The usual selling price does not include sales at public auction if the sale is part of a liquidation of the seller's assets in a bankruptcy proceeding or if the seller is unable to use common marketing techniques to obtain the usual selling price for the property. A sale or other disposition by this state or an agency or political subdivision of this state of land acquired for delinquent taxes or an appraisal made in connection with the sale or other disposition or the value attributed to the property of regulated public utilities by a governmental regulatory agency for rate-making purposes is not controlling evidence of true cash value for assessment purposes. *In determining the true cash value, the assessor shall also consider* the advantages and disadvantages of location; quality of soil; zoning; existing use; *present economic income of structures*, including farm structures; *present economic income of land if the land is being farmed or otherwise put to income producing use*; quantity and value of standing timber; water power and privileges; and mines, minerals, quarries, or other valuable deposits known to be available in the land and their value. . . .

* * *

(4) As used in subsection (1), "present economic income" means for leased or rented property the ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values. The actual income generated by the lease or rental of property is not the controlling indicator of its true cash value in all cases. This subsection does not apply to property subject to a lease entered into before January 1, 1984 for which the terms of the lease governing the rental rate or tax liability have not been renegotiated after December 31, 1983. *This subsection does not apply to a nonprofit housing cooperative subject to regulatory agreements between the state or federal government entered into before January 1, 1984. As used in this subsection, "nonprofit cooperative housing corporation"*

> *means a nonprofit cooperative housing corporation that is engaged in providing housing services to its stockholders and members and that does not pay dividends or interest upon stock or membership investment but that does distribute all earnings to its stockholders or members*. [Emphasis added.][3]

Forest Hills argues on appeal that the most recent statutory definition of "present economic income" does not apply to it because it is a nonprofit housing cooperative that had regulatory agreements executed before January 1, 1984. Forest Hills therefore concludes that the rationale in *CAF I*, 392 Mich 442, and *CAF II*, 410 Mich 428, should be used to define "present economic income" and, accordingly, that it means "actual income." Forest Hills also argues that MCL 211.27(4) would require application of a capitalization-of-income approach to value.

The phrase "present economic income" is defined in MCL 211.27(4) "for leased or rented property." Forest Hills, as a nonprofit cooperative, is expressly excluded from this definition. "When statutory provisions are construed by the court and the Legislature reenacts the statute, it is assumed that the Legislature acquiesced to the judicial interpretation." *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 373; 781 NW2d 310 (2009). Therefore, with the exception of the statutory definition provided for "leased or rented property" in MCL 211.27(4), "present economic income" means "actual income." Therefore, "present economic income," as used in MCL 211.27(1), is properly construed to mean actual income.

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[3] After the tax years at issue in this case, 2012 PA 409, effective December 20, 2012, amended the list for the assessor to consider by deleting "mines" and adding the phrase "not otherwise exempt under this act" after "deposits" in the last quoted sentence in MCL 211.27(1).

Nonetheless, there is no merit to Forest Hills' argument that this means that the Tax Tribunal was *required* to use a capitalization-of-income approach to value. MCL 211.27(1) does not require assessments based on a particular valuation method. MCL 211.27(1) states that "[i]n determining the true cash value, the assessor shall also consider the advantages and disadvantages of . . . present economic income of structures . . . ." (Emphasis added.) "Consider" is commonly defined as "to think carefully about, [especially] in order to make a decision; contemplate; ponder." *Random House Webster's College Dictionary* (2005) Caselaw verifies that no particular valuation method is required for real property assessments. Indeed, *CAF I*, 392 Mich at 456, stated; "[T]here may be such facts, peculiar to the circumstances under consideration, as would indicate that the income capitalization approach is too speculative to be a reliable indicator of valuation. In such circumstances the tax assessor may base his assessment upon a more reliable method of valuation." *CAF II*, 410 Mich at 461, quoted that observation. As stated in *Meadowlanes*, 437 Mich at 484: "The Legislature did not direct that specific methods be used. Thus, the task of approving or disapproving specific valuation methods or approaches has fallen to the courts." It follows that the material question in this issue is whether the Tax Tribunal adopted a wrong principle in rejecting Forest Hills' proposed capitalization-of-income approach for improved parcels or perhaps the alternative "transfer value" approach.

Forest Hills' expert, Gargaro, summarized his computations as follows:

> I took the financial statements for each year, the audited financial statements, and from those statements for each year took the following values: total rental revenue plus total tenant charges for each year, which came to total

> revenue. And then took operating expenses as classified in the financial statements under the headings of administrative, utilities, operating, maintenance and taxes and insurance, and accumulated those and reduced them by the property taxes paid, to come up with a net operating income.
>
> And then took the net operating income and ascribed a capitalization rate to it, and added to that an additional capitalization rate as it related to the property tax component, since they're ad valorem taxes. And came up with a total capitalization rate, which then I used the cap rate to derive the proposed true cash value, and then cut that in half for the proposed assessment for each year under the disclosure.

He used this method for both the improved and vacant parcels. The total proposed true cash value for the improved and vacant parcels under this approach varied from tax year to tax year. As set forth in the hearing officer's proposed opinion, the lowest proposed true cash value was $2,149,320 for tax year 2006. The highest proposed true cash value was $4,183,400 for tax years 2004 and 2005.

On appeal, Forest Hills relies on *Pinelake Housing Coop v Ann Arbor*, 159 Mich App 208; 406 NW2d 832 (1987), to argue that its proposed approach should have been used. Forest Hills was one of the two petitioner/housing cooperatives in that case. *Id*. at 210. The tax years in issue were 1981 through 1984. *Id*. This Court approved a capitalization-of-income approach to value that essentially treated membership fees like large security deposits and "capitalized" the annual mortgage payments for the housing project. *Id*. at 225-226. This Court stated, in part:

> To determine net income under the income approach, operating expenses are subtracted from gross income. However, mortgage payments are not considered to be an

> operating expense, but rather an expense of financing the property. Because the annual budget process makes gross income a function of expenses so that the project generates no cash flow, the result is that when actual expenses are subtracted from actual income, all that is basically left are the annual payments on the mortgage. The concern is that the capitalization of the total annual mortgage payment has no relationship to the property's value.
>
> However, it is our opinion that such a result nevertheless represents the values that such properties possess. Such projects, when solvent, are able to generate sufficient income to retire the mortgage debt at the one percent effective rate. The ability of a property to generate sufficient income to pay off its underlying financing is value. The fact that "net income" . . . represents little more than the annual debt service is simply an expression of our belief that under the regulatory restrictions such projects have little other value. [*Pinelake*, 159 Mich App at 225.]

In this case, the hearing officer considered, but rejected, Forest Hills' proposed capitalization-of-income approach, which used actual "carrying charges" in lieu of rent, because it was not a credible indicator of value. The hearing officer found this approach flawed because it did not take into account the positive value influence of the subsidized mortgage, but found that, even if an adjustment were made, the evidence was "insufficiently persuasive to support adoption of [Forest Hills'] overall capitalization rate." The hearing officer had stated earlier, when stating his findings of fact with respect to the testimony of Forest Hills' expert:

> 32. Mr. Gargaro testified that "he didn't see where frankly the income approach applied." He stated that he used the statutory "carve-out approach" and did the mathematical computations set forth in [Exhibit] P-2, which purports to be an income approach to value using monthly carrying charges as gross potential income.

> 33. Mr. Gargaro stated that the capitalization rates used in [Forest Hills'] "income approach" were taken from a "sheet of paper in the office" that included listings of capitalization rates for similar properties. He did not testify as to what type of properties the capitalization rates were intended to apply. [Citation omitted.]

The hearing officer also determined that the value of the decision in *Pinelake* had been severely diminished by the decision in *Meadowlanes* that the subsidized mortgage and other positive value influences should be considered. In *Meadowlanes*, 437 Mich at 501, our Supreme Court held that "in computing the true cash value of real property, the Michigan Tax Tribunal may take into account the value, if any, of a federal government mortgage subsidy."

The Tax Tribunal concurred in the hearing officer's determination that the cost approach, and not the income approach, provided the most accurate determination of valuation. It specifically addressed the *Pinelake* decision, stating:

> [Forest Hills] argues that the court's decision in *Pinelake* preserved its interpretation of MCL 211.27(4). In other words, [Forest Hills] argues that the Tribunal should accept its use of "actual monthly service charges as analogous to rent, and the analogy of the membership fees as security deposits." The Tribunal disagrees and finds that while actual monthly service charges and membership fees may be *considered* in valuing the subject property under an income capitalization approach, as suggested in *Meadowlanes*, utilizing these figures will not result in a reasonable estimate of the property's true cash value. This is due to the fact that actual monthly service charges and membership fees *will not generate income*. Instead, they are established to solely cover the expenses of operating the property and insuring that the property is maintained. According to the Appraisal Institute, *The Dictionary of Real Estate Appraisal*, (Chicago: 5th ed, 2010), p99, the

> income capitalization approach is "[a] set of procedures through which an appraiser derives a value for an *income-producing property* by converting its anticipating benefits (cash flows and reversion) into property value." "Income producing property" is defined as "[a] type of property created primarily to produce monetary income." (*Id*., p99) In this case, there is no doubt that the subject property was not created to produce income. [Citation omitted.]

Forest Hills has failed to establish any wrong principle applied by the Tax Tribunal in making this determination. Clearly, consideration was given to the approach in *Pinelake* in light of our Supreme Court's subsequent determination regarding the method for valuing federally subsidized housing in *Meadowlanes*, 437 Mich 473. Considering the whole record, including the meager evidence offered by Forest Hills through its expert to justify the capitalization rate and the finding that the highest and best use of the property was its current use, we conclude that the Tax Tribunal did not err by failing to base the determination of true cash value on Forest Hills' proposed variation from the common capitalization-of-income approach to value.

Ordinarily, courts will respect the existence of a corporation as separate from its shareholders. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). But if property is to be valued on the basis of its use as a nonprofit housing cooperative that is owned by its occupants through their shareholder or membership interests in the nonprofit corporation, an accurate valuation would require some consideration of the value of the physical structures and land that benefit the occupants, and not simply the net operating income produced through payments made by the occupants that are used to make loan payments or the value of federal subsidies that reduce interest on the loans. Indeed, as discussed in Part IV of this opinion, the Legislature treats the shareholder-

occupants as having a transferrable ownership for purposes of determining the taxable value of nonprofit housing cooperatives. Consistently, it is appropriate to consider the benefits of housing ownership available to those shareholder-occupants.

In the alternative, Forest Hills contends that the tribunal wrongfully rejected the "transfer value" approach to value. Article III, § 8(d) of the corporate bylaws for Forest Hills contains a transfer-value formula for the board of directors to purchase a membership in Forest Hills, which consists of the sum of four items: (1) the subscription price of the first occupant of the unit, (2) the "Value of Occupancy Agreement," (3) certain improvements installed at the expense of the member, and (4) amounts designated in a table, which depend on the number of bedrooms in a unit and the age of the mortgage for a particular section of the housing project.

Article 1 of the occupancy agreement requires that a member pay the member subscription price and "the Initial Payment under the Occupancy Agreement . . . (which Initial Payment under the Occupancy Agreement is referred to in the By Laws of the Corporation as the 'Value of Occupancy Agreement')."

Forest Hills' proposed transfer-value approach resulted in a gradual increase in the proposed true cash value for each tax year from 2000 to 2009 for the improved and vacant parcels. The hearing officer indicated in his proposed opinion that it ranged from $1,380,210 for 2000 to $2,595,540 for 2009. He indicated in a chart that Forest Hills' proposed transfer value for 2000 was $1,461,360.[4]

[4] Forest Hills asserts that the range was $1,461,360 for 2000 to $2,595,540 for 2008, but the precise calculations are not material to a proper resolution of this issue.

Gargaro gave the following testimony to explain his computations:

> I went to the bylaws and occupancy agreements, and the bylaws have the transfer of value formula in them and confirmed numbers from the Article 3, Section 5(d) [sic] of the bylaws. And then went to the occupancy agreement, Article 1 to get the subscription price number, and the value of the occupancy agreement, and used the numbers in those documents to come up with the transfer value for each year.

Gargaro later testified that the transfer value for a particular occupant depends on the number of bedrooms of the unit occupied and the "section" of the housing cooperative. For instance, he used $430 as the transfer value for the first four tax years of units located in Sections 1 and 2. He had been given a "transfer value table" to make his computations, and assumed that it had been prepared by Forest Hills.

The hearing officer found Forest Hills' proposed transfer-value approach even less persuasive than the proposed capitalization-of-income approach. He determined:

> The consideration that a person pays to acquire the right to occupy a unit, referred to as the "transfer value," bears no relation to the "fair market value" of the property rights acquired. The seller is not free to market the unit for the highest price that the market will bear, and the buyer is prohibited from paying an amount greater than the "transfer value" provided for in the regulatory agreement. Therefore, there is a market for units in a coop, but the price paid to acquire a unit is not equal to "fair market value."
>
> The buyer of a coop share receives the right to occupy a good quality dwelling unit, and effectively assumes a portion of a favorable mortgage with a federally subsidized effective interest rate of 1%. The buyer receives many

> benefits of private home ownership, such as federal income tax deductions for mortgage interest. *It is fair to say that the buyer receives more than he or she bargains for, by virtue of the benefits conferred by the federal section 236 program.* Units in a cooperative are part of a real estate market in that rights to the unit are exchanged for money. However, the actual consideration paid (transfer value) bears no relation to the "fair market value" of each unit. This requires rejection of [Forest Hills'] theory that [true cash value] should equal the "transfer value."

The Tax Tribunal also rejected the "transfer value," "combined buy-out prices," or "actual sales price" approach to value when considering Forest Hills' exceptions to the hearing officer's proposed opinion, although its decision focused on Forest Hills' argument that the Tax Tribunal was required to accept its capitalization-of-income approach.

Forest Hills has failed to establish that the Tax Tribunal adopted a wrong principle by not using the proposed transfer-value approach. As indicated in the hearing officer's proposed opinion, which was adopted by the Tax Tribunal, the consideration paid by Forest Hills to an occupant moving out of a unit does not measure the benefits of home ownership associated with the unit. Therefore, transfer value is not equivalent to fair market value.

IV. UNCAPPING TAXABLE VALUE

Forest Hills argues that the Tax Tribunal violated MCL 211.27a(6)(j) by prorating the uncapped taxable value associated with a transfer of a unit in the housing cooperative to units that did not transfer. It contends that the increase in taxable value must be confined to the transferred unit and, therefore, that separate parcel numbers must be assigned to each unit.

Underlying this issue is a provision of the General Property Tax Act (GPTA), MCL 211.27a, enacted by the Legislature to implement an amendment of Const 1963, art 9, § 3 established by Proposal A of 1994. As explained in *Mich Props*, 491 Mich at 529-530:

> Proposal A places a cap on the taxable value of a property so that, based on the previous year's taxable value, any yearly increase in taxable value is limited to either the rate of inflation or 5 percent, whichever is less. That cap on taxable value applies only to the current owner of the property, and the property's taxable value is uncapped when the property is transferred. The uncapped taxable value for the year after the transfer sets a new baseline value that is subject to a new cap. The GPTA is the enabling legislation that carries out the edicts of Proposal A.

As amended by Proposal A, Const 1963, art 9, § 3 provides, in pertinent part:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. *When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value*. [Emphasis added].

MCL 211.27a(1) contains the 50 percent limit for the assessed value of "property." MCL 211.27a(2) contains the limitations imposed under Proposal A for the taxable value of a "parcel of property." MCL 211.27a(2) provides:

> Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each *parcel* of property is the lesser of the following:
>
> (a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.
>
> (b) The property's current state equalized valuation. [Emphasis added.]

MCL 211.27a(3) contains the "uncapping" exception for transferred property. *Mich Props*, 491 Mich at 531. It provides:

> Upon *a transfer of ownership of property* after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer. [Emphasis added.]

MCL 211.27a(6) defines "transfer of ownership." It provides, in pertinent part:

> As used in this act, "transfer of ownership" means the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest. Transfer of ownership of property includes, but is not limited to, the following:
>
> * * *

> (j) A conveyance of an ownership interest in a cooperative housing corporation, except that portion of the property not subject to the ownership interest conveyed.

In *Colonial Square Coop v Ann Arbor*, 263 Mich App 208, 211-212; 687 NW2d 618 (2004), this Court held that it was permissible for the Legislature to include this definition of "transfer of ownership," but disapproved of an approach that failed to track the individual units transferred, stating:

> However, a finding that the definition does not run contrary to the Constitution does not end our inquiry. In this case, the city failed to track the individual units transferred, but rather uncapped the value of the whole parcel in proportion to the percentage of units transferred. This the city cannot do. Only by happenstance would the city arrive at an evaluation that did not affect "that portion of the property not subject to the ownership interest conveyed." MCL 211.27a(6)(j). Moreover, annual reevaluations of an entire parcel of property run contrary to the Constitution's plain meaning because they impose increasing obligations on the units in a cooperative that have not been transferred. Const 1963, art 9, § 3. The city's current estimation approach veils which units, if any, the city actually reassessed. The Constitution does not allow the city to reassess the entire parcel's value on the basis of a phantom reevaluation of the percentage of units transferred. Because of these shortfalls in the city's procedure, its application of the valid statute violated our Constitution.

In this case the hearing officer determined that the holding in *Colonial Square* could be satisfied in this case because individual units transferred were tracked by the City. The Tax Tribunal agreed. It rejected Forest Hills' argument that it would be necessary to assign separate parcel numbers to each unit in order to satisfy Const 1963, art 9, § 3, and MCL 211.27a.

On appeal, Forest Hills has failed to establish any error in the Tax Tribunal's application of MCL 211.27a(6)(j).

The flaw in Forest Hills' argument is that it is the only owner of the parcels of real property at issue in this case. MCL 211.27a(6)(j) does not address transfers of ownership of parcels of real property, but only transfers of an ownership interest in the cooperative housing corporation itself. Likewise, MCL 211.27a(3) addresses "a transfer of ownership of property" rather than a transfer of a "parcel of property."

This is significant because the word "parcel" is not used synonymously with "property" in the GPTA, but is used to identify the unit of taxation. As indicated in *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 632; 462 NW2d 325 (1990), different parcels of property having the same owner are generally taxed as separate units. The GPTA contains two statutory exceptions. *Id*. at 632 n 4; see also *Great Lakes*, 227 Mich App at 411-412. Both exceptions are in provisions addressing an assessor's preparation of the assessment roll. MCL 211.24(a) provides, in pertinent part:

> All contiguous subdivisions of any section that are owned by 1 person, firm, corporation, or other legal entity and all unimproved lots in any block that are contiguous and owned by 1 person, firm, corporation, or other legal entity shall be assessed as 1 parcel, unless demand in writing is made by the owner or occupant to have each subdivision of the section or each lot assessed separately. However, failure to assess contiguous parcels as entireties does not invalidate the assessment as made.

MCL 211.25(1)(e) provides:

> When 2 or more parcels of land adjoin and belong to the same owner or owners, they may be assessed by 1 valuation if permission is obtained from the owner or owners. The assessing authority shall send a notice of intent to assess the parcels by 1 valuation to the owner or owners. Permission shall be considered obtained if there is no negative response within 30 days following the notice of intent.

Because MCL 211.27a(3) and (6)(j) only require that taxable value be uncapped in a proportion to the property associated with a particular transfer of interest in the cooperative housing corporation, the failure to have assigned a separate parcel number to the transferred unit does not preclude the taxable value of the property within the co-op that was transferred from being uncapped. As stated in the hearing officer's proposed opinion and judgment: "The effect upon the tax liability of the coop is the same whether this increase is attributed to a unit that has been assigned a separate parcel number or if the unit does not have a separate parcel number. It increases the tax liability of the coop in either event." The tribunal's approach to uncapping taxable value did not constitute an error of law.[5]

V. CROSS-MOTIONS FOR SUMMARY DISPOSITION

Forest Hills moved in the circuit court for summary disposition under MCR 2.116(C)(10) and sought a declaration that MCL 211.27(4) is unconstitutional, as least as applied to its and other similarly situated properties, unless a capitalization-of-actual-income or

[5] Forest Hills also argues in a separate issue that the Tax Tribunal erred by failing to establish the taxable value for each individual parcel. Because Forest Hills does not cite the factual basis for this argument, this Court need not address it. "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." MCR 7.212(C)(7). An appellant may not leave it to this Court to search for a factual basis to sustain or reject a position. *Great Lakes*, 227 Mich App at 424. Nonetheless, the tribunal adopted the hearing officer's proposed opinion and judgment with one exception. In response to an exception taken by the City, the tribunal amended a chart on page 4 of the hearing officer's proposed opinion and judgment to reflect correct "current values" for 2007 and 2008. That chart contained combined true cash, assessed, and taxable values for the eight parcels that were at issue in the case. The tribunal's conclusions for each parcel and tax year were set forth on pages 7 to 9 of the hearing officer's proposed opinion and judgment. Because the tribunal did not modify these amounts, Forest Hills' argument is rejected as lacking factual support.

"share transfer values" approach is used to value its property because other approaches and, in particular, the procedures used by the City Assessor, will result in the property being over-assessed. No documentary evidence was submitted in support of the motion.

Defendants (the City and the City Assessor) responded by moving for summary disposition under MCR 2.116(C)(4) and (I)(2) on the ground that the circuit court lacked subject-matter jurisdiction to declare that the City Assessor's application of the tax statutes resulted in an unconstitutional assessment on Forest Hills' property. Defendants argued that the Tax Tribunal had exclusive jurisdiction to review the assessments and that the Tax Tribunal's review would cure any constitutional violation. Defendants asserted that the circuit court could accept the allegations in Forest Hills' complaint as true for purposes of the motion. Like Forest Hills, defendants did not submit a copy of the Tax Tribunal's decision in support of their motion. But Forest Hills' counsel argued at the September 28, 2011 hearing that the Tax Tribunal did not agree that nonprofit housing cooperatives must be valued on the basis of actual income, but would use whatever approach to value was deemed worthwhile. Further, it appears that the circuit court considered the Tax Tribunal's decision in its decision when ruling from the bench on September 28, 2011, as follows:

> Court hereby removes this case from abeyance based on the reasons stated in the Defendant's [sic] brief *and the final opinion and judgment issued by the Michigan Tax Tribunal*.
>
> [Forest Hills'] motion for summary disposition is denied and the Court grants judgment in favor of the Defendant [sic]. This is a final order. [Emphasis added.]

The circuit court specified in its order that it was denying Forest Hills' motion for summary disposition

and granting judgment in favor of defendants under MCR 2.116(I)(2) "for the reasons stated from the bench on September 28, 2011."

A. PRESERVATION OF ISSUE

In general, an issue is not preserved for appeal unless it was presented to and decided by the circuit court. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). But an issue of subject-matter jurisdiction may be raised at any time, even for the first time on appeal. *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996).

Defendants' challenge to the circuit court's subject-matter jurisdiction is properly before this Court because this issue may be raised at any time. Further, while the circuit court's decision could have been clearer, it appears that the circuit court agreed with defendants' argument that it lacked subject-matter jurisdiction. Regardless, the circuit court did not rule on Forest Hills' request for declaratory relief. Therefore, Forest Hills' request that this Court provide declaratory relief was not preserved for appeal. But if this Court concludes that the trial court had subject-matter jurisdiction, this Court may consider an issue involving a question of law for which the facts necessary have been presented. *Gen Motors*, 290 Mich App at 387. This Court will not reverse a trial court's order of summary disposition when the right result was reached for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

B. STANDARD OF REVIEW

A trial court's grant or denial of a motion summary disposition in a declaratory judgment action is reviewed de novo. *Farm Bureau Ins Co v Abalos*, 277 Mich App

41, 43; 742 NW2d 624 (2007). Whether a trial court has subject-matter jurisdiction is also reviewed de novo. *Usitalo v Landon*, 299 Mich App 222, 228; 829 NW2d 359 (2013). This Court also reviews de novo issues involving the interpretation and application of a statute. *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008).

But a trial court has discretion in determining whether to grant declaratory relief under MCR 2.605. As explained in *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 Mich 743 (1993), "Assuming the existence of a case or controversy within the subject matter of the court, the determination to make such a declaration is ordinarily a matter entrusted to the sound discretion of the court." "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

C. ANALYSIS

Although the circuit court relied on MCR 2.116(I)(2) to grant defendants' motion for summary disposition, that rule merely provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." Forest Hills' motion in this case was based on MCR 2.116(C)(10), which tests the factual support for a claim. Summary disposition under this rule is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Farm Bureau*, 277 Mich App at 43-44. The court is required to consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties when judgment is sought under MCR 2.116(C)(10). See MCR 2.116(G)(2).

Defendants' response to Forest Hills' motion was based on MCR 2.116(C)(4), which provides that summary disposition may be granted when "[t]he court lacks jurisdiction of the subject matter." Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case. *Usitalo*, 299 Mich App at 228.

> In reviewing a motion under MCR 2.116(C)(4), it is proper to consider the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact. *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000); see also MCR 2.116(G)(5). Jurisdictional questions are reviewed de novo, but this Court " 'must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction.' " *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007), quoting *CC Mid West, Inc v McDougall*, 470 Mich 878 (2004) (alteration by the *L & L* Court). [*Toaz*, 280 Mich App at 459.]

An appellate court will review a trial court's summary-disposition ruling under the correct rule. *Farm Bureau*, 277 Mich App at 43. Therefore, MCR 2.116(C)(4) provides the proper standard for considering defendants' challenge to the circuit court's subject-matter jurisdiction.

The circuit court lacked jurisdiction to consider Forest Hills' request for declaratory relief. Although MCR 2.605(A)(1) permits a court to grant declaratory relief in a case of actual controversy, it does not limit or expand the court's subject-matter jurisdiction. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012).

At the time Forest Hills filed its complaint in circuit court in October 2009, MCL 205.731, as amended by

2008 PA 125, effective May 9, 2008, provided, in pertinent part:[6]

> 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.

Merely couching a challenge to an assessment in constitutional terms does not deprive the Tax Tribunal of its exclusive jurisdiction to consider a claim that the assessment is arbitrary or without foundation. As further explained in *Foreclosure Petition*, 286 Mich App at 112-113:

> The Tax Tribunal has no jurisdiction to hold statutes invalid or to consider constitutional matters; only the circuit court may do so. Thus, if a challenge to a tax assessment rests solely on an argument that the tax assessment was made under authority of an illegal statute, the circuit court would have jurisdiction over the matter. But merely phrasing a claim in constitutional terms will not divest the Tax Tribunal of its exclusive jurisdiction. . . .

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[6] Before the amendment, the statute contained the same substantive provisions. It stated:

> The tribunal's exclusive and original jurisdiction shall be:
>
> (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 property tax laws.
>
> (b) A proceeding for refund or redetermination of a tax under the property tax laws. [MCL 205.731, as enacted by PA 186.]

> Where a forfeiture challenge does not require any findings of fact, but rather only construction of law—where no factual issues requiring the tribunal's expertise are present—the circuit court has jurisdiction to consider the issue. [Citations omitted.]

Although Forest Hills did not directly challenge any particular assessment in the complaint, Forest Hills challenged the method used by the City Assessor to determine the assessments by allegation in its complaint that MCL 211.27 requires the use of actual income to determine value. Forest Hills also alleged:

> 16. Regardless of whether or not the City Assessor's interpretation of MCL 211.27 is correct, the manner of its application to the Forest Hills Property, and others similarly regulated, is arbitrary and capricious and results in Forest Hills being treated differently from other taxpayers based upon no legitimate distinction.
>
> 17. If MCL 211.27 permits the procedures employed by the City Assessor, for the purpose of valuing the Forest Hills Property, then the statute violates [Forest Hills'] rights of due process and equal protection in contravention of U.S. Const. Amendment 14 and MCL [sic] Const. Art. 1, §§ 2 and 17 . . . .
>
> * * *
>
> 21. Absent a declaration from this Court, Defendants will continue to value the Forest Hills Property, for assessment purposes, in an arbitrary and capricious way and in a way that results in Forest Hills being treated differently from other taxpayers based upon no legitimate distinction.

In essence, Forest Hills' claim was an attempted appeal of its tax assessment. Because the gravamen of Forest Hills' claim was that the City Assessor used an arbitrary and capricious method of valuation and this issue falls squarely within the Tax Tribunal's exclusive jurisdiction under MCL 205.731(a), the circuit court

lacked jurisdiction to consider it. Forest Hills' characterization of its claim of unequal treatment as one involving being "over-assessed" is consistent with this conclusion. The Tax Tribunal has exclusive jurisdiction to decide this issue. The circuit court lacked subject-matter jurisdiction to hear and decide Forest Hills' request for declaratory relief.

In Docket No. 305194, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. In Docket No. 306479, we affirm.

O'CONNELL, J., concurred with FITZGERALD, J.

WHITBECK, P.J. (*concurring in part and dissenting in part*). I agree with the majority's conclusions regarding the Tax Tribunal's duty to make an independent determination of true cash value, the application of MCL 211.27, and the city of Ann Arbor's cross-motion for summary disposition. But regarding the Tax Tribunal's true-cash-value determination, I would conclude that the Tax Tribunal adequately addressed the issue of economic obsolescence. Accordingly, I dissent from the majority's analysis under Part II(C)(3).

The majority concludes that the Tax Tribunal inappropriately applied the cost approach to the subsidized property. The majority reasons that the Tax Tribunal found that the hearing officer found that there was no economic obsolescence when the hearing officer determined that the Tax Tribunal could not make an independent estimate of functional obsolescence. I disagree with this characterization of the Tax Tribunal's finding.

When valuating property using "the cost approach, valuing the real property as subsidized," the Tax Tribunal should calculate "economic or external obsoles-

cence . . . ."[1] But "[i]f there is a market for subsidized housing at the location where it is built and a sufficient number of individuals who can afford to pay the rent required, then there will be little economic obsolescence under this approach."[2]

As the majority notes, the Tax Tribunal adopted the hearing officer's proposed opinion and judgment and considered Forest Hills' argument that the hearing officer failed to make findings regarding an obsolescence adjustment. The hearing officer determined that "where the vacancy rate has varied between 0% and 5% for the years at issue, this suggests that the cost approach could be used with no economic obsolescence applied." The Tax Tribunal rejected Forest Hills' argument that the hearing officer had failed to make findings on an obsolescence adjustment. The Tax Tribunal ruled that, given the hearing officer's use of the cost approach and the uncertain vacancy rate from 2004 to 2009, "the [hearing officer] *was correct in finding that*, *under* Meadowlanes, *there is no economic obsolescence*."[3]

Whether the Tax Tribunal properly or improperly interpreted the hearing officer's poorly phrased determination is irrelevant. We review the Tax Tribunal's decision, not the hearing officer's decision.[4] When read in conjunction with the *Meadowlanes* Court's statement that there is little economic obsolescence when there is a market for subsidized housing, the Tax

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[1] *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 503; 473 NW2d 636 (1991).

[2] *Id*.

[3] Emphasis added.

[4] See *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 630, 635-637; 806 NW2d 342 (2011) (observing that this Court reviews decisions of the Tax Tribunal; the Tax Tribunal's determination is de novo).

Tribunal's statement that the hearing officer correctly found that there was no economic obsolescence was, in fact, a finding that there was no economic obsolescence.

We must accept the Tax Tribunal's factual findings if "competent, material, and substantial evidence on the whole record" supports them.[5] Because there was evidence that the vacancy rates were low, competent evidence supported the Tax Tribunal's finding that the parcels did not have economic obsolescence. Accordingly, I would conclude that remand on this point is unnecessary. In all other respects, I agree with the majority opinion.

I would affirm in part, reverse in part, and remand.

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[5] Const 1963, art 6, § 28; see also *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012).

In re BROWN/KINDLE/MUHAMMAD MINORS

Docket No. 318357. Submitted June 4, 2014, at Detroit. Decided June 12, 2014, at 9:05 a.m.

The Department of Human Services petitioned the Wayne Circuit Court, Family Division, to terminate the parental rights of respondent to her three minor children pursuant to MCL 712A.19b(3)(b)(*ii*), (b)(*iii*), (g), and (j), after the children told Child Protective Services workers that respondent had repeatedly sent them to stay with a man who sexually abused them. Petitioner moved to admit these statements and subsequent videotaped statements made to forensic interviewers under MCR 3.972(C)(2), which allows a statement made by a child under 10 regarding sexual abuse to be admitted into evidence through the testimony of a person who heard the child make the statement if it has been made under circumstances that provide adequate indicia of trustworthiness. At a pretrial hearing to determine whether the statements met this requirement, respondent objected to the forensic interviewers' testimony about the children's statements, arguing that the videorecording of the interview was the best evidence of the statements' contents. The court, Christopher D. Dingell, J., overruled the objection and declined to admit or view the videorecording. After a trial, the court found clear and convincing evidence to terminate respondent's parental rights, and respondent appealed.

The Court of Appeals *held*:

1. The trial court clearly erred by not admitting the videorecorded forensic interviews of the children pursuant to MCL 712A.17b(5), which requires such statements to be admitted at all nonadjudicative proceedings instead of live testimony. The hearing to determine whether the children's statements were admissible under MCR 3.972(C)(2) was a nonadjudicative proceeding, and the videorecordings were the best evidence of the children's statements. However, reversal was not warranted because the alleged inconsistencies between the witnesses' videorecorded statements and their testimony were explored on cross-examination and acknowledged by the trial court.

2. The trial court did not clearly err by terminating respondent's parental rights. The fact that the children were bonded with

respondent and had been placed with relatives did not outweigh the fact that respondent lacked the ability to keep the children safe and effectively parent them.

Affirmed.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — EVIDENCE — VIDEORECORDED STATEMENTS.

A pretrial hearing to determine whether a child's statements to another person are admissible through that person's testimony under MCR 3.972(C)(2) is nonadjudicative for purposes of MCL 712A.17b, which requires any videorecorded statement the child made under that provision to be admitted at all proceedings except at the adjudication stage.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Lesley Carr Farrow*, Assistant Attorney General, for petitioner.

Michigan Children's Law Center (by *Lindsay Hermans*) for the minors.

Nancy A. Plasterer for respondent.

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

PER CURIAM. Respondent appeals as of right the order terminating her parental rights to her minor children—MB, AM, and AK—pursuant to MCL 712A.19b(3)(b)(*ii*) (failure to prevent abuse), (b)(*iii*) (nonparent caused abuse and reasonable likelihood of repeated abuse by nonparent if placed in parent's home), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood that the minor child would be harmed if returned to the parent's home).[1] Although the trial court clearly erred by not admitting the videorecorded forensic inter-

[1] The order also terminated the parental rights of the unknown father of AM. The parental rights of MB's and AK's respective fathers were not terminated.

views of the children, under the circumstances of this case, the error does not require reversal. Accordingly, we affirm.

I. BASIC FACTS

The Department of Human Services filed a petition alleging that respondent failed to protect the minor children from sexual abuse by repeatedly sending them to stay at the apartment of James Lester, whom the children called "Uncle Lenny," even after the children told respondent that they were being abused. The petition sought termination at original disposition.

Under MCR 3.972(C), the "tender years" exception to the rule against admitting hearsay, petitioner moved to admit into evidence statements that each of the three children made to Child Protective Services (CPS) workers and to Sandra Brown, MB's paternal grandmother. Petitioner also sought to admit statements the children made to forensic interviewers from the Kids-TALK Children's Advocacy Center.[2] The trial court conducted a two-day hearing to determine whether the statements were admissible under MCR 3.972(C)(2)(a) and received the testimony of a number of witnesses.

Jenette Lippiello, a Kids-TALK forensic interviewer, was qualified as an expert in forensic interviewing. AM told Lippiello that she was taken from her mother's care because Lester touched her "coo-coo," indicating her genital area, when she was spending the night at his home with her brothers. AM said she had been sleeping

[2] Kids-TALK is a community-based program that provides treatment to "suspected child victims of sexual abuse, physical abuse, neglect, or other forms of psychological trauma," and also conducts forensic interviewing of child victims. The Guidance Center, *Kids-TALK Children's Advocacy Center* <http://www.guidance-center.org/kids-talk> [http://perma.cc/3DR6-XTV5] (accessed June 12, 2014).

at the time, but knew something had happened because "she remembered it, and because . . . it felt like something crawling on her." AM also told Lippiello that she knew it had happened because respondent told her. AM told Lippiello that respondent found out about the touching because her mother's friend saw it on the news. Respondent did not make AM visit Lester after that. AM did not report seeing any abuse directed at either of her brothers.

Lippiello also interviewed MB. MB told Lippiello that every time he and his brother would go to Lester's, Lester would "bother" their "privates." Lippiello asked MB what he meant by the word "bother," and MB answered that Lester "would put his mouth on [MB's] private, and [put] his mouth on [AK's] private." MB stated that the abuse started when he was seven years old. When Lippiello asked MB to tell her about the last time Lester abused him and AK, MB said that they were spending the night at Lester's when Lester put his mouth on MB's private and sucked it. MB then saw Lester go over to AK, place his private in AK's mouth, and make AK suck it. MB indicated that he told his mother after the first instance of abuse and she told him they would not have to go back. However, they did go back after Lester asked respondent if he could see the boys. MB said respondent "made them" return to Lester's apartment.

On the second day of the hearing, respondent objected to the forensic interviewers' testimony regarding the content of children's statements, arguing that "the Court actually seeing [the videorecorded Kids-TALK interview] would be . . . the best evidence rather than having someone interpret them." The fathers and Lester joined in the request. Petitioner offered to produce the videorecorded interview under seal, to be

reviewed only by the trial court,[3] and further requested that it be kept secured. The trial court overruled the objection and declined to admit or view the actual interview, but left open the opportunity to revisit the issue at trial.

Loren Shiener, whom the court recognized as an expert in forensic interviewing, testified that she interviewed AK at Kids-TALK. Although AK had a hard time focusing on the interview, he told Shiener that Lester touched his "private part" inside his pants. AK said that the touching occurred while he was sleeping and that he tried to pull his pajama bottoms up when he woke. MB, seeing this occur, said to Lester, "Get off my brother like that." AK said he told his mother about the incident, but he could not remember how respondent reacted to his disclosure.

Brown, MB's paternal grandmother, testified that in January 2013, she was driving MB to her house when MB told her, "Uncle Lenny has been touching us." Brown stopped the car and asked MB to repeat what he said. MB told her that Lester touched his privates and put MB's private in Lester's mouth and also put Lester's private in AK's mouth. MB told Brown it happened every time they went to Lester's apartment. MB told his mother about the abuse and she reassured him that they would never have to go back there again. Later, however, Lester asked respondent if the boys could come over and respondent allowed Lester to pick them up. MB reported that the abuse continued.

Brown opined that MB was telling the truth. Although she had caught him telling lies before, she stated that when he was lying he could not look her in the face and would stutter. But when he disclosed the abuse to her, MB

[3] The videorecorded interviews had previously been made available for viewing by all counsel of record. MCL 712A.17b(7).

looked at her face and was very consistent. The next day Brown told respondent that she needed to discuss respondent's "sons being molested." According to Brown, respondent said, "What? You called Child Protective Services on me?" and hung up.

Tricia Shano, the CPS worker who authored the petition in this case, testified that she interviewed MB at his school on January 29, 2013. As Shano introduced herself and began the interview, MB stated that he knew she was there to talk about what Lester did to him. MB told her that, during a visit to Lester's apartment the weekend before the interview, MB and AK were sleeping on the floor. At one point during the night, Lester put his mouth on MB's privates. MB then watched as Lester went over to AK and placed his private in AK's mouth. MB told Lester to stop, but Lester hit him with an extension cord. MB told Shano he did not tell respondent about the abuse because he was afraid, but Shano could not recall the reason he gave for being afraid.

Shano interviewed MB at his school again, on February 11, 2013, after the children made statements indicating that respondent may have been aware of the abuse. MB told her that the first time they went to Lester's apartment, Lester "bothered" AK's privates. MB also said that he told his mother about the abuse and she said, "Okay, you won't have to go back anymore."

Shano also interviewed AM on February 11, 2013. AM said that Lester touched her "middle," indicating her vaginal area. AM told respondent what had happened, and respondent did not make AM go back to Lester's, but she continued to let her brothers go. Shano concluded that AM, who was five years old at the time of the interview, was telling the truth.

The trial court found that the children's statements "have adequate indicia of trustworthiness," but qualified its finding by noting that "[p]erhaps there is not quite as much trust for the later statements by [MB], also the statements by [AM] and [AK]." The court stated that it had "a great deal of faith that [MB] was telling [Brown] the truth," and that the "fact that [AM] was not sent back over [to Lester's apartment] leaps out."

The matter then proceeded to trial, at which the court received additional testimony from witnesses regarding respondent's ability to parent and protect the children. The court asserted jurisdiction over the children and further found clear and convincing evidence to terminate respondent's parental rights, primarily because of her failure to protect the children from sexual abuse. Respondent now appeals as of right.

II. TENDER-YEARS HEARING

Respondent first argues that the trial court abused its discretion when it admitted the minor children's out-of-court statements made to the forensic interviewers but denied respondent's request to review the actual videorecorded interviews in camera. We agree that the trial court's refusal to admit the videotapes was contrary to the clear language of MCL 712A.17b(5). However, the trial court's error does not warrant reversal in this case.

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010) (citations omitted). "However, decisions regarding the admission of evidence frequently involve pre-

liminary questions of law," which are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Whether the trial court was required to admit the videotapes is a question of statutory interpretation, which we also review de novo. *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014).

In admitting the children's statements to the forensic interviewers into evidence, the trial court relied exclusively on MCR 3.972(C). This court rule permits a trial court to receive as substantive evidence of abuse what would otherwise be deemed inadmissible hearsay evidence. MCR 3.972(C) provides, in part:

> (2) Any statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.
>
> (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony. [MCR 3.972(C)(2)(a).]

On appeal, respondent does not contest a trial court's ability to receive testimony regarding a young child's statement under this court rule, but argues that the trial court erred by failing to admit and view the actual videorecordings of the children's Kids-TALK forensic interviews.[4] We agree.

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[4] Specifically, respondent argues that the children's statements lacked "adequate indicia of trustworthiness," a defect that would have been

MCR 3.972(C)(2) is a general rule that applies to "any statement" made by a child "regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x)." The trial court correctly referred to this general rule and applied it to MB's statements to his grandmother, which were made spontaneously and were not the result of a forensic interview. The trial court also properly applied the court rule to the unrecorded statements the children made to workers who interviewed them at school.

However, there is a specific statute governing the admissibility of a particular type of statement given by a child: those that have been videorecorded in the manner set forth in detail in MCL 712A.17b, which provides, in relevant part:

> (5) A custodian of the videorecorded statement may take a witness's videorecorded statement. The videorecorded statement shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness. The videorecorded statement shall state the date and time that the statement was taken; shall identify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording; and shall show a time clock that is running during the taking of the statement.
>
> (6) In a videorecorded statement, the questioning of the witness should be full and complete; shall be in accordance with the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628; and, if appropriate for the witness's developmental level, shall include, but need not be limited to, all of the following areas:
>
> (a) The time and date of the alleged offense or offenses.

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cured had the court "viewed the video recordings [to] determin[e] whether and what statements were admissible."

> (b) The location and area of the alleged offense or offenses.
>
> (c) The relationship, if any, between the witness and the respondent.
>
> (d) The details of the offense or offenses.
>
> (e) The names of other persons known to the witness who may have personal knowledge of the offense or offenses.

There is no issue in this case that the videorecorded statement complied with the requirements of the statute. And MCL 712A.17b(5) unambiguously provides that, in proceedings brought under MCL 712A.2(b), "The videorecorded statement *shall* be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness." (Emphasis added.) Thus, while the trial court correctly invoked the court rule in general, it inexplicably ignored the statutory mandate that the children's videorecorded statements be admitted into evidence.

We hold that MCL 712A.17b(5) requires a trial court to admit videorecordings of a child's forensic interview during a nonadjudicatory stage—here, a tender-years hearing.

> As always, the goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written. [*Harris*, 495 Mich at 126-127 (citations and quotation marks omitted).]

The language contained in MCL 712A.17b(5) could not be more clear: "The videorecorded statement *shall* be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness."

Our Court addressed this statute in *In re Archer*, 277 Mich App 71; 744 NW2d 1 (2007). In *Archer*, the respondent parents argued that the trial court violated MCL 712A.17b(5) when it allowed videorecordings of the minor children's statements to be played during a tender-years evidentiary hearing. *Archer*, 277 Mich App at 81. This Court concluded that the hearing was held "before the adjudicative stage had begun" and, therefore, the trial court did not violate MCL 712A.17b(5) when it admitted videorecordings of the minor children's statements at that time. *Id*. The plain language of the statute, coupled with *Archer*'s holding that a tender-years evidentiary hearing is not adjudicative, compels the conclusion that the trial court in this case clearly erred by failing to admit the videorecordings. The videorecordings were the best evidence of the children's statements, not the forensic interviewers' interpretation of those statements.

Nevertheless, we do not conclude that reversal is necessary. In considering whether to admit the children's statements, the trial court had to first ascertain that the circumstances surrounding the giving of the statements provided adequate indicia of trustworthiness, which included evidence separate and apart from the actual videorecordings. "Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate." *Archer*, 277 Mich App at 82.

The trial court acknowledged this list of suggested circumstances on the record, and found that the minor children's statements had adequate indicia of trustworthiness. The trial court noted that MB had "[n]o motive to fabricate," that his statements to his grandmother were

"very spontaneous" and "generally consistently repetitive," and that Brown's testimony seemed consistent with the testimony that followed. There was no videorecording of MB's statement to his grandmother, and the trial court's finding that MB's statement provided adequate indicia of trustworthiness is supported by the record evidence. As for the other children, the trial court indicated its concern regarding the indicia of trustworthiness of their statements. The trial court nevertheless concluded that the statements were admissible. Again, this conclusion has support in the record. Lippiello testified that she believed AM "was telling me the truth as she knew it and her perception of what happened." Regarding MB, Lippiello testified: "I asked him if he would promise to talk about things that are true and tell the truth, and he said yes." Shiener concluded that, although AK initially told her he would not tell the truth, he "could tell the difference between the truth and a lie," and understood that he was to tell only the truth. Each of the siblings' statements seemed to corroborate MB's original statement to his grandmother.

Respondent argues that, had the trial court watched the videorecordings, which were inconsistent with the witnesses' testimony, the trial court would not have admitted the statements into evidence. We note, however, that these inconsistencies were explored on cross-examination and were fully acknowledged by the trial court when it rendered its decision. Accordingly, although the trial court clearly erred when it refused to admit the videorecordings into evidence, reversal is not warranted.

III. GROUNDS FOR TERMINATION

Respondent next argues that the trial court clearly erred when it terminated her parental rights. We disagree.

"To terminate parental rights, a trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake." *In re White*, 303 Mich App 701; 846 NW2d 61 (2014) (citations omitted).

The court found that termination of respondent's parental rights was justified under MCL 712A.19b(3)(b)(*ii*), (b)(*iii*), (g), and (j), which provide:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> * * *
>
> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
>
> (*iii*) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.
>
> * * *

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

AM, MB, and AK each disclosed that they were molested by "Uncle Lenny" in his apartment. MB and AK were abused repeatedly. Respondent testified that MB told her about the abuse in either June or August 2012. She confronted Lester, who denied the allegations. Respondent asked MB to repeat his allegations in front of Lester, which he refused to do. Thereafter, respondent continued to allow MB and AK to stay with Lester at his apartment until January 2013 when the petition was filed. It is striking that respondent only knew Lester for a month before allowing her children to stay with him. He was "a friend of [her] friend." Respondent did not know Lester's full name, his address, or how to contact him.

On cross-examination, respondent acknowledged that she allowed her children to be placed in harm's way, but argued that there was no indication that this would happen again. However, MB and AK were sexually abused repeatedly for at least five months after MB disclosed the molestation to respondent; AM and AK also claimed to have told respondent about Lester's practices. It is clear that respondent was in a position to prevent the abuse and failed to do so and that the children would have been at risk of harm in her care,

justifying termination under subsection 19b(3)(b)(*ii*), (b)(*iii*), and (j).

Moreover, respondent was not in a position to provide her children with proper care or custody. At the time of the hearing, she was living in a shelter. Before that, she had transient housing and rarely had hot water or heat. Respondent also had a rather extensive CPS history beginning in 2005. Three of six complaints were substantiated, including one in 2010 for physical neglect and poor living conditions, one in 2007 when AM tested positive for marijuana at birth, and one in 2006 for unspecified physical neglect. Respondent admitted that she smoked marijuana daily before the termination petition was filed. Considering respondent's history of inadequate housing and reliance on other people to raise the minor children, the trial court did not clearly err when it found that respondent was not in a position to provide the children with proper care or custody under subsection 19b(3)(g).

If a trial court finds that a statutory basis for terminating parental rights exists by clear and convincing evidence, it is required to terminate parental rights if "it finds from a preponderance of evidence on the whole record that termination is in the children's best interests. We review for clear error the trial court's determination regarding the children's best interests." *White*, 303 Mich App at 713. To make a best-interest determination, "the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The fact that a child is placed with a relative weighs against termination. *Id*. at 42-43.

In this case, the trial court focused on the fact that respondent allowed the children to be sexually abused. It noted that she had money to smoke marijuana daily, but did not have money for adequate food or fit housing. Respondent argues that the children are bonded to her and had been placed with relatives. Although the fact that a child is placed with a relative weighs against termination, and a foster-care worker testified that respondent did not miss any supervised visits and that the minor children were bonded to her, it was clear that respondent lacked the ability to keep her children safe or effectively parent them. Respondent repeatedly sent AK and BM to Lester's apartment, where they were sexually abused. She explained that she did so because the boys "begged" her to send them there, as if the requests of a four-year-old and a seven-year-old outweighed any concern respondent may have had for their safety. Additionally, the children's need for permanency, stability, and finality militated against placing the minor children in respondent's care. Testimony that respondent frequently changed housing, lived illegally in a series of abandoned houses without utilities or appliances, and left the minor children in the care of others demonstrates that she cannot offer permanency, stability, and finality. Accordingly, termination of respondent's parental rights was in the best interests of the minor children.

Affirmed.

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

GIVIDEN v BRISTOL WEST INSURANCE COMPANY

Docket Nos. 312082 and 312129. Submitted June 4, 2014, at Detroit. Decided June 17, 2014, at 9:00 a.m. Leave to appeal sought.

Stephen P. Gividen filed a claim with Farmers Insurance Exchange for personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101, for injuries he sustained when the off-road vehicle (ORV) he was driving collided with a Jeep driven by Brandon Northrup. Northrup's Jeep, which had been modified for off-road travel, was insured by a policy purchased in Texas from a Farmers agent that bore the names of the Bristol West Insurance Group and the Home State County Mutual Insurance Company. After Farmers denied Gividen's claim, the Assigned Claims Facility assigned Auto Club Insurance Association (ACIA) to handle the matter, and ACIA paid PIP benefits to Gividen. Gividen brought this action in the Wayne Circuit Court to determine the order of priority of Farmers, Home State, Bristol West and its related corporate entities, and ACIA for paying the PIP benefits he claimed. ACIA filed a cross-claim seeking reimbursement from the other defendants for the PIP benefits it had already paid and a determination that they were responsible for paying Gividen's PIP benefits in the future. After a hearing on the parties' motions for summary disposition, the court, Daphne Means Curtis, J., concluded that although neither the Jeep nor the ORV was a motor vehicle as defined by the no-fault act, the Jeep was a motor vehicle under the terms of Northrup's insurance policy. Therefore, the court ruled that Farmers, Bristol West, and Home State were jointly responsible for providing the PIP benefits to which Gividen was entitled under that policy. The court discharged ACIA from its obligation, ordered the remaining defendants to reimburse ACIA for $502,796.25, and dismissed ACIA from the case. In Docket No. 312082, Gividen appealed the order of judgment that partially denied his motion for summary disposition on the ground that the Jeep was not a motor vehicle for purposes of the no-fault act as a matter of law, and in Docket No. 312129, the Bristol West defendants appealed the same order. The cases were consolidated for appeal.

The Court of Appeals *held*:

1. The trial court did not err by ruling, as a matter of law, that the Jeep was not a motor vehicle for purposes of the no-fault act

because the undisputed evidence established that the Jeep had been modified to the extent that it was no longer designed for operation on a public highway.

2. The trial court erred by concluding that Northrup's insurance policy obligated any of the insurers to pay no-fault PIP benefits to Gividen. Given that ORVs are statutorily excluded from no-fault coverage by MCL 500.3101(2)(e), the fact that the insurance policy did not expressly exclude ORVs is irrelevant.

3. The trial court erred by concluding that Gividen was entitled to no-fault PIP benefits under the out-of-state coverage clause in Northrup's insurance policy. The out-of-state coverage clause provided coverage for the minimum amount of no-fault insurance required in Michigan if the insured was legally responsible for such coverage. However, because the Jeep was not a motor vehicle for the purposes of the no-fault act, the collision was not an auto accident to which the policy applied.

4. The Bristol West defendants were not estopped from arguing that the Jeep was not a motor vehicle, despite the fact that they initially denied Gividen's claim on another basis, because estoppel is not available to broaden the coverage of a policy to protect the insured against risks not included therein or expressly excluded therefrom.

Judgment vacated; case remanded for entry of an order consistent with this opinion.

INSURANCE — NO-FAULT — MOTOR VEHICLES — MODIFICATIONS FOR OFF-ROAD TRAVEL.

A motor vehicle that has been modified for off-road travel to the extent that it is no longer designed for operation on a public highway does not qualify as a motor vehicle for purposes of the no-fault act, MCL 500.3101 *et seq*.

Logeman, Iafrate & Logeman, PC (by *James A. Iafrate*), for Steven P. Gividen.

Worsfold Macfarlane McDonald, PLLC (by *David M. Pierangeli*), for Bristol West Insurance Co. and others in Docket No. 312082.

Cory, Knight & Bennett (by *Patrick W. Bennett*) for Bristol West Insurance Co. and others in Docket No. 312129.

Hom, Killeen, Siefer, Arene & Hoehn (by *Elaine I. Harding*), and *John A. Lydick*, of counsel, for Auto Club Insurance Association.

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

WILDER, P.J. This case arises from a collision between an off-road vehicle (ORV) driven by plaintiff Steven P. Gividen and a modified 1976 Jeep driven by Brandon Northrup, who is not a party to this lawsuit. In Docket No. 312082, plaintiff appeals as of right the trial court's order of judgment, which granted in part and denied in part the motions for summary disposition filed by plaintiff and by defendants/cross-defendants Bristol West Insurance Company, Bristol West Preferred Insurance Company, Farmers Insurance Exchange, and Home State County Mutual Insurance Company (the Bristol West defendants) and entered judgment in favor of defendant/cross-plaintiff Auto Club Insurance Association (ACIA) in the amount of $502,796.25. In Docket No. 312129, the Bristol West defendants appeal as of right the same order of judgment. We vacate the judgment and remand for proceedings consistent with this opinion.

I

Plaintiff was seriously and permanently injured when the ORV he was operating collided with the modified Jeep driven by Brandon Northrup. At the time of the accident, plaintiff was not covered by a no-fault insurance policy and did not reside with a relative with no-fault coverage. Northrup's Jeep was insured by a policy purchased in Texas. The cover page of the policy stated that the policy was a Texas personal auto policy, listed the names Bristol West Insurance Group and

Home State County Mutual Insurance Company, and stated that the policy was administered by Coast National General Agency, Inc. Northrup testified in his deposition that the policy was issued through a Farmers Insurance Company agent and that he thought he had insurance coverage from Farmers.

Plaintiff filed a claim with Farmers for personal protection insurance (PIP) benefits under the no-fault act, which Farmers denied. Thereafter, plaintiff filed a no-fault claim with the Assigned Claims Facility, which assigned defendant ACIA to handle the claim. ACIA paid PIP benefits to plaintiff. This lawsuit followed.

II

A

In Docket No. 312082, plaintiff argues that the trial court erred by finding, as a matter of law, that the Jeep was not a "motor vehicle" for the purposes of Michigan's no-fault act, MCL 500.3101 *et seq*. We disagree.

This Court reviews a trial court's decision regarding a motion for summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Urbain v Beierling*, 301 Mich App 114, 122; 835 NW2d 455 (2013). A motion for summary disposition under MCR 2.116(C)(10) should be granted 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. *Id*.; see MCR 2.116(G)(3) and (4).

Under MCL 500.3105(1), "an insurer is liable to pay benefits for accidental bodily injury arising out of the

ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." A "motor vehicle" is defined as

> a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels. Motor vehicle does not include a motorcycle or a moped, as defined in section 32b of the Michigan vehicle code, 1949 PA 300, MCL 257.32b. Motor vehicle does not include a farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan vehicle code pursuant to section 216 of the Michigan vehicle code, 1949 PA 300, MCL 257.216. Motor vehicle does not include an ORV. [MCL 500.3101(2)(e).]

In this case, the undisputed evidence regarding the modifications made to the Jeep make it apparent that the Jeep had been rendered an ORV. For example, Northrup testified that at the time of the accident, the headlights, taillights, turn signals, speedometer, and odometer on the Jeep were not "hooked up." The original metal shell had been removed from the Jeep and replaced with a fiberglass shell and, except for the steering column, ignition, and brakes, the wiring had not been reconnected. In addition, the Jeep did not have doors or a rearview mirror. Finally, the Jeep was equipped with a roll bar and had expensive tires that were impractical for driving on a paved road because the tires would have been torn up and provided a "bumpy" ride. Because this evidence established that the Jeep had been modified to the extent that it was no longer "designed for operation upon a public highway," the Jeep did not qualify as a "motor vehicle" under the no-fault act at the time of the accident. See *Schoenith v Auto Club of Mich*, 161 Mich App 232; 409 NW2d 795 (1987); *Apperson v Citizens Mut Ins Co*, 130 Mich App 799; 344 NW2d 812 (1983).

We therefore find no error in the trial court's conclusion that there existed no genuine issue of material fact regarding whether the Jeep was a "motor vehicle" under MCL 500.3101(2)(e).[1] Consequently, plaintiff was not entitled to PIP benefits arising out of the ownership, operation, maintenance or use of the Jeep under the no-fault act.[2]

B

In Docket No. 312129, the Bristol West defendants first argue that the trial court erred by concluding that, despite the fact that the Jeep was not a "motor vehicle" under Michigan's no-fault act, plaintiff was nevertheless entitled to Michigan no-fault PIP benefits under the language of the insurance policy at issue. We agree that the trial court erred by concluding that the policy obligated any of the insurers to pay no-fault PIP benefits to plaintiff.

The trial court concluded that plaintiff was entitled to no-fault PIP benefits under the policy because the policy language, broadly construed, permitted the term "motor vehicle" to be defined in a way that did not exclude ORVs. We disagree.

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[1] The fact that the Jeep is not a motor vehicle distinguishes this case from *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 41; 592 NW2d 395 (1998) (insurer did not violate Michigan law by issuing an Indiana insurance policy to the insured because there was no evidence the insurer knew or should have known the insured was a Michigan resident). Had we found the Jeep to be a motor vehicle, this would have been a more difficult case.

[2] That the Assigned Claims Facility assigned ACIA to handle plaintiff's claim did not prove to the contrary that plaintiff was entitled to no-fault benefits arising out of the ownership, operation, maintenance or use of the Jeep. The Assigned Claims Facility will only deny "an obviously ineligible claim." MCL 500.3173a. And as ACIA argued on appeal, it mistakenly paid no-fault benefits before learning that the Jeep had been modified to the extent that it was no longer designed for operation on a public highway.

The policy did not define "motor vehicle." Instead, the policy defined "your covered auto" to include "any vehicle shown in the declarations" and "a private passenger auto." The policy's definition of "your covered auto" has no relation to the term "motor vehicle" as defined in the Michigan no-fault act. Had the parties intended to insure the Jeep as a motor vehicle under the no-fault act, they would have contracted for PIP benefits, which are required by the act. See MCL 500.3101 *et seq*. The declaration page contains no such benefits. The Bristol West defendants correctly argue that, because ORVs are statutorily excluded from no-fault coverage by MCL 500.3101(2)(e), the mere fact that the policy did not expressly exclude ORVs is irrelevant. Because the trial court properly determined that the Jeep was not a "motor vehicle" under the no-fault act, plaintiff was not entitled to Michigan no-fault PIP benefits based on the policy definition of "your covered auto."

C

The trial court further concluded that plaintiff was entitled to no-fault PIP benefits under the out-of-state coverage clause in the policy. We disagree.

Under the liability coverage in the policy, the insurer promised to "pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident." If the accident occurred out of state, the insurer would "interpret [the] policy for that accident as follows:"

> If the state or province has:
>
> 1. A financial responsibility or similar law specifying limits of liability for bodily injury or property damage higher than the limit shown . . . your policy will provide the higher limit.

> 2. A compulsory insurance or similar law requiring nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage.[3]

Thus, the out-of-state coverage provision provided coverage for the minimum amount of no-fault insurance required in Michigan *if* the insured was legally responsible for such coverage. Because the Jeep was not a "motor vehicle" for the purposes of the Michigan no-fault act, however, the collision between plaintiff and Northrup was not "an auto accident to which this policy applies," and plaintiff was not entitled to PIP benefits under the out-of-state coverage language in the policy. Therefore, the trial court erred by ruling that plaintiff was entitled to Michigan no-fault PIP benefits under the out-of-state coverage provision.

D

Plaintiff further argues that the Bristol West defendants are estopped from arguing that the Jeep was not a "motor vehicle" because they initially denied the claim on another basis and only raised the defense that the Jeep was not a "motor vehicle" after the lawsuit was filed. "Generally, once an insurance company has denied coverage to its insured and stated its defenses, the insurer has waived or is estopped from raising new defenses." *Mich Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 436; 592 NW2d 760 (1999). However, this Court has stated that waiver and estoppel " 'are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or

[3] The policies appended to the parties' appellate briefs differ slightly; however, the quoted language is common to both and the differences do not affect our analysis.

expressly excluded therefrom.' " *Lee v Evergreen Regency Coop*, 151 Mich App 281, 285; 390 NW2d 183 (1986), quoting 1 ALR 3d 1139, 1144. As evidenced by the declarations page of the policy, the Bristol West defendants did not agree to pay PIP benefits, and neither the policy's coverage of the "covered auto" nor the out-of-state coverage provision constituted coverage for a "motor vehicle" under Michigan's no-fault act. Furthermore, the denial letter from Farmers expressly reserved "all of its rights and defenses pursuant to the no-fault law and the policy." Under these circumstances, we conclude that the Bristol West defendants are not estopped from arguing that the Jeep was not a "motor vehicle" under the no-fault act.

III

The trial court did not err by concluding as a matter of law that the modified Jeep was not a "motor vehicle" as defined in the no-fault statute but was an ORV. The trial court erred, however, by concluding that plaintiff was entitled to no-fault PIP benefits under the out-of-state coverage portion of the insurance policy. Therefore, the trial court erred by granting in part plaintiff's motion for summary disposition because plaintiff was not entitled to no-fault PIP benefits.

The trial court also erred by partially denying the Bristol West defendants' motion for summary disposition brought on the ground that no PIP benefits were owed to plaintiff because the Jeep was not a "motor vehicle." Furthermore, the trial court erred by granting ACIA's motion for summary disposition on its claim for reimbursement from the Bristol West defendants and in entering judgment for ACIA.

The trial court's order of judgment is vacated. This matter is remanded for entry of an order consistent

with this opinion. We do not retain jurisdiction. Having prevailed in full, the Bristol West defendants may tax costs pursuant to MCR 7.219.

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

BARROW v CITY OF DETROIT ELECTION COMMISSION

WHITE v CITY OF DETROIT ELECTION COMMISSION

WILCOXON v CITY OF DETROIT ELECTION COMMISSION

Docket Nos. 317540, 318683, and 318828. Submitted June 11, 2014, at Detroit. Decided June 17, 2014, at 9:05 a.m.

On June 18, 2013, the Court of Appeals held that Michael Duggan was statutorily ineligible to be named as a candidate for Mayor of Detroit on the ballot used in the August 2013 primary election, *Barrow v City of Detroit Election Comm*, 301 Mich App 404 (2013). On July 1, 2013, Duggan filed a declaration of intent to run as a write-in candidate for mayor and began campaigning to have Detroit voters physically write his name onto the primary election ballot. Tom Barrow, a candidate for mayor on the ballot, Citizens United Against Corrupt Government, a nonprofit corporation headed by Robert Davis, and Desmond Michelle White, a Detroit resident and registered voter, then brought an action in the Wayne Circuit Court against the City of Detroit Election Commission, the Detroit City Clerk, Duggan, and the Michael Duggan for Mayor Committee, seeking, in part, a temporary restraining order (TRO) and a writ of mandamus compelling the election commission and the clerk to refrain from counting any write-in votes for Duggan in the primary election on the ground that Duggan did not meet the Detroit City Charter's residency requirements. Plaintiffs also sought a declaratory judgment that Duggan was ineligible to run as a write-in candidate. Defendants opposed the requests and sought summary dismissal of the claims. The court, Lita Masini Popke, J., ruled in defendants' favor and dismissed plaintiffs' claims. Citizens United and White appealed. Docket No. 317540.

White and Davis brought a separate action in the Wayne Circuit Court against the election commission, the city clerk, the Wayne County Board of Canvassers, and Accuform, Inc., the official printer of the ballots for the November 2013 general election, challenging the adequacy of the design for and the instructions provided with the absentee voter ballots circulated for the general election and the procedure by which the election commission ultimately approved the absentee ballot for circulation. Duggan's

motion to intervene as a defendant was granted. Plaintiffs sought a writ of mandamus to preclude counting the votes cast on the challenged absentee ballots and to compel the reprinting and redistribution of the ballots. Plaintiffs also sought a declaratory judgment regarding the conformity of the absentee ballot with legal requirements and the propriety of the ballot-approval method. Defendants sought dismissal, in part, on the basis that, although the election commission had not originally conducted an open meeting for a vote on whether Accuform would print the ballots, it had subsequently held an open meeting at which it formally approved the ballots to be used in the general election and ratified all the prior actions taken by the clerk and the Detroit Department of Elections relating to the ballots. The court, Patricia Perez Fresard, J., held in favor of defendants and dismissed the action. Plaintiffs appealed. Docket No. 318683.

D. Etta Wilcoxon, a candidate for Detroit City Clerk appearing on the general election ballot, and Citizens United Against Corrupt Government also brought a separate action in the Wayne Circuit Court against the City of Detroit Election Commission and the city clerk, seeking a writ of mandamus, a declaratory judgment, and injunctive relief, in part, to prevent the use of satellite absentee voting sites at Wayne County Community College campuses where voters could fill out and turn in their absentee voter ballots. The court, Patricia Perez Fresard, J., rejected plaintiffs' challenge and denied their complaint. Citizens United appealed. Docket No. 318828. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Although the appeals arguably are moot, they raise publicly significant issues that are likely to recur and yet evade judicial review and, therefore, the issues may be addressed on appeal.

2. The trial court properly granted summary disposition to defendants in Docket No. 317540, because Duggan satisfied the legal requirements to run as a write-in candidate in the primary election by filing his declaration of intent to run as a write-in candidate by the statutory deadline. The Detroit City Charter does not address the requirements for a write-in candidate to file for office but does provide that, except as provided by the charter or an ordinance, state law applies to the filing for office by candidates. State law sets forth a single precondition for a write-in candidacy—the filing of a declaration of intent by the statutory deadline. Duggan met the deadline for his declaration of intent. Duggan was not obligated to file the same documents required of a candidate whose name appears on the ballot (a nominating petition signed by the requisite percentage of voters and an affidavit of identification) because the requirements for

such filings apply only to candidates seeking to have their names preprinted on the ballot and not to write-in candidates. Plaintiffs were not entitled to mandamus relief in Docket No. 317540.

3. The trial court properly dismissed the challenges to the absentee ballots and the ballot-approval method in Docket No. 318683. The ballot's design comported with the legal requirements for an electronically tallied ballot, the instructions were consistent with those statutorily required for absentee ballots, and any error in the ballot-approval process was remedied by ratification by the election commission. Because the election commission could authorize the actions of its chairperson and its staff, it possessed the authority to ratify their past actions. Plaintiffs failed to establish a violation of the Purity of Elections Clause, Const 1963, art 2, § 4. The trial court properly denied plaintiffs' request for a declaratory judgment, writ of mandamus, or injunctive relief in Docket No. 318683.

4. The trial court properly denied plaintiffs' motion for a declaratory judgment with regard to the clerk's use of satellite clerk offices in Docket No. 318828. Creating satellite offices to allow easy access for absentee voters falls squarely within the roles of the election department and the clerk to supervise, plan, and monitor the city's elections as provided in the city charter. There is no basis to conclude that the use of satellite offices for early absentee voting is prohibited by state statute. The provisions of MCL 168.759(5) and (6) indicate that the clerk's properly credentialed assistants may receive absentee ballot applications at locations other than the clerk's office and that applications may be delivered personally to the clerk or an authorized assistant of the clerk at locations other than the clerk's office. Although MCL 168.761(1) permits an absentee ballot to be delivered to the applicant in person at the clerk's office, it does not prohibit personal delivery at other locations. MCL 168.764a permits delivery to the clerk or an authorized assistant of the clerk at locations other than the clerk's office. MCL 168.764b(2) and (3) permit the use of satellite locations within a city to accept delivery of absentee ballots. There is no doubt that the Legislature has expressly authorized the clerk's office to accept delivery of both applications for absentee ballots and absentee ballots following voting at locations other than the clerk's office. No statutory provisions prohibit the clerk from issuing applications and absentee ballots at satellite locations. The clerk's office includes the two satellite locations. Plaintiffs abandoned on appeal their argument that the use of the satellite clerk's offices violated the Purity of Elections Clause of Const 1963, art 2, § 4.

5. Defendants in Docket Nos. 317540 and 318683 may not challenge in this appeal the trial court's denial of their request for sanctions because they did not file a cross-appeal from the denial

of their request. To the extent that defendants are asking for sanctions against plaintiffs under MCR 7.216(C)(1) for filing a vexatious appeal, defendants must file a separate motion under MCR 7.211(C)(8). The sanctions request set forth in defendants' appellate brief does not constitute a motion under the court rule. Such a motion may be filed within 21 days of the opinion disposing of these appeals. The request for appellate sanctions is denied without prejudice.

Affirmed.

1. ELECTIONS — WRITE-IN CANDIDATES — DECLARATIONS OF INTENT.

State law provides that a write-in candidate must file a declaration of intent to be a write-in candidate with the filing official for that office on or before 4 p.m. on the second Friday immediately before the election; write-in votes cast for a person who did not properly file a declaration of intent to be a write-in candidate may not be counted (MCL 168.737a(1)).

2. MUNICIPAL CORPORATIONS — RATIFICATION OF ACTS OR CONTRACTS OF AGENTS OR OFFICERS.

A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers when the corporation could legally have authorized such acts and contracts in the first instance, except when the mode of contracting operates as a limitation on the power to contract.

3. MUNICIPAL OFFICERS — POWERS.

Municipal officers generally have only such powers as are expressly granted by statute or by sovereign authority or that are necessarily implied from those granted; a power is necessarily implied if it is essential to the exercise of authority that is expressly granted.

4. ELECTIONS — ABSENTEE VOTER BALLOTS.

The Legislature has expressly authorized the office of the clerk of a city, township, or village to accept delivery of both applications for absentee voter ballots and absentee voter ballots following voting at locations other than the clerk's office (MCL 168.759(5) and (6); MCL 168.764a; MCL 168.764b).

5. APPEAL AND ERROR — CROSS-APPEALS.

An appellee may urge an alternative ground for affirmance without filing a cross-appeal, but may not obtain a decision more favorable than that rendered below without filing a cross-appeal.

6. ACTIONS — VEXATIOUS PROCEEDINGS — DAMAGES — MOTIONS.

A party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under MCR 7.211(C)(8); a request contained in any other pleading, including a brief filed under MCR 7.212, does not constitute a motion under MCR 7.211(C)(8).

Andrew A. Paterson for Citizens United Against Corrupt Government and Desmond Michelle White.

Robert Davis *in propria persona.*

Portia L. Roberson, Corporation Counsel, and *Sheri L. Whyte*, *Eric B. Gaabo*, and *Linda Fegins*, Assistant Corporation Counsel, for the City of Detroit Election Commission and the Detroit City Clerk.

Zenna Elhasan, Corporation Counsel, and *Janet Anderson-Davis*, Assistant Corporation Counsel, for the Wayne County Board of Canvassers.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*) and *Melvin Butch Hollowell*, *Esq., PC* (by *Melvin Butch Hollowell*), for Michael Duggan and the Michael Duggan for Mayor Committee.

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM. These consolidated appeals relate to the primary and general elections held in the city of Detroit in August and November of 2013. Plaintiffs are citizens, mayoral and city clerk candidates, and an activist committee who brought legal challenges to both elections. Defendants are Detroit's current mayor, Michael Duggan, its election commission and city clerk, and Duggan's campaign committee. Plaintiffs moved for declaratory judgments, injunctive relief, and writs of

mandamus in an effort to derail Duggan's write-in campaign, the circulation of allegedly imperfect absentee ballots, and the in-person collection of completed absentee ballots at satellite city clerk offices. The Wayne Circuit Court correctly denied relief in all three cases. We affirm.

I. BACKGROUND

A. DOCKET NO. 317540—THE DUGGAN WRITE-IN CAMPAIGN

On June 18, 2013, this Court held Michael Duggan statutorily ineligible to be named as a candidate for Mayor of Detroit on the ballot used in the August 2013 primary election because he had not lived in the city for one year on the date he filed for candidacy. *Barrow v City of Detroit Election Comm*, 301 Mich App 404, 417; 836 NW2d 498 (2013) (*Barrow I*). On July 1, 2013, Duggan filed a declaration of intent to run as a write-in candidate and began campaigning to have Detroit voters physically write his name onto the primary election ballot.

One week later, Tom Barrow (a candidate for mayor on the August 2013 primary ballot), Citizens United Against Corrupt Government (a nonprofit corporation headed by Robert Davis), and D. Michelle White (a resident of and registered voter in Detroit),[1] filed suit against the Detroit Election Commission, the Detroit City Clerk, Duggan, and the Michael Duggan for Mayor Committee. Relevant to this appeal, plaintiffs sought a temporary restraining order (TRO) and a writ of mandamus compelling the election commission and the clerk to refrain from counting any write-in votes for Duggan in the primary election on the ground that he did not meet the Detroit City Charter's residency re-

[1] D. Michelle White and Desmond M. White are the same individual.

quirements. They also requested a declaratory judgment that Duggan was ineligible to run as a write-in candidate. Defendants opposed the TRO and asked for summary dismissal of plaintiffs' claims. They argued that Duggan qualified as a write-in candidate because he had lived in the city for more than one year on the date he filed his declaration of intent.

The circuit court ruled in defendants' favor, denying the TRO and summarily dismissing plaintiffs' claims. The court first concluded that *Barrow I*'s preclusion of Duggan's running as an official candidate did not prevent Duggan's write-in campaign. The law governing a write-in candidacy is different from and less strict than the law governing candidacy as an official candidate on the ballot, the court reasoned. An "official candidate" is a person certified to have his or her name printed on the official ballot. A "write-in candidate," the court distinguished, is a person who has met the requirements to have write-in votes cast in his or her name counted, despite ineligibility for placement by name on the ballot. *Barrow I* was limited to the issue of Duggan's official candidacy and did not preclude him from being qualified for consideration as a write-in candidate.

MCL 168.737a establishes the requirements for a write-in candidate, the court ruled. That statute requires only that an individual file a declaration of intent to be a write-in candidate on or before 4:00 p.m. on the second Friday immediately before the election. Duggan met the statutorily calculated deadline of July 26 by filing his declaration of intent on July 1. In addition, MCL 168.321(1) provides that the qualifications of a city official shall be in accordance with the city's charter. The circuit court's review of the Detroit City Charter revealed no specific reference to write-in can-

didates. And the broadly worded candidacy provisions required a person seeking elective office to be a resident and a qualified and registered voter of the city of Detroit for one year at the time of filing for office. Duggan was a resident and a registered voter of Detroit for one year as of April 12, 2013. Accordingly, the court ruled:

> [E]ven though Mr. Duggan could not meet the residency requirements to have his name placed on the ballot as an official candidate, he has met the residency requirements to be considered an eligible write-in candidate because he did not file for that option until July 1, 2013. Applying strict statutory construction to the applicable statutes and City Charter provisions, Mr. Duggan is an eligible write-in candidate.

Thus, the city could count the write-in votes cast in Duggan's favor.[2] This appeal followed.

B. DOCKET NO. 318683—ADEQUACY OF ABSENTEE BALLOTS

In this appeal, plaintiffs White and Davis challenge the adequacy of the design for and the instructions provided with the absentee ballots circulated for the November 2013 general election and the procedure by which the election commission ultimately approved the absentee ballot for circulation. Plaintiffs filed suit against the election commission, the clerk, Accuform, Inc. (the official printer of the ballots for the November 2013 general election), and the Wayne County Board of Canvassers. The trial court granted Duggan's motion to intervene as a defendant. The suit stemmed from

[2] Plaintiffs also unsuccessfully challenged the legality of Duggan's campaign materials. Plaintiffs raise this issue in the statement of questions presented in their appellate brief but make no relevant argument. We therefore deem this issue abandoned and decline to address it. See *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

White's belief that the instructions accompanying her absentee ballot were not correctly attached and that the perforations on the ballot did not comply with state law. Plaintiffs further contended that, contrary to state law, it was the city clerk who approved the ballot format rather than approval being given by the election commission at a public meeting. They sought a writ of mandamus to preclude counting the votes cast on the challenged absentee ballots and to compel the reprinting and redistribution of these ballots. Plaintiffs also requested a declaratory judgment regarding the conformity of the absentee ballot with legal requirements and the propriety of the ballot-approval method.

At an October 8 hearing, defendants stipulated that the election commission had not conducted an open meeting for a vote on whether Accuform would print the 2013 general election ballots. The circuit court noted that in *Wilcoxon v Detroit Election Comm*, Wayne Circuit Court No. 13-012502-AW, the case generating the third of these consolidated appeals, the parties had agreed to hold an open commission meeting to vote on ratifying the city clerk's actions, thereby resolving any legal issues regarding the ballot-approval method.[3]

Thereafter, defendants sought dismissal of the claims against them. They argued that the statute requiring diagonal, rather than horizontal, perforations on a ballot applied only to paper ballots counted by hand, not ballots tallied electronically like those used by the city. Defendants further noted that the statute requiring placement of ballot instructions on the ballot's secrecy

[3] Plaintiffs in *Wilcoxon* also had challenged the adequacy of the absentee ballot and approval method. The circuit court in that case found that the subsequently conducted open election commission meeting resolved those issues. Plaintiffs in *Wilcoxon* have not challenged that ruling on appeal.

sleeve applied only to ballots cast in a precinct, not to absentee ballots. Defendants further informed the court that the election commission had held an open meeting on October 11, at which it formally approved the ballots to be used in the 2013 general election and ratified all actions taken by the clerk and the Detroit Election Department relating to the ballots, rendering moot plaintiffs' claims.

Another hearing was conducted on October 16, at which White admitted that she had decided not to use her absentee ballot and instead planned to vote in person. The court used this admission to find that White would suffer no harm caused by any claimed absentee ballot deficiency. The court then noted the irreparable harm to the city and thousands of absentee voters if the ballot were found invalid. Specifically, approximately 32,000 absentee ballots had already been sent to the voters, who likely would be disenfranchised if the city had to quickly reprint and redistribute the ballots. The court dismissed plaintiffs' case in its entirety, and this appeal followed.

C. DOCKET NO. 318828—OFF-SITE, IN-PERSON ABSENTEE VOTING

For the general election, the clerk and the election commission arranged specific dates, prior to the actual Election Day, for voters to fill out and turn in their absentee ballots at satellite locations situated at Wayne County Community College campuses. Beginning on October 21, 2013, and running through November 4, 2013, registered voters in the city of Detroit could appear at these locations, apply for, and cast absentee ballots. Plaintiffs Citizens United and D. Etta Wilcoxon (a Detroit City Clerk candidate appearing on the general election ballot) filed an emergency complaint for writ of mandamus, declaratory judgment, and injunc-

tive relief. Relevant to this appeal, plaintiffs sought to bar the off-site, in-person voting method, arguing that a voter may personally apply for and submit an absentee ballot only at the clerk's official office.

The circuit court rejected plaintiffs' challenge to the satellite absentee voting sites. First, the court noted that the extensively advertised satellite sites were scheduled to open only three days later, with a weekend intervening. Shuttering the satellite offices could preclude some voters from casting a ballot. Second, the method had been used in the 2012 primary and general elections and the 2013 primary election without any harm or effect on the purity of the election process. Because plaintiffs offered only speculation regarding possible adverse effects of using the satellite locations, the court denied their complaint. When Citizens United Against Corrupt Government appealed, this Court consolidated all three appeals.

II. MOOTNESS

Arguably these appeals are moot. The August 2013 primary election and the November 2013 general election are historical events. The winning candidates have now held office for more than six months. "This Court's duty is to consider and decide actual cases and controversies." *Morales v Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003). We generally do not address moot questions or declare legal principles that have no practical effect in a case. *Id*. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010) (cita-

tion omitted). "However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review." *In re Application of Indiana Mich Power Co to Increase Rates*, 297 Mich App 332, 340; 824 NW2d 246 (2012).

The contour of the election requirements for write-in candidacy in the city of Detroit presents a publicly significant issue. Legal questions likely will recur because write-in candidates may run in future elections, particularly given Duggan's successful write-in candidacy. Yet the issues may evade review given the short time between the statutory deadline for filing a declaration of intent to run as a write-in candidate and the subsequent election. See MCL 168.737a(1) (requiring a write-in candidate to file a declaration of intent to be a write-in candidate on or before 4:00 p.m. on the second Friday immediately before the election); *Grano v Ortisi*, 86 Mich App 482, 487; 272 NW2d 693 (1978) (holding, in a dispute over candidacy requirements, that although the election had already occurred, the issue raised would be reviewed because it was capable of repetition yet was likely to evade review given the short time between when nominating petitions are filed and the subsequent election is held).

The same is true for the absentee ballot procedures used in the Detroit general election, including the methods for filing those ballots with the city. These issues bear great public significance and likely will recur if the city adopts the same ballot format and employs satellite offices in future elections. Again, time constraints frequently render complete appellate review impossible in advance of an election. Accordingly, we review plaintiffs' contentions despite the completion of the challenged elections.

III. STANDARDS OF REVIEW

In the separate actions below, the circuit court denied plaintiffs TROs, declaratory judgments, and writs of mandamus. In relation to the Duggan write-in campaign, the court summarily dismissed plaintiffs' complaint based on MCR 2.116(C)(10).

We review de novo a circuit court's decision on a motion for summary disposition. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). "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).

We also review de novo a circuit court's decision whether to issue a writ of mandamus. *Barrow I*, 301 Mich App at 411.

> A plaintiff has the burden of establishing entitlement to the extraordinary remedy of a writ of mandamus. The plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it

> involves no discretion or judgment, and (4) the plaintiff has no other adequate legal or equitable remedy. [*Id*. at 411-412 (citation omitted).]

Whether a defendant has a clear legal duty to perform an act and whether a plaintiff has a clear legal right to performance are legal questions that we also consider de novo. *Id*. at 411.

"Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). The purpose of a declaratory judgment is to definitively declare the parties' rights and duties, to guide their future conduct and relations, and to preserve their legal rights. See *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993).

We review for an abuse of discretion a circuit court's decision whether to grant injunctive relief. *Kernen v Homestead Dev Co*, 232 Mich App 503, 509-510; 591 NW2d 369 (1998).

> When deciding whether to grant an injunction under traditional equitable principles,
>
> > a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

> [*Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148; 809 NW2d 444 (2011), quoting *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998).]

These consolidated appeals also involve the interpretation and application of various election-related statutes and provisions of the Detroit City Charter. The interpretation of a statute or a municipal charter presents a question of law that we review de novo. *Hackel v Macomb Co Comm*, 298 Mich App 311, 316; 826 NW2d 753 (2012).

> When reviewing the provisions of a home rule city charter, we apply the same rules that we apply to the construction of statutes. The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Courts apply unambiguous statutes as written. [*Barrow I*, 301 Mich App at 413-414 (citations omitted).]

"This Court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Bay City v Bay Co Treasurer*, 292 Mich App 156, 166-167; 807 NW2d 892 (2011) (quotation marks and citation omitted).

IV. ANALYSIS

A. DOCKET NO. 317540—DUGGAN WRITE-IN CAMPAIGN

The circuit court properly granted summary disposition to defendants in Docket No. 317540, because Duggan satisfied the legal requirements to run as a write-in candidate in the August 2013 primary election for mayor of Detroit. Specifically, Duggan filed his declaration of intent to run as a write-in candidate by the statutory deadline.

State law defers to local rule in the sphere of city elections. See MCL 168.321 (providing that "the qualifications, nomination, election, appointment, term of office, and removal from office of a city officer shall be in accordance with the charter provisions governing the city"). The Detroit City Charter, in turn, falls back on state law to fill any gaps in its election code. See Detroit Charter, § 3-106 ("Except as otherwise provided by this Charter or ordinance, state law applies to the qualifications and registration of voters, the filing for office by candidates, the filing of petitions for initiative and referendum, and the conduct and canvass of city elections."). The Detroit City Charter does not address the requirements for a *write-in* candidate to file for office. Thus, under § 3-106, state law applies.

State law sets forth a single, simple precondition for a write-in candidacy—filing a declaration of intent by a certain date. MCL 168.737a(1) provides, in relevant part:

> [T]he board of election inspectors shall not count a write-in vote for a person unless that person has filed a declaration of intent to be a write-in candidate as provided in this section. The write-in candidate shall file the declaration of intent to be a write-in candidate with the filing official for that elective office on or before 4 p.m. on the second Friday immediately before the election.

Indisputably, Duggan filed his declaration of intent to be a write-in candidate on July 1, 2013, which was before the statutory deadline of the second Friday immediately before the August 2013 primary election. Accordingly, Duggan qualified to run as a write-in candidate and to have the write-in votes cast in his favor counted.

Despite the plain statutory language, plaintiffs contend that Duggan was additionally obliged to file the

same documents required of a candidate whose name appears on the ballot: a nominating petition signed by the requisite percentage of voters and an affidavit of identification. Plaintiffs cite Detroit Charter, § 3-109, which states, in relevant part: "A candidate for nomination to an elective city office shall file with the City Clerk a non-partisan nominating petition consisting of one (1) or more petition forms." Such a petition must "be signed by a number of voters of the City equal to not more than one percent (1%) nor less than one-fourth percent (1/4%) of the total number of votes cast in the preceding Regular City General Election for the office which the candidate seeks." *Id*. Plaintiffs further cite MCL 168.558(1), which provides, in relevant part:

> When filing a nominating petition . . . for a federal, county, state, city, township, village, metropolitan district, or school district office in any election, a candidate shall file with the officer with whom the petitions . . . is filed 2 copies of an affidavit of identity.

According to plaintiffs, the term "candidate" used in § 3-109 includes a write-in candidate, and Duggan therefore needed to file a nominating petition containing the requisite number of voter signatures. Likewise, plaintiffs insist, MCL 168.558(1) mandated that Duggan file two copies of an affidavit of identity.

Plaintiffs' argument lacks merit. The charter provision neither refers to write-in candidates nor prescribes what a write-in candidate must file. Rather, § 3-109 merely states that a "candidate for nomination to an elective city office" must file a nominating petition with the requisite number of signatures. The charter does not define the term "candidate." "This Court may rely on a dictionary definition to give an otherwise undefined word its plain and ordinary meaning." *Hackel*, 298 Mich App at 319 n 2. *Random House Webster's College*

Dictionary (2001) defines "candidate" as "a person who seeks or is selected by others for an office, honor, etc." Duggan arguably could be viewed as a "candidate" under this definition because, by filing a declaration of intent to be a write-in candidate for mayor of Detroit, he was seeking an office.

But such an interpretation of the charter language is ultimately untenable. "[C]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). "Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another." *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 472; 838 NW2d 736 (2013). And Detroit Charter, § 3-106 expressly instructs that any gaps in the city election code are to be filled by application of state election law. It follows that statutory provisions on the same subject matter or sharing a common purpose with respect to filing for office must be read collectively with charter provisions unless the charter or ordinance provides otherwise.

Plaintiffs' construction of Detroit Charter, § 3-109 and MCL 168.558(1) would require write-in candidates to collect the same number of signatures and file the same documents required of candidates whose names will be preprinted on the official ballot. By definition, however, a write-in candidate's name does *not* appear on the ballot, which is why such a candidate's name must be *written in* by voters. If a candidate filed all documents prerequisite to placement of his or her name on the preprinted ballot, that candidate would have no

reason to mount a write-in campaign. As defendants observe, a candidate generally chooses the write-in option to avoid the more stringent conditions precedent to being named on the preprinted ballot. Thus, plaintiffs' proposed interpretation of § 3-109 would effectively eliminate write-in candidacies. This would, in turn, render as surplusage or nugatory the language in MCL 168.737a(1) necessitating that a write-in candidate file a declaration of intent. Therefore, the requirements for filing a nominating petition and an affidavit of identity must apply only to candidates seeking to have their names preprinted on the ballot and *not* to write-in candidates.

Plaintiffs' reliance on *Barrow I*, 301 Mich App 404, as precluding Duggan's write-in campaign is misplaced. In *Barrow I*, 301 Mich App at 426, this Court held that Duggan did not meet the requirements for including his name *on the ballot*. As discussed, a write-in candidate's name does not appear on the ballot, the name must be written in by the voter. Moreover, in rejecting a constitutional challenge to the charter's durational residency requirement, this Court expressly recognized the possibility that Duggan could still be a write-in candidate under MCL 168.737a. *Barrow I*, 301 Mich App at 425 n 16. *Barrow I* lends no support to plaintiffs' position.

Because Duggan satisfied the legal requirements to be a write-in candidate in the August 2013 primary election for mayor of Detroit, plaintiffs' declaratory judgment claim fails. Nor were plaintiffs entitled to mandamus relief, given that they failed to establish that the clerk and the election commission owed a clear legal duty to reject Duggan's declaration of intent to be a write-in candidate or to refuse to count write-in votes

cast for Duggan in the primary election. Therefore, the circuit court properly granted summary disposition to defendants.[4]

B. DOCKET NO. 318683—ADEQUACY OF ABSENTEE BALLOTS

The circuit court also properly dismissed on the merits White's and Davis's challenges to the absentee ballots and the ballot-approval method in Docket No. 318683.[5] The ballot's design comported with the legal requirements for an electronically tallied ballot, the instructions were consistent with those statutorily required for absentee ballots, and any error in the ballot-approval process was remedied by ratification.

Plaintiffs first contend that White's actual absentee ballot did not conform to the format prescribed in MCL 168.705, which states, in relevant part:

> The ballots of each kind shall be of uniform size and printed in black ink on white paper of a grade equal to 50-pound book, machine finished, and sufficiently thick so that the printing cannot be distinguished from the back. *The ballots of each kind shall be perforated diagonally across the upper right-hand corner of the face thereof*, so that the corner can be readily torn off. Printed on the detachable corner shall be *the name or kind of ballot*, and *a bold-face letter corresponding to a similar letter on the ballot box*. The ballots shall be numbered consecutively on such corner, such number to be printed thereon. [Emphasis added.]

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[4] Plaintiffs raise additional challenges in the statement of questions presented, which they entirely fail to address in the body of their appellate brief. Those issues are abandoned and we decline to consider them. See *Houghton*, 256 Mich App at 339-340.

[5] As the lower court reached the correct result on the merits, we need not consider the parties' alternate challenges based on Davis's lack of standing and failure to file a circuit court bond.

Specifically, plaintiffs assert that White's actual absentee ballot was noncompliant because the perforation was horizontal rather than diagonal, and there was no detachable corner that stated the name or kind of ballot and a bold-face letter corresponding to a similar letter on the ballot box.

Plaintiffs fail to recognize that MCL 168.705, which was enacted by 1954 PA 116, pertains to paper ballots that are placed in a ballot box and counted by hand. More recent enactments govern modern elections in which electronic voting tabulators are used. In particular, MCL 168.794c, which was rewritten by 1990 PA 109, now provides, in relevant part:

> The provisions of [MCL 168.794 to MCL 168.799a] control with respect to elections where electronic voting systems are used, and shall be liberally construed so as to carry out the purpose of the provisions. A provision of law relating to the conduct of elections that conflicts with [MCL 168.794 to MCL 168.799a] does not apply to the conduct of elections with an approved electronic voting system.

See also *Vorva v Plymouth-Canton Community Sch Dist*, 230 Mich App 651, 657; 584 NW2d 743 (1998) (recognizing that MCL 168.794 to MCL 168.799a "control with respect to elections where electronic voting systems are used").

Detroit uses an electronic voting system. Therefore, MCL 168.794 through MCL 168.799a control with respect to Detroit elections, and not MCL 168.705. Nothing in the applicable statutes compels a diagonal perforation or placement on a detachable corner of the information set forth in MCL 168.705. Rather, MCL 168.795b(2) states: "Ballots that are processed through electronic tabulating equipment after the elector has voted shall have an attached, numbered, perforated stub." White's absentee

ballot contained an attached, numbered, perforated stub. The absentee ballot thus conformed to the applicable statutory requirements.[6]

Plaintiffs contend that the board of canvassers, city clerk, and election commission improperly relied on the Secretary of State's Michigan Ballot Production Standards Manual to determine the propriety of the ballot. We find irrelevant whether defendants referred to the manual as the ballot actually complied with statutory requirements. In any event, even if the manual lacks the force of law, it may still be considered as explanatory, *Hanlin v Saugatuck Twp*, 299 Mich App 233, 249; 829 NW2d 335 (2013), and defendants could consider it when designing the ballot.

Next, plaintiffs contend that the clerk and election commission failed to include the required ballot-marking instructions on the front of the ballot secrecy sleeve or in a clear plastic pocket on the front of the secrecy sleeve accompanying the absentee ballot. MCL 168.736c and MCL 168.736d require the inclusion of specific "ballot marking instructions" on "the ballot secrecy sleeve" at both general and nonpartisan elections. An absentee ballot does not have a ballot secrecy sleeve, however. Such sleeves are used to protect a voter's privacy at the public polls and are unnecessary when voting in the sanctity of one's home. Rather, MCL 168.764 and MCL 168.764a only require the instructions to "be included" with the absentee ballots sent to voters. Plaintiffs try to bootstrap the requirement that the statutorily required instructions be printed on a

[6] Plaintiffs also contend that Accuform lacked legal authority to print the ballots for the November 2013 general election pursuant to MCL 168.718 (proscribing printing of nonconforming ballots), because the perforation did not comply with MCL 168.705. As the ballot conformed with those statutes applicable to electronically tabulated elections, this argument lacks any merit.

ballot secrecy sleeve through MCL 168.764(c)'s mandate that "[f]or a nonpartisan election, the ballot marking instructions as provided in [MCL 168.736d]" must "be included with each absent voter ballot furnished." This language does not suggest that the instructions must be provided in the manner stated in MCL 168.736d, only that the same instructions must "be included" with the absentee ballot. As the absentee ballot provided to White included these instructions, no violation of law occurred.

Plaintiffs further argue that the clerk usurped the authority of the election commission concerning the printing of the ballots. It is well established that it is the province of the election commission, not the city clerk, to approve and furnish the ballots to be used in an election. In *Roseville Bd of Election Comm'rs v Roseville City Clerk*, 53 Mich App 477, 480-481; 220 NW2d 181 (1974), this Court agreed with the plaintiff-city board of election commissioners that it, rather than the defendant-city clerk, had the duty to prepare, print, and deliver the ballots to be used. And MCL 168.560 prohibits the counting of ballots not furnished by the election commission: "Ballots other than those furnished by the board of election commissioners, according to the provisions of this act, shall not be used, cast, or counted in any election precinct at any election. The size of all official ballots shall be as the board of election commissioners prescribes."[7] Plaintiffs cite *Taylor v Cur-*

[7] Plaintiffs note language in other statutory provisions reflecting that only the election commission has the authority to prepare, print, and deliver the ballots. See MCL 168.323 (stating the primary results shall be "certified to the board of city election commissioners, who shall prepare and furnish ballots for the ensuing election"); MCL 168.690 (providing that a city board of election commissioners shall have the ballots printed and delivered to the election commission's city clerk at least 10 days before the election); MCL 168.719 (stating that a city's election commis-

rie, 277 Mich App 85, 94-95; 743 NW2d 571 (2007), for the proposition that municipal officers have only such powers as are conferred on them by law, and therefore the city clerk had no authority to act on the election commission's behalf. Plaintiffs contend that the city clerk's admission at a hearing held in *Wilcoxon* that she alone approved the ballot rendered the election void, and the election commission could not retroactively delegate its authority to the clerk through a subsequent vote.

At the October 2 hearing in *Wilcoxon*, the transcript of which was provided with the record in this appeal, the city clerk explained that she chairs the election commission. She asserted that she acted in her dual capacity when giving final approval of the ballot and in ordering the ballot's printing and distribution. The clerk testified that the election commission met "on the front end," i.e., before the primary election, to approve the general layout of the ballots for both the August 2013 primary election and the November 2013 general election, but admitted that the commission had not, as of October 2, reconvened to approve the printing of the specific ballot for the general election. When asked who had authorized the printer, Accuform, to begin printing the ballots for the November general election, the clerk indicated that the city's election department had done so. The clerk appoints the director and the deputy director of the election department. The clerk further explained that her actions were consistent with the past practices and policies of the election commission dating back to the early 1990s. The clerk must administer the election in accordance with the law. The ordering and

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sion shall perform the duties regarding the preparation, printing, and delivery of ballots that are required by law of the boards of election commissioners of counties).

mailing of ballots are perfunctory, administrative tasks, in the clerk's view. Accordingly, she believed that the election commission was not required to hold a public meeting and vote before the clerk performed those tasks.

City charter provisions support the clerk's testimony. Detroit Charter, § 3-101 provides: "A Department of Elections shall plan, monitor and administer all elections in the City of Detroit."

> The Department of Elections is headed by the Election Commission composed of:
>
> 1. The City Clerk, who is Chairperson;
> 2. The President of the City Council; and
> 3. The Corporation Counsel. [Detroit Charter, § 3-102.]

Detroit Charter, § 3-103 states that "[t]he Election Commission has general supervision of all elections in the City and may hire assistants, inspectors, and other election personnel." Further,

> The City Clerk shall appoint a Director and Deputy Director of the Department of Elections, who are skilled and experienced in municipal election administration. Under the direction of the City Clerk and in accordance with general policies of the Election Commission, the Director shall supervise, plan and monitor all activities and operations incidental to the conduct of elections and voter registration. [Detroit Charter, § 3-104.]

The city clerk is the chairperson of the election commission and oversees the election department, which acts as the staff for the commission. According to the city clerk's testimony, the election commission approved of the general ballot format and the chairperson of the election commission, with the help of the staff—the election department—took all necessary steps thereafter. We can find no support for the propo-

sition that the election commission must provide approval before every step in the ballot preparation and printing process. And we need not answer that question in this appeal as the election commission ratified the city clerk's and election department's actions.

The election commission held an open meeting on October 11, at which it unanimously adopted a resolution approving the ballots to be used in the November 2013 general election and ratified all actions taken by the clerk and the election department relating to the ballots. The resolution stated, in relevant part:

> **NOW, THEREFORE, BE IT RESOLVED,** The Commission accepts the results of the 2013 primary election, as certified by the Wayne County Board of Canvassers and the State of Michigan, and approves the content, size, form and format of the 2013 general election ballot, which has been printed by Accuform Printing and Graphics, Inc.; and
>
> **NOW BE IT FURTHER RESOLVED,** The Commission approves and ratifies all actions previously taken by Janice Winfrey, taken in her capacity as Chairperson of the Commission and as Detroit City Clerk, with the assistance of the Director and Deputy Director of the Detroit Department of Elections ("the Elections Department") and the Elections Department's staff, agents or representatives, relating to the review, approval, handling, procurement, printing, furnishing, delivery, mailing and distribution of ballots for the 2013 general election; and
>
> **NOW BE IT FINALLY RESOLVED,** The Commission further authorizes Ms. Winfrey, in her capacity as Chairperson of the Commission and as Detroit City Clerk, with the assistance of the Director and Deputy Director of the Elections Department and the Elections Department's staff, agents or representatives, and all other members of the Commission, to take such additional actions as may be required for the completion of the 2013 general election, including but not limited to the review, approval, handling, procurement, printing, furnishing, delivery, mailing, distribution, collecting, tabulation, transportation and storing of

> ballots for the 2013 general election, and all other duties incidental to the administration of the election.

In light of the election commission's October 11, 2013 resolution approving the ballots and ratifying all of the clerk's actions relative to the preparation, printing, and distribution of the ballots, plaintiffs' argument on this issue lacks merit. Even accepting plaintiffs' contentions that the election commission holds the exclusive power to authorize the preparation, printing, and distribution of the ballots and that the clerk was acting as the clerk and not the election commission chairperson, the election commission did precisely what was required in its October 11, 2013 resolution.

Plaintiffs' suggestion that the election commission could not retroactively authorize the clerk's actions also fails.

> The doctrine is well established that a municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, when the corporation might legally have authorized such acts and contracts in the first instance, subject to exception where the mode of contracting operates as a limitation upon the power to contract. [*Davis v Mayor, Recorder, & Aldermen of the City of Jackson*, 61 Mich 530, 540; 28 NW 526 (1886) (citation omitted).]

See also *Commercial State Bank of Shepherd v Sch Dist No 3 of Coe Twp, Isabella Co*, 225 Mich 656, 663; 196 NW 373 (1923) (holding that a school district's board could subsequently ratify that which it could authorize in the first place). The clerk prepared, printed, and distributed the absentee ballots in her capacities as clerk and chairperson of the election commission, with the assistance of the election department, which functions as the election commission's staff. Therefore, because the election commission could authorize the

actions of its chairperson and its staff in the first place, it also possessed the authority to ratify their past actions.

Plaintiffs argue that the city defendants' and Accuform's actions violated the Purity of Elections Clause of Const 1963, art 2, § 4, which states, in relevant part:

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

"The phrase 'purity of elections' does not have a single precise meaning. However, it unmistakably requires fairness and evenhandedness in the election laws of this state." *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 692-693; 662 NW2d 804 (2003) (some quotation marks, ellipsis, and citations omitted). Plaintiffs argue that, because the Purity of Elections Clause entrusts to the Legislature the authority to make laws to guarantee the purity of elections, to preserve the secrecy of the ballot, and to guard against abuses of the elective franchise, *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 205; 452 NW2d 471 (1989), and "[t]he Legislature enacted the Michigan Election Law pursuant to its constitutional grant of authority," quoting *Fleming v Macomb Co Clerk*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2008 (Docket No. 279966), p 4, this Court cannot permit defendants to ignore statutory provisions concerning the proper printing of the ballots. This argument assumes that defendants violated provisions of the Michigan Election Law, a premise that is

incorrect for the reasons already discussed. Therefore, plaintiffs have failed to establish that defendants violated the Purity of Elections Clause.

Accordingly, because all of plaintiffs' arguments are devoid of merit, the circuit court did not err by denying plaintiffs' request for a declaratory judgment. The circuit court also properly declined to issue a writ of mandamus because defendants did not have a clear legal duty to perform the acts requested by plaintiffs. *Barrow I*, 301 Mich App at 411-412.

Nor have plaintiffs established entitlement to injunctive relief requiring the reprinting and remailing of the absentee ballots. "To obtain a preliminary injunction, the moving party bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 648; 825 NW2d 616 (2012) (quotation marks and citation omitted). The first element is "the likelihood that the party seeking the injunction will prevail on the merits[.]" *Mich AFSCME Council 25*, 293 Mich App at 148 (quotation marks and citation omitted). Because plaintiffs failed to meet even the threshold burden, they were not entitled to the requested relief.

C. DOCKET NO. 318828—SATELLITE CLERK OFFICES

The circuit court also properly denied plaintiffs' motion for a declaratory judgment pertaining to the clerk's use of satellite locations for in-person absentee voting in Docket No. 318828. Various statutes recognize or imply the authority of the clerk and his or her staff to distribute and accept absentee ballots at places other than the clerk's regular office. Moreover, the satellite locations were part of the official clerk's office during the period in which they operated.

Plaintiffs argue that defendants lack authority to establish satellite locations for the purpose of allowing early, in-person absentee voting. Yet, "[t]he city of Detroit is a home rule city." And our Supreme Court has "held that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied." *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003) (quotation marks and citations omitted); see also Const 1963, art 7, § 22. Municipal officers generally have only such powers as are expressly granted by statute or by sovereign authority or that are necessarily implied from those granted. *Taylor*, 277 Mich App at 94. "[A] power is necessarily implied if it is essential to the exercise of authority that is expressly granted." *Id*. at 95.

The election commission has general supervision of all elections in the city. Detroit Charter, § 3-103. The clerk, who acts as the chairperson of the election commission, has the authority to appoint the director and deputy director of the city's election department. Detroit Charter, § 3-104. And "[u]nder the direction of the City Clerk and in accordance with general policies of the Election Commission, the Director shall supervise, plan and monitor all activities and operations incidental to the conduct of elections and voter registration." *Id*. Creating satellite offices to allow easy access for absentee voters falls squarely within the election department's and the clerk's role of "supervis[ing], plan[ning] and monitor[ing]" the city's elections.

Moreover, we find no basis to conclude that the use of satellite offices for early absentee voting is prohibited by statute. Indeed, statutes recognize the clerk's authority to receive absentee ballots and applications

for absentee ballots at locations other than the clerk's office. MCL 168.759(5) requires the clerk to have absentee ballot application forms available in the clerk's office at all times and to furnish an absentee ballot application form to anyone upon a verbal or written request. This provision sets forth language that is to be included in applications, including: "An assistant authorized by the clerk *who receives absent voter ballot applications at a location other than the clerk's office* must have credentials signed by the clerk." (Emphasis added.) This language plainly reflects that the clerk's properly credentialed assistants may receive absentee ballot applications at locations other than the clerk's office. In addition, instructions for applicants for absentee voter ballots contained in MCL 168.759(6) include a direction to deliver the application by one of various methods, one of which is to "[d]eliver the application personally to the clerk's office, to the clerk, or to an authorized assistant of the clerk." This language indicates that an absentee voter ballot application may be delivered personally to the clerk or an authorized assistant of the clerk at locations other than the clerk's office; otherwise, the portion of the sentence after "clerk's office" would be rendered surplusage. See *Johnson*, 492 Mich at 177.

Plaintiffs misconstrue language in MCL 168.761, which addresses the manner of delivering absentee ballots to applicants. MCL 168.761(1) states that the clerk

> shall forward by mail, postage prepaid, or shall deliver personally 1 of the ballots or set of ballots if there is more than 1 kind of ballot to be voted to the applicant. Subject to the identification requirement in subsection (6), absent voter ballots may be delivered to an applicant in person at the office of the clerk.

Although this provision permits an absentee ballot to be delivered to the applicant in person at the clerk's office,

it does not prohibit personal delivery at other locations. MCL 168.761(4) provides:

> Absent voter ballots shall be issued in the same order in which applications are received by the clerk of a city, township, or village, as nearly as may be, and each ballot issued shall bear the lowest number of each kind available for this purpose. However, this provision does not prohibit a clerk from immediately issuing an absent voter ballot to an absent voter who applies in person in the clerk's office for absent voter ballots.

This statute merely allows the clerk to issue absentee ballots out of order to persons who apply in person at the clerk's office, i.e., before ballots are issued to voters who had applied by mail. It does not prohibit delivering an absentee ballot to an applicant at a satellite location.

Further, MCL 168.764a provides instructions for absentee voters that must be included with each ballot. The instructions provide six steps to follow. Step 3 provides that after voting, the elector is to place the ballot in a return envelope. Step 5 of the instructions states: "Deliver the return envelope by 1 of the following methods: . . . Deliver the envelope personally to the office of the clerk, to the clerk, or to an authorized assistant of the clerk." MCL 168.764a. This language permits delivery to the clerk or an authorized assistant of the clerk at locations other than the clerk's office; otherwise the language following the phrase "office of the clerk" would be rendered mere surplusage. See *Johnson*, 492 Mich at 177.

MCL 168.764b(2) states: "The clerk of a city, township, or village may accept delivery of absent voter ballots at any location in the city, township, or village." Likewise, MCL 168.764b(3) states, in relevant part:

> The clerk of a city, township, or village may appoint the number of assistants necessary to accept delivery of absent

> voter ballots at any location in the city, township, or village. . . . An assistant appointed to receive ballots at a location other than the office of the clerk shall be furnished credentials of authority by the clerk. If an absent voter's ballot is received by an assistant at any location other than the clerk's office the assistant, upon request, shall exhibit the credentials to the absent voter before the assistant accepts an absent voter ballot.

These provisions plainly permit the use of satellite locations within the city to accept delivery of absentee ballots.

Read together, the above provisions allow the use of satellite locations for early absentee voting. MCL 168.759(5) expressly allows a clerk's assistant to receive absentee ballot applications at locations other than the clerk's office; MCL 168.759(6) reflects that an applicant may deliver the application to the clerk or an assistant of the clerk at a location other than the clerk's office; MCL 168.764a indicates that, after voting, the absentee ballot may be delivered to the clerk or an authorized assistant at a location other than the clerk's office; and MCL 168.764b expressly allows the clerk or a properly credentialed assistant to accept delivery of absentee ballots at any location in the city. Thus, there is no doubt that the Legislature has expressly authorized the clerk's office to accept delivery of both applications for absentee ballots and absentee ballots following voting at locations other than the clerk's office.

Further, no statutory provisions prohibit the clerk from issuing applications and absentee ballots at satellite locations. Although MCL 168.761 permits delivery of absentee ballots at the clerk's office to voters who apply in person, it does not proscribe in-person delivery at other locations. Read as a whole, the statutory scheme permits the use of satellite locations. Defendants acted within their expressly granted and neces-

sarily implied powers in supervising or directing the conduct of the election by allowing absentee voting in person at two satellite locations.

Furthermore, the clerk's "office" includes the two satellite locations. No statute defines what encompasses the city clerk's "office." *Random House Webster's College Dictionary* (2001) defines "office" as "a place where business is conducted." The clerk conducted business at the two satellite locations by performing absentee voting activities at those locations, activities encompassed in the clerk's duties by the city charter. See Detroit Charter, §§ 3-102, 3-103, and 3-104. While MCL 168.761(1) provides that "absent voter ballots may be delivered to an applicant in person at the office of the clerk," the use of the singular term "office" does not mean that only one physical location can constitute the clerk's office. See MCL 8.3b ("Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number.").

Plaintiffs also suggest that the use of satellite locations violated the Purity of Elections Clause of Const 1963, art 2, § 4. According to plaintiffs, "there are no safeguards in place to ensure that the transfer and proper custody of the absentee ballots cast at those proposed satellite locations will be properly secured and transferred as the Michigan Election Law requires." Plaintiffs offer no record evidence to support their assertion that defendants failed to ensure the safe transfer and proper custody of the absentee ballots cast at satellite locations. "This Court will not search the record for factual support for a party's claim." *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009); see also MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the transcript,

the pleadings, or other document or paper filed with the trial court."). This argument is thus abandoned. *McIntosh*, 282 Mich App at 485.

V. SANCTIONS

Duggan and his campaign committee request sanctions in Docket Nos. 317540 and 318683. They assert that plaintiffs filed frivolous complaints and motions for temporary restraining orders and pursued frivolous and vexatious appeals. MCR 2.114(D) and (E) provide for sanctions when a plaintiff files a frivolous action or an action meant to harass a defendant. However, defendants have not sought relief in the correct manner.

To the extent that defendants seek the imposition of sanctions with respect to documents filed *in the circuit court*, the issue is not properly before us. Defendants requested sanctions in the circuit court, but that request was denied. As the motion was denied and no sanctions were awarded, defendants were required to file a cross-appeal. An appellee may urge an alternative ground for affirmance without filing a cross-appeal, but an appellee may not obtain a decision more favorable than that rendered below without filing a cross-appeal. *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 351; 725 NW2d 684 (2006). Defendants have not filed a cross-appeal and therefore may not challenge in this appeal the lower court's failure to award sanctions.

To the extent that defendants are asking for sanctions against plaintiffs for filing a vexatious appeal, defendants must file a separate motion. MCR 7.216(C)(1) authorizes sanctions for a vexatious appeal as follows:

> The Court of Appeals may, on its own initiative or *on the motion of any party filed under MCR 7.211(C)(8)*, assess actual and punitive damages or take other disciplinary

> action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
>
> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
>
> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court. [Emphasis added.]

MCR 7.211(C)(8), in turn, provides:

> *Vexatious Proceedings*. A party's request for damages or other disciplinary action under MCR 7.216(C) *must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule*. A party may file a motion for damages or other disciplinary action under MCR 7.216(C) at any time within 21 days after the date of the order or opinion that disposes of the matter that is asserted to have been vexatious. [Emphasis added.]

Thus, the sanctions request set forth in defendants' appellate brief does not constitute a motion under the court rule. Such a motion may be filed within 21 days after the date of this Court's opinion disposing of these appeals. MCR 7.211(C)(8). Therefore, we deny the request for appellate sanctions without prejudice.

We affirm the circuit court's actions in all three appeals. In Docket Nos. 317540 and 318683, we deny without prejudice Duggan's and the Michael Duggan for Mayor Committee's request for appellate sanctions. Although defendants are the prevailing parties on the merits, they may not tax costs pursuant to MCR 7.219, as these appeals involve significant questions of public interest. See *East Grand Rapids Sch Dist v Kent Co Tax*

Allocation Bd, 415 Mich 381, 401; 330 NW2d 7 (1982); *Polania v State Employees' Retirement Sys*, 299 Mich App 322, 335; 830 NW2d 773 (2013).

DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ., concurred.

PEOPLE v LOPEZ

Docket No. 314953. Submitted June 10, 2014, at Detroit. Decided June 19, 2014, at 9:00 a.m. Leave to appeal denied, 497 Mich ___.

Jorge Lopez was convicted by a jury in the Wayne Circuit Court of armed robbery, assault with intent to rob while armed, possession of a firearm during the commission of a felony (felony-firearm), unlawful possession of a firearm by a felon, and carrying a concealed weapon. The court, James A. Callahan, J., sentenced defendant as a fourth-offense habitual offender to concurrent terms of 35 to 55 years in prison for the robbery, assault, felon-in-possession, and concealed-weapon convictions, plus a consecutive term of 2 additional years in prison for the felony-firearm conviction. Defendant appealed.

The Court of Appeals *held*:

1. The sentencing court must sentence the defendant to a minimum sentence within the range determined by scoring the sentencing guidelines unless the court decides to depart from the guidelines. If the court wishes to depart from the guidelines, it must articulate substantial and compelling reasons for departing that are objective and verifiable, keenly attract the court's attention, and are of considerable worth in deciding the terms of the sentence. The court is not required to score the guidelines for and sentence the defendant on each of his or her concurrent convictions if the court properly scored and sentenced the defendant on the conviction with the highest crime classification because, under MCL 771.14(2)(e), presentence reports and guidelines calculations are only required for the conviction with the highest crime classification. Although § 14, on its own, applies only to the probation department, MCL 777.21(2) states that the sentencing court must score the offenses in multiple-offense situations subject to how the probation department does so. The rationale for this legislative scheme is fairly clear because, except in possibly an extreme and tortured case, the guidelines range for the conviction with the highest crime classification will be greater than the guidelines range for any other offense. Given that the sentences are to be served concurrently, the guidelines range for the highest-crime-class offense would subsume the guidelines range for lower-

crime-class offenses and there would be no tangible benefit resulting from establishing guidelines ranges for the lower-crime-class offenses. Courts, however, must be cognizant of the statutory maximums for each conviction and ensure that each individual sentence, irrespective of the guidelines calculations used, does not exceed its statutory maximum. In this case, because the sentences for defendant's lower-crime-class offenses were to be served concurrently with the highest-crime-class-felony sentence, the guidelines did not need to be scored for the lower-crime-class offenses, and there was no departure from the sentencing guidelines. Further, defendant's maximum sentences of 55 years in prison for the lower-crime-class offenses did not exceed the statutory maximum for those offenses because defendant was sentenced as a habitual offender under MCL 769.12(1)(b).

2. A defendant is guaranteed the right to the effective assistance of counsel under both the United States and Michigan Constitutions. In this case, defendant argued that his attorney erred by failing to investigate how the police learned of his whereabouts before his arrest, but defendant failed to establish the relevance of the information and, thus, failed to establish how his attorney's conduct was objectively unreasonable.

3. The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. In light of the testimony of the two complaining eyewitnesses, the evidence presented at trial weighed in favor of defendant's guilt, and defendant was not entitled to relief.

Affirmed.

GLEICHER, J., concurring in part and dissenting in part, agreed with the majority's resolution of defendant's challenges concerning the great weight of the evidence and ineffective assistance of counsel, but disagreed with the majority's conclusion that defendant did not need to be separately sentenced for each conviction. The language of MCL 777.21(2) compels the trial court to score the sentencing guidelines applicable to each conviction. MCL 771.14(2)(e)(*ii*) and (*iii*), on which the majority rely, concern the sentencing duties of the probation department, not the sentencing court. By failing to separately score the guidelines for each conviction, sentencing courts may inadvertently impose departure sentences. Judge GLEICHER would have remanded the case for guidelines calculation and separate sentencing for each conviction.

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

Jorge Lopez, *in propria persona*, and *Daniel J. Rust* for defendant.

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

DONOFRIO, P.J. Following his jury trial, defendant was convicted of all five crimes charged: Count I—armed robbery, in violation of MCL 750.529; Count II—assault with intent to rob while armed, in violation of MCL 750.89; Count III—possession of a firearm during the commission of a felony (felony-firearm), in violation of MCL 750.227b; Count IV—unlawful possession of a firearm by a felon, in violation of MCL 750.224f; and Count V—carrying a concealed weapon, in violation of MCL 750.227. The court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 35 to 55 years in prison for Counts I, II, IV, and V, plus a consecutive term of 2 additional years for Count III.

On appeal, defendant challenges the sentencing court's failure to individually score the sentencing guidelines, MCL 777.1 *et seq*., for each of his convictions and its failure to sentence him in accordance with the guidelines range applicable to each conviction. Defendant also filed a brief under Standard 4 of Supreme Court Administrative Order No. 2004-6, asserting that he is entitled to a new trial because the jury's verdict was against the great weight of the evidence and that

both his trial and appellate counsel provided him ineffective legal assistance. Finding no merit to any of these arguments, we affirm.

I. THE SENTENCING GUIDELINES AND LOWER-CRIME-CLASS FELONIES

Defendant argues that the sentencing court erred when it sentenced him on all his felonies in accordance with the sentencing guidelines for the most serious conviction. He reasons that scoring and calculating the guidelines for the other convictions would have resulted in a lower guidelines range for those convictions, which results in his imposed sentences being illegal because the court did not justify any upward departure. We disagree.

The standard of review for sentencing decisions was set forth in *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003):

> [T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [Quotation marks omitted.]

Michigan's sentencing guidelines calculations only affect a defendant's minimum sentence, while a defendant's maximum sentence is limited by statute. *People v McCuller*, 479 Mich 672, 677; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). The sentencing court must sentence the defendant to a minimum sentence within the guidelines

range unless it decides to depart from the guidelines. MCL 769.34. If a trial court wishes to impose a minimum sentence outside the guidelines range, it must articulate substantial and compelling reasons for departing that are objective and verifiable, keenly attract the court's attention, and are of considerable worth in deciding the terms of the sentence. *Babcock*, 469 Mich at 257.

Defendant does not dispute that the court correctly scored the guidelines and sentenced defendant as a III-F offender for armed robbery, which is a Class A felony, MCL 777.16y, to incarceration for 35 to 55 years.[1] Rather, defendant argues that the trial court was required to sentence him on his felon-in-possession-of-a-firearm and carrying-a-concealed-weapon convictions—both of which are Class E felonies, MCL 777.16m—using the sentencing guidelines for Class E felonies. We are bound by this Court's decision in *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005), which addressed this exact issue. In *Mack*, we held that the trial court was not required to independently score the guidelines for and sentence the defendant on each of his concurrent convictions if the court properly scored and sentenced the defendant on the conviction with the highest crime classification.[2] *Id*. at 126-130. The *Mack* Court reasoned

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[1] Defendant's minimum sentence of 35 years in prison, or 420 months in prison, falls within the minimum-sentence guidelines range of 135 to 450 months in prison for a fourth-offense habitual offender. See MCL 777.21(3)(c); MCL 777.62.

[2] *Mack* was later called into question in *People v Johnigan*, 265 Mich App 463, 470; 696 NW2d 724 (2005) (opinion by SAWYER, J.), in which the lead opinion criticized *Mack*'s failure to properly interpret MCL 777.21(2). The lead opinion in *Johnigan* concluded that *Mack* was erroneous because at the time *Mack* was decided, MCL 777.21(2) stated, " 'If the defendant was convicted of multiple offenses, subject to section 14 of *chapter IX*, score each offense as provided in this part.' " *Id*. (emphasis added). The lead opinion observed that § 14 of Chapter IX was

that, when sentencing on multiple concurrent convictions, the guidelines did not need to be scored for the lower-crime-class offenses because MCL 771.14(2)(e) provides that presentence reports and guidelines calculations were only required "for the highest crime class felony conviction."[3] *Id*. at 127-128, citing MCL 771.14(2)(e). The rationale for this legislative scheme is fairly clear because, except in possibly an extreme and tortured case, the guidelines range for the conviction with the highest crime classification will be greater than the guidelines range for any other offense. Given that the sentences are to be served concurrently, the guidelines range for the highest-crime-class offense would subsume the guidelines range for lower-crime-

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MCL 769.14, which was inapplicable to *Mack*. *Id*. The lead opinion, however, noted that if MCL 777.21(2) had referred to "§ 14 of *chapter XI* (MCL 771.14)" instead of Chapter IX, then the author would have agreed with *Mack*'s conclusion. *Id*. at 471 (emphasis added).

Johnigan, however, does not compel us to deviate from *Mack*. First, the opinion's criticism of *Mack* was nonbinding dicta because it was not necessary to the resolution of the case. See *Dessart v Burak*, 252 Mich App 490, 496; 652 NW2d 669 (2002). Second, the Legislature, after the *Johnigan* decision was issued, amended MCL 777.21(2) to refer to Chapter XI instead of Chapter IX. See 2006 PA 655. Thus, with the amendment of MCL 777.21(2), the lead opinion in *Johnigan* now fully supports *Mack*'s holding. *Johnigan*, 265 Mich App at 471 (opinion by SAWYER, J.).

[3] The dissent criticizes our and the Mack Court's reliance on MCL 771.14(2)(e), but as the dissent recognizes, MCL 777.21(2) states that the court must, in a multiple-offense situation, "subject to section 14 of chapter XI [MCL 771.14], score each offense as provided in this part." (Emphasis added.) We agree and acknowledge that Chapter XI (including § 14 of Chapter XI), on its own, only applies to the probation department. But when MCL 777.21, which applies to the sentencing court, states that the court is to score offenses subject to how the probation department does so, it then necessarily incorporates those terms into the court's obligations. See Johnigan, 265 Mich App at 471. Otherwise, the language, "subject to [MCL 771.14]" would serve no purpose and be rendered nugatory, which is disfavored. People v Hershey, 303 Mich App 330, 336; 844 NW2d 127 (2013).

class offenses, and there would be no tangible reason or benefit in establishing guidelines ranges for the lower-crime-class offenses. Therefore, because the sentences for defendant's lower-crime-class offenses were to be served concurrently with the highest-class-felony sentence, the Class E guidelines did not need to be scored and there was no departure.

We caution sentencing courts, when imposing concurrent sentences, to remain cognizant of any statutory maximums for each conviction and to ensure that each individual sentence, irrespective of any guidelines calculations used, does not exceed its statutory maximum. In this case, defendant's maximum sentences of 55 years in prison for his Class E felony convictions did not exceed the statutory maximum. Normally, the statutory maximum for these offenses is five years. MCL 750.224f(5); MCL 750.227(3). However, defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, which elevated those statutory five-year maximums to life. Specifically, MCL 769.12(1)(b) provides that if the base offense normally is punishable by a maximum term of five years or more, then "the court . . . may sentence the person to imprisonment for life or for a lesser term." Therefore, the imposed sentences did not run afoul of any legislative maximum.

Further, we also question, like the *Mack* Court did, "whether a sentence for a conviction of the lesser class felony that is not scored under the guidelines pursuant to [MCL 771.14(2)(e)(*ii*) and (*iii*)] could permissibly exceed the sentence imposed on the highest crime class felony and remain proportional." *Mack*, 265 Mich App at 129. But because defendant's sentences for his lower-crime-class felonies did not exceed those imposed for his highest-crime-class felonies, we need not decide that question. See *id*.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant claims that he received ineffective assistance of trial and appellate counsel. We initially note that defendant's challenge to his trial counsel was not preserved because he did not move for a new trial or for a *Ginther*[4] hearing. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). He did preserve his challenge to the effectiveness of his appellate counsel by raising it in his Standard 4 brief.

> Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. Where claims of ineffective assistance of counsel have not been preserved, our review is limited to errors apparent on the record. [*People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) (citations and quotation marks omitted).]

A finding is clearly erroneous if "the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

The Court uses the same legal standard for ineffective assistance of counsel when scrutinizing the performance of trial counsel and appellate counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). Although defendant is guaranteed the right to counsel under both the United States Constitution, US Const, Am VI, and Michigan Constitution, Const 1963, art 1, § 20, defendant bears a heavy

[4] People v Ginther, 390 Mich 436, 443; 212 NW2d 922 (1973).

burden in establishing "that counsel's performance was deficient and that he was prejudiced by the deficiency." *People v Meissner*, 294 Mich App 438, 458; 812 NW2d 37 (2011). The crux of this test is to determine whether any mistakes effectively deprived defendant of the right to a fair trial. *Id*. at 459.

The United States Supreme Court has set forth a two-prong test to determine whether counsel was ineffective in a given case. First, defendant must prove that his trial counsel failed to meet an objective standard of reasonableness based on "prevailing professional norms." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, defendant must establish prejudice, which is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

Defendant argues that his appellate counsel was ineffective, but defendant fails to meet the heavy burden of establishing the claim. Defendant does not identify any specific legal issue that his appellate counsel failed to raise on appeal. Defendant's failure to properly argue the merits of the issue results in it being abandoned. *People v King*, 297 Mich App 465, 474; 824 NW2d 258 (2012). Moreover, to the extent that defendant argues that appellate counsel should have raised the issue of trial counsel being ineffective, because defendant raises this issue in his Standard 4 brief, any possible error committed by his appellate counsel was cured.

Our review of defendant's challenge to the effectiveness of his trial counsel is limited to mistakes apparent on the record. *Matuszak*, 263 Mich App at 48. It appears that defendant is arguing that his attorney erred by failing to investigate how the police learned of his whereabouts before his arrest, asserting that the anonymous informant had an improper motive to lead

the police to his location. But defendant does not establish how this purported evidence would have affected the outcome of the trial. How the police came to arrest and charge defendant is irrelevant to defendant's guilt or innocence. Because defendant failed to establish the relevance of this matter, he has not established how his attorney's conduct was objectively unreasonable. Moreover, defendant cannot show prejudice from this purported error because the most compelling evidence was the eyewitness testimony, which would not have been affected or impeached by evidence relating to how the police ultimately located defendant.

III. GREAT WEIGHT OF THE EVIDENCE

Defendant finally claims in his Standard 4 brief that the jury's verdict was against the great weight of the evidence. Because defendant did not move for a new trial before filing the appeal, this argument is unpreserved for appellate review. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Unpreserved challenges to the great weight of the evidence are reviewed for plain error affecting the defendant's substantial rights. *Id*.

At trial and during a police lineup, the two complaining eyewitnesses, Sharon Fritz and Amber Sebastiani, clearly identified defendant as the individual who entered the bar and robbed them that night. They reported that defendant, along with a masked man, entered the bar while it was closed, pulled out a gun, pointed it at them, and repeatedly said "money." Fritz and Sebastiani claimed that defendant put his gun to Fritz's head and forcefully stole her gun after she tried to get it in order to defend herself. They also testified that defendant attempted to shoot them. Sebastiani said that she physically struggled with defendant to

stop him from shooting them, and that defendant shoved Fritz down onto stairs during the fray. They claimed that defendant stole Fritz's gun by taking it with him when he fled the bar. Both Fritz and Sebastiani testified consistently with each other, and defendant did not offer any evidence that impeached their credibility or established inconsistencies. At the end of the trial, the parties stipulated that defendant was not allowed to be in possession of a firearm because of his status as a convicted felon.

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 218-219. In light of the evidence just discussed, the evidence did not heavily preponderate against the verdict, and defendant has failed to demonstrate any plain error. The evidence at trial universally weighed in favor of defendant's guilt for all of the offenses. Accordingly, defendant's claim fails.

Affirmed.

M. J. KELLY, J., concurred with DONOFRIO, P.J.

GLEICHER, J. (*concurring in part and dissenting in part*). I concur with the majority's resolution of defendant's great weight of the evidence and ineffective assistance of counsel challenges, but respectfully dissent from the majority's conclusion that defendant need not be separately sentenced for all convictions. In my view, MCL 777.21(2) compels the trial court to score the sentencing guidelines applicable to each conviction: "If the defendant was convicted of multiple offenses, subject to [MCL 771.14], *score each offense* as provided in this part." (Emphasis added.)

The majority rests its holding on MCL 771.14(2)(e)(*ii*) and (*iii*), which fall within the "probation" chapter of the Code of Criminal Procedure. These subparagraphs set forth the sentencing duties assigned to the probation department, not the sentencing court.

Regardless of the probation department's responsibility to prepare presentence investigation reports and to score sentencing guidelines, the sentencing court bears an independent obligation to pass sentence in accordance with the statutory sentencing guidelines. See MCR 6.425(D) and (E). "A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). As Justice MARKMAN's dissenting statements in *People v Warren*, 485 Mich 970 (2009), and *People v Stone*, 495 Mich 984 (2014), highlight, withholding separate scoring for each conviction means that by default, defendants may receive inadvertent departure sentences. I would remand for guidelines calculation and separate sentencing for each conviction.

GLENN v TPI PETROLEUM, INC

Docket No. 308636. Submitted January 14, 2014, at Detroit. Decided June 24, 2014, at 9:05 a.m.

Phillip Glenn, Terry Glenn, and others, brought an action in the Wayne Circuit Court against TPI Petroleum, Inc., Valero Energy Corporation, and others, asserting claims including negligence, nuisance, and trespass related to the contamination of plaintiffs' properties by leaky underground storage tanks located on property that was once operated as a gasoline station. Valero moved for summary disposition under MCR 2.116(C)(1), arguing that the court lacked personal jurisdiction over it. The court, Amy P. Hathaway, J., denied the motion. Valero sought leave to appeal. In lieu of granting leave to appeal, in an unpublished order entered October 7, 2011 (Docket No. 305145), the Court of Appeals vacated the trial court's order denying the motion for summary disposition and remanded the case to the trial court. The Court of Appeals ordered the trial court to explain its decision to exercise jurisdiction under MCL 600.715 and to determine whether the exercise of jurisdiction was consistent with the requirements of due process. On remand, the trial court again denied Valero's motion for summary disposition. The Court of Appeals granted Valero's application for leave to appeal.

The Court of Appeals *held*:

1. It is the duty of the lower court or tribunal on remand to comply strictly with the mandate of the appellate court. The trial court's opinion on remand was deficient because the trial court failed to follow the instructions of the Court of Appeals, which required the trial court to explain certain aspects of its ruling. The trial court erred by failing to comply with the specific directives of the Court of Appeals. Further, when allegations in the pleadings are contradicted by documentary evidence, the plaintiff may not rest on mere allegations but must produce admissible evidence of his or her prima facie case establishing jurisdiction. In this case, the trial court improperly construed the allegations in plaintiffs' pleadings as true even after Valero came forward with documentary evidence contradicting plaintiffs' allegations.

2. Jurisdiction over the person may be established by way of general personal jurisdiction or limited personal jurisdiction. Under MCL 600.711(3), general personal jurisdiction over a corporation may be based on the carrying on of a continuous and systematic part of the corporation's general business in the state. Taking into account the caselaw addressing the subject and the definitions of the words "continuous" and "systematic," courts in Michigan have general jurisdiction over a defendant if the defendant has a general plan for conducting business on a regular basis within the state. In this case, plaintiffs failed to establish the existence of general personal jurisdiction over Valero given the documentary evidence indicating that Valero was not registered to do business in Michigan, did not own or lease property in Michigan, did not have employees nor direct involvement in the provision of goods or services in Michigan, and that Valero had no association, ownership, or contact with the gasoline station alleged to have caused the contamination. Plaintiffs failed to plead or demonstrate an adequate alter ego relationship between Valero and its subsidiaries, and the mere suggestion that Valero was, in some manner, conjoined with various subsidiaries that operate in Michigan was not sufficient to establish general personal jurisdiction.

3. Under MCL 600.715, limited personal jurisdiction may be established by demonstrating the existence of certain relationships between a corporation or its agent and the state including (1) the transaction of any business in the state, (2) the doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort, (3) the ownership, use, or possession of any real or tangible personal property situated in the state, (4) contracting to insure any person, property, or risk located within the state at the time of contracting, and (5) entering into a contract for services to be performed or for materials to be furnished in the state by the defendant. If limited personal jurisdiction is authorized by the statute, the court must then determine if the exercise of jurisdiction would be consistent with the requirements of the Due Process Clause. In this case, plaintiffs failed to establish the existence of limited personal jurisdiction over Valero under MCL 600.715. There were no allegations that Valero contracted to insure anything in the state, or that Valero committed any specific act that resulted in an action for tort in the state. Although plaintiffs alleged that Valero owned property in Michigan, Valero submitted documentary evidence contradicting that allegation and plaintiffs failed to produce admissible evidence supporting their allegation. With regard to the transaction of business in the state or entering into a contract for services or

materials in the state, plaintiffs cited the work of Shay Wideman, whom plaintiffs alleged was affiliated with Valero, in remediating the contamination and the existence of Valero branded gasoline stations in the state. But the evidence only connects Wideman with subsidiaries of Valero, and plaintiffs failed to allege sufficient facts to pierce the corporate veil. Rather, the record indicated that Valero was a holding company without employees or direct involvement in the provision of goods or services.

Trial court's decision denying Valero's motion for summary disposition reversed.

JURISDICTION — GENERAL PERSONAL JURISDICTION — A CONTINUOUS AND SYSTEMATIC PART OF THE CORPORATION'S GENERAL BUSINESS.

Jurisdiction over the person may be established by way of general personal jurisdiction or limited personal jurisdiction; general personal jurisdiction over a corporation may be based on the carrying on of a continuous and systematic part of the corporation's general business in the state, and courts in Michigan, therefore, have general jurisdiction over a defendant if the defendant has a general plan for conducting business on a regular basis within the state; the mere suggestion that a corporation is, in some manner, conjoined with various subsidiaries that operate in Michigan is not sufficient to establish general personal jurisdiction (MCL 600.711).

Williams Acosta, PLLC (by *Avery K. Williams*), for Phillip Glenn, Terry Glenn, Gregory Lee, Laverne Lee, First Baptist World Changers International Ministries, and Lennell Caldwell.

Dykema Gossett PLLC (by *John A. Ferroli*, *Jill M. Wheaton*, and *T. L. Summerville*) for Valero Energy Corporation.

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

WILDER, J. Defendant Valero Energy Corporation (Valero) appeals by delayed leave granted[1] the trial court's denial of Valero's motion for summary disposi-

[1] *Glenn v TPI Petroleum, Inc*, unpublished order of the Court of Appeals, entered March 2, 2012 (Docket No. 308636).

tion brought under MCR 2.116(C)(1) for lack of personal jurisdiction. We reverse.

This matter arises from the alleged contamination of plaintiffs' properties by leaky underground storage tanks located on property that was operated as a gasoline station at 22645 West Eight Mile Road, in Detroit, Michigan. Valero challenges the trial court's second denial of its motion for summary disposition brought pursuant to MCR 2.116(C)(1), following this Court's remand in *Glenn v TPI Petroleum, Inc*, unpublished order of the Court of Appeals, entered October 7, 2011 (Docket No. 305145). In remanding this case to the trial court, this Court stated, in relevant part:

> In ruling that it had specific (limited) personal jurisdiction under MCL 600.715, the trial court failed to determine if the exercise of jurisdiction was consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. *Electrolines*[*, Inc*] *v Prudential Assurance* [*Co, Ltd*], 260 Mich App 144, 167; 677 NW2d 874 (2003). Therefore, the matter is REMANDED to the trial court to conduct the proper analysis. In addition, the trial court shall provide further explanation as to the facts upon which it was relying upon to exercise jurisdiction under MCL 600.715 and identify the particular subsection upon which it relied, where Valero Energy Corporation provided a covenant deed with respect to the property in Benton Harbor, which established the property was not owned by Valero Energy, and provided an affidavit establishing that Shay Wideman was not an employee or agent of Valero Energy. The trial court shall also explain its statement that the companies for whom Wideman was working "all trace back" to Valero Energy Corporation, and why it is imputing Wideman's actions to Valero Energy and/or disregarding the corporate entities, especially where the complaint does not assert a claim to pierce the corporate veil. See *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). [*Id*.]

On remand, the trial court again denied Valero's motion for summary disposition.

As recognized by this Court in *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012):

> This Court reviews de novo a trial judge's decision on a motion for summary disposition. The legal question of whether a court possesses personal jurisdiction over a party is also reviewed de novo. This case also presents the legal question of whether the exercise of personal jurisdiction over a nonresident . . . is consistent with the notions of fair play and substantial justice required by the Due Process Clause of the Fourteenth Amendment, which we likewise review de novo. [Citations omitted.]

Specifically:

> When reviewing a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(1), the trial court and this Court consider the pleadings and documentary evidence submitted by the parties in a light most favorable to the nonmoving party. The plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. The plaintiff's complaint must be accepted as true unless specifically contradicted by affidavits or other evidence submitted by the parties. Thus, when allegations in the pleadings are contradicted by documentary evidence, the plaintiff may not rest on mere allegations but must produce admissible evidence of his or her prima facie case establishing jurisdiction. [*Id*. at 221 (citations and quotation marks omitted).]

To the extent this case involves the interpretation and application of a statute, our review is de novo. 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 con-

tained 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). If statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). An unambiguous statute must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

I

Valero contends the trial court failed, on remand, to follow the instructions of this Court to explain aspects of its ruling. As discussed in *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544-545; 705 NW2d 365 (2005):

> The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court. When an appellate court remands a case without instructions, a lower court has the same power as if it made the ruling itself. However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order. It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court. [Citations and quotation marks omitted.]

In vacating the original order denying summary disposition to defendant and remanding to the trial court, this Court specifically instructed the trial court to do the following:[2]

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[2] *Glenn*, unpublished order of the Court of Appeals, entered October 7, 2011 (Docket No. 305145).

> • Conduct a proper analysis and determine whether "the exercise of jurisdiction was consistent with the requirements of the Due Process Clause of the Fourteenth Amendment."
>
> • Explain the facts the court relied on in exercising jurisdiction under MCL 600.715 and "identify the particular subsection upon which it relied" in light of the covenant deed submitted by Valero and the Wideman affidavit establishing that he was not an employee of Valero.
>
> • Explain "its statement that the companies for whom Wideman was working 'all trace back' to Valero . . . , and why it is imputing Wideman's actions to Valero Energy and/or disregarding the corporate entities, especially where the complaint does not assert a claim to pierce the corporate veil."

In its November 23, 2011 order, the trial court cited *Electrolines* as articulating the applicable standard used to determine whether the exercise of jurisdiction is consistent with the Due Process Clause. Other than citing the *Electrolines* standard and identifying the three questions to be addressed in this analysis, the trial court did not indicate what evidence it relied on to answer the questions posed by this Court.

The majority of the trial court's opinion was simply a recitation of the evidence relied on by plaintiffs before Valero submitted various affidavits and documentation contradicting that evidence. While this recitation may be construed as an explanation of the factual basis for the trial court's determination to exercise jurisdiction, it remains deficient in that it did not, as ordered by this Court, identify the specific subsection of the applicable statute that it relied on to establish jurisdiction. Further, the remand order required the trial court to explain its findings in light of the covenant deed and affidavits provided by Valero. But without explanation,

the trial court continued to rely on the allegations made by plaintiffs before the submission of the covenant deed and Valero's affidavits. The trial court ignored the well-established rules pertaining to summary disposition, which were implied in the remand order from this Court. Specifically:

> The plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. The plaintiff's complaint must be accepted as true *unless specifically contradicted by affidavits or other evidence* submitted by the parties. Thus, *when allegations in the pleadings are contradicted by documentary evidence, the plaintiff may not rest on mere allegations but must produce admissible evidence of his or her prima facie case* establishing jurisdiction. [*Yoost*, 295 Mich App at 221 (citations and quotation marks omitted; emphasis added).]

In the circumstances of this case, Valero came forward with documentary evidence to dispute plaintiffs' allegations, but the trial court incorrectly continued to construe the allegations in plaintiffs' pleadings as true. See *id*. at 222. See also *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991) ("Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence.").

Further, while the trial court, in a conclusory manner, determined that sufficient evidence existed to link Wideman to Valero, it did not explain, as required by this Court's order, how Valero was to be held legally liable and why the corporate entities could be "disregard[ed]," particularly when Wideman does not work for Valero and plaintiffs failed to plead the concepts or theories of vicarious liability, agency, alter ego, or pierc-

ing of the corporate veil. *Glenn*, unpublished order of the Court of Appeals, entered October 7, 2011 (Docket No. 305145).

" 'It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court.' " *K & K Constr, Inc*, 267 Mich App at 544-545, quoting *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). The trial court erred by failing to comply on remand with the very specific directives of this Court.

II

Valero also challenges the trial court's determination regarding the existence of jurisdiction in this litigation. Addressing the concept of general personal jurisdiction, this Court has explained:

> [P]laintiff [bears] the burden of demonstrating that the trial court possessed personal jurisdiction over defendant[], although only a prima facie showing of jurisdiction was needed to defeat defendant['s] motion for summary disposition. Jurisdiction over the person may be established by way of general personal jurisdiction or specific (limited) personal jurisdiction.
>
> The exercise of general jurisdiction is possible when a defendant's contacts with the forum state are of such nature and quality as to enable a court to adjudicate an action against the defendant, even when the claim at issue does not arise out of the contacts with the forum state. When a defendant's contacts with the forum state are insufficient to confer general jurisdiction, jurisdiction may be based on the defendant's specific acts or contacts with the forum state. [*Electrolines*, 260 Mich App at 166 (citations omitted).]

In accordance with MCL 600.711, demonstration of the existence of any of the following relationships between a corporation and the state of Michigan provides a

sufficient basis for a court to exercise general personal jurisdiction over the corporation:

> (1) Incorporation under the laws of this state.
>
> (2) Consent, to the extent authorized by the consent and subject to the limitations provided in [MCL 600.]745.
>
> (3) The carrying on of a continuous and systematic part of its general business within the state.

It is undisputed that Valero has not consented to the litigation and is not incorporated in the state of Michigan. Rather, plaintiffs contend that Valero conducts "a continuous and systematic part of its general business" in Michigan, MCL 600.711(3), which Valero denies. In support of their claim, plaintiffs rely on (1) a "Valero Map of Operations,"[3] indicating the presence of its "retail and branded wholesale network" in Michigan, (2) correspondence involving or authored by Wideman pertaining to access agreements for the contaminated sites by TPI Petroleum, Inc., and (3) several websites indicating Wideman held a management position with Valero.

Neither MCL 600.711, nor caselaw, has specifically defined what constitutes "a continuous and systematic part" of a corporation's general business. But courts have looked at whether the particular corporate entity has a physical location, officers, employees, or bank accounts in Michigan. See *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 428; 633 NW2d 408 (2001). Of additional guidance are cases that have considered a corporation's conduct in soliciting and procuring sales and purchases within Michigan. See *Helzer v F Joseph Lamb Co*, 171 Mich App 6, 11; 429 NW2d 835 (1988); *Lincoln v Fairfield-Nobel Co*, 76 Mich App 514, 518; 257 NW2d 148 (1977); *Kircos v Goodyear Tire & Rubber Co*,

[3] Capitalization altered.

70 Mich App 612, 614; 247 NW2d 316 (1976). The United States Supreme Court has found it appropriate to exercise general jurisdiction over foreign corporations when it has been determined that "their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, SA v Brown*, 564 US ___, ___; 131 S Ct 2846, 2851; 180 L Ed 2d 796 (2011). In *Kircos v Lola Cars Ltd*, 97 Mich App 379, 386-387; 296 NW2d 32 (1980), this Court stated:

> Where the relationship to the state is too attenuated, jurisdiction is not present. A foreign corporation must actually be present within the forum state on a regular basis, either personally or through an independent agent, in order to be subjected to general personal jurisdiction.
>
> * * *
>
> A corporation is not "present" merely because goods that it has manufactured and sold are within a jurisdiction, absent an incident creating a limited jurisdiction . . . . The fact that the corporation knows that purchasers of its products will be continuously selling its products within a jurisdiction does not mean that it is carrying on a continuous and systematic part of its general business within the state . . . . The fact that this is done through an exclusive importer and distributor of its products does not mean that the importer and distributor is, per se, the corporation's alter ego: the establishment of such a relationship does not carry the legal significance of the vow "whither thou goest, I will go". We look rather to see if there were activities carried on in the corporation's behalf by those who are authorized to act for it. [Citations omitted.]

This Court may also consult dictionary definitions to determine the meaning of "a continuous and systematic part" of a corporation's general business as used in MCL 600.711(3). See *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013). The word "continuous" is

defined as "uninterrupted in time; without cessation[.]" *Random House Webster's College Dictionary* (2001). The word "systematic" is defined as "having, showing, or involving a system, method, or plan" and "given to or using a system or method[.]" *Id*. Thus, taking into account pertinent caselaw and these dictionary definitions, we conclude that courts in Michigan would have general jurisdiction over defendants if defendants had a general plan for conducting business on a regular basis within the state of Michigan.

Plaintiffs have not carried their burden to establish the existence of general jurisdiction in this matter. According to Valero's affidavits, it is a holding company and a Delaware corporation with its principal place of business in San Antonio, Texas. Valero is not registered to do business in Michigan, does not lease or own real property, and it has neither employees nor direct involvement in the provision of goods or services—in Michigan or elsewhere. Steve Gilbert, Valero's assistant secretary and its disclosure and compliance officer, also averred that Valero has no association, ownership, or contact with the Detroit gasoline station alleged to have caused the contamination, and that Wideman

> has never been assigned by his employer to do work for [Valero] or any of its predecessors, he has never been authorized by [Valero] or any of its predecessors to represent it or act for it, and he has never been authorized to hold himself out as its employee or agent.

In his own affidavit, Wideman also explained that he does not work for Valero, but instead, he is employed by Valero Services, Inc., which assigns him to work for subsidiaries of Valero, such as MRP, Michigan Reutilization, LLC, or TPI Petroleum, Inc., and Total Petroleum, Inc. Wideman's affidavit is consistent with the correspondence involving Wideman submitted by plaintiffs,

which connected him only to subsidiaries MRP and TPI, not Valero. Valero's assistant secretary explained that Valero has no ownership or shareholder interest in, or control over, those subsidiaries.[4]

Plaintiffs assert that any distinction between Valero and the various subsidiary corporations constitutes a "shell game" and a "sham." But, in accordance with *Avery v American Honda Motor Car Co*, 120 Mich App 222, 225; 327 NW2d 447 (1982):

> In Michigan, the test of a principal-agent relationship is whether the principal has the right to control the agent. . . . :
>
> > [I]t would seem appropriate, for the purpose of determining the amenability to jurisdiction of a foreign corporation which happens to own a subsidiary corporation carrying on local activities, to inquire whether the parent has the requisite minimum contacts with the State of the forum. Thus the ownership of the subsidiary carrying on local activities in Michigan represents merely one contact or factor to be considered in assessing the existence or non-existence of the requisite minimum contacts with the State of Michigan, but is not sufficient of itself to hold the present foreign corporations amenable to personal jurisdiction.
>
> [Citations omitted.]

Because "[t]he burden to prove jurisdictional facts is on the plaintiff" the mere suggestion in this litigation that Valero is, in some manner, conjoined with various subsidiaries that operate in Michigan is not sufficient to establish general personal jurisdiction. *Id*. Specifically,

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[4] Although Wideman has an "@Valero.com" e-mail address, Valero Marketing and Supply Company owns and operates the Valero.com website—and any copyrighted materials associated with it—and owns the Valero registered trademark.

plaintiffs failed to plead or demonstrate an adequate "alter ego" relationship between Valero and its subsidiaries or that Valero had any control over the subsidiaries. In addition, as noted by the United States Supreme Court, "[f]low of a manufacturer's products into the forum . . . may bolster an affiliation germane to *specific* jurisdiction. But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Goodyear*, 564 US at ___; 131 S Ct at 2855 (citation omitted). "A corporation's continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Id*. at ___; 131 S Ct at 2856 (quotation marks omitted), citing *Int'l Shoe Co v State of Washington, Office of Unemployment Compensation & Placement*, 326 US 310, 318; 66 S Ct 154; 90 L Ed 95 (1945). Therefore, in its initial order, the trial court correctly determined that it lacked general personal jurisdiction over Valero.

III

This does not, however, complete the inquiry as it remains to be determined whether Valero should be subject to limited personal jurisdiction. Limited personal jurisdiction is governed by MCL 600.715, which provides:

> The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:

> (1) The transaction of any business within the state.
>
> (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.
>
> (3) The ownership, use, or possession of any real or tangible personal property situated within the state.
>
> (4) Contracting to insure any person, property, or risk located within this state at the time of contracting.
>
> (5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.

In the factual circumstances of this case, MCL 600.715(4) is not applicable.

This Court has explained that a "two-step analysis" is to be undertaken in determining whether a court may exercise limited personal jurisdiction. *Yoost*, 295 Mich App at 222-223. Specifically:

> First, this Court ascertains whether jurisdiction is authorized by Michigan's long-arm statute. Second, this Court determines if the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. Both prongs of this analysis must be satisfied for a Michigan court to properly exercise limited personal jurisdiction over a nonresident. Long-arm statutes establish the nature, character, and types of contacts that must exist for purposes of exercising personal jurisdiction. Due process, on the other hand, restricts permissible long-arm jurisdiction by defining the quality of contacts necessary to justify personal jurisdiction under the constitution. [*Id*. at 222-223 (citations and quotation marks omitted).]

As stated in *Oberlies*, 246 Mich App at 430, "Our Legislature's use of the word 'any' to define the amount of business that must be transacted establishes that even the slightest transaction is sufficient to bring a corporation within Michigan's long-arm jurisdiction." In turn, this Court has explained the "three-part test"

used to determine whether the exercise of limited personal jurisdiction "comports with due process[.]" *Yoost*, 295 Mich App at 223.

> First, the defendant must have purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. [*Id*., quoting *Mozdy v Lopez*, 197 Mich App 356, 359; 494 NW2d 866 (1992).]

Again, contrary to this Court's order on remand, the trial court failed to identify which subsection(s) of MCL 600.715 it relied on to establish limited personal jurisdiction. There is no dispute that the Detroit gasoline station that is alleged to be the source of contamination in this case has never been owned or operated by Valero. Significantly, plaintiffs' complaint does not contain any allegations of wrongful acts or ownership by Valero of the subject gasoline station. The complaint is also silent with regard to the theory or basis on which plaintiffs seek to hold Valero liable for the damages alleged. Necessarily, this precludes the establishment of limited personal jurisdiction under MCL 600.715(2), which requires, "The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort." Again, plaintiffs' complaint is silent with regard to any specific act alleged to have been done by Valero that could be construed as "resulting in an action for tort."

Plaintiffs have also failed to establish liability under MCL 600.715(3), which concerns ownership of property within Michigan. In contesting Valero's motion for summary disposition, plaintiffs relied on a webpage for Valero, listing a property in Benton Harbor, Michigan for sale. In

its reply brief, Valero attached an affidavit made by Valero's assistant secretary, denying Valero's ownership of any property in the state of Michigan, and a covenant deed demonstrating that the Benton Harbor property is owned by MRP, not Valero. In addition, Valero contended it had no control over the webpage listing the Benton Harbor property for sale. Plaintiffs submitted no evidence in response. Where, as here, a defendant has come forward with documentary evidence specifically contradicting allegations made by the plaintiff, the plaintiff "may not rest on mere allegations but must produce admissible evidence of his or her prima facie case establishing jurisdiction." *Yoost*, 295 Mich App at 221. See also *SSC Assoc Ltd Partnership*, 192 Mich App at 363-364. In light of the documentary evidence submitted by Valero on the issue of property ownership in Michigan, plaintiffs have failed to establish limited personal jurisdiction over Valero under MCL 600.715(3).

The only bases remaining on which limited personal jurisdiction over Valero might have been established are MCL 600.715(1) ("The transaction of any business within the state.") and MCL 600.715(5) ("Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant."). Plaintiffs assert that jurisdiction is appropriate under both of these subsections because of the work performed by Wideman in remediation of the contaminated site and his indication on various websites that he is affiliated with Valero. Plaintiffs further assert that various websites establish that Valero transacts business within the state because they show the existence of various Valero branded gasoline stations and the supplying of Valero branded products to the stations.

In support of these allegations, plaintiffs submitted items of correspondence authored by Wideman or for-

warded to him regarding remediation of the contaminated site. The correspondence only identifies Wideman with MRP and TPI, not Valero. Despite these designations, plaintiffs argue that the subsidiaries constitute the alter ego of Valero, justifying piercing of the corporate veil. Plaintiffs did not actually plead an alter ego theory or request the trial court to pierce the corporate veil of Valero in their pleadings. Arguably, by failing to raise the theories of vicarious liability and alter ego or piercing of the corporate veil in their pleadings, plaintiffs' contentions in this regard could have been dismissed for failure to state a claim. However, Valero only sought dismissal under MCR 2.116(C)(1) (lack of jurisdiction) and not in accordance with MCR 2.116(C)(8). See *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 642 n 3; 802 NW2d 717 (2010).

In addition, " 'to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff would have to allege: (1) the existence of a parent-subsidiary relationship, and (2) facts that justify piercing the corporate veil.' " *Id*. at 642-643, quoting *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 548; 537 NW2d 221 (1995). Plaintiffs have initially failed to establish the existence of a parent-subsidiary relationship. See *Dutton Partners, LLC*, 290 Mich App at 642. Further, plaintiffs have failed to allege sufficient facts to establish that the corporate veil should be pierced. This Court has explained in detail the reasons for piercing of the corporate veil and what must be demonstrated to justify that action. As stated in *Foodland Distrib*, 220 Mich App at 456-457:

> As a general proposition, the law treats a corporation as an entirely separate entity . . . . This fiction is a convenience, introduced to serve the ends of justice. However, when this fiction is invoked to subvert justice, it may be ignored by the courts. The traditional basis for piercing the

> corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations.
>
> There is no single rule delineating when the corporate entity may be disregarded. As the Court [has previously] held . . . , "[t]he entire spectrum of relevant fact forms the background for such an inquiry, and the facts are to be assessed in light of the corporation's economic justification to determine if the corporate form has been abused." More recently, this Court has upheld the following standard for piercing the corporate veil:
>
> > "First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff."
>
> [Citations omitted.]

In the circumstances of this case, there has been no demonstration by plaintiffs that Valero is a "mere instrumentality of another entity . . . ." *Id*. at 457 (citations and quotation marks omitted). Factors used by courts to determine the propriety of piercing the corporate veil include: (1) whether the corporation is undercapitalized, (2) whether separate books are kept, (3) whether there are separate finances for the corporation, (4) whether the corporation is used for fraud or illegality, (5) whether corporate formalities have been followed, and (6) whether the corporation is a sham. *Laborers' Pension Trust Fund v Sidney Weinberger Homes, Inc*, 872 F2d 702, 704-705 (CA 6, 1988).[5]

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[5] While the decisions of federal circuit courts are not binding, they may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

Based on the record before us, we conclude that Valero correctly maintains that it is a holding company, without employees or direct involvement in the provision of goods or services. Plaintiffs have not come forward with any evidence or demonstrated that there has been a failure to maintain Valero's separate corporate identity through the comingling of funds with the relevant subsidiaries or that Valero controlled the decisions and actions of the other corporate entities. The only tangible indication of a relationship between Valero and the subsidiaries is the location of their offices at a shared address. While a corporate address may be shared, there is no evidence to indicate that separate corporate formalities have not been maintained. Despite having been afforded an opportunity to conduct additional discovery, plaintiffs have not come forward with any evidence to dispute Valero's affidavits or to substantiate the implication that justification exists to pierce Valero's corporate veil.

In addition, there is no activity on the part of Valero to demonstrate that it engaged or participated in any wrongful act. It is undisputed that Valero never owned or operated the subject property or gasoline station situated on it. Piercing of the corporate veil is appropriate only when a parent company is "abusing its corporate shield for its own purposes." *Dutton Partners, LLC*, 290 Mich App at 644. Given the absence of any wrongful conduct engaged in by Valero, there is no justification to pierce the corporate veil and, commensurately, no basis to assert jurisdiction under MCL 600.715(1) or (5).

Plaintiffs' failure to meet the initial requirement of establishing that limited personal jurisdiction exists under Michigan's long-arm statute, *Yoost*, 295 Mich

App at 222, renders the second inquiry—whether the exercise of jurisdiction comports with due process—unnecessary.

We reverse the decision of the trial court and remand the case for entry of summary disposition in favor of Valero and further proceedings not inconsistent with this opinion. Valero may tax costs. MCR 7.219.

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

WAISANEN v SUPERIOR TOWNSHIP

Docket No. 311200. Submitted May 13, 2014, at Marquette. Decided June 24, 2014, at 9:10 a.m.

Kenneth A. Waisanen, as trustee of the Waisanen Family Trust, brought an action in the Chippewa Circuit Court against Superior Township. Defendant had a conducted survey that revealed that a portion of plaintiff's property encroached on First Street, a lake-access roadway dedicated to public use. Plaintiff sought to quiet title to the encroaching portion. Defendant counterclaimed for possession of that same portion of First Street. The court, Nicholas J. Lambros, J., granted plaintiff's request to quiet title in his favor, concluding that plaintiff had established the elements of adverse possession or, in the alternative, that plaintiff had acquired title through acquiescence. Defendant appealed. Following Kenneth Waisanen's death, John Waisanen, the successor trustee, was substituted as the plaintiff in the action.

The Court of Appeals *held*:

1. MCL 600.5821(2) provides that an action brought by a municipal corporation to recover possession of a public highway, street, alley, or any other public ground is not subject to the periods of limitations provided by statute. At issue in this case was whether MCL 600.5821(2) bars a party's claims when the plaintiff has brought a claim to quiet title and the defendant municipality has counterclaimed for possession of the property. In *Mason v City of Menominee*, 282 Mich App 525 (2009), the Court of Appeals held that MCL 600.5821(2) did not bar an acquiescence claim when the party seeking possession filed the action and the action consequently had not been brought by the defendant municipality. The holding in *Mason* applies equally to adverse possession claims and claims for acquiescence. Both adverse possession claims and acquiescence claims seek title to disputed property by virtue of possession, and both involve a limitations period. Therefore, MCL 600.5821(2) does not bar claims for either adverse possession or acquiescence unless they occur in an action brought by a municipal corporation for recovery of the possession of property.

2. Defendant argued that the case was an action brought by a municipal corporation for recovery of public grounds under

MCL 600.5821(2) because it brought a counterclaim for possession of the property. Under MCR 2.101(A) and (B), however, there is one form of action in Michigan, known as a "civil action," which is commenced by filing a complaint with a court. Therefore, MCL 600.5821(2) does not provide protection for a municipal corporation that has merely counterclaimed for possession in an existing action rather than bringing an action of its own. The trial court did not err by failing to apply MCL 600.5821(2) to plaintiff's claims.

3. A claim of adverse possession requires clear and cogent proof that possession of the disputed property has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period, which under MCL 600.5801(4) is 15 years. The use of the property must be hostile, that is, without permission and in a manner that is inconsistent with the rights of the true owner. What acts or uses are sufficient to constitute adverse possession depends on the facts in each case and to a large extent on the character of the premises. The trial court did not err by concluding that the elements of adverse possession were established. Although there was some testimony with regard to the exclusivity element indicating that members of the public had occasionally used part of the area to access the beach and a state park, occasional trespasses do not suffice to defeat a claim of exclusivity. The record otherwise supported the trial court's conclusion that plaintiff's possession of the disputed property was visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period.

4. There are three theories of acquiescence in boundary lines: (1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from an intention to deed to a marked boundary. Plaintiff relied on the first theory, acquiescence for the statutory period. A boundary line long treated and acquiesced in as the true line should not be disturbed by a new survey. The record supported the inference that both plaintiff and defendant believed, at least before the survey, that the existing breakwater ran along the western border of the property and that the addition to the house built in 1981 was entirely inside the property's boundaries. Given defendant's active and passive acquiescence to the use made by the Waisanen family for a period well in excess of 15 years, the trial court did not err by granting plaintiff's motion to quiet title under the alternative theory of acquiescence.

Affirmed.

RONAYNE KRAUSE, J., concurring, agreed with the majority's decision to affirm and the reasoning that was actually necessary to arrive at that result; however, she but wrote separately because she believed that the majority opinion went beyond what was necessary to resolve this matter. It was unnecessary to consider whether plaintiff had satisfied the evidentiary burden of showing adverse possession or acquiescence. Defendant argued only that the First Street right of way was public land and that under MCL 600.5821(2) plaintiff could therefore not maintain its claims against a municipality. Plaintiff's motion to quiet title concerned property that was dedicated to, and used by, the public as a public street. The plain language of the statute, however, does not apply in situations in which the municipal corporation did not bring the action. While defendant contended that it did bring an action for the recovery of public land because it counterclaimed for that relief, Judge RONAYNE KRAUSE agreed with the majority that under the court rules, an action is commenced by filing a complaint but not necessarily by filing any pleading. Defendant did not bring the action within the meaning of the statute. MCL 600.5821(2) permits municipalities to commence actions by filing complaints for the recovery of public lands at any time, but it does not protect a municipality from actions against it on theories of adverse possession or acquiescence.

LIMITATION OF ACTIONS — MUNICIPAL CORPORATIONS — ADVERSE POSSESSION — ACQUIESCENCE IN BOUNDARIES — COMMENCEMENT OF ACTIONS — COUNTERCLAIMS.

MCL 600.5821(2) provides that an action brought by a municipal corporation to recover possession of a public highway, street, alley, or any other public ground is not subject to the limitations periods provided by statute, but the statute does not bar claims for adverse possession or acquiescence unless they occur in an action brought by a municipal corporation for recovery of the possession of property; because under MCR 2.101(A) and (B) an action must be commenced by filing a complaint with a court, MCL 600.5821(2) does not provide protection for a municipal corporation that has merely counterclaimed for possession in an existing action rather than bringing an action of its own.

Moher & Cannello, PC (by *Steven J. Cannello*), for plaintiff.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, PC (by *John K. Lohrstorfer*), for defendant.

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J. In this action to quiet title, defendant appeals as of right the order of the circuit court, entered following a bench trial, quieting title in plaintiff's[1] favor. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 1971, Kenneth Waisanen purchased property in the Jordan Beach subdivision. The parcel abuts First Street, a lake-access roadway dedicated to public use. At the time Waisanen purchased the property, it contained a break wall. In 1981, Waisanen constructed an addition to his home on the property. In 2008, defendant conducted a survey of lake-access roadways in the subdivision. According to the 2008 survey and unbeknownst to Waisanen, the break wall encroached approximately 10 feet onto First Street, and the addition encroached approximately 3 feet onto First Street. Following the survey, plaintiff filed an action to quiet title to the portion of First Street that included Waisanen's break wall and addition. Defendant counterclaimed for possession of that same portion of First Street. The circuit court granted plaintiff's request to quiet title in his favor, finding that plaintiff had established the elements of adverse possession or, in the alternative, that plaintiff had acquired title through acquiescence. Defendant argues on appeal that the trial court erred with respect to both theories.

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[1] Plaintiff is the successor trustee for the Waisanen Family Trust. During the lower court action, Kenneth A. Waisanen was trustee. The term "plaintiff" will be used to refer to both the trustee and the successor trustee of the Waisanen Family Trust. See *Waisanen Family Trust v Superior Twp*, unpublished order of the Court of Appeals, entered April 7, 2014 (Docket No. 311200) (granting a substitution of parties).

II. STANDARD OF REVIEW

We review de novo actions to quiet title, *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996), as well as a trial court's conclusions of law following a bench trial, *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). We review for clear error a trial court's findings of fact during a bench trial. *Walters*, 239 Mich App at 456.

Issues of statutory interpretation are questions of law that we review de novo. *Mason v City of Menominee*, 282 Mich App 525, 527-528; 766 NW2d 888 (2009).

III. APPLICABILITY OF MCL 600.5821(2)

As a threshold matter, resolution of defendant's appeal requires that we determine whether MCL 600.5821(2) bars a party's claims when, as here, the plaintiff has brought a claim to quiet title and the defendant municipality has counterclaimed for possession of the property. We conclude that it does not.

MCL 600.5821 provides in relevant part as follows:

> (1) Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.
>
> (2) Actions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations.

It is undisputed that defendant is a "municipal corporation." See MCL 41.2; *Smith v Scio Twp*, 173 Mich App 381, 388; 433 NW2d 855 (1988). Therefore it is the applicability of MCL 600.5821(2) that is at issue here.

In considering this question, it is useful to review three prior decisions of this Court, although none is dispositive of the precise issue presented in this case. In *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365; 711 NW2d 391 (2006), this Court considered the plaintiff's appeal of the trial court's grant of summary disposition to the defendant township on the grounds that MCL 600.5821(2) barred the plaintiff's claim for adverse possession. The plaintiff had brought suit for adverse possession of township property on which it had placed billboards; the defendant raised MCL 600.5821(2) as an affirmative defense. *Id*. at 367. It does not appear that the defendant township filed a counterclaim.

Notably, *Canton Charter Twp* did not consider the threshold issue of whether MCL 600.5821(2) applies in the first instance when a municipality is a *defendant* in an action brought by a plaintiff for adverse possession. Although that was the circumstance presented in that case, the Court instead noted that it was "undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation" and stated that the "sole issue" before it was whether the disputed property qualified as "public ground" within the meaning of that term in the statutory subsection. *Id*. at 370. The Court then adopted a broad definition of "public ground" as referring to " 'publicly owned property open to the public for common use' . . . ." *Id*. at 375 (citation omitted). On that basis, the Court affirmed the trial court's award of summary disposition to the defendant township on the plaintiff's adverse possession claim.

In *Mason*, 282 Mich App 525, this Court considered a municipal defendant's appeal of an order of the trial court quieting title to a disputed parcel of real property

in favor of the plaintiffs on the basis of acquiescence. The plaintiffs had brought an action to quiet title to the property. *Id*. at 526. It does not appear that the defendant municipality raised a counterclaim; instead, the defendant raised the defense that MCL 600.5821(2) shielded it from claims to property based on the theory of acquiescence. *Id*. at 527. This Court disagreed, stating:

> While subsection 1 [of MCL 600.5821] applies to "[a]ctions for the recovery of any land where the state is a party," subsection 2 applies to "[a]ctions brought by any municipal corporations . . . ." It is evident from the language employed in subsection 1 that the Legislature could have made subsection 2 applicable in all cases brought by or against a municipality. The Legislature, however, chose not to do so. Further, interpreting subsection 2 to apply to any case in which a municipality is a party would render the words "brought by" in subsection 2 nugatory. Finally, an acquiescence claim involves a limitations period. *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993). The term "periods of limitations" in MCL 600.5821(2) renders that provision applicable to claims asserting acquiescence for the statutory period. Thus, because the language of MCL 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the property, it does not preclude plaintiffs' claim. [*Id*. at 528-529 (second and third alterations in original).]

In a concurring opinion in *Mason*, Judge BECKERING noted that this interpretation of MCL 600.5821(2) carried the potential, perhaps unrecognized by the Legislature, for "inconsistent outcomes, depending on which party beats the other to the courthouse, given [the Legislature's] chosen language in MCL 600.5821(2)." *Id*. at 533 (BECKERING, J., concurring). Nonetheless, she concluded that "the plain language of the statute does

not apply in situations where the municipal corporation did not bring the action, which is the present case." *Id*. at 534. Judge BECKERING noted that "[a]t first blush, this Court's opinion in [*Canton Charter Twp*] appears to conflict with the idea that MCL 600.5821(2) applies only to actions brought by a municipality," but the parties in *Canton Charter Twp* had not "raise[d] the issue that [was] before" the Court in *Mason* and the Court remained "bound to interpret the plain language set forth by the Legislature in MCL 600.5821(2)." *Id*. at 536-537. Judge BECKERING declined to address any distinctions between adverse possession and acquiescence given the inapplicability of MCL 600.5821(2). *Id*. at 536 n 1.

Finally, in *Beach v Lima Twp*, 283 Mich App 504; 770 NW2d 386 (2009), aff'd 489 Mich 99 (2011), this Court considered a defendant township's appeal of the trial court's grant of summary disposition to the plaintiffs on the basis that the plaintiffs had acquired title to the disputed property by adverse possession. The plaintiffs had brought an action to quiet title, to which the defendant had counterclaimed, also to quiet title. *Id*. at 507. This Court noted both *Canton Charter Twp* and *Mason* in considering the defendant's claim that MCL 600.5821(2) rendered it immune to the plaintiff's adverse possession claim, but ultimately concluded that the property at issue was not "public grounds" and that MCL 600.5821(2) was therefore inapplicable. *Id*. at 523.

Neither *Canton Charter Twp* nor *Mason* nor *Beach* is on all fours with the instant case. In all three of those cases, as here, the municipality was named as a defendant. However, whereas the instant case presents both adverse possession and acquiescence theories, *Canton Charter Twp* and *Beach* presented adverse possession theories only, while *Mason* presented only a claim of

acquiescence. Further, while the municipal defendant in *Beach* filed a counterclaim, as did defendant in this case, the municipal defendants in *Canton Charter Twp* and *Mason* did not.

Defendant argues that the trial court improperly relied on *Beach*, since the sole and dispositive issue in that case was whether the property at issue was "public grounds." On that point, we agree with defendant; *Beach* simply did not decide the issue that is before us, i.e., whether MCL 600.5821(2) applies in the first instance, regardless of whether property is public grounds, when the municipality is a *defendant* to a claim for adverse possession or acquiescence and has filed a counterclaim for possession of the property.

Defendant further argues that, under *Canton Charter Twp*, plaintiff's claim for adverse possession is barred by MCL 600.5821(2) and that *Mason*'s allowance of a plaintiff's acquiescence claim does not apply when, as here, the defendant municipal corporation has filed a counterclaim for possession of the property. Taken in isolation, language from *Canton Charter Twp* indeed would suggest that an adverse possession claim is barred. However, it is clear that the Court in *Canton Charter Twp* was not presented with the issue of whether adverse possession claims are barred in their entirety by MCL 600.5821(2) even when the municipality, as a defendant, has not initiated the legal proceedings. The Court did not *decide* that issue; rather it stated, without reference to authority, that the issue was "undisputed" and therefore did not need to be considered. *Canton Charter Twp*, 269 Mich App at 370. It also noted that the "sole issue" before it was whether the land in question was "public ground." *Id*. The Court's statements about whether the statute prevented a party from claiming adverse possession

against a municipal corporation were not necessary to the resolution of that issue and therefore are not binding. See *Edelberg v Leco Corp*, 236 Mich App 177, 183; 599 NW2d 785 (1999).[2]

The issue was, however, addressed and decided in *Mason*, in which this Court held that MCL 600.5821(2) did not bar an acquiescence claim because the action had been filed by the party seeking possession and had not been "brought by" the municipality. *Id*. at 529. We hold that the holding in *Mason* applies equally to an adverse possession claim and a claim for acquiescence. We note that the language of MCL 600.5821(2) makes no mention of the terms "adverse possession" or "acquiescence," but merely states that "[a]ctions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations." Both adverse possession claims and acquiescence claims seek title to disputed property by virtue

[2] We note that the trial court in *Canton Charter Twp* relied on the reasoning of an unpublished opinion, *Cascade Charter Twp v Adams Outdoor Advertising*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2004 (Docket No. 240625), in granting summary disposition in the defendant's favor. In that case, the plaintiff township filed a claim against the defendant seeking removal of a billboard and damages, and the defendant counterclaimed for adverse possession. *Id*. at 1. This Court noted that the only issue was whether the land was public ground, and if it was, it would undisputedly bar plaintiff's claim under MCL 600.5821(2) because a municipal corporation had brought an action for recovery of the property. *Id*. at 2-5. Accordingly, although the issue to be decided was similar to that in *Canton Charter Twp*, the procedural postures of the two cases were very different. In *Canton Charter Twp*, the parties appear to have accepted, perhaps from a mistaken reading of *Cascade Charter Twp*, that if the land in question was public, the plaintiff's claim would be barred and do not appear to have raised, briefed, or argued the issue of whether MCL 600.5821(2) applied to a case in which the plaintiff brought an action for adverse possession against a municipal corporation rather than a case in which the plaintiff merely counterclaimed against the municipality that had initially filed suit.

of possession, and both involve a limitations period. See *Beach*, 283 Mich App at 524; *Mason*, 282 Mich App at 529. The plain language of the statute thus does not invite us to treat these claims differently.

Further, we conclude that the rationales of the majority opinion in *Mason* and Judge BECKERING's concurrence apply equally to both adverse possession claims and acquiescence claims. "[T]he plain language of the statute does not apply in situations where the municipal corporation did not bring the action . . . ." *Mason*, 282 Mich App at 534 (BECKERING, J., concurring). To hold otherwise would be to not only stray from the plain language of the statute but to "render the words 'brought by' in subsection 2 nugatory." *Id*. at 529 (opinion of the Court). Therefore, we hold that MCL 600.5821(2) does not bar claims for either adverse possession or acquiescence unless they occur in an action brought by a municipal corporation for recovery of possession of the property.

Seeking to distinguish *Mason*, defendant cursorily argues that because it brought a counterclaim for possession of the property, the instant case therefore *is* an action "brought by" a municipal corporation for recovery of the public grounds. Defendant provides this Court with no authority, and the Court's own research has located none, in which the filing of a counterclaim by a municipal defendant has divested a plaintiff of the right to pursue a claim for adverse possession or acquiescence against a municipal corporation. We could decline to address defendant's argument on that ground. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) ("Argument must be supported by citation to appropriate authority or policy."). Nonetheless, we consider, and ultimately reject, defendant's contention.

Our court rules do not support defendant's position that the case before us is an "[a]ction[] brought by" defendant for recovery of property by virtue of its counterclaim for possession of the property. MCL 600.5821(2). In Michigan, there is "one form of action known as a 'civil action.' " MCR 2.101(A). A civil action is "commenced by filing a complaint with a court." MCR 2.101(B). Further, MCR 2.110 defines "pleading" to include both a "complaint" and a "counterclaim." MCR 2.110(A)(1) and (3). Thus, had our Supreme Court wished to indicate that an "action" could be "commenced" by filing a "pleading" rather than a "complaint," it could have easily done so. See also MCR 2.203(A) and (B) (governing the compulsory and permissive joinder of "claims" by a "pleader," which encompasses both complaints and counterclaims). MCR 2.203(B) also refers to joining "two claims" in a "single action," further supporting the distinction between a "claim" and an "action." MCR 2.504(A) provides for the dismissal of an "action," and Subrule (2)(a) provides that a court shall not dismiss an "action" if the defendant has "pleaded a counterclaim," unless the counterclaim can remain pending for independent adjudication. Finally, MCR 2.604(A) provides that an order adjudicating fewer than all the "claims . . . does not terminate the action as to any of the claims or parties . . . ."

These court rules indicate that, as written, MCL 600.5821(2) does not provide protection for a municipal corporation that has merely counterclaimed for possession in an existing action, rather than bringing an action of its own. Issues regarding the application of limitations periods are procedural. See *Gleason v Dep't of Transp*, 256 Mich App 1, 2; 662 NW2d 822 (2003). With regard to procedural issues, the Michigan Court Rules control. See *Staff v Johnson*, 242 Mich App 521, 533; 619 NW2d 57 (2000).

Further, holding as defendant suggests would render the distinction between "[a]ctions for the recovery of any land where the state is a party" (in Subsection (1) of MCL 600.5821) and actions "brought by" municipal corporations (in Subsection (2)) essentially nugatory, which we decline to do. See *Mason*, 282 Mich App at 528-529. Although this holding does not resolve the danger of inconsistent results noted by Judge BECKERING in *Mason*, the plain language of the statute and our existing court rules compel such a conclusion, absent any clarification from the Legislature or our Supreme Court. See *Mason*, 282 Mich App at 535-536 (BECKERING, J., concurring).

Having determined that the trial court did not err by failing to apply MCL 600.5821(2) to plaintiff's claims, we now examine its ruling with respect to each claim.

IV. ADVERSE POSSESSION

A claim of adverse possession requires clear and cogent proof that possession of the disputed property has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period. *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The use of the property must be "hostile," that is "without permission and in a manner that is inconsistent with the rights of the true owner." *Jonkers v Summit Twp*, 278 Mich App 263, 271, 273; 747 NW2d 901 (2008). The statutory period of limitations for adverse possession is 15 years. MCL 500.5801(4).

"[W]hat acts or uses are sufficient to constitute adverse possession depends upon the facts in each case and to a large extent upon the character of the premises." *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957). In this case, Kenneth Waisanen testified that he purchased the property in 1971. Plaintiff's property

shares a boundary line with First Street—a dedicated public access right of way—and the house on the property crosses over the lot line by approximately 3 feet as measured in the 2008 survey. John Waisanen testified that his father constructed the addition to the house in 1981; it is 3 feet of this addition that encroaches unto First Street. A break wall enclosing plaintiff's purported side yard to the west encroaches on First Street by more than 10 feet. Kenneth Waisanen testified that the break wall was present when he purchased the property. Further, he had used his property exclusively since purchasing it, and neither the public nor defendant had used the area between the break wall and the house for any purpose. There was testimony by others that members of the public had historically used the right of way to access the beach on Waiska Bay and a state park.

The trial court did not err by concluding that the elements of adverse possession were established. Although, with regard to the exclusivity element, there was some testimony that members of the public occasionally used the area between the break wall and the house to access the beach and state park, such occasional trespasses do not suffice to defeat a claim of exclusivity. See *Doctor v Turner*, 251 Mich 175, 186; 231 NW 115 (1930). The record otherwise supports the trial court's conclusion that plaintiff's possession of the disputed property was visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period. *Kipka*, 198 Mich App at 439.

V. ACQUIESCENCE

There are three theories of acquiescence to boundary lines: acquiescence for the statutory period, acquiescence following a dispute and agreement, and acquies-

cence arising from the intention to deed to a marked boundary. *Walters*, 239 Mich App at 457. In this case, plaintiff does not assert that defendant acquiesced following a dispute and agreement or that defendant's acquiescence arose from an intention to deed to a marked boundary. Instead, plaintiff relies on the first theory—acquiescence for the statutory period.

"It has been repeatedly held by this Court that a boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys. Fifteen years' recognition and acquiescence are ample for this purpose . . . ." *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956) (quotation marks and citations omitted). The trial court based its finding of acquiescence on what it believed to be considerable evidence that defendant had never complained to anyone in the Waisanen family that the property was encroaching on First Street. The court concluded that defendant had put up a guardrail and "some infrastructures" that respected the boundary line claimed by plaintiff. This conclusion is suspect because of conflicting testimony regarding whether defendant or the county put up these structures. Nonetheless, the point the court was making was that when these structures were built, defendant did not take the opportunity to inform the Waisanen family that they were encroaching on the right of way. This is consistent with the record and supports the inference that both plaintiff and defendant believed, at least before 2008, that the break wall ran along the western border of the property and that the addition to the house built in 1981 was entirely inside the property boundaries.

The court noted that no complaint had ever been made about the addition to the home. There is some dispute, however, whether a building permit was ob-

tained that would have put defendant on notice of the encroachment. Unlike the break wall, the home's encroachment is slight enough to have escaped notice upon a visual inspection of the area. The court also noted that the Waisanen family had maintained and used the area up to the break wall. This is supported by the testimony and documentary evidence.

Accordingly, given defendant's active and passive acquiescence to the use being made by the Waisanen family of the land up to the break wall for a period well in excess of 15 years, the trial court did not err by granting plaintiff's motion to quiet title under the alternative theory of acquiescence.

VI. CONCLUSION

This action was not "brought by" defendant, nor does defendant's filing of a counterclaim alter that fact. MCL 600.5821(2) is therefore inapplicable and does not bar plaintiff's claims for adverse possession and acquiescence.[3] Further, the trial court did not err by finding that the

[3] As noted earlier, this result, while dictated by the plain language of MCL 600.5821, results in a municipal corporation being immunized from periods of limitations only if it wins "the race to the courthouse." As Judge BECKERING noted in her concurrence in *Mason*, although Subsections (1) and (2) of MCL 600.5821 were amended to their present form in 1988, Subsection (1) represents a substantial change in the law, while Subsection (2) remains very similar to the predecessor statute enacted in 1907. *Mason*, 282 Mich App at 535-536 (BECKERING, J., concurring). "This leaves one to wonder whether the Legislature intended the different protections afforded by each subsection . . . ." *Id.* at 536. Nonetheless, as judicial construction of an unambiguous statute is neither necessary nor permitted, *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002), it remains for our Legislature, not this Court, to fix such an arguably anomalous result if the plain language of Subsection (2) does not in fact represent the Legislature's intent regarding protection for municipal corporations with respect to actions for recovery of public lands.

elements of those claims were established and quieting title to the disputed property in favor of plaintiff.

Affirmed.

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

RONAYNE KRAUSE, J. (*concurring*). I concur with the majority's decision to affirm and, in broad overview, the reasoning employed by the majority that is actually necessary to arrive at that result. I write separately only because I believe the majority's opinion goes beyond what is necessary to resolve this matter.

In 1971, plaintiff purchased Lot 7 of the Jordan Beach Subdivision in Superior Township, Chippewa County. Lot 7 is a lakefront parcel, on the shore of Lake Superior to its north. It is bounded to the south by Shenandoah Avenue and to the west by a 40-foot-wide right of way platted as First Street. The plat map depicts First Street as running perpendicular to, and all the way to, the water's edge. Physically, however, a guardrail, installed in 1981 when Shenandoah Avenue was paved, crosses First Street on the lakeward side of Shenandoah Avenue, and a variety of utility equipment is also installed in the right of way. Despite this apparent termination of First Street itself at Shenandoah Avenue, witnesses testified that they had historically used, and continued to use, the First Street right of way to access the beach and water. At issue is plaintiff's encroachment onto the right of way: a 1981 addition to plaintiff's house encroached onto the right of way by 3.25 feet, and a break wall that was already in place when plaintiff purchased Lot 7 encroached onto the right of way by approximately 15 feet.

The encroachments were discovered, apparently to the surprise of all parties, in 2008, when defendant

commissioned a survey of the area. Plaintiff commenced the instant suit, seeking to quiet title to the encroached-upon area on alternative theories of adverse possession and acquiescence. Defendant counterclaimed for possession of that same portion of First Street. The trial court found in plaintiff's favor on both theories. Defendant now appeals, arguing that the trial court erred in its application of both theories.

We review de novo actions to quiet title. *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996). We likewise review de novo a trial court's conclusions of law following a bench trial. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). However, we review for clear error the trial court's findings of fact in an equitable action. *Silich v Rongers*, 302 Mich App 137, 143; 840 NW2d 1 (2013). We will only conclude there is clear error if we are definitely and firmly convinced that the trial court made a mistake. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

A claim of adverse possession requires clear and cogent proof that possession of the disputed property has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period. *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The statutory period of limitation for adverse possession is 15 years. MCL 500.5801(4). A claim of acquiescence may be based on, in relevant part, acquiescence for the statutory limitations period. *Walters*, 239 Mich App at 457. "[A] boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys. Fifteen years' recognition and acquiescence are ample for this purpose." *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956) (quotation marks and citations omitted). Acquiescence merely requires that the parties treated a particular

boundary line as the true line. *Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009).

It is beyond dispute that plaintiff has been openly and exclusively using the encroached-upon area since 1971, and predecessors in ownership before that, well in excess of the statutory period for either adverse possession or acquiescence. Indeed, defendant makes no real attempt on appeal to dispute whether plaintiff's actions over the years have at least nominally satisfied the factual prerequisites for either adverse possession or acquiescence described above. Rather, defendant argues that the First Street right of way is public land, and therefore, pursuant to MCL 600.5821, plaintiff simply may not maintain the instant claims against a municipality such as itself.[1]

I agree that the First Street right of way is public ground. "Public ground" is a broad term that is intended "to protect municipalities from adverse possession claims" and generally applies to "publicly owned property open to the public for common use . . . ." *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365, 375; 711 NW2d 391 (2006) (quotation omitted). A review of the 1925 plat for the Jordan Beach Subdivision shows that all the platted streets and alleys, including First Street, were dedicated to public use. The plat states that "the streets and alleys as shown on said plat are hereby dedicated to the use of the Public." The evidence established that the public had accepted this dedication by using the street for beach access and maintaining and providing utility service to the street. Plaintiff notes that the evidence

[1] Consequently, I believe it is unnecessary to consider whether plaintiff has satisfied his evidentiary burden of showing either adverse possession or acquiescence. This Court has been asked only to address whether either action is legally cognizable under the circumstances.

also shows that no member of the public had used the encroached-upon area for nearly 40 years, but that does not change the nature of the encroached-upon property. Plaintiff's motion to quiet title concerns property that was dedicated to, and used by, the public as a public street.

MCL 600.5821 provides in relevant part as follows:

> (1) Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.
>
> (2) Actions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations.

The most recent amendment of MCL 600.5821(1) "reinstated the common-law rule that one cannot acquire title to state-owned property through adverse possession or prescriptive easement." *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 35-36; 792 NW2d 40 (2010), citing *Gorte v Dep't of Transp*, 202 Mich App 161, 165-166; 507 NW2d 797 (1993); see also *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 647; 528 NW2d 221 (1995) ("[W]e note the Legislature has decided that a claim of adverse possession against state lands is against public policy and, therefore, will not be recognized.").

However, the property at issue here is not owned by the state, but is owned by a municipality. In contrast to Subsection (1) of the statute, the plain "language of MCL 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the

property . . . ." *Mason*, 282 Mich App at 529 (opinion of the Court); accord *id*. at 534 (BECKERING, J., concurring). Because the plain language of MCL 600.5821(2) does not refer to either acquiescence or adverse possession, I perceive no reason to treat either theory differently.[2] "[T]he plain language of the statute does not apply in situations where the municipal corporation did not bring the action . . . ." *Mason*, 282 Mich App at 534 (BECKERING, J., concurring).

Defendant contends that it *did* "bring" an action for the recovery of public land because it counterclaimed for that relief. I agree entirely with the majority's explanation of why, pursuant to the court rules, an "action" is "commenced" by filing a "complaint," but not necessarily by any "pleading." Consequently, defendant is incorrect: it brought claims, but it did not bring an action within the meaning of the statute. Therefore, MCL 600.5821(2) permits municipalities to *commence actions by filing complaints* for the recovery of public lands at any time, but it does not protect a municipality from actions *against* it on adverse possession or acquiescence theories.

I concur in affirming.

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[2] I have not considered *Beach v Lima Twp*, 283 Mich App 504; 770 NW2d 386 (2009), aff'd 489 Mich 99 (2011), because the property at issue in that case was not "public ground."

PEOPLE v NGUYEN

Docket No. 312319. Submitted February 12, 2014, at Detroit. Decided June 24, 2014, at 9:15 a.m. Leave to appeal sought.

Thanh Manh Nguyen was charged in the 52-4 District Court with possession with intent to deliver 50 to 449 grams of cocaine after cocaine was discovered in his pocket during a search following a traffic stop of his vehicle. The traffic stop was conducted after a confidential informant (CI) cooperating with federal agents had agreed to purchase a large quantity of cocaine from defendant and it appeared that defendant had obtained the cocaine and was driving to meet the CI at a prearranged location in Troy. He was also charged with 16 counts related to drugs, weapons, and contraband discovered in his home during a search pursuant to a warrant conducted following the traffic stop. The court, Kirsten Nielsen Hartig, J., suppressed the evidence of the cocaine found in defendant's pocket and dismissed the count relating thereto on the basis that the police had no probable cause to arrest defendant. The court then dismissed the remaining counts, concluding that, absent evidence of the cocaine found in defendant's pocket and his statements to the police at that time, there was no probable cause to support the issuance of the search warrant for the home. The prosecution appealed. The Oakland Circuit Court, James M. Alexander, J., determined that there was probable cause to arrest defendant, reversed the district court's suppression of the evidence of the cocaine found in defendant's pocket, and reversed the dismissal of the charges against defendant. The circuit court then remanded the matter to the district court for further proceedings. On remand, the district court reinstated the charges and bound defendant over to the circuit court on the charges. The circuit court, Nanci J. Grant, J., accepted defendant's conditional plea of guilty with regard to all 17 counts, entered a judgment convicting defendant of the charges, and sentenced defendant as a fourth-offense habitual offender. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

1. An officer making an arrest without a warrant may rely on information received through an informant as long as the infor-

mant's statement is reasonably corroborated by other matters within the officer's knowledge. An informant's veracity, reliability, and basis of knowledge are all highly relevant in determining the value of the informant's report and can be used to determine whether probable cause exists. The existence of probable cause is determined by the totality of the circumstances.

2. The testimony at the preliminary examination showed that the CI was credible and reliable. The information the CI provided was highly relevant to establishing probable cause to believe that defendant possessed a large quantity of cocaine. Because the federal agents and the Troy police officers reasonably corroborated the information provided by the CI, the police properly relied on this information in making an arrest without a warrant. Probable cause to arrest defendant existed at the time his vehicle was initially stopped. The collective information known by the federal agents and the police officers before defendant's arrest would have justified the belief of a fair-minded person of average intelligence that defendant possessed a substantial amount of cocaine. The police had probable cause to lawfully arrest defendant.

3. The evidence supports the circuit court's conclusion that probable cause to arrest defendant did not dissipate despite the fact that cocaine was not found on defendant during an initial pat-down search for weapons and a subsequent consensual search of defendant's vehicle. Given the credible and corroborated information from the CI that defendant possessed cocaine, that cocaine was not discovered during the pat-down search for weapons or the search of the vehicle, and that defendant may have disregarded a police officer's order to stop his vehicle in order to take time to hide the cocaine in his pocket, the circuit court did not err by finding that probable cause for the arrest continued to exist during the second search of defendant when the cocaine was discovered in his pocket.

4. Because the arrest was lawful, the search incident to the arrest, which revealed the cocaine in defendant's pocket, was also lawful. A search incident to an arrest may still be valid if the arrest has not been made at the time the search is conducted and the arrest follows quickly on the heels of the search. The search may occur immediately before the arrest, at the place of the arrest, or at the place of detention, and may occur before the defendant is advised of his or her right to post bail. Because a search incident to an arrest may occur whenever there is probable cause to arrest, even if the arrest has not been made at the time the search is conducted, the police were not required to arrest defendant before conducting the search incident to his arrest. Additionally, because

probable cause existed to arrest defendant, the need to preserve evidence for later use at trial still existed even though the search was conducted before the arrest.

5. Because the facts and circumstances were sufficient to warrant a prudent individual to believe that defendant had committed an offense, the district court's conclusion regarding the subjective beliefs of the police officers with regard to whether probable cause existed at the time of the search that revealed the cocaine is not determinative of the outcome in this case. Regardless of the subjective beliefs of police officers during a traffic stop, probable cause to justify an arrest is examined under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.

6. Because the police had probable cause to arrest defendant, the police did not need any additional justification to conduct the search incident to the arrest. The intervening pat-down search for weapons and consensual search of the vehicle did not negate the facts that probable cause to arrest defendant existed at the time of the initial stop and the police could have arrested him at any point.

Affirmed.

1. CRIMINAL LAW — ARRESTS WITHOUT WARRANTS — INFORMANT TIPS — PROBABLE CAUSE.

A police officer making an arrest without a warrant may rely on information received through an informant as long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge; the existence of probable cause based on informant tips is determined by the totality of the circumstances.

2. CRIMINAL LAW — ARRESTS WITHOUT WARRANTS — PROBABLE CAUSE — COLLECTIVE-KNOWLEDGE APPROACH.

The Court of Appeals recognizes the collective-knowledge approach that allows numerous law enforcement agents to possess different information that, in its totality, establishes probable cause to believe that an offense has occurred and that the defendant committed the offense.

3. CRIMINAL LAW — ARRESTS WITHOUT WARRANTS — SEARCHES INCIDENT TO AN ARREST.

A search incident to an arrest is an exception to the warrant requirement and may occur whenever there is probable cause to arrest; a search incident to an arrest may still be valid if the arrest has not been made at the time the search is conducted and the

> arrest follows quickly on the heels of the search; the police do not need an additional justification to conduct a search incident to an arrest when the police have probable cause for the arrest.

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

Arnone Law Offices, PLLC (by *Joseph R. Arnone*), for defendant.

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

WILDER, J. Defendant appeals by leave granted[1] his convictions, following a conditional plea of guilty, of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(*iii*), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), possession of ecstasy, MCL 333.7403(2)(b)(*i*), manufacturing 5 to 44 kilograms of marijuana, MCL 333.7401(2)(d)(*ii*), possession of a firearm by a felon, MCL 750.224f, possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), possession of less than 25 grams of oxycodone, MCL 333.7403(2)(a)(*v*), fraudulent use of a public utility over $500, MCL 750.282(1) and (2), possession of dihydrocodeine, MCL 333.7403(2)(b)(*ii*), possession of psilocin, MCL 333.7403(2)(c), and seven counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 11 to 30 years' imprisonment for the convictions of possession with intent to deliver 50 to

[1] *People v Nguyen*, unpublished order of the Court of Appeals, entered November 21, 2012 (Docket No. 312319).

449 grams of cocaine, possession with intent to deliver less than 50 grams of cocaine, possession of Ecstasy, manufacturing 5 to 44 kilograms of marijuana, and possession of a firearm by a felon. In addition, he was sentenced to 11 to 15 years' imprisonment for the convictions of possession with intent to deliver marijuana, possession of less than 25 grams of oxycodone, fraudulent use of a public utility over $500, and possession of dihydrocodeine. Finally, he was sentenced to two days' imprisonment for his conviction of possession of psilocin and two years' imprisonment for each of the seven felony-firearm convictions. We affirm.

I

This appeal arises from a traffic stop of defendant's vehicle on September 7, 2010, in the city of Troy. The record establishes that a confidential informant (CI), who was cooperating with United States Immigration and Customs Enforcement (ICE), had agreed to purchase a large quantity of cocaine from defendant in the city of Troy. With prior knowledge of the CI's agreement, the Troy police stopped defendant's vehicle, asked defendant to get out of the vehicle, and thereafter performed a pat-down search for weapons and a consensual vehicle search. Officer Neil Piltz searched the driver's compartment, underneath the seats, the top of the seats, and behind the driver's seat. Officer Piltz then talked to defendant while another officer conducted a search using a canine. No drugs were located in the vehicle during this initial search.

Throughout his conversation with Officer Piltz, defendant had his hands in his pants pockets. Officer Piltz testified at the preliminary examination that when defendant removed his hands from his pockets, he noticed a bulge in defendant's right pants pocket—

bigger than a golf ball—where it had been smooth during the initial pat-down. Officer Piltz felt the bulge and asked defendant what it was while he began to check inside defendant's pocket. Defendant then put his hands together in front of his body and told the officer that he should arrest him. Officer Piltz asked defendant why, to which defendant responded, "for what you're going to find in my pocket." Officer Piltz pulled out a felt bag and before he could look inside, defendant stated that it contained cocaine. Officer Piltz then arrested defendant.

Approximately 20 minutes lapsed from the time defendant was pulled over to the time Officer Piltz found the cocaine and arrested defendant. Later and contemporaneous with his arrest, defendant waived his *Miranda*[2] rights and admitted operating an illegal marijuana growing operation in his home and possessing firearms and other illicit controlled substances. The Troy police relied on defendant's statements and the cocaine found at the time of the arrest to obtain a search warrant for his home. When the search warrant was executed at defendant's home, various illegal drugs, firearms, and other contraband were recovered.

II

Defendant was charged with 17 counts in total. Count I (possession with intent to deliver 50 to 449 grams of cocaine) was based on the recovery of cocaine from defendant's pocket at the time of the arrest, and Counts II through XVII related to the drugs, weapons, and contraband found in his home. The district court began a preliminary examination and heard testimony and argument on four separate hearing dates, May 10,

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

2011, July 12, 2011, August 16, 2011, and October 11, 2011. At the May 10, 2011 hearing, Officer Piltz and Sergeant Scott Salter of the Troy Police Department testified regarding the events that occurred leading up to the arrest. After both officers testified, defense counsel moved for the suppression of the evidence of the cocaine found in defendant's pocket on the basis that the search was illegal. The district court ruled that the statements made by defendant to Officer Piltz, that he had cocaine in his pocket, were inadmissible because the officer violated defendant's *Miranda* rights. The district court also ruled that the police lacked probable cause for the arrest, citing a lack of testimony regarding what they knew about the CI and whether the information was reliable. In connection with its probable cause ruling, the district court stated: "It seemed quite obvious to me from the tape that both officers believed that they had come up empty and that there was nothing to arrest the defendant for until he sees the bulge, goes in and takes it." Following this ruling, in response to the prosecution's request, the district court set aside its finding that the police had lacked probable cause and permitted the prosecution to reopen the proofs in order to present testimony from ICE agents regarding whether the police had probable cause for the arrest.

At the July 12, 2011 hearing, ICE agents Brian Helmerson and Julia Harris testified regarding the information they received from the CI and the surveillance conducted on defendant. Agent Helmerson testified that the CI had been used previously as a CI in three ICE investigations. On the prior occasions, the CI had identified individuals involved in narcotics trafficking and then arranged meetings to conduct controlled-substance transactions. According to Agent Helmerson, the CI's information resulted in the seizure of controlled substances, seven arrests, and five convictions.

Two weeks before defendant's arrest, Agent Helmerson contacted Sergeant Salter at the Troy Police Department and informed him of the CI's agreement to buy cocaine from defendant in the city of Troy. Agent Helmerson informed Sergeant Salter that the information was from a reliable and credible source.

Throughout the day leading up to defendant's arrest, ICE agents heard the CI talking on the phone with defendant, who allegedly told the CI he was going to retrieve the cocaine after work and deliver it to the CI in the city of Troy. A surveillance team then saw defendant leave his work location and approach a house in a southwest Detroit location considered to be in a high-intensity drug-trafficking area. After defendant had arrived in southwestern Detroit, the CI received a communication from defendant indicating that he was in possession of the cocaine. Defendant then drove toward the specific Troy location at which defendant and the CI had agreed to meet.

When defendant was seen driving toward the city of Troy, Agent Helmerson contacted Sergeant Salter to turn over surveillance of defendant to the Troy Police Department. Agent Helmerson told Sergeant Salter the specific time that defendant's vehicle would enter the city and provided a photograph of defendant. Sergeant Salter observed a vehicle matching the description and displaying the license plate number of defendant's vehicle, which was moving in the direction that Sergeant Salter had been told defendant's vehicle would be traveling, and relayed this information to Officer Piltz, who also saw defendant's vehicle traveling in that specific direction. Officer Piltz then conducted the traffic stop.[3]

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[3] Officer Piltz had previously testified during the May 10, 2011 hearing that he initiated a traffic stop of defendant's vehicle and used his

At the conclusion of the July 12, 2011 hearing defendant filed a motion to suppress evidence of the cocaine found in his pocket, claiming it was the fruit of an unlawful search. Defendant also moved to suppress his statements made to the police after the arrest as fruits of an unlawful arrest. At the August 16, 2011 hearing on the motion to suppress, the district court found:

> The defendant's stop was reasonable. His frisk was reasonable under Terry.[4] The search of his car was reasonable because I think at the moment he was stopped, based on the case law and the, the previous use of the informant and the informant having information that the defendant had the cocaine on his person.
>
> At the moment of the stop I agree with the prosecution that they didn't need his consent to, to search his car. That they could have arrested him for probable cause for being in possession of narcotics with intent to distribute. And search the car and have searched him.

Further, the district court articulated that, because the police found no contraband after they frisked defendant and searched his vehicle, a reasonable person would not have concluded that the confidential informant was correct. The district court held:

> [E]verything that occurred post this stop and before the moment of the second search, which in my opinion the search—the going into the pants was definitely a search. It was not Terry. It was without a search warrant. And the probable cause had absolutely dissipated by the time he went into the pants before the second search.

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vehicle's public address system to instruct defendant to turn onto the next side street. Defendant did not stop at the next roadway, as instructed, but continued driving for about 500 feet and, at the same time, moved in the driver's seat as if he was "hiding something or moving something within the car."

[4] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

The district court suppressed evidence of the cocaine found in defendant's pocket on the basis that the police had no probable cause for the arrest, and it dismissed Count I (possession with intent to deliver 50 to 449 grams of cocaine).

At the October 11, 2011 hearing, the district court heard testimony focused on the remaining counts in order to determine whether defendant's statements to the police after he was arrested were fruits of an unlawful arrest. At this hearing Officer Scott Lamilza testified that he used defendant's statements from the interview following his arrest to obtain the search warrant for defendant's home. On the basis of this testimony, the district court suppressed defendant's statements as fruits of an unlawful arrest. The district court concluded that, absent evidence of the cocaine recovered from defendant's pocket and his statements, there was no probable cause to support the issuance of the search warrant for defendant's home. Accordingly, the district court dismissed the remaining Counts II through XVII.

The prosecution appealed the ruling in the circuit court. The circuit court concluded that, under the totality of the circumstances, "the information provided by the informant was sufficiently corroborated and supplemented by ICE Agents' and Troy Officers' investigation to warrant a finding of probable cause or 'a fair probability that contraband or evidence of a crime will be found in a particular place.' " (Citation omitted.) The circuit court further found that the probable cause did not dissipate as a result of Officer Piltz's failure to find cocaine during the pat-down and vehicle searches and that the police officers' failure to find the cocaine during the pat-down and vehicle searches did not constitute contrary facts supporting the dissipation of the

probable cause, but, rather, that these facts were supportive of the notion that the cocaine must be on defendant. The circuit court also concluded that it did not matter whether the police searched defendant before or after the lawful arrest. The circuit court reversed the district court's suppression of the cocaine evidence and dismissal of Count I. Further, the circuit court ruled that, because defendant's arrest was legal, the fruit of the poisonous tree doctrine did not apply to defendant's statements made to the police while in custody. The circuit court then remanded the matter to the district court for further proceedings. On remand, the district court reinstated the charges and defendant was bound over to the circuit court.

On July 12, 2012, defendant tendered a conditional plea of guilty regarding all 17 counts. Defendant preserved his right to challenge the circuit court's ruling.

III

On appeal, defendant contends that the circuit court erred by ruling that probable cause to arrest him existed at the time of the search, and even if probable cause did exist, it dissipated after the unsuccessful pat-down and vehicle searches. Further, defendant contends that because he was not arrested before the search and the police only arrested him after unlawfully recovering cocaine from his pants pocket, the search did not fall within the exception to the warrant requirement applicable to a search incident to an arrest. We disagree.

A

This Court reviews a trial court's factual findings in a suppression hearing for clear error. *People v Jenkins*,

472 Mich 26, 31; 691 NW2d 759 (2005), but "the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress." *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

B

Both the United States and the Michigan Constitutions protect persons against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Bolduc*, 263 Mich App 430, 437; 688 NW2d 316 (2004). "The lawfulness of a search or seizure depends on its reasonableness." *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). A custodial arrest based on probable cause is not an unreasonable intrusion under the Fourth Amendment. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). An arresting officer, or collectively the officers involved in an investigation ("the police team" approach), must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant has committed it. MCL 764.15; see *People v Dixon*, 392 Mich 691, 696-698; 222 NW2d 749 (1974); *People v Mackey*, 121 Mich App 748, 753-754; 329 NW2d 476 (1982); *United States v Perkins*, 994 F2d 1184 (CA 6, 1993).[5] In reviewing a claim that the police lacked probable cause to arrest, this Court must determine "whether facts available . . . at the moment of arrest would justify a fair-minded person of average intelligence in believing

[5] Although judicial decisions from foreign jurisdictions are not binding, we find this opinion from the United States Court of Appeals for the Sixth Circuit persuasive. *Hiner v Mojica*, 271 Mich App 604, 611-612; 722 NW2d 914 (2006).

that the suspected person had committed a felony." *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983) (quotation marks and citation omitted). "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). "Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause . . . ." *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998).

Our Supreme Court, in *People v Levine*, 461 Mich 172, 183; 600 NW2d 622 (1999), recognized that Michigan caselaw is consistent with federal precedent regarding the existence of probable cause on the basis of informant tips. The existence of probable cause is determined by the totality of the circumstances. *Id*. at 185, citing *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). In making an arrest without a warrant, an officer " 'may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.' " *Gates*, 462 US at 242, quoting *Jones v United States*, 362 US 257, 269; 80 S Ct 725; 4 L Ed 2d 697 (1960), overruled on other grounds *United States v Salvucci*, 448 US 83, 85; 100 S Ct 2547; 65 L Ed 2d 619 (1980); see also *Levine*, 461 Mich at 182 (recognizing that an officer making an arrest without a warrant may rely on a tip, rather than direct observations, as long as the tip is reasonably corroborated by other matters within the officer's knowledge). An "informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report," and they can be used to determine whether probable cause exists. *Levine*, 461 Mich at 180, quoting *Gates*, 462 US at 230.

C

In the instant case, the testimony at the preliminary examination showed that the CI was credible and reliable. The CI had provided narcotics-trafficking information and arranged controlled-substances transactions in the past, resulting in seven arrests and five convictions. Accordingly, the information the CI provided about the arrangement to purchase cocaine from defendant was highly relevant to establishing probable cause to believe that defendant possessed a large quantity of cocaine. *Levine*, 461 Mich at 180, citing *Gates*, 462 US at 230. Furthermore, not only had the information provided by the CI been credible and reliable in the past, the information the CI provided about defendant was also reasonably corroborated by the observations of defendant made by both the ICE agents and the Troy police officers. After defendant allegedly reported to the CI by phone that he was going to retrieve the cocaine after work and deliver it to the CI in Troy, the surveillance team saw defendant drive from work, stop in a high-intensity drug-trafficking neighborhood, and then drive toward the specific location at which defendant and the CI had agreed to meet. In addition, the CI reported that defendant had confirmed his possession of the cocaine before he began driving toward Troy. Given that the ICE agents and the Troy police officers reasonably corroborated the information provided by the CI, the police properly relied on this information in making an arrest without a warrant. *Gates*, 462 US at 242; see also *Levine*, 461 Mich at 182.

On the basis of the testimony provided by the ICE agents and the Troy police officers, probable cause to arrest defendant existed at the time defendant's vehicle was initially stopped by Officer Piltz. The collective information known by the ICE agents and the Troy

police officers before defendant's arrest justified the belief by a fair-minded person of average intelligence that defendant had possession of a substantial amount of cocaine. At the time of defendant's arrest, the ICE agents and the Troy police were aware that defendant and the CI had engaged in communications and negotiations culminating in the CI's agreement to purchase a large quantity of cocaine from defendant at a specific location in Troy. The ICE agents corroborated the CI's statement that defendant would leave his place of business and obtain the cocaine when they saw defendant leave his work and go to a high-intensity drug-trafficking area in southwestern Detroit. The ICE agents further corroborated the CI's statement that defendant was going to drive to Troy to sell the cocaine he had obtained, when defendant communicated by phone with the CI that he had the cocaine in his possession and they saw defendant driving toward Troy. This information was relayed to the Troy police, who had a photograph of defendant, a description of his vehicle and its license plate number, and information regarding the direction in which defendant would be heading. The Troy police observed the vehicle that matched the description and license plate number heading in the direction indicated by the ICE agent. Furthermore, when Officer Piltz activated his emergency lights to initiate the traffic stop, defendant failed to follow the officer's instructions to pull off onto the next side road. Instead, he continued traveling for another 500 feet and Officer Piltz observed defendant moving around in the vehicle as though he was attempting to move or hide something. Because we recognize the collective-knowledge approach allowing numerous law enforcement agents to possess different information that, in its totality, establishes probable cause, the information possessed collectively by the ICE agents

and the Troy police officers was sufficient for a fair-minded person of average intelligence to believe that defendant had committed or was committing a crime. *Dixon*, 392 Mich at 696-698; *Mackey*, 121 Mich App at 753-754; *Perkins*, 994 F2d 1184. Therefore, the police had probable cause to lawfully arrest defendant.

D

Alternatively, defendant contends that, even if probable cause existed, it dissipated after the police performed a pat-down search for weapons and found no cocaine after searching his vehicle. Again, the district court's ruling that probable cause dissipated and the circuit court's holding that it did not are subject to review de novo. *Williams*, 472 Mich at 313. The district court relied on our Supreme Court's decision in *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992). In *Russo*, the Court held:

> Once established, probable cause to arrest, which is concerned with historical facts, is likely to continue indefinitely, absent the discovery of contrary facts. By contrast, it cannot be assumed that evidence of a crime will remain indefinitely in a given place. Thus, "staleness" is not a separate doctrine in probable cause to search analysis. It is merely an aspect of the Fourth Amendment inquiry. [*Id*. at 605.]

Although the district court viewed the failure to find the cocaine during the initial pat-down for weapons and vehicle search as facts supporting the dissipation of probable cause, the circuit court held that these facts demonstrated that it was more probable that the cocaine was on defendant. The evidence supports the circuit court's conclusion that probable cause did not dissipate. The ICE agents and the police received information from a reliable and credible informant that

defendant possessed a substantial amount of cocaine. Defendant failed to stop his vehicle as ordered by Officer Piltz, and while he continued to drive, defendant made evasive movements indicating that he was moving or hiding something. The fact that cocaine was not found either during the pat-down search, which was geared toward searching for weapons, or the search of defendant's vehicle, did not lead to the dissipation of probable cause. Rather, given the credible and corroborated information from the CI that defendant possessed cocaine, that cocaine was not recovered during the pat-down search for weapons or the search of the vehicle, and that defendant may have disregarded the order to stop his vehicle to take time to hide the cocaine in his pocket, the circuit court did not err by finding that probable cause for the arrest continued to exist during the second search of defendant.

E

Having found the arrest to be lawful, we hold that the search incident to that arrest, which revealed the cocaine in defendant's pocket, was also lawful. Generally, a search conducted without a warrant is unreasonable unless it was conducted pursuant to an established exception to the warrant requirement. *Beuschlein*, 245 Mich App at 749. A search incident to an arrest is an exception to the warrant requirement, and may occur whenever there is probable cause to arrest. *People v LaBelle*, 478 Mich 891 (2007). There are two historical rationales for the "search incident to arrest" exception: "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v Iowa*, 525 US 113, 116; 119 S Ct 484; 142 L Ed 2d 492 (1998).

Defendant contends that this was not a proper search incident to an arrest because it occurred before the arrest. A search incident to an arrest may still be valid if the arrest has not been made at the time the search is conducted, *LaBelle*, 478 Mich at 891, and the arrest follows "quickly on the heels" of the search, *Rawlings v Kentucky*, 448 US 98, 111; 100 S Ct 2556; 65 L Ed 2d 633 (1980). The search may occur immediately before the arrest, at the place of arrest, or at the place of detention, and may occur before the defendant is advised of his or her right to post bail. *Champion*, 452 Mich at 115-116; *People v Crawford*, 202 Mich App 537, 538-539; 509 NW2d 519 (1993). In the instant case, after defendant was pulled over, Officer Piltz performed a pat-down search for weapons, and defendant consented to a vehicle search. After the police searched the vehicle, they searched defendant again and found cocaine in his pocket. Because a search incident to an arrest may occur whenever there is probable cause to arrest, even if the arrest has not been made at the time the search is conducted, the police were not required to arrest defendant before conducting the search incident to the arrest. *LaBelle*, 478 Mich at 891. Given that the police had probable cause to arrest defendant, the fact that defendant was searched immediately before his arrest does not make the search incident to the arrest invalid. Additionally, because probable cause existed to arrest defendant, the need to preserve evidence for later use at trial still existed even though the search was conducted before the arrest.

F

Defendant further asserts that no arrest was going to occur until after the police searched him the second time and, as a result, the principles regarding searches

incident to an arrest do not apply. In support of this argument, defendant asserts that the district court made factual findings that the officers did not believe that they had probable cause to arrest defendant at the time of the search. At the May 10, 2011 hearing, before the district court reopened proofs for evidence from the ICE agents, the district court stated, "It seemed quite obvious to me from the tape that both officers believed that they had come up empty and that there was nothing to arrest the defendant for until he sees the bulge, goes in and takes it." Regardless of the subjective beliefs of the police officers at the traffic stop, our Supreme Court has instructed us that the probable cause inquiry is "objective." *People v Cipriano*, 431 Mich 315, 342; 429 NW2d 781 (1988). The Court held:

> An arresting officer's subjective characterization of the circumstances surrounding an arrest does not determine its legality. Rather, probable cause to justify an arrest has always been examined under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. [*Id*.]

Because the surrounding facts and circumstances were sufficient to warrant a prudent individual to believe that defendant had committed an offense, the district court's conclusion about the subjective beliefs of the police officers with regard to whether probable cause existed is not outcome-determinative here.

Defendant also contends that the stop was an investigatory stop and the initial pat-down was a justified *Terry* pat-down; however, after the officers conducted a consensual search of his vehicle, the second pat-down was no longer justified under *Terry*, thus making it an illegal search. Despite defendant's contention, this case does not rest upon "reasonable suspicion," as was the case in *Terry v Ohio*, 392 US 1, 26-27; 88 S Ct 1868; 20

L Ed 2d 889 (1968) (holding that when the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer, the officer may perform a limited pat-down search for weapon). While it is true that a police officer may perform a limited pat-down search for weapons if the officer has reasonable suspicion that the individual is armed, *id*. at 27, the police, in the present case, had probable cause to arrest defendant when they initiated the stop. A *Terry* frisk must be justified by reasonable suspicion, while a search incident to an arrest needs no justification, as long as the underlying arrest is supported by probable cause. *People v Eaton*, 241 Mich App 459, 463; 617 NW2d 363 (2000), citing *United States v Robinson*, 414 US 218, 235; 94 S Ct 467; 38 L Ed 2d 427 (1973). Because the police had probable cause to arrest defendant, the police did not need any additional justification to conduct the search incident to the arrest. The intervening pat-down search for weapons and consensual search of the vehicle did not negate the facts that probable cause existed at the time of the initial stop and the police could have arrested defendant at any point.

IV

For the foregoing reasons, we conclude that the circuit court did not err by reversing the district court's suppression of the evidence regarding the cocaine. The police had probable cause to arrest defendant and the search incident to the lawful arrest was valid.

Affirmed.

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