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COURT OF APPEALS

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[1] From October 14, 2013.

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COURT OF APPEALS CASES

LIVINGSTON CAPITAL LLC v STATE TAX COMMISSION

LARIAT, INC v STATE TAX COMMISSION

Docket Nos. 310125 and 311287. Submitted July 9, 2013, at Lansing. Decided July 25, 2013, at 9:00 a.m.

Livingston Capital LLC owned two parcels of property in Green Oak Charter Township used for the warehousing, packaging, processing, and distribution of consumer goods. The township assessor notified Livingston Capital that the property would be classified as industrial real property for the 2010 tax year. Livingston Capital did not protest the classification, which the board of review accepted for the tax rolls. The assessor subsequently appealed the acceptance of this classification to the State Tax Commission (STC), seeking to have the property reclassified as commercial real property. The STC granted the appeal and changed the classification for the 2010 tax year from industrial real property to commercial real property. Livingston Capital appealed in the Ingham Circuit Court. The court, Clinton Canady III, J., ordered the property's classification changed back to industrial real property, concluding that the assessor did not have standing to appeal the acceptance of his own classification and that, as a result, the STC did not have jurisdiction to change the classification. The STC appealed.

Lariat, Inc., owned a parcel of property in Green Oak Charter Township. The township assessor notified Lariat that the property would be classified as industrial real property for the 2010 tax year. Lariat did not protest the classification, which the board of review accepted for the tax rolls. The assessor subsequently appealed the acceptance of this classification to the STC, seeking to have the property reclassified as commercial real property. The STC granted the appeal and changed the classification of the property for the 2010 tax year from industrial real property to commercial real property. Lariat appealed in the Livingston Circuit Court. The court, Michael P. Hatty, J., ordered the classification of the property changed back to industrial real property, concluding among other holdings that the property was clearly used for industrial purposes under MCL 211.34c(2)(d) or, alternatively, that the STC lacked jurisdiction to hear the assessor's appeal because the

classification had not first been protested to the board of review. The STC appealed, and the Court of appeals consolidated the appeals.

The Court of Appeals *held*:

The circuit courts did not err by determining that the STC lacked jurisdiction to hear the assessor's appeals in these cases. MCL 211.34c(6) provides that an owner of any assessable property who disputes the classification of that property must notify the assessor and may protest the assigned classification to the March board of review and that an owner or assessor may appeal the decision of that board by filing a petition with the STC not later than June 30 of the tax year. Thus, what may be appealed to the STC is only the decision stemming from a protest to the March board of review by the owner who disputes the classification of the property. An assessor cannot appeal a classification to the STC if the property owner has not protested the classification to the board of review. Because plaintiffs never protested the classifications of their properties to the respective boards of review, no appealable decisions under MCL 211.34c(6) were ever made.

Affirmed.

TAXATION — PROPERTY TAX — STATE TAX COMMISSION — APPEALS OF PROPERTY CLASSIFICATION BY ASSESSOR.

MCL 211.34c(6) provides that an owner of any assessable property who disputes the classification of that parcel must notify the assessor and may protest the assigned classification to the March board of review and that an owner or assessor may appeal the decision of that board by filing a petition with the State Tax Commission not later than June 30 of the tax year; an assessor cannot appeal a classification to the commission if the property owner has not first protested the classification to the board of review.

Honigman Miller Schwartz and Cohn LLP (by *Michael B. Shapiro* and *Jason Conti*) for Livingston Capital LLC.

Neal D. Nielsen for Lariat, Inc.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Michael R. Bell* and *Matthew B. Hodges*,

Assistant Attorneys General, for the State Tax Commission, Robert Naftaly, Douglas Roberts, and Barry Simon in *Livingston Capital*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for the State Tax Commission, Robert Naftaly, Douglas Roberts, and Barry Simon in *Lariat*.

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM. In Docket No. 310125, defendant State Tax Commission (STC) appeals the April 16, 2012, order of the Ingham Circuit Court classifying plaintiff Livingston Capital LLC's property as industrial real property. In Docket No. 311287, the STC appeals the June 22, 2012, order of the Livingston Circuit Court classifying Lariat, Inc.'s property as industrial real property.

In Docket No. 310125, Livingston Capital owns two parcels of real property in Green Oak Charter Township that host a facility used by Gordon Food Service, Inc., for the warehousing, packaging, processing, and distribution of consumer goods. In 2010, Livingston Capital was notified by the township assessor that the property would be classified as industrial real property for the 2010 tax year, as it had been in previous years. Livingston Capital did not protest the classification, and the classification was accepted to the tax rolls by the board of review.

On April 27, 2010, however, the assessor appealed the acceptance of his industrial real property classification to the STC, seeking to have the property reclassified as commercial real property. On August 16, 2010, the STC granted the appeal and changed the classification of the

property for the 2010 tax year from industrial real property to commercial real property, holding that "[w]arehouses are commercial".

Following the STC's decision, Livingston Capital appealed to the circuit court. The circuit court issued an oral opinion changing the classification of the property back to industrial real property for the 2010 tax year. The circuit court had multiple reasons for its decision, including that the assessor did not have standing to appeal the acceptance of his own classification and that as a result, the STC did not have jurisdiction to change the accepted classification.

In Docket No. 311287, Lariat owns a parcel of real property in Green Oak Charter Township that is leased by three commercial entities, Fonson, Inc., McDonald Modular Solutions, Inc., and CMA Heavy Haul, Inc. In 2010, Lariat was notified by the township assessor that the property would be classified as industrial real property for the 2010 tax year, as it had been in previous years. Lariat did not protest the classification, and the classification was accepted to the tax rolls by the board of review.

On April 27, 2010, however, the assessor appealed the acceptance of his industrial real property classification to the STC, seeking to have the property reclassified as commercial real property. On August 16, 2010, the STC granted the appeal and changed the classification of the property for the 2010 tax year from industrial real property to commercial real property, holding that "[e]xcavating contractors are commercial."

Following the decision, Lariat appealed the decision to the circuit court. The circuit court issued an opinion changing the classification of the property back to industrial real property for the 2010 tax year. In support, the circuit court found that the record showed the

property was clearly used for industrial purposes under MCL 211.34c(2)(d), as it was used for the removal or processing of gravel, stone, or mineral ore. Alternatively, the circuit court found that the STC had lacked jurisdiction to hear the township assessor's appeal, as the classification of the property had not first been protested to the board of review, and that the order reclassifying the property as commercial real property was invalid because of a lack of the statutorily required signature and seal.

These cases are resolved by an issue common to both cases: whether an assessor can appeal to the STC when the classification has not been protested at the board of review. We conclude that an assessor cannot do so.

Appeals to the STC concerning property classifications are governed by MCL 211.34c(6), which reads, in relevant part, as follows:

> An owner of any assessable property who disputes the classification of that parcel shall notify the assessor and may protest the assigned classification to the March board of review. An owner or assessor may appeal the decision of the March board of review by filing a petition with the state tax commission not later than June 30 in that tax year.

Although no protests were ever made to the boards of review by the property owners, the assessor still appealed the classification of the properties. The STC asserts that the appeals were still proper under MCL 211.34c(6) because the appeals were of the decisions of the boards of review to accept the assessor's original classification of the properties under MCL 211.34c(1). This interpretation, however, runs counter to the plain and unambiguous language of MCL 211.34c(6).

> The primary goal of statutory interpretation is to "ascertain the legislative intent that may reasonably be inferred from the statutory language." "The first step in that

> determination is to review the language of the statute itself." Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, "[t]he words of a statute provide 'the most reliable evidence of its intent . . . .' " [*Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011) (citations omitted; alterations in original.]

Under MCL 211.34c(6), an assessor is permitted to appeal "the" decision of the board of review, not "a" decision. In context,[1] the reference to "the decision" in the second sentence of the provision refers back to the decision stemming from a protest by the "owner of any assessable property who disputes the classification of that parcel." The STC's interpretation would divorce the term "the decision" from the context in which it is placed and require that "the decision" include the board of review's decision to accept a classification onto the property tax rolls under MCL 211.34c(1).

Therefore, because plaintiffs never protested the classification of the their properties to the respective boards of review, no appealable decisions under MCL 211.34c(6) were ever made. The circuit courts did not err by determining that the STC lacked jurisdiction to hear the assessor's appeals in these cases.

Affirmed. Plaintiffs may tax costs.

SAWYER, P.J., and METER and DONOFRIO, JJ., concurred.

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[1] See *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 716-717; 822 NW2d 522 (2012).

ZAREMBA EQUIPMENT, INC v HARCO NATIONAL INSURANCE COMPANY

Docket Nos. 298221 and 298755. Submitted May 16, 2013, at Traverse City. Decided July 25, 2013, at 9:05 a.m. Leave to appeal sought.

Zaremba Equipment, Inc., brought an action in the Otsego Circuit Court against Harco National Insurance Company and Patrick Musall, who was Harco's agent, after a fire destroyed plaintiff's building and its contents. The complaint alleged negligence, fraud, innocent misrepresentation, breach of contract, promissory estoppel, and other claims, all related to the adequacy of the coverage provided in the insurance policy and representations that Musall made or failed to make concerning that coverage. The jury found for plaintiff on all of its claims and awarded the damages that plaintiff requested. The court, Dennis F. Murphy, J., denied defendants' motions for judgment notwithstanding the verdict (JNOV) and a new trial. Defendants appealed. The Court of Appeals, BORRELLO and GLEICHER, JJ. (O'CONNELL, P.J., concurring in part and dissenting in part), affirmed in part, reversed in part, vacated in part, and remanded for a new trial. 280 Mich App 16 (2008) (*Zaremba I*). On remand, a second trial was held before a new jury. The new jury found Musall negligent and that he had made an innocent misrepresentation, but rejected plaintiff's fraud claim. The jury further determined that plaintiff's comparative negligence was a proximate cause of its damages. The trial court, Janet M. Allen, J., rejected defendants' motions for JNOV and a new trial and entered judgment for plaintiff in the amount of $1,245,264.40 plus interest. The court subsequently awarded $134,739.33 in costs and attorney fees. Defendants appealed and plaintiff cross-appealed.

The Court of Appeals *held*:

1. Under the law of the case doctrine, if an appellate court has ruled on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case when the facts remain materially the same. Defendants' argument that plaintiff's failure to read its policy doomed its negligence claim was rejected in *Zaremba I*. The central holding

in *Zaremba I* identified plaintiff's failure to read its policy as comparative fault to be weighed against Musall's negligence. That determination constituted the law of the case. The parties also litigated plaintiff's innocent misrepresentation claim in accordance with the analysis set out in *Zaremba I*. Thus, the trial court correctly denied defendants' motion for JNOV based on plaintiff's failure to read its insurance policy.

2. Under the common law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage. However, there is an exception to the general no-duty rule when an event occurs that alters the nature of the relationship between the agent and the insured. A special relationship may arise, pursuant to which an agent acquires greater duties to the customer, when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. Contrary to defendants' argument, in this case abundant evidence supported plaintiff's claim that Musall stepped from the role of order taker into that of insurance advisor. By making coverage recommendations, misrepresenting the coverage provided in the policy, and assuming an obligation to appraise or survey the property to calculate its replacement value, Musall established a duty of care different from that of an ordinary insurance agent. Accordingly, the trial court properly rejected defendants' challenge to the sufficiency of the evidence.

3. An attorney's comments do not normally constitute grounds for reversal unless they reflect a deliberate attempt to deprive the opposing party of a fair and impartial proceeding. Reversal is only required when the prejudicial statements reveal an intent to inflame or otherwise prejudice the jury, or to deflect the jury's attention from the issues involved. Despite breaches of the norms of professional conduct by counsel for both sides, the record does not indicate any studied purpose to prejudice the jury or to divert the jury's attention from the merits of the case. Nor did the objections, speeches, comments, and arguments of counsel qualify as inflammatory, extreme, or deliberately misleading. Further, much of the challenged conduct by plaintiff's counsel occurred outside the presence of the jury. The arguments made only to the trial court did not deprive defendants of a fair trial. A "speaking objection" is an objection that contains more information than the judge needs to rule on the objection. In this case, the trial court

recognized the problem of speaking objections, admonished counsel to avoid them, and properly instructed the jury that the lawyers' statements and arguments were not evidence. Accordingly, defendants' claim that speaking objections tainted the jury's ability to fairly decide the case was without merit. Nor did plaintiff's counsel's comments on Musall's credibility deprive defendants of a fair trial given that the record confirmed that Musall was less than entirely truthful and forthcoming when answering some of plaintiff's counsel's questions. Although plaintiff's counsel succeeded in improperly suggesting to the jury that the insurance policy was difficult to understand, contrary to the holding in *Zaremba I*, the trial court's instructions on the matter did not permit the jury to accept that excuse for failing to read and understand the policy. Thus, to the extent that plaintiff's counsel made incursions into improper territory, the comments constituted harmless error. The trial court did not err by denying defendants' motion for JNOV based on plaintiff's counsel's alleged misconduct.

4. Only when verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. In this case, the jury determined that plaintiff was 30 percent comparatively negligent with regard to the general negligence count and 20 percent comparatively negligent with regard to the innocent misrepresentation claim. The trial court properly rejected defendants' objection to the proposed judgment on the basis of the differing percentages of comparative negligence given the distinct arguments that were made concerning comparative fault. The jury reasonably could have concluded that plaintiff bore a higher percentage of comparative fault with regard to the general negligence claims because of plaintiff's failure to read its policy, and a lesser percentage for providing Musall with incorrect information for the appraisal. The trial court did not err by declining to recognize only the greater finding of comparative fault when entering judgment on the alternative theories of recovery or in declining to order a new trial for that reason.

5. Under MCR 2.403(O)(1), if a party has rejected a case evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. The trial court did not err in its award of case evaluation sanctions. The costs generated in connection with both trials were necessitated by the rejection of the case evaluation because they arose after the rejection. The cost of two trials was part of the risk assumed by defendants when they rejected the evaluation.

6. With regard to plaintiff's cross-appeal, the law of the case doctrine did not preclude the jury from assessing plaintiff's comparative fault related to the innocent misrepresentation claim. The law of the case doctrine is a general rule that applies only if the facts remain materially the same. Because the facts adduced at the second trial differed meaningfully from those adduced at the first trial, the trial court properly submitted to the jury the question of plaintiff's comparative fault for Musall's misrepresentation.

Affirmed.

Howard & Howard Attorneys PLLC (by *Michael F. Wais* and *Michael O. Fawaz*) for plaintiff.

John R. Monnich, PC (by *John R. Monnich*), and *Jacobs and Diemer, PC* (by *John P. Jacobs* and *Timothy A. Diemer*), for defendants.

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

PER CURIAM. This insurance coverage dispute arose in 2003, when a fire consumed the primary building occupied by plaintiff Zaremba Equipment, Inc. Defendant Harco National Insurance Company sold Zaremba the insurance policy in effect at the time of the fire. The policy stated limits of $525,000 for the building and $700,000 for its contents. After the loss, Zaremba learned that it would cost far more than those limits to replace the building and its contents.

Zaremba brought suit, complaining that defendant Patrick Musall, an insurance agent employed solely by Harco, negligently advised Zaremba regarding the appropriate amount of replacement coverage for the business and misrepresented the nature and extent of the coverage purchased. Zaremba further alleged that Musall improperly appraised the building at a value far lower than its actual replacement cost, and committed

fraud. Defendants denied that Musall performed an appraisal and asserted that had Zaremba bothered to read its policy, it would have understood its clearly stated coverage limits. In 2009, an Otsego County jury found in Zaremba's favor and awarded the corporation $2,353,778 exclusive of costs, attorney fees, interest, and case evaluation sanctions.

This Court reversed and remanded for a new trial, holding that the trial court had erroneously refused to instruct the jury that Zaremba bore a duty to read its insurance policy. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16; 761 NW2d 151 (2008) (*Zaremba I*). Our opinion explained that Zaremba's admitted failure to read its policies could constitute comparative negligence. We directed that a second jury assess the comparative fault of both Zaremba and Musall when considering Zaremba's negligence claims.

A properly instructed jury found Musall negligent and determined that Musall had made an innocent misrepresentation, but rejected Zaremba's fraud claim. The jury further determined that Zaremba's comparative negligence constituted a proximate cause of its damages. The trial court entered judgment for Zaremba in the amount of $1,245,264.40 plus interest, and subsequently awarded $134,739.33 in costs and attorney fees.

Defendants raise a number of appellate challenges to the verdict and postverdict awards. Defendants insist that Zaremba's failure to read the policy should have operated as a complete bar to recovery, that Musall owed Zaremba no duty of care, and that Zaremba's counsel repeatedly distracted the jury by injecting irrelevancies, including the length and interpretive difficulty of the insurance policy. Zaremba cross-appeals, arguing that the jury should not have been permitted to

consider Zaremba's comparative negligence in relation to Musall's innocent misrepresentations.

The law of the case disposes of defendants' first two arguments, and the trial court's oft-repeated instruction that the lawyers' comments were not evidence defeats the third. Because facts emerged during the second trial substantiating defendants' argument that Zaremba bore responsibility for Musall's innocent misrepresentation, the trial court correctly ruled that a comparative negligence analysis applied to this claim. Although the trial was far from perfect, we find no errors warranting reversal.

I. UNDERLYING FACTS AND PROCEEDINGS

The evidence developed during the second trial generally duplicated our previous description of the relationship between Zaremba and Musall:

> Musall testified that since 1998 or 1999 he had met with Jimmy Zaremba,[1] plaintiff's business manager, at least twice a year to discuss plaintiff's insurance needs, Harco's available coverages, and potential policy limits. Musall admitted that at some point before plaintiff accepted Harco's 2002-2003 insurance proposal, Jimmy presented a "Customgard John Deere Insurance Proposal" prepared for plaintiff. The Deere insurance proposal included a "Building Coverage" limit of $450,000 and identified an applicable "Extended Recovery Endorsement" that included "Guaranteed Replacement Cost." Musall conceded that Jimmy had asked him to "meet or beat" the Deere proposal and expressed a desire "to be fully insured." Musall utilized a software program called "Marshall & Swift" to prepare a "cost estimate" for reconstructing plaintiff's building, which calculated a building value of $494,449. According to Jimmy, Musall represented that Marshall & Swift was "the leader in the industry, and this is what

[1] For the sake of clarity, we will follow the lead of *Zaremba I* and refer to James "Jimmy" Zaremba by his nickname in this opinion.

> insurance agents use all the time to come up with evaluations on a building." Although Musall did not recall telling Jimmy about the Marshall & Swift estimate, he admitted that after its preparation, plaintiff increased its building coverage limit to $525,000.
>
> Musall also conceded that he made specific recommendations in response to Jimmy's request that plaintiff be "fully insured." He admitted that he would have recommended more coverage if he had known that it would cost $1,192,000 to replace the building because the "intent was there" to insure plaintiff "for the cost of replacing the building." Musall further explained that if Jimmy had asked for $1.5 million of building coverage, Musall would have advised him that "I didn't feel he needed that much coverage."
>
> Jimmy recalled that in July 2001 a car had run into a nearby restaurant, killing some customers. Jimmy heard that the restaurant owner "had a holy nightmare" with his insurance company and realized that if something happened to plaintiff's building, zoning issues would preclude rebuilding in the same location. At about the same time, Jimmy learned of Deere's "guaranteed replacement coverage" and consulted Musall to discuss the adequacy of plaintiff's coverage and to communicate his desire that plaintiff be "fully insured." Jimmy asked Musall to compare plaintiff's 2001 Harco coverage, which included an 80 percent coinsurance provision that obligated plaintiff to cover 20 percent of its own insured losses, with the Deere proposal. According to Jimmy, Musall represented that for $500 less than the Deere quotation, Harco would provide a building policy limit of $525,000 and that "with the replacement costs, we would be fully insured." [*Id*. at 23-24.]

Based on these facts, we held that Zaremba established that Musall and Zaremba shared a "special relationship" pursuant to *Harts v Farmers Ins Exch*, 461 Mich 1, 10-11; 597 NW2d 47 (1999). Using *Harts* as our guide, we described the parties' respective duties of care as follows: "[W]hen an insurance agent elects to

provide advice regarding coverage and policy limits, the agent owes a duty to exercise reasonable care. The insured has a duty to read its insurance policy and to question the agent if concerns about coverage emerge." *Zaremba I*, 280 Mich App at 36.

Given our holding, we anticipated that the second trial would generally focus on whether: (1) Musall negligently appraised the replacement costs of Zaremba's building and contents, (2) Musall misrepresented that the Zaremba policy included "replacement coverage," (3) Musall negligently failed to provide Zaremba with the replacement coverage it had ordered, and (4) Zaremba was comparatively negligent. With regard to the last issue, we stated, "A jury could reasonably conclude that plaintiff's failure to read its 2002-2003 policy qualified as a proximate cause of its failure to obtain clarification regarding the Harco policy limits before the February 2003 fire." *Id*. at 35.

Our opinion drew a distinction between Zaremba's claims arising from Musall's advice and representations and Musall's appraisal of the building and its contents. Regarding the appraisal allegation, we found Zaremba's duty to read the policy inapplicable. We explained, "Plaintiff's policy and related documents do not contain . . . any information that might have called into question the accuracy of the Marshall & Swift computation or Musall's allegedly negligent representation that plaintiff could replace its building within the limits of the policy." *Id*. We pointed out that logically, Zaremba's failure to read its insurance policy "does not represent a proximate cause" of any damages awarded under the negligent appraisal theory of liability. *Id*.

In the second trial, the court's comparative fault and proximate cause instructions tracked the Model Civil Jury Instructions. Neither party objected to the sub-

stance of the instructions.[2] The jury rejected that defendants had committed fraud, but upheld Zaremba's claims of negligence and innocent misrepresentation and awarded damages in the amount of $1,556,448 on each theory. The jury assessed Zaremba as 30 percent comparatively negligent in connection with its negligence claims and 20 percent comparatively negligent with regard to the innocent misrepresentation claim. The trial court determined that Zaremba was entitled to a single satisfaction based on the alternative theories of recovery and awarded the higher of the two resulting figures—$1,245,265.40.

II. ANALYSIS

A. JUDGMENT NOTWITHSTANDING THE VERDICT BASED ON ZAREMBA'S FAILURE TO READ THE POLICY

Defendants first contend that the trial court should have granted their motion for judgment notwithstanding the verdict (JNOV) because Zaremba's failure to read its policy negated defendants' tort liability. The "inexorable duty to read" an insurance policy, defendants argue, defeats as a matter of law an insured's subjective beliefs about policy provisions. Defendants further insist that given the unambiguous policy language, Zaremba failed to prove that it reasonably relied on Musall's misrepresentations. We review de novo a trial court's ruling on a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). "A motion for . . . JNOV should be granted only if the evidence viewed in [the light most favorable to the nonmoving party] fails to establish a claim as a matter of law." *Id*.

[2] As discussed in greater detail later in this opinion, Zaremba objected to the trial court's decision to instruct the jury at all regarding Zaremba's comparative fault for Musall's innocent misrepresentations.

Defendants' arguments fly in the face of the law of the case. Our central holding in *Zaremba I* identified Zaremba's failure to read its policy as comparative fault to be weighed against Musall's negligence. This determination constituted the law of the case. It governed the retrial, and it governs this appeal. Defendants have offered no reason that we should disregard the law of the case, and we decline to do so.

Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). Defendants invite us to adopt precisely the same argument they made in *Zaremba I*, that failure to read the policy doomed Zaremba's negligence claims. We need not rehash the reasons we rejected that view; they are plainly spelled out in the first opinion.

Similarly, we decline to revisit our holding regarding Zaremba's innocent misrepresentation claim. We previously explained that Zaremba "cannot prevail on a fraud or innocent misrepresentation theory premised on Musall's representations regarding the policy limits" because the policy unambiguously set forth those limits. *Zaremba I*, 280 Mich App at 40. However,

> plaintiff's fraud and innocent misrepresentation claims also encompassed Musall's statements regarding the accuracy of the Marshall & Swift computation and whether plaintiff could actually replace its building for $525,000. Neither the policy language nor any documents provided by defendants regarding the policy would have shed light on the accuracy of the Marshall & Swift estimate or Musall's representation that the $525,000 coverage limit constituted adequate replacement coverage. Therefore, the

> record could support plaintiff's claims that Jimmy reasonably relied on Musall to accurately evaluate the cost of replacing the building and also reasonably relied on Musall's representation that the Marshall & Swift calculation constituted a reasonable assessment of the building's replacement cost. [*Id*. at 40-41.]

Our review of the record reveals that the parties litigated Zaremba's innocent misrepresentation claim in accordance with our analysis; we detect no error.

B. JUDGMENT NOTWITHSTANDING THE VERDICT BASED ON INSUFFICIENT EVIDENCE

Next, defendants assert that Zaremba failed to prove that Musall and Jimmy had a special relationship under *Harts*, and that the trial court should have granted JNOV on this ground. According to defendants, the special relationship theory of liability permitted by the trial court converts insurance agents into insurance advisors and appraisal experts, imposes on agents a duty to know the prospective insured's business better than the prospective insured, and improperly extends an agent's duty to "serving as a fact-checker, a business advisor, appraisal expert or financial planner." "When reviewing a claim that there was insufficient evidence presented in a civil case, this Court must view the evidence in a light most favorable to the plaintiff and give the plaintiff the benefit of every reasonable inference." *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 41; 550 NW2d 809 (1996).

The trial court rejected defendants' sufficiency of the evidence challenge, finding that viewed in the light most favorable to Zaremba, "Musall held himself out to be an expert who could advise Zaremba as to the proper coverage," and having done that, "Musall assumed a duty . . . to provide such proper coverage as was requested . . . ." We agree with the trial court.

"[U]nder the common law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage." *Harts*, 461 Mich at 8. Insurance agents, who function "essentially" as "order takers," should be distinguished from insurance counselors, who function as advisors. *Id*. at 9, citing MCL 500.1232. However, the Supreme Court carved out an exception to the general "no duty" rule "when an event occurs that alters the nature of the relationship between the agent and the insured." *Id*. at 9-10. A special relationship may arise, pursuant to which an agent acquires greater duties to the customer, when

> (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id*. at 10-11.]

In this case, abundant evidence supported that Musall stepped from the role of order taker into that of insurance advisor. Musall admitted that he was "an expert in insuring truck and auto dealerships" such as Zaremba, and that he "specifically made recommendations to Jim Zaremba as to what he needed . . . in terms of insurance to be fully insured[.]" Musall conceded that Jimmy had requested enough insurance to replace the building, and the "[t]he intent was there" to cover "the cost of replacement of the building." To that end, Musall agreed that Jimmy asked him to perform an "appraisal." Instead, Musall performed a "cost estimate" using the Marshall & Swift computer program, which calculated the replacement cost at just under $525,000. This evidence, supplied by Musall himself, supports that Musall assumed a duty to advise Zaremba

regarding the coverage needed to replace its building, thereby creating a special relationship.

Jimmy explained that his "replacement coverage" discussion with Musall began when Jimmy presented Musall with an insurance quotation from John Deere. According to Jimmy, the Deere quotation characterized the coverage as "guaranteed replacement costs." Jimmy asked Musall to "meet or beat" the Deere coverage, which Musall agreed to do. Jimmy testified that Musall then undertook a "survey" of Zaremba's building, which he witnessed someone accomplish by touring the facility and taking measurements and photos. Musall's correspondence with Harco supports this allegation; the "Input Data Listing" form completed by Musall identifies Musall as having "[s]urveyed" the property on January 9, 2002.

Jimmy recalled asking Musall whether Zaremba was insured for full replacement coverage in the event of a total loss, and that Musall reassured him that full replacement coverage was in place. This evidence buttressed Zaremba's "special relationship" claim by supporting that Musall misrepresented the nature and extent of the coverage. See *Harts*, 461 Mich at 10-11. By making coverage recommendations, misrepresenting the coverage provided in the policy, and assuming the obligation to "appraise" or "survey" the property to calculate its replacement value, Musall established a duty of care quite different from that of an ordinary insurance agent.

Defendants insist that pursuant to *Casey v Auto-Owners Ins Co*, 273 Mich App 388; 729 NW2d 277 (2006), "the Duty to Read trumped whatever subjective hopes the insured might have about different coverage amounts after their initial purchasing decision proved to be inadequate." Defendants' reliance on *Casey* is

misplaced. In *Casey*, this Court rebuffed an insured's argument that the insurer bore an obligation to determine the correct amount of insurance for the dwelling in question. *Casey* explained that even if the insured "reasonably expected that such a duty or guarantee would be imposed by the policy, that expectation cannot overcome the actual terms of the policy." *Id*. at 397.

Notably, the insurance agent in *Casey* neither rendered coverage advice nor misrepresented coverage terms. Rather, *Casey* presented a garden-variety relationship between an insurance agent and his client. This Court specifically noted that "the policy did not impose any duty on Auto-Owners to accurately appraise the property, nor did it include any guarantee that the coverage provided would be adequate to cover any loss that might occur." *Id*. Unlike the plaintiffs in *Casey*, Zaremba enjoyed a special relationship with its insurance agent, Musall, that gave rise to different obligations. Accordingly, we reject the argument that Zaremba's "special relationship" proofs were insufficient to establish Musall's duty to advise with due care.

C. JUDGMENT NOTWITHSTANDING THE VERDICT BASED ON ATTORNEY MISCONDUCT

Defendants next argue that Michael Wais, Zaremba's attorney, committed misconduct that denied defendants a fair trial. Defendants describe Wais's misconduct as "speaking objections,"[3] "running commentary" on the evidence, repeated accusations that the defense witnesses were "liar[s]," and statements designed to portray the policy as too difficult for a layperson to understand. Wais's goal, defendants urge, was to encourage

[3] A "speaking objection" is an objection that contains more information than the judge needs to rule on the objection. Speaking objections are often intended to influence the jury or the witness.

the jury to nullify Zaremba's duty to read the policy. The trial court denied defendants' motion for a new trial on this ground, finding that Wais's conduct "does not rise to the level of irregularity or misconduct under MCR 2.611(A)(1)(a) or MCR 2.611(A)(1)(b) that would justify the granting of a new trial."

We review for an abuse of discretion a trial court's general conduct of a trial. See *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990). This standard of review also applies to a court's decision on a motion for a new trial, *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006), and a court's evidentiary decisions, *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). An attorney's comments do not normally constitute grounds for reversal unless they reflect a deliberate attempt to deprive the opposing party of a fair and impartial proceeding. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). "Reversal is required only where the prejudicial statements" reveal a deliberate attempt to inflame or otherwise prejudice the jury, or to "deflect the jury's attention from the issues involved." *Id*.

Defendants correctly observe that Wais engaged in speaking objections, commented occasionally on the evidence, and proposed an incorrect legal theory concerning Zaremba's duty to read its insurance policy. Defense counsel also engaged in speaking objections, commented negatively on the trial court's handling of the case, and vigorously argued a patently incorrect legal theory regarding the admissibility of the Deere

proposal.[4] This was a hard-fought case during which the trial court occasionally lost control of the attorneys, and the attorneys frequently ignored the trial court's repeated admonitions to behave themselves. Despite the breaches of professional conduct norms revealed in the trial transcript, we perceive no "studied purpose to prejudice the jury" or to divert the jury's attention from the merits of the case. *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354; 273 NW2d 75 (1978). Nor did the objections, speeches, comments, and arguments qualify as inflammatory, extreme, or deliberately misleading.

Defendants have directed us to a number of places in the transcript where, in defendants' estimation, Wais engaged in improper and prejudicial conduct. Many of the record citations involve argument conducted outside the presence of the jury. We decline to find that arguments made only to the trial court deprived defendants of a fair trial.

We first address defendants' complaint concerning speaking objections. Evidentiary objections that go beyond recitation of the pertinent rule of evidence being invoked risk prejudice. See MRE 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."). Both sides engaged in speaking

[4] Defense counsel argued that the Deere proposal constituted inadmissible hearsay despite that Zaremba did not propose the document's introduction to prove its truth. Whether the Deere quotation was "true" or "accurate" bore no relevance to the case. Zaremba sought to use it only to corroborate that Jimmy asked Musall to "meet or beat" the specific coverage set forth in the proposal. We mention this evidentiary issue solely to illustrate that counsel may vigorously argue a legally incorrect proposition without depriving the opposing side of a fair trial.

objections. The trial court admonished both counsel to avoid speaking objections. We have reviewed each and every alleged speaking objection identified by defendants and find no comments or arguments rising to the level of professional misconduct, or that likely engendered unfair prejudice. Moreover, the trial court recognized the problem and dealt with it emphatically when denying defendants' motion for a mistrial on this ground:

> *The Court*: Well, I want to make a statement that the first day of trial I had both of you in chambers, and I told you I was not going to tolerate interruptions and rude behavior. And I agree with you, [defense counsel], there ha[ve] been interruptions, and you've been rude. Yeah, it's been way --
>
> [*Defense Counsel*]: I -- I agree with all that. I said that.
>
> *The Court*: It's been way too contentious between the two of you attorneys. Now, I understand that you -- things can get a little bit rough on cross-exam. We had a little bit of [an] emotional situation yesterday, when I -- oh, my gosh, was it John Zaremba was on the stand? And I understand that there is emotion in this case, but it shouldn't be being generated by the attorneys.
>
> I think I can give an instruction to the jury to attempt to cure this, and I appreciate your motion.
>
> * * *
>
> *The Court*: All right. The other rule is you're not to approach the bench. If you want to state an objection, state it from counsel table or the podium. We can't have all this interacting with the Court and the witnesses and so forth.
>
> So I'm -- I'll deny your motion, and does everybody understand the ground rules because I will be sanctioning attorneys if -- if there were -- if there are violations?
>
> [*Counsel*]: (No response)

The Court: You do not interrupt the witness. You do not interrupt the attorney. You let them finish their question or their answer. You state simply and precisely the reason for your objection. I'll permit counsel to counter with a response, and then, the Court will rule. And once I rule, that's it.

After admonishing counsel, the trial court instructed the jury as follows:

The Court: All right. Members of the jury, I'm going to give you a few instructions again just to clarify something.

As I told you in the beginning, statements by attorneys are not evidence. Questions by attorneys are not evidence. Certainly, what they state in their objections are not evidence. Only the witnesses' answers are evidence if we're talking about a live witness or the exhibits are evidence.

I want you to disregard anything that does not comport with what you've heard coming out of the witness stand or exhibits, any statements made by the attorneys in this matter. I've outlined for them the procedure I want them to follow in the future as far as objection procedure and so forth.

Certainly, my rulings also are not in favor or against any party. You should not consider that as any opinion that I may have as to the facts of this case because you are the sole judges of the facts.

If I were -- If I do sustain an objection to a question for whatever legal reason, I don't want you to speculate on what the answer would have been.

Okay. Does everybody understand all that?

Jurors: (Positive response)

The Court: Okay. And as far as any statements of the law, you follow the law as I give it to you not as stated by the attorneys. Okay? You can listen to the attorneys as to their understanding of the law, but if it conflicts with -- with what I tell you is the law, you have to follow what I tell you. Okay?

Jurors: (Positive response)

The Court: All right. You may proceed.

The trial court repeated this instruction at the conclusion of the case:

> As I told you before, the lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. The lawyers' questions to witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Given the forceful manner in which the trial court handled the "speaking objection" problem, we find no merit in defendants' claim that speaking objections tainted the jury's ability to fairly decide this case.

Defendants next challenge as misconduct Wais's frequent allegations that defense witnesses "lied" or were "liar[s]." Credibility was very much at stake in this case. Musall denied appraising Zaremba's property, denied that he promised to procure replacement coverage, and recollected several pertinent conversations differently than Jimmy. Throughout Wais's cross-examination of Musall, Wais successfully impeached Musall with trial exhibits and the testimony Musall gave during the first trial. The record confirms that Musall was less than entirely truthful and forthcoming when answering some of Wais's questions. The trial court observed that Musall's testimony had not been wholly consistent and concluded that Wais's comments on Musall's truthfulness did not constitute an unsub-

stantiated attack. The trial court's reasoning was sound and we decline to disturb it.

Defendants' most substantial argument relates to Wais's insistence during the trial that Zaremba's failure to read the policy did not qualify as comparative negligence because the policy was difficult to understand. Wais introduced this theme in his opening statement, without objection:

> And one of the excuses that you're going to hear from the other stuff [sic] is that Jim Zaremba should have read his insurance policy. And I'll tell you why that doesn't get us anywhere anyway later. But for this claim, there's not going to be any -- and the Judge is going to instruct you as to the law. It's either he did it wrong, and if he did, we win, or if he didn't, we lose. If all the defense is about they should have read the insurance polic[y], and I'll get to that again, do not apply to this claim. It's already been ruled upon as a matter of law, and the Judge will tell you that.
>
> So when you're hearing about this stuff about, you know, you should have read the policy, just look at this. *Can't you figure it out?* Look at this other document. *Can't you read that and all the stuff that they're going to try to attack my client with? None of that applies because rightly reading it you wouldn't know that he didn't do it. You can read it all you want, and it doesn't say I lied to you when I told you that I did the appraisal.*
>
> That's why if you find that he did not do the appraisal that he said he would do -- oh, he has a very good excuse for the appraisal. [Emphasis added.]

In *Zaremba I*, we emphasized that Zaremba bore a legal duty to read its policy, and that its failure to do so could qualify as comparative negligence. We also rejected the notion that the stated policy limits "lacked clarity or harbored ambiguity." *Zaremba I*, 280 Mich App at 34 n 8. Our opinion further declared that because the policy language had no bearing on Zarem-

ba's "negligent appraisal" theory of liability, the comparative negligence analysis did not apply to that claim. *Id*. at 35.

To the extent Wais referred to the appraisal theory when calling into question the jury's ability to "figure [the policy] out," he did not run afoul of this Court's ruling. At other times, however, Wais crossed the line. For example, later in his opening statement Wais declared, "This is the insurance policy other than the pictures. It is double-sided. It goes on and on for lots of pages. If you can figure this out, the next time I do a case I may hire you. Because I'll tell you, I couldn't figure it out." On another occasion, Wais told the court (in the jury's presence) that he intended to argue that because Harco's claims adjuster had conceded that the "lawn and garden" portion of the policy was difficult to understand, Zaremba "wasn't comparatively negligent for not reading it because if he would have read it he wouldn't understand it any better[.]" This argument was improper for two reasons. First, the lawn and garden coverage had nothing to do with the issues presented during the second trial. Second, this Court instructed that, with regard to the relevant policy provisions, the policy limits were clearly stated without ambiguity.

Despite his announced intention to argue that the policy was too confusing to be understood by Zaremba, Wais apparently thought better of it by the time of the closing arguments. The only comment that referred to the policy was an accurate and unobjectionable statement: "There's not a single document that if you read it a hundred times, if you hire the smartest brains in the world . . . , nobody could find a single document that says, if you read this, you'll see that you were not fully insured. The

document doesn't exist." Wais refrained from arguing that the policy was generally confusing or overly long. Moreover, Jimmy admitted during cross-examination that defendants had provided the coverage stated in the policy.

At the conclusion of the case the trial court properly instructed the jury:

> Now, as part of Plaintiff's duty, the Plaintiff is obligated to read the insurance policies and raise questions about the coverage within a reasonable time after the policies are issued. If the Plaintiff does not read the policies, he is charged with knowledge of the terms and conditions of the insurance policies.

Although Wais had succeeded in suggesting to the jury that the policy was difficult to understand, the trial court's instructions did not permit the jury to adopt this excuse for failing to read and understand it.

Wais's incursions into improper territory do not warrant a new trial. His comments were isolated, brief, and appear to have played no part in the jury's verdict. Even assuming that Wais deliberately mischaracterized our previous opinion while making arguments to the trial court or questioning witnesses, his comments constituted harmless error.

D. INCONSISTENT VERDICTS

Next, defendants challenge as "completely [i]nconsistent" the jury's verdict that Zaremba was 30 percent comparatively negligent as to the general negligence count and only 20 percent comparatively negligent with regard to the innocent misrepresentation claim. Defendants contend that these verdicts cannot be logically reconciled except by assigning the higher comparative

negligence finding to the whole verdict. The trial court rejected defendants' objection to the proposed judgment on this ground, reasoning:

> The jury was certainly given two separate causes of action requiring separate proofs. The proofs justified the jury's allocation of fault both for the negligence claim and the innocent misrepresentation claim. While the Court has not been given an appellate case exactly on point, this Court concludes that the jury verdict in this case is not inconsistent and irreconcilable and is supported by the evidence, the jury instructions and the arguments of the parties.

The trial court properly rejected defendants' objection to the proposed judgment based on the differing percentages of comparative negligence assigned to Zaremba's differing theories of liability. By harmonizing the jury's comparative fault verdicts, the trial court abided by the fundamental principle that "[o]nly where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside[.]" *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987). Moreover, the Court Rules do not provide an avenue to a new trial based on an inconsistency or incongruity in the jury's conclusions. *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001).

Zaremba advanced and the jury considered several species of negligence claims. One set of general negligence allegations encompassed whether Musall (a) negligently failed to procure the insurance coverage Zaremba requested and (b) negligently appraised Zaremba's building and contents. A second set of claims, denoted "innocent misrepresentation," concerned whether Musall falsely represented that (a) the coverage stated in the policy was adequate to replace the building and its contents and (b) the Marshall & Swift appraisal constituted a reasonable

assessment of the building's replacement cost. With regard to each of these liability theories, defendants countered with comparative negligence arguments. Concerning Musall's representations and his failure to procure enough coverage, defendants contended that Zaremba should have read its policy. Regarding the appraisal, defendants maintained that Jimmy supplied Musall with incorrect information.

Given these distinct arguments concerning comparative fault, we find no inconsistency in the jury's verdict. The jury reasonably could have concluded that Zaremba bore a higher percentage of comparative fault with regard to the general negligence claims based on Zaremba's failure to read its policy, and a lesser percentage for providing Musall with incorrect information for the appraisal. Because the different percentage findings of comparative negligence can be reconciled, the trial court did not err by declining to recognize only the greater of them when entering judgment on the alternative theories of recovery, or in declining to order a new trial for that reason.

E. CASE EVALUATION SANCTIONS

Defendants next challenge the trial court's award of case evaluation sanctions in connection with both the original trial and the retrial. Defendants insist that they should be responsible for case evaluation sanctions in connection with the retrial only. We find no error. The trial court followed applicable caselaw by including the first trial in its award of case evaluation sanctions.

MCR 2.403(O)(1) states, "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." Before the first trial, a unanimous

case evaluation panel awarded Zaremba $1,200,000, which defendants rejected. The case then proceeded to a verdict. This Court upheld the jury's verdict of $496,185 for breach of contract, $258,554 in penalty interest, and $42,481 for recovery of insurance proceeds. *Zaremba I*, 280 Mich App at 25. On retrial the jury awarded Zaremba an additional $1,556,448, reduced by comparative negligence to $1,245,264.40. Zaremba claimed entitlement to sanctions because defendants rejected the case evaluation. The trial court awarded sanctions in the amount of $67,271.50 in connection with the retrial of the tort claims, and, over defendants' objections, $67,467.83 in connection with the first trial.

In *Severn v Sperry Corp*, 212 Mich App 406, 417; 538 NW2d 50 (1995), this Court held that "fees generated in connection with both trials were 'necessitated by the rejection' of the mediation evaluation because they arose after the rejection," adding, "[t]he cost of two trials was part of the risk assumed by [the rejecting party] when it rejected the mediation evaluation." Defendants concede, "binding precedent is currently against our position," but, citing the conflict rule, MCR 7.215(J), urge this Court to initiate the process for overruling itself. We decline this invitation.

F. ZAREMBA'S CROSS-APPEAL

Zaremba challenges the jury's verdict in two respects. First, Zaremba argues, the law of the case doctrine precluded the jury from assessing Zaremba's comparative fault related to the innocent misrepresentation claim. Zaremba next contends that even if the jury properly evaluated whether Zaremba bore any comparative fault for Musall's innocent misrepresenta-

tion, the 20 percent reduction applied only to the claim for the building itself, and not its contents.

Zaremba has also misapprehended the law of the case doctrine. Because the facts of the second case differed meaningfully from those of the first, the trial court properly submitted the question of Zaremba's comparative fault for Musall's misrepresentation to the jury. Further, Zaremba failed to preserve its challenge to the application of comparative fault to its building contents claim, and for that reason, we reject it.

Zaremba's argument stems from the following portions of *Zaremba I*:

> [P]laintiff's liability claims arising from Musall's negligent appraisal of its building do not logically lend themselves to a comparative negligence analysis. In addition to plaintiff's insufficient coverage claim, plaintiff contended that Musall negligently calculated the replacement value of its building. Plaintiff's policy and the related documents do not contain, however, any information that might have called into question the accuracy of the Marshall & Swift computation or Musall's allegedly negligent representation that plaintiff could replace its building within the limits of the policy. Thus, under the negligent appraisal theory of liability, plaintiff's own failure to read its insurance documents does not represent a proximate cause of its damages.
>
> * * *
>
> . . . [P]laintiff's fraud and innocent misrepresentation claims also encompassed Musall's statements regarding the accuracy of the Marshall & Swift computation and whether plaintiff could actually replace its building for $525,000. Neither the policy language nor any documents provided by defendants regarding the policy would have shed light on the accuracy of the Marshall & Swift estimate or Musall's representation that the $525,000 coverage limit constituted adequate replacement coverage. [*Zaremba I*, 280 Mich App at 35, 40.]

Zaremba asserts that given this language, the law of the case required the trial court to refrain from submitting to the jury the question of Zaremba's comparative fault for Musall's innocent misrepresentation.

"The law of the case doctrine is a general rule that applies only if the facts remain substantially or materially the same." *People v Phillips (After Second Remand)*, 227 Mich App 28, 31-32; 575 NW2d 784 (1997). Unlike in the first trial, evidence presented to the second jury indicated that Jimmy supplied Musall with an incorrect number for the square footage of the building. Musall contended that this erroneous number contributed to his errant calculation of the building's replacement value. This evidence sufficed to support a comparative negligence instruction, and to avoid application of the law of the case doctrine.

While Zaremba objected to submitting the question of comparative fault for any innocent misrepresentation to the jury, Zaremba raised no argument that comparative negligence could not apply to Musall's evaluation of the value of the building contents. Zaremba could have requested a special verdict distinguishing between the damages awarded for the building and those awarded for the contents. It failed to do so. Accordingly, Zaremba has waived any error.

Affirmed.

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

PEOPLE v JANES

Docket No. 312490. Submitted July 17, 2013, at Detroit. Decided July 25, 2013, at 9:10 a.m.

John Wesley Janes was charged in the 93rd District Court with owning a dangerous animal that caused a serious injury, MCL 287.323(2), after Janes's pit bull attacked and bit a child. The court, Mark E. Luoma, J., determined that MCL 287.323(2) was a strict-liability offense and bound Janes over to the Alger Circuit Court. Janes moved to quash the bindover and dismiss the charge, arguing that MCL 287.323(2) required a criminal intent. The circuit court, William W. Carmody, J., agreed that MCL 287.323(2) was not a strict-liability offense, but nevertheless denied the motion to quash the bindover, concluding that the bindover was valid because there was evidence that Janes had been negligent or reckless and that this *mens rea* would be part of any jury instruction on the charge. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. Courts have generally assumed that when a legislature codifies a common-law crime, the statute includes a requirement of criminal intent. Accordingly, the omission of any mention of criminal intent in a statute must not be construed as eliminating the element from the crime. Instead, courts will infer that element unless the statute contains an express or implied indication that the legislative body wanted to dispense with it.

2. The circuit court did not err when it determined that the Legislature's silence with respect to any criminal intent being required under MCL 287.323(2) did not render that offense a strict-liability crime. In 1988 PA 426, MCL 287.321 through 287.323, the Legislature enacted a statutory scheme to deal with dangerous animals, providing criminal penalties for the owners of dangerous animals that injure or kill persons. MCL 287.323(2) provides that the owner of an animal that meets the definition of a dangerous animal in MCL 287.321(a) is guilty of a felony if the animal attacks a person and causes serious injury other than death. The Legislature's use of the present tense in the statute indicated that to establish a violation of MCL 287.323(2), the

prosecution must prove beyond a reasonable doubt that (1) the defendant owned or harbored a dog or other animal, (2) the dog or other animal met the definition of a dangerous animal in MCL 287.321(a) before and throughout the incident at issue, and (3) the animal attacked a person causing serious injury, as defined in MCL 287.321(e), other than death. Because the Legislature did not specifically address any particular criminal intent that must be proved to establish a violation of MCL 287.323(2) and the simple omission of the appropriate phrase regarding intent from the statute is not, by itself, sufficient to justify dispensing with an intent requirement, the element of criminal intent must be inferred absent an indication that the Legislature expressly or impliedly intended to dispense with that element.

3. In construing statutes that create public-welfare or regulatory offenses, courts may infer from silence that the legislative body did not intend to require proof of *mens rea* because public-welfare offenses generally apply to items whose character is such that a reasonable person would understand that he or she may be held strictly liable for his or her possession of the item. As long as a defendant knows that he or she is dealing with a dangerous device of a character that places the defendant in responsible relation to a public danger, the defendant should be alerted to the probability of strict regulation, and the assumption is that the legislative body intended to place the burden on the defendant to ascertain whether the conduct fell within the statute. A court should avoid construing a statute to dispense with criminal intent if doing so would criminalize a broad range of apparently innocent conduct, and dangerousness alone does not put the average person on notice of the potential for strict liability. A significant portion of Michigan's citizens own dogs, and almost all dogs have the potential to inflict injury, that is, they are in some general sense dangerous. The danger posed by dogs in the general sense is not such that it alerts an individual to probable regulation that might render him or her a felon if the dog injures a person. Thus, rather than enacting a public-welfare offense, the Legislature instead intended to impose criminal liability under MCL 287.323(2) only when the owner knew that his or her animal possessed the characteristics that brought it within the statutory definition of a dangerous animal.

4. MCL 287.323(3) and (4) provide criminal penalties when an owner has an animal that was previously adjudicated to be a dangerous animal and causes an injury that is not serious or allows the animal to run at large. MCL 287.321(a) also includes excep-

tions to the definition of "dangerous animal." The statutory scheme as a whole, however, does not show a legislative intent to dispense with proof of criminal intent.

5. The circuit court did err by imposing a negligence standard. Janes also incorrectly contended that the prosecution must prove that his gross negligence caused the injuries at issue. While caselaw has held that MCL 287.323(1) requires proof of the defendant's gross negligence in handling the animal that caused the victim's death, that holding was premised on the fact that MCL 287.323(1) provides that a person who violated it is guilty of involuntary manslaughter, which was a common-law offense with a criminal-intent element. None of the remaining sections in the act refer impliedly or otherwise to negligent conduct. Accordingly, the requisite intent element for a violation of MCL 287.323(2) is that the owner knew that the dog or other animal met the definition of a dangerous animal under MCL 287.321(a) before the incident at issue.

Affirmed and remanded for further proceedings.

JANSEN, J., dissenting, would have held that the Legislature intended to make the criminal offense set forth in MCL 287.323(2) a strict-liability crime. The use of the present tense in the definition of a dangerous animal in MCL 287.321(a) suggests that an animal can meet the definition the very first time it bites or attacks a person or another dog. There is no indication that an animal must have a known propensity for dangerousness to meet the definition, nor does the statute require that the animal have previously bitten or attacked a person or another dog. Accordingly, an animal may constitute a dangerous animal the very first time it bites or attacks a person or another dog. MCL 287.323(2) similarly does not require that the owner of the animal know of the animal's propensity for dangerousness. The only elements of the crime are (1) that the animal meets the definition of a dangerous animal and (2) that the animal attacks a person and causes serious injury other than death. MCL 287.323(2) is a public-welfare statute, and the criminal offense set forth in it contains no scienter requirement because the Legislature intended to shift the burden of acting at hazard to those who own and possess animals in this state. Accordingly, Judge JANSEN would have affirmed the circuit court's denial of Janes's motion to quash, but reversed the circuit court's warning to the prosecution that it will have to prove Janes's criminal intent at trial.

CRIMINAL LAW — INTENT — STRICT-LIABILITY OFFENSES — DANGEROUS ANIMALS CAUSING INJURY — ELEMENTS.

MCL 287.323(2), which provides that the owner of an animal that meets the definition of a dangerous animal in MCL 287.321(a) is guilty of a felony if the animal attacks a person and causes serious injury other than death, is not a strict-liability offense; a conviction under MCL 287.323(2) requires proof beyond a reasonable doubt (1) that the defendant owned or harbored a dog or other animal, (2) that the dog or other animal met the definition of a dangerous animal in MCL 287.321(a) before and throughout the incident at issue, (3) that the owner knew that the dog or other animal met the definition of a dangerous animal before the incident, and (4) that the animal attacked a person and caused a serious injury, as defined in MCL 287.321(e), other than death.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Karen A. Bahrman*, Prosecuting Attorney, for the people.

Kathryn S. Denholm for defendant.

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

M. J. KELLY, J. In this interlocutory criminal appeal, the prosecution appeals by leave granted the circuit court's order denying defendant John Wesley Janes's motion to quash his bindover on the charge of owning a dangerous animal causing serious injury. See MCL 287.323(2). Although the circuit court denied Janes's motion to quash, it also determined that the statute at issue was not a strict-liability offense, as the prosecutor contended, and it warned the prosecutor that she would have to prove at trial that Janes had a negligent criminal intent. On appeal, the prosecution argues that the circuit court erred when it imposed a criminal-intent requirement on the statutory language because the Legislature intended MCL 287.323(2) to be a strict-liability offense. We conclude that, although the statute is silent on criminal intent, that silence is not dispositive. The statute must be interpreted in light of the

background principles of the common law and, when read in that light, this offense is not a strict-liability offense; rather, the statute requires proof that the owner knew that his or her animal was a dangerous animal within the meaning of the dangerous animal statute before the incident at issue. For this reason, we affirm the circuit court's order and remand this case for further proceedings consistent with this opinion.

I. BASIC FACTS

At Janes's May 2012 preliminary examination, Carol Karr testified that she assisted Cheryl Anderson with caring for Anderson's ailing mother. Karr stated that she helped Anderson at her home, which was in the country, several days each week. A few months before the incident at issue, Janes, and later his adult son, moved into Anderson's home. Janes was recovering from knee surgery at the time.

Anderson owned a cocker spaniel and, after Janes moved in with Anderson, he went to a local shelter and acquired a pit bull. Karr said that Anderson and Janes would let the dogs out into the yard and they would play. However, she saw the pit bull get aggressive with the cocker spaniel; he would "stand over the [c]ocker and not let the [c]ocker get up . . . ." She stated that the pit bull had bitten the cocker spaniel, but did not injure it.

Karr testified that, on the day at issue, Anderson had gone to work, but called to say that she expected a friend's child to visit. Anderson told Karr that the child would be dropped off by the school bus. Karr said she was on the phone when she saw the child coming up the driveway and went onto the porch to greet her. At the time, the dogs were on the wheelchair ramp in the front yard.

Karr stated that the cocker spaniel jumped on the child, but ceased when Karr told it to stop. At that point, the pit bull jumped up and bit the child's face and then her arm. Karr told the person she was speaking with on the phone to call 911 as she grabbed the child and lifted her up and away from the pit bull. The pit bull then began to attack the child's legs: "He bit her, grabbed her, started shaking her. He was pulling her out of my arms." She described the dog's demeanor as "very fierce." Karr said a neighbor heard her screaming for help and came over and used a shovel to separate the dog from the child, but even then the dog would "spin around and attack again." Eventually, Janes's son got the dog into the house and police officers arrived. Karr said that, after the dog was removed, she could see that the child had injuries to her face and arm, but she said the injuries to the child's leg were the most severe: "her knee was torn up bad right to the bone."

Karr testified that the pit bull had not, to her knowledge, threatened or attacked any people during the six weeks that she knew it. She did, however, testify that Janes's son told her that the pit bull had bitten him.

Bill Carlson testified at the preliminary examination that he was a deputy with the Alger County Sheriff's Department. He investigated the pit bull and determined that the dog had been surrendered to the local shelter on April 23, 2012, and adopted by Janes on April 27, 2012. He stated that the incident occurred on May 18, 2012.

Carlson said that the staff at the shelter were surprised to hear that the dog was involved in an attack because they thought the "dog was a friendly dog." He also contacted the previous owner and learned that the previous owner had taken the dog in as a "rehab" that

had been "abused prior to her receiving it." The previous owner had indicated that she was wary of the dog, but she did not report any attacks or biting incidents. Indeed, when she surrendered the dog she signed a statement that the " 'animal has not bitten anyone to my knowledge in the past 14 days.' " The previous owner told Carlson that she surrendered the dog because she could no longer give it the time it needed. Carlson related that, when he went to the shelter to ensure that the dog was properly secured, it charged him.

After hearing the testimony at the preliminary examination, the district court determined that MCL 287.323(2) was a strict-liability offense and that there was sufficient evidence to bind Janes over.

In June 2012, Janes moved to quash the bindover and dismiss the charge against him. Specifically, Janes argued that MCL 287.323(2) must be read to include criminal intent and, because the prosecutor had failed to present any evidence that he "caused the attack, had any knowledge or notice of the dog's dangerous nature, or that [he] acted with gross negligence," the charge must be dismissed.

In an opinion and order entered in July 2012, the circuit court agreed that MCL 287.323(2) was not a strict-liability offense, but nevertheless denied the motion to quash the bindover and dismiss the charge. The court explained that the bindover was valid because there was evidence that Janes had been negligent or reckless. It also stated that all "future proceedings shall be conducted and tried with the understanding that" this *mens rea* "shall be part and parcel of any jury instruction on the charge."

The prosecution then appealed to this Court by leave granted.

II. THE ELEMENTS OF MCL 287.323(2)

A. STANDARDS OF REVIEW

Whether the Legislature intended a statute to impose strict liability or intended it to require proof of criminal intent is a matter of statutory interpretation. *People v Quinn*, 440 Mich 178, 185; 487 NW2d 194 (1992). This Court reviews de novo the proper interpretation and application of statutes. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

B. BACKGROUND PRINCIPLES ON CRIMINAL INTENT

Under Michigan's common law, every conviction for an offense required proof that the defendant committed a criminal act (*actus reus*) with criminal intent (*mens rea*). *People v Likine*, 492 Mich 367, 393; 823 NW2d 50 (2012); *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005) (opinion by KELLY, J.), citing *People v Rice*, 161 Mich 657, 664; 126 NW 981 (1910); *Tombs*, 472 Mich at 466 (TAYLOR, C.J., concurring), citing *People v Roby*, 52 Mich 577, 579; 18 NW 365 (1884) (COOLEY, C.J.). Criminal intent can be one of two types: the intent to do the illegal act alone (general criminal intent) or an act done with some intent beyond the doing of the act itself (specific criminal intent). *People v Langworthy*, 416 Mich 630, 639; 331 NW2d 171 (1982). Thus, when a statute prohibits the willful doing of an act, the act must be done with the specific intent to "bring about the particular result the statute seeks to prohibit." *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983).

In contrast, a strict-liability offense is one in which the prosecution need only prove beyond a reasonable doubt that "the defendant committed the prohibited act, regardless of the defendant's intent and regardless

of what the defendant actually knew or did not know." *Likine*, 492 Mich at 393. Our Supreme Court has recognized that the Legislature can constitutionally enact offenses that impose criminal liability without regard to fault. *Quinn*, 440 Mich at 188. And whether the Legislature intended to enact a strict-liability offense is generally a matter of statutory interpretation. *Id*. at 185-188. In determining whether the Legislature intended to dispense with criminal intent, our Supreme Court has adopted the analytical framework first stated by the United States Supreme Court in *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952). See *Quinn*, 440 Mich at 185-188.

In *Morissette*, the Court recognized that the contention that a criminal act must normally be done with criminal intent is "no provincial or transient notion"; it "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette*, 342 US at 250. The principle that an offender cannot be convicted of a crime unless it is proved that there was a "concurrence of an evil-meaning mind with an evil-doing hand" "took deep and early root in American soil." *Id*. at 251-252. And for that reason, when legislatures began to codify the common law, courts generally assumed that those statutes included criminal intent:

> As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. [*Id*. at 252.]

For these reasons, courts will not lightly presume that the Legislature intended to dispense with the criminal

intent traditionally required at common law: "the omission of any mention of criminal intent" must not "be construed as eliminating the element from the crime." *Tombs*, 472 Mich at 454 (opinion by KELLY, J.), citing *Morissette*, 342 US at 272-273. Instead, courts will "infer the presence of the element unless a statute contains an express or implied indication that the legislative body wanted to dispense with it." *Tombs*, 472 Mich at 454.

With these background principles in mind, we shall now examine the elements of the statute at issue.

C. THE DANGEROUS-ANIMAL STATUTE

Whether the Legislature intended to impose strict liability under MCL 287.323(2) is a matter of legislative intent. *Quinn*, 440 Mich at 185. And determining legislative intent, by necessity, must begin with a review of the language actually used by the Legislature in drafting the statute. *People v Williams*, 491 Mich 164, 172; 814 NW2d 270 (2012). When the statutory language is clear and unambiguous, this Court must enforce it as written. *Id*.

In 1988, the Legislature enacted a statutory scheme to deal with dangerous animals. See 1988 PA 426, enacting MCL 287.321 through 287.323, effective March 30, 1989. As part of that scheme, the Legislature provided criminal penalties for the owners of dangerous animals that injure or kill persons. See MCL 287.323(1) through (3). In this case, the prosecution charged Janes with violating MCL 287.323(2), which penalizes the owner of a dangerous animal that causes a serious injury:

> If an animal that meets the definition of a dangerous animal in [MCL 287.321(a)] attacks a person and causes serious injury other than death, the owner of the animal is guilty of a felony, punishable by imprisonment for not more

> than 4 years, a fine of not less than $2,000.00, or community service work for not less than 500 hours, or any combination of these penalties.

To prove a violation of this statute, the prosecution must prove beyond a reasonable doubt that the defendant was an owner, which is defined to mean "a person who owns or harbors a dog or other animal." MCL 287.321(c). The prosecution must also prove that the owner's animal attacked a person and caused "serious injury other than death" to that person. MCL 287.323(2); see also MCL 287.321(e) (defining "serious injury" as "permanent, serious disfigurement, serious impairment of health, or serious impairment of a bodily function of a person"). Finally, the Legislature also required the prosecution to prove that the animal was one "that meets the definition of a dangerous animal." MCL 287.323(2).

By referring to an animal "that meets" the definition of a dangerous animal at the time that the animal "attacks a person," the Legislature indicated that the animal must meet the definition even before the attack at issue. For that reason, it necessarily follows that the prosecution cannot use the incident at issue to prove that the animal was a dangerous animal. To hold otherwise would be to rewrite the statute to state: If an animal meets the definition of a dangerous animal in MCL 287.321(a) by attacking a person and causes serious injury other than death, the owner is guilty of a felony. But the Legislature did not write the statute in that way—it chose to require proof that the animal is one "that meets" the definition *and* "attacks a person and causes serious injury . . . ." MCL 287.323(2). The Legislature used the present tense for both "meet" and "attack" in the conditional clause (if the animal "meets" the definition and "attacks" a person) to show

that the animal must meet the definition of a dangerous animal before and throughout the attack giving rise to criminal liability. Thus, the prosecution must prove both that the animal qualified as a dangerous animal before the incident at issue and continued to qualify as a dangerous animal throughout the incident. MCL 287.321(a); MCL 287.323(2).

Consequently, we hold that, in order to establish that a defendant violated MCL 287.323(2), the prosecution must prove beyond a reasonable doubt that (1) the defendant owned or harbored a dog or other animal, (2) the dog or other animal met the definition of a dangerous animal provided under MCL 287.321(a) before and throughout the incident at issue, and (3) the animal attacked a person causing serious injury, as defined under MCL 287.321(e), other than death.

From a review of these elements, it is apparent that the Legislature did not specifically address any particular criminal intent that must be proved in order to establish a violation of MCL 287.323(2). But the " 'simple omission of the appropriate phrase' " from the statute is not, by itself, sufficient to " 'justify dispensing with an intent requirement'. . . ." *Liparota v United States*, 471 US 419, 426; 105 S Ct 2084; 85 L Ed 2d 434 (1985), quoting *United States v United States Gypsum Co*, 438 US 422, 438; 98 S Ct 2864; 57 L Ed 2d 854 (1978). Because we must construe the statute in light of the background principles of the common law, "in which the requirement of some *mens rea* for a crime is firmly embedded," *Staples v United States*, 511 US 600, 605; 114 S Ct 1793; 128 L Ed 2d 608 (1994), we must infer that the Legislature intended some criminal intent in the absence of an indication that the Legislature expressly or impliedly intended to dispense with that element, *Tombs*, 472 Mich at 454 (opinion by KELLY, J.);

id. at 466 (TAYLOR, C.J., concurring). Recognizing that this Court must infer the existence of a criminal intent element unless the Legislature explicitly or implicitly provided otherwise, the prosecution argues on appeal that there is "abundant and compelling" evidence that the Legislature intended to impose strict liability under MCL 287.323(2).

1. PUBLIC-WELFARE STATUTE

The prosecution first argues that this offense is a "public welfare offense," which offenses do not traditionally require any criminal intent. Specifically, the prosecution contends that mere ownership of an animal—because animals are "potentially dangerous thing[s]"—is sufficient to warrant the imposition of criminal liability without regard to knowledge or intent when the animal causes death or serious injury. For that reason, the prosecution maintains, there need be no proof that the owner had "prior knowledge of the animal's particular propensity for dangerousness" or otherwise acted negligently in handling the animal.

In *Staples*, the petitioner appealed his conviction for possessing an unregistered machine gun (an assault rifle that had been modified to be capable of fully automatic fire). *Staples*, 511 US at 603. On appeal, the petitioner argued that, in order to be convicted of possessing an unregistered machine gun, the prosecutor had to prove that the petitioner "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." *Id*. at 602. In considering the matter, the Supreme Court first analyzed the statute and noted that it was silent with respect to the criminal intent necessary to convict, but this silence did not "necessarily suggest that Congress intended to dispense with a conventional *mens rea*

element, which would require that the defendant know the facts that make his conduct illegal." *Id*. at 605. Similarly to the case here, the prosecution in *Staples* argued that the statute at issue was a public-welfare offense that regulated inherently dangerous devices—firearms—and, for that reason, Congress's silence on criminal intent should not give rise to a "presumption favoring *mens rea*." *Id*. at 606.

The United States Supreme Court recognized that the presumption in favor of imposing criminal intent as an element does not invariably apply to public-welfare or regulatory offenses: "In construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense." *Id*. The Court explained that public-welfare offenses generally apply to items whose character is such that a reasonable person would understand that he or she may be held strictly liable for his or her possession of the item:

> In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." Thus, we essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements. [*Id*. at 607 (citations omitted; alteration in original).]

In rejecting the prosecution's contention that the presumption should not apply, the Supreme Court noted that it typically avoids construing a statute to

dispense with criminal intent "where doing so would 'criminalize a broad range of apparently innocent conduct.' " *Id*. at 610, quoting *Liparota*, 471 US at 426. And it stated that dangerousness alone would not put the average person on notice of the potential for strict liability:

> Under [the prosecution's] view, it seems that *Liparota*'s concern for criminalizing ostensibly innocuous conduct is inapplicable whenever an item is sufficiently dangerous—that is, dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with *mens rea*. But that an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence. [*Staples*, 511 US at 611.]

Here, it is beyond dispute that a significant portion of Michigan's citizens own animals, including a large portion who own dogs. It is similarly beyond reasonable dispute that almost all dogs have the potential to inflict injury—that is, that dogs are, in "some general sense," dangerous. *Id*. But that being said, there has been widespread lawful ownership of dogs in this nation since before its founding. See *id*. at 610 (finding it significant that there has been a "long tradition of widespread lawful gun ownership" in the United States). And the danger posed by dogs in the general sense is not such as to "alert an individual to probable regulation" that might render him or her a felon if the dog injures a person. *Id*. at 611. As was the case in *Liparota* and *Staples*, we are reluctant to construe this statute in a way that "would impose

criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of [the animal] in their possession—makes their actions entirely innocent." *Id*. at 614-615. To paraphrase the United States Supreme Court, we find it unthinkable that the Legislature intended to subject law-abiding, well-intentioned citizens to a possible four-year prison term if, despite genuinely and reasonably believing their animal to be safe around other people and animals, the animal nevertheless harms someone. See *id*. at 615. That is, we are reluctant to impute to our Legislature the intent of dispensing with the criminal-intent requirement when it would "mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation" under the statute. *Id*. at 616. Rather, we think that the Legislature intended to impose criminal liability under MCL 287.323(2) only when the owner *knows* that his or her animal possessed the characteristics that brought it within the statutory definition. See *id*. at 602. Indeed, we find it compelling that the Legislature has already demonstrated that it can—when it wishes—draft a statute that imposes strict liability on dog owners, but nevertheless chose not to do so here. See MCL 287.351(1) ("If a dog bites a person, without provocation . . . , the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness."). Accordingly, given the Legislature's failure to explicitly or impliedly provide for strict liability, we hold that the prosecution must prove beyond a reasonable doubt that the owner knew that his or her animal was a dangerous animal within the meaning of MCL 287.321(a) before the incident at issue.

2. STATUTORY SCHEME

We also do not agree with the prosecution's contention that the statutory scheme as a whole evinces a legislative intent to dispense with proof of criminal intent. The prosecution relies heavily on the fact that the Legislature provided for criminal penalties when an owner has an "animal previously adjudicated to be a dangerous animal" that causes an injury that is not serious or allows that animal to "run at large." MCL 287.323(3) and (4). Specifically, the prosecution contends that, by requiring prosecutors to prove that the animal was previously "adjudicated to be a dangerous animal," the Legislature indicated that those offenses require a showing that the owner had prior knowledge of the animal's dangerous character, which, the prosecution further maintains, is in stark contrast to the requirements of MCL 287.323(1) and (2). However, MCL 287.323(3) and (4) do not in fact require proof that the owner had prior knowledge of the animal's dangerous propensities—they only require that the animal, without regard to the owner's knowledge, has been adjudicated as such. An owner may acquire an animal that has been previously adjudicated to be a dangerous animal within the meaning of MCL 287.321(a) without any knowledge that the animal has been so adjudicated. And the additional requirement that the animal has been previously adjudicated to be a dangerous animal is consistent with a scheme that imposes some level of knowledge before criminal liability can attach; that is, the Legislature might reasonably have determined that an owner's knowledge that an animal has bitten or attacked someone in the past—without a specific adjudication of dangerousness—is sufficient by itself to warrant the imposition of criminal liability when the animal subsequently injures or kills another, see MCL 287.323(1) and (2), but that a higher showing is neces-

sary to impose criminal liability for lesser injuries or for allowing such an animal to run at large.

For similar reasons, we also do not agree that the Legislature's decision to include exceptions to the general definition of a dangerous animal shows that it intended to dispense with a criminal-intent element. As we have already explained, the Legislature's decision to limit an owner's liability to situations in which an animal "that meets" the definition of a dangerous animal "attacks" a person means that the prosecution must prove, in relevant part, that the animal has previously bitten or attacked a person. MCL 287.323(2); MCL 287.321(a). The definition of a dangerous animal is quite broad and could subject an owner to liability for any harm subsequently caused by his or her animal even when the prior incident was not representative of the animal's dangerous propensities. The Legislature decided to exclude some animals from the definition even though the animal may have previously bitten or attacked a person. The Legislature determined that an animal should not be deemed a dangerous animal if it bit or attacked a trespasser, if the animal bit or attacked a person who provoked or tormented it, or if the animal was responding to protect a person. MCL 287.321(a)(*i*) through (*iii*). The Legislature also determined that the definition should not apply to livestock. MCL 287.321(a)(*iv*).

These exclusions are consistent with a legislative intent to impose a criminal-intent element premised on the owner's knowledge that the animal meets the definition of a dangerous animal. The Legislature could reasonably have concluded that an owner who is aware that his or her animal bit or attacked a person in the past, but who knows that the bite or attack occurred under unique circumstances not indicative of a danger-

ous propensity, is not on notice that the animal presents a higher degree of danger to the public at large. Therefore, it could reasonably have believed that such an owner should not be held criminally liable for any future harm caused by that animal. In contrast, an owner who knows that his or her animal has bitten or attacked a person in the past and did so under circumstances that did not exclude the animal from the definition provided under MCL 287.321(a) is on notice that his or her animal poses a danger to the public and, accordingly, the Legislature could reasonably have concluded that the owner should be held criminally liable for any future harm that the animal causes.

3. GROSS NEGLIGENCE

Although we agree that MCL 287.323(2) includes a criminal-intent element, we do not agree with the circuit court's decision to impose a negligence standard. We also disagree with Janes's contention on appeal that the prosecution must prove that his gross negligence caused the injuries at issue. We acknowledge that this Court has previously held that, in order to establish a violation of MCL 287.323(1), the prosecution must prove that the defendant's gross negligence in handling the animal caused the victim's death. See *People v Trotter*, 209 Mich App 244; 530 NW2d 516 (1995). However, the Court in *Trotter* premised its holding on the Legislature's decision to state that a person who violated that section was guilty of involuntary manslaughter, which was a common-law offense with a criminal-intent element. *Id*. at 248-249.

In contrast to that section, none of the remaining sections of 1988 PA 426 refer—impliedly or otherwise—to negligent conduct. Rather, the primary focus in the remaining sections is on the defendant's status as the owner

of an animal that meets the definition of a dangerous animal under MCL 287.321(a) and causes the specified injuries or engages in the proscribed behavior. See MCL 287.323(2) through (4). Although it is clear that the Legislature's purpose in enacting these sections was to prevent the harms identified in the statute (i.e., to prevent dangerous animals from running at large or injuring persons), it is equally clear that it sought to discourage these harms by placing owners on notice that they will be held criminally liable for any harms caused by their dangerous animals. Stated another way, it is evident to us that the Legislature sought to curtail the *ownership* of dangerous animals and not the negligent *keeping* or *handling* of dangerous animals. Consequently, we believe the most natural reading of this statutory scheme is to impose liability on owners who *knowingly* keep a dangerous animal that causes the specified harm and to do so without regard to the reasonableness of the owner's conduct.

III. CONCLUSION

The circuit court did not err when it determined that the Legislature's silence with respect to criminal intent required under MCL 287.323(2) did not render that offense a strict-liability crime. Michigan courts must infer a criminal intent for every offense in the absence of an express or implied Legislative intent to dispense with criminal intent. Because there is no indication that the Legislature intended to make MCL 287.323(2) a strict-liability offense, we infer that the Legislature intended to require the prosecution to prove criminal intent. We further conclude that having the requisite intent is proof that the owner knew that his or her animal met the definition of a dangerous animal under

MCL 287.321(a). For these reasons, we hold that the prosecution must prove the following elements beyond a reasonable doubt in order to convict Janes under MCL 287.323(2): (1) that Janes owned or harbored a dog or other animal, (2) that the dog or other animal met the definition of a dangerous animal provided under MCL 287.321(a) before and throughout the incident at issue, (3) that he knew that the dog or other animal met the definition of a dangerous animal within the meaning of MCL 287.321(a) before the incident at issue, and (4) that the animal attacked a person and caused a serious injury other than death.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

JANSEN, J. (*dissenting*). In my opinion, the Michigan Legislature intended to make the criminal offense set forth in § 3(2) of the dangerous animals act, MCL 287.323(2), a strict-liability crime. Therefore, I respectfully dissent.

Section 3(2) of the dangerous animals act, MCL 287.323(2), provides:

> If an animal that meets the definition of a dangerous animal in [MCL 287.321(a)] attacks a person and causes serious injury other than death, the owner of the animal is guilty of a felony, punishable by imprisonment for not more than 4 years, a fine of not less than $2,000.00, or community service work for not less than 500 hours, or any combination of these penalties.

In turn, § 1(a) of the dangerous animals act, MCL 287.321(a), provides:

> "Dangerous animal" means a dog or other animal that bites or attacks a person, or a dog that bites or attacks and

> causes serious injury or death to another dog while the other dog is on the property or under the control of its owner. However, a dangerous animal does not include any of the following:
>
> (*i*) An animal that bites or attacks a person who is knowingly trespassing on the property of the animal's owner.
>
> (*ii*) An animal that bites or attacks a person who provokes or torments the animal.
>
> (*iii*) An animal that is responding in a manner that an ordinary and reasonable person would conclude was designed to protect a person if that person is engaged in a lawful activity or is the subject of an assault.
>
> (*iv*) Livestock.

The use of the present tense in § 1(a) suggests that an animal can meet the definition of a "dangerous animal" the very first time it "bites or attacks" a person or another dog. Noticeably absent from § 1(a) is any indication that, in order to meet the definition of a "dangerous animal," an animal must have a known propensity for dangerousness. Nor does § 1(a) require that the animal has previously bitten or attacked a person or another dog. Accordingly, it is clear that an animal may constitute a "dangerous animal" within the meaning of § 1(a) the very first time it bites or attacks a person or another dog.

Similarly, § 3(2) does not require that the owner of the animal know of the animal's propensity for dangerousness. The only elements enumerated in § 3(2) are (1) that the animal "meets the definition of a dangerous animal" and (2) that the animal "attacks a person and causes serious injury other than death." MCL 287.323(2).

I fully acknowledge that "where [a] criminal statute is a codification of the common law, and where mens rea

was a necessary element of the crime at common law," courts generally "will not interpret the statute as dispensing with knowledge as a necessary element." *People v Quinn*, 440 Mich 178, 185-186; 487 NW2d 194 (1992); see also *Morissette v United States*, 342 US 246, 250-251; 72 S Ct 240; 96 L Ed 288 (1952). But unlike § 3(1) of the dangerous animals act, MCL 287.323(1), which specifically refers to MCL 750.321, which in turn codifies the prohibition against the common-law offenses of voluntary and involuntary manslaughter, see *People v Trotter*, 209 Mich App 244, 248-249; 530 NW2d 516 (1995), § 3(2) of the dangerous animals act is not a codification of the common law. "[W]here the offense in question *does not* codify a common-law offense and the statute omits the element of knowledge or intent," this Court must examine "the intent of the Legislature to determine whether it intended that knowledge be proven as an element of the offense, or whether it intended to hold the offender liable regardless of what he knew or did not know." *Quinn*, 440 Mich at 186 (emphasis added).

It is well established that, pursuant to the state's general police power, the Legislature may enact criminal statutes that punish certain conduct irrespective of the actor's intent, knowledge, or state of mind. *Id*. at 186-187; see also *Shevlin-Carpenter Co v Minnesota*, 218 US 57, 69-70; 30 S Ct 663; 54 L Ed 930 (1910). Especially in the context of public-welfare legislation, the Legislature may choose "to protect those who are otherwise unable to protect themselves by placing 'the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.' " *Quinn*, 440 Mich at 187, quoting *United States v Dotterweich*, 320 US 277, 281; 64 S Ct 134; 88 L Ed 48 (1943). I conclude that § 3(2) is just such a public-welfare statute and that the criminal offense set

forth therein contains no scienter requirement because the Legislature intended to shift "the burden of acting at hazard" to those who own and possess animals in this state. See *Dotterweich*, 320 US at 281.

I find support for this conclusion in the legislative history of the dangerous animals act. I recognize that legislative bill analyses "are 'generally unpersuasive tool[s] of statutory construction' " and "do not necessarily represent the views of any individual legislator." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007) (citation omitted; alteration in original). But "legislative bill analyses do have probative value in certain, limited circumstances." *Id*.

The dangerous animals act was added by way of 1988 PA 426, effective March 30, 1989. 1988 PA 426 was originally introduced as House Bill 4897 and went through several minor revisions before it was ultimately enacted by the Legislature. As indicated in the final legislative bill analysis of HB 4897, one of the arguments in favor of the bill was that it "would provide stiff penalties for irresponsible pet owners who endangered others by their failure to properly train or restrain their pets. Such penalties would encourage owners to take their responsibilities seriously . . . ." House Legislative Analysis, HB 4897 (as enrolled), January 20, 1989. This language further supports my conclusion that, in enacting § 3(2), the Legislature intended to shift the burden of acting to pet owners in an effort "to protect those who are otherwise unable to protect themselves," *Quinn*, 440 Mich at 187, irrespective of any particular pet owner's knowledge or state of mind.

I conclude that the offense set forth in § 3(2) of the dangerous animals act is a strict-liability crime, containing no scienter requirement. Accordingly, I would

affirm the circuit court's denial of defendant's motion to quash, but reverse the circuit court's warning to the prosecution that it will have to prove defendant's criminal intent at trial.

BELLEVUE VENTURES, INC v MORANG-KELLY INVESTMENT, INC

Docket No. 309743. Submitted July 10, 2013, at Detroit. Decided July 30, 2013, at 9:00 a.m.

Bellevue Ventures, Inc., brought an action in the Wayne Circuit Court against Morang-Kelly Investment, Inc., alleging that Morang-Kelly had stopped making payments on some used supermarket equipment it had purchased from plaintiff and installed at one of its Detroit stores. Morang-Kelly responded that the equipment was faulty and, further, that it was not a party to the purchase and installation agreement because the person who signed it, Mike Awdish, was not Morang-Kelly's authorized agent. The court, Prentis Edwards, J., awarded plaintiff $90,336.84 of the $95,700 balance due on a theory of unjust enrichment. Judge John A. Murphy entered a judgment in that amount, and defendant appealed.

The Court of Appeals *held*:

1. The trial court erred by striking defendant's countercomplaint, amended answers, and amended affirmative defenses on the ground that these items failed to appear in the register of actions or the physical case file. MCR 2.107(G) requires only that a party confirm that its pleadings have been filed *with* the clerk, not *by* the clerk, and defendant presented copies of the documents at issue that had been time-stamped by the court clerk's office. However, this error was harmless because the court allowed defendant to pursue the substance of the stricken defenses and counterclaim throughout the trial.

2. The trial court did not err by refusing to dismiss plaintiff's cause of action on the ground that the documents it had provided defendant were under the name of a corporation that no longer existed. Plaintiff had the capacity to recover damages under a theory of unjust enrichment regardless of the corporation's status.

3. The trial court did not err by concluding that Awdish had either actual or apparent authority to act as defendant's agent. Furthermore, plaintiff would have been entitled to recover damages under a theory of unjust enrichment regardless of Awdish's legal status.

4. The record was insufficient to determine whether the trial court erred by proceeding with a bench trial rather than a trial by jury. Remand was necessary to determine whether plaintiff had actually filed the jury demand on which defendant asserted it had relied.

Reversed and remanded; jurisdiction retained.

1. PLEADINGS — FILING WITH COURT CLERK.

Under MCR 2.107(G), it is a party's responsibility to confirm that it has filed its pleadings and other materials with the court clerk; a party need not be able to prove that the clerk subsequently filed these documents or included them in the register of actions.

2. PLEADINGS — FILING WITH COURT CLERK — PROOF OF FILING.

The presentation of a time-stamped copy of a document constitutes proof of compliance with the filing requirements of MCR 2.107(G).

Sitto Law, PLLC (by *Brent F. Sitto* and *Timothy Mulligan*), for plaintiff.

Chasnick Terrasi, PLLC (by *David A. Chasnick* and *Margaret S. Terrasi*), for defendant.

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant appeals by right the circuit court order awarding plaintiff $90,336.84, for unjust enrichment. For the reasons stated below, we reverse and remand.

I. FACTS

Plaintiff, Bellevue Ventures, Inc., doing business as Metro Equipment, Inc., is a Michigan corporation engaged in the business of purchasing, refurbishing, and selling used equipment. Defendant, Morang-Kelly Investment, Inc., doing business as Farmer's Best, is a Michigan corporation engaged in the supermarket business.

In April of 2010, plaintiff filed a complaint against

defendant alleging breach of contract and unjust enrichment. Plaintiff alleged that it had entered into a contract for the sale and installation of used supermarket refrigeration equipment at defendant's Wyoming Street location in Detroit with a person named Mike Awdish; however, defendant had ceased making payments on the equipment with an outstanding balance of $95,700 that remained to be paid. At a bench trial on the matter, defendant asserted that the equipment was faulty and had cost defendant tens of thousands of dollars in lost product and repair costs, that defendant was not a party to the contract at issue because Awdish was not an authorized agent of defendant, and that Awdish had merely given the equipment to defendant.

At the conclusion of trial, the trial court issued an oral opinion awarding plaintiff $90,336.84. In support of this award, the trial court ruled that although there was no written contract between the parties, an informal agreement existed between plaintiff and Awdish. The court further ruled that Awdish either was or held himself out to be defendant's agent and that the equipment was still in use by defendant and defendant would be unjustly enriched if it did not perform its side of the agreement. The trial court arrived at the award by using the contract price and offsetting the amount actually paid to plaintiff, as well as giving credit to defendant for repair expenses incurred within a reasonable time after purchase.

II. ANALYSIS

First, defendant argues that the trial court erred by striking defendant's countercomplaint, amended answers, and amended affirmative defenses. We agree, but find the error harmless. We review a lower court's

striking of a pleading for an abuse of discretion. *Jordan v Jarvis*, 200 Mich App 445, 452; 505 NW2d 279 (1993).

At the time defendant's pleadings were struck, MCR 2.107(G) provided that "[t]he filing of all pleadings and other papers with the court as required by [the court] rules must be with the clerk of the court . . . ."[1] Further, "[i]t is the responsibility of the party who presented the papers to confirm that they have been filed with the clerk." *Id*.

Plaintiff moved to strike defendant's countercomplaint, amended answers, and amended affirmative defenses after they failed to appear in either the register of actions or the physical case file. Defendant presented to the trial court copies of the pleadings, all of which contained a time-stamp from the Wayne County Clerk's Office, and established that a third-party summons concerning the pleadings had been issued by the clerk; however, the trial court struck the pleadings on the basis of defendant's failure to ensure that they had been filed with the clerk pursuant to MCR 2.107(G).

On appeal, defendant asserts that it did everything required under the court rules to ensure that the documents in question were filed, and that the trial court abused its discretion by granting plaintiff's motion to strike. We agree. The court rule provides that "[i]t is the responsibility of the party who presented the materials to confirm that they have been filed with the clerk." MCR 2.107(G). The rule does not, however, require that the party who presented the materials to the clerk confirm that the clerk subsequently filed the materials in the physical file or included them in the register of actions. Accordingly, we hold that proof of filing *with* the clerk, and not proof of filing *by* the clerk,

[1] This provision was amended effective January 1, 2013, but the minor changes in phrasing do not affect the applicability of our analysis.

is sufficient to establish compliance with MCR 2.107(G). We further hold that the presentation of time-stamped copies to the trial court constitutes proof of such compliance, and plaintiff's motion to strike should have been denied.

Despite this error, however, the trial court's erroneous grant of plaintiff's motion to strike was rendered harmless by the fact that the trial court permitted defendant to pursue the substance of the stricken defenses and counterclaim throughout trial. In those documents, defendant had asserted that any alleged breach was justified by the fact that plaintiff had supplied defendant with defective merchandise and that defendant had incurred substantial costs while repairing those defects. At trial, significant portions of testimony and argument were devoted to the state of the equipment sold to defendant by plaintiff. In fact, at the conclusion of trial, the trial court ordered an offset to the amount awarded to plaintiff to account for some of the repairs that defendant was required to pay for after purchasing the merchandise in question. Therefore, defendant suffered no prejudice and is not entitled to relief.

Additionally, defendant argues that the trial court erred by ruling that plaintiff had the legal capacity to file a lawsuit. We disagree. We review a trial court's decision on a motion in limine for an abuse of discretion. *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986).

In the instant case, on the morning of trial, defendant made a motion in limine seeking dismissal of plaintiff's cause of action, arguing that all of the invoices and documents provided to defendant had been under the name of Metro Equipment, Inc., and that no such corporation existed. Accordingly, defendant argued that Metro Equipment, Inc. lacked the legal power to

sue and that plaintiff's action must be dismissed, as plaintiff was holding itself out as Metro Equipment, Inc. The trial court rejected defendant's argument.

On appeal, defendant continues to assert that it was entitled to dismissal on the grounds that Metro Equipment, Inc. is not a valid corporation. Defendant fails to recognize, however, that the trial court awarded a judgment to plaintiff under a theory of unjust enrichment. The elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991). In such instances, the law operates to imply a contract in order to prevent unjust enrichment. *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). However, a contract will be implied only if there is no express contract covering the same subject matter. *Id*.

Here, the record reflects that there was no express contract between the parties, and that defendant received a benefit from plaintiff in the form of refrigeration equipment, installation, and maintenance. The record also shows that plaintiff was not paid in full for those goods and services. Under these facts, inequity would result if plaintiff were allowed to retain the benefit of the unpaid goods and services, and these facts alone are sufficient to establish both a theory of unjust enrichment and, by extension, plaintiff's capacity to recover damages. Therefore, because plaintiff had the power to sue under the equitable theory of unjust enrichment, the trial court did not err by permitting the case to go to trial.

Defendant also argues that the trial court erred by finding that Mike Awdish was an agent of defendant. We disagree. We review a trial court's findings of fact for clear error. MCR 2.613(C).

The Michigan Supreme Court has defined "apparent authority" as follows:

> Whenever the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal, or without interference suffers the agent to assume such a position, and thereby justifies those dealing with the agent in believing that he is acting within his mandate, an apparent authority results which replaces that actually conferred as the basis for determining rights and liabilities. [*Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957) (citation and quotation marks omitted).]

Here, not only did Awdish hold himself out as having authority to bind defendant with regard to the store the equipment was being installed in, defendant ratified this apparent authority by accepting the goods and services, as well as the invoices for those goods and services. Defendant's assertions at trial and on appeal—that Awdish was not an agent of defendant and that defendant was not a party to the agreement at issue—are completely belied by defendant's conduct, as well as by the facts of this case.

Further, as noted, remedy in this matter was granted under the equitable theory of unjust enrichment. It was undisputed at trial that defendant received the equipment from plaintiff, that the equipment was still in use by—in fact, "needed" by—defendant, and that plaintiff had not been fully compensated for the equipment and services it rendered to the benefit of defendant. Under those facts, the agency status of Awdish is of no true legal significance, because defendant received a benefit from plaintiff and inequity would have resulted from the retention of the benefit. *Dumas*, 437 Mich at 546. Therefore, either because Awdish had authority or apparent authority to bind defendant to an agreement or because plaintiff provided defendant with a benefit

that would be unjust for defendant to retain, the trial court did not err by ruling that defendant was liable for the outstanding balance due on the equipment in question.

Finally, defendant argues that the trial court erred by proceeding with a bench trial rather than a trial by jury. We find that the record is insufficient to determine this issue. We review whether a party has a right to a jury trial de novo. *In re MCI Telecom Corp Complaint*, 240 Mich App 292, 311; 612 NW2d 826 (2000).

Under MCR 2.508(D)(1), a party who fails to file a jury demand or pay the jury fee waives the right to trial by jury. Under MCR 2.508(D)(3), "[a] demand for trial by jury may not be withdrawn without the consent, expressed in writing or on the record, of the parties or their attorneys."

In the instant case, a bench trial was conducted over the objections of defendant, who asserted that plaintiff had filed a jury demand on which defendant had relied. While the register of actions reflects that plaintiff paid a jury fee and filed a jury demand, no jury demand appears in the lower court record and no reference to a jury demand was made in any of plaintiff's filings.

Unfortunately, and much to the frustration of this Court, deficiencies and irregularities in the record and register of actions have been substantial issues throughout the instant case at both the trial and appellate court levels. Given the systemic deficiencies in the record, we are unable to determine with any degree of certainty whether we should base our determination on the content found in the register of actions, or the lack of content found in the lower court record.[2]

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[2] As we indicated previously, defendant had time-stamped copies of pleadings that are neither in the file nor in the register of actions, and

Accordingly, we find it necessary to remand this issue to the trial court for an evidentiary hearing as to whether or not a jury demand was properly filed and a jury fee was paid in this matter. Only then can a final determination be made as to whether or not defendant was entitled to a jury trial.

Reversed and remanded for the reasons stated in this opinion. We retain jurisdiction.

FORT HOOD, P.J., and FITZGERALD, J., concurred with RONAYNE KRAUSE, J.

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although plaintiff indicates that no jury fee was paid and no jury demand was filed, both are noted on the register of actions.

McLEAN v CITY OF DEARBORN

Docket No. 309563. Submitted June 5, 2013, at Detroit. Decided August 1, 2013, at 9:00 a.m.

Patricia McLean brought an action in the Wayne Circuit Court against the city of Dearborn, seeking damages for injuries sustained when she stepped off a sidewalk and into a pothole in a road. Plaintiff's attorney sent a notification letter to the city's manager and mayor indicating that plaintiff had been injured after tripping and falling on a city street. Plaintiff's attorney subsequently responded to a communication from Broadspire, plaintiff's third-party claims administrator, giving full details about plaintiff's injuries, as well as the specific location of the accident. Defendant filed a motion for summary disposition, arguing that plaintiff had failed to provide presuit notice of her claim, as required by MCL 691.1404, because plaintiff had failed to adequately describe her alleged injuries and the exact nature of the defect. Plaintiff argued that any defects in the original notice were cured by the subsequent letter to Broadspire. The trial court, Daniel P. Ryan, J., denied defendant's motion, concluding that the original notice sufficiently described the nature of the defect by enclosing pictures of the defect and that plaintiff's letter to Broadspire, describing the nature of her injuries, was sufficient to satisfy the MCL 691.1404 notice requirement. Defendant appealed.

The Court of Appeals *held*:

1. For purposes of the highway exception to governmental immunity, MCL 691.1402(1), a person who is injured by reason of a governmental agency failing to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel, must timely notify the governmental agency that has jurisdiction over the roadway of the injury sustained, the nature of the defect, and the names of known witnesses, MCL 691.1404(1). Notice need not be provided in any particular form and is sufficient if it is timely and contains the requisite information. The required information does not have to be contained within the initial notice; it is sufficient if a supplemental notice received by the governmental agency within the 120-day period

contains the required elements. In this case, the trial court properly concluded that plaintiff's description of the nature and location of the defect in the original notification letter that was sent to the city manager and mayor satisfied the MCL 691.1404(1) notification requirement; any deficiency in the written description was remedied by the inclusion of photographs of the defect.

2. Plaintiff's original notice to defendant that she had received "significant injuries" did not comply with the notification-of-the-injury-sustained requirement of MCL 691.1404(1) because the description was inadequate to inform defendant of her actual injuries.

3. MCL 691.1404(2) requires that notice of the injury sustained and location of the highway defect may be served on any individual who may lawfully be served with civil process directed against the governmental agency. Under MCR 2.105(G)(2), service of process may be made on the mayor, the city clerk, or the city attorney of a city. However, for purposes of MCR 2.105(H)(1), service of process may be made on a defendant by serving an agent authorized by written appointment or by law to receive service of process. Broadspire was not authorized by statute or court rules to receive service of process on behalf of defendant The trial court erred by concluding that plaintiff's supplemental letter to Broadspire functioned as a supplemental notice under MCL 691.1404(2).

4. Defendant properly preserved the issue of deficient service of process by raising it in the trial court.

Reversed and remanded for entry of summary disposition in favor of defendant.

M. J. KELLY, P.J., dissenting, would have concluded that plaintiff established a question of fact whether she complied with the MCL 691.1404 notice requirement when she sent the supplemental letter to Broadspire and would have affirmed the trial court's denial of defendant's summary disposition motion.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — NOTICE OF INJURIES — SERVICE OF PROCESS — THIRD-PARTY CLAIMS ADMINISTRATOR.

For purposes of the highway exception to governmental immunity, notice to the alleged responsible governmental agency of the injury sustained and location of the highway defect that caused the injuries may be served on any individual who may lawfully be served with civil process directed against the governmental agency; under MCR 2.105(G)(2), service of process may be made on the mayor, the city clerk, or the city attorney of a city; for purposes of MCR 2.105(H)(1), service of process may be made on a defendant by serving an agent authorized by written appointment or by

law to receive service of process; absent an express written authorization, a third-party claims administrator is not authorized to accept service of process on behalf of a city defendant for purposes of notification of the injuries sustained from an alleged highway defect (MCL 691.1404[1] and [2]).

Kaufman, Payton & Chapa (by *Lawrence C. Atorthy*), for Patricia McLean.

William H. Irving and *Debra A. Walling* for city of Dearborn.

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

BOONSTRA, J. Defendant appeals by right the order of the trial court denying defendant's motion for summary disposition. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) on the grounds of governmental immunity. Because we find that the trial court erred by concluding that plaintiff had satisfied the notice requirements of MCL 691.1404(1), and the defect was not cured by subsequent communications to defendant's third-party claims administrator, we reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff alleged that she tripped and fell while stepping off a sidewalk onto a road in the city of Dearborn on July 11, 2008. She stated at her deposition that her left foot "went right into that pothole," causing her to fall and sustain injuries. After attempting to ice and rest her foot, plaintiff had her husband take her to Oakwood Hospital that same day. Plaintiff stated that "They took x-rays and told me my foot was broken and that I'd have to go in and have a cast put on."

Five days later, plaintiff's attorney sent a letter addressed to the "City Manager or Mayor's Office" of defendant. The letter stated in relevant part:

> RE: OUR CLIENT: PATRICIA MCLEAN; DATE OF INCIDENT: JULY 11, 2008; LOCATION OF INCIDENT: PUBLIC STREET LOCATED DIRECTLY ACROSS FROM 1136 MASON STREET, DEARBORN, MICHIGAN 48124
>
> Dear City Manager or Mayor:
>
> Please be advised that my client, Patricia Mclean, sustained a significant injuries [sic] as a result of tripping and falling due to a hazardous and defective city street at the above referenced location.
>
> * * *
>
> On the above date, Ms. Mclean sustained the above-mentioned injuries when she tripped and fell on a defective portion of city street located directly across the street from 1136 Mason, Dearborn, Michigan. Enclosed you will find color laser copies of photographs showing the exact location where our client's injury occurred, as well as of the hazardous defect that was allowed to remain on the street.

On September 16, 2008, plaintiff's attorney responded to a communication from Ms. Flory Morisette of the Claims Department of Broadspire. The parties agree that Broadspire is defendant's third-party claims administrator (TPA). The letter stated in relevant part:

> As you know, our office serves as counsel to [plaintiff], who was seriously injured on city property on the referenced date. Pursuant to your letter dated August 7, 2008, I have enclosed multiple photographs of the exact location of the raised, defective, and uneven portion of the "highway" located directly across from 1136 Mason Street in the public street in the City of Dearborn (see attached). In addition, my client has sustained a fractured left foot and has tretated [sic] at Oakwood Hospital and will seek follow up care.

On July 8, 2010, plaintiff filed a complaint in the trial court, alleging numerous injuries, including a fractured left foot; head, neck and back injuries; injuries to the upper and lower extremities; permanent scarring; headaches; "severe shock"; "[s]evere humiliation and embarrassment"; and "severe, frequent and persistent pain," as well as aggravation of preexisting medical conditions. Plaintiff also described the defect as "a broken, deteriorated, cracked, crumbled, hole."

Defendant filed a motion for summary disposition, arguing that plaintiff had failed to provide adequate presuit notice of her claim pursuant to MCL 691.1404. Specifically, defendant argued that plaintiff had failed to adequately describe the alleged injuries sustained and the exact nature of the defect. Plaintiff responded that any defects in the original notice were cured by the subsequent letter to Broadspire.

The trial court agreed with plaintiff, concluding that the original notice sufficiently described the nature of the defect by enclosing pictures of the defect. The trial court further concluded that plaintiff's letter to Broadspire sufficiently described the nature of her injury to satisfy the notice requirement of the statute. The trial court therefore denied defendant's motion for summary disposition. Defendant moved the trial court for reconsideration, which the trial court denied. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7) and (C)(10). *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010); *Maiden v Rozwood*; 461 Mich 109, 118; 597 NW2d 817 (1999). 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. *Oliver*, 290 Mich App at 683. In reviewing a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other evidence introduced by the parties to determine whether no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. MCR 2.116(G)(4); *Maiden*, 461 Mich at 119. The evidence submitted must be considered "in the light most favorable to the opposing party." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011).

III. NOTICE

The governmental tort liability act, MCL 691.1401 *et seq*., provides immunity from tort claims to governmental agencies engaged in a governmental function, as well as governmental officers, agents or employees. The Legislature has set forth six exceptions to governmental tort immunity. *Lash v City of Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). Relevant here is the "highway exception" to governmental immunity, which allows a governmental agency to be liable for damages caused by an unsafe highway. MCL 691.1402(1) provides in relevant part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for

> travel may recover the damages suffered by him or her from the governmental agency.

This exception is to be narrowly construed. *Grimes v Dep't of Transp*, 475 Mich 72, 78; 715 NW2d 275 (2006).

An injured person is required to timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the nature of the defect, and the names of known witnesses. MCL 691.1404(1); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200, 203-204, 219; 731 NW2d 41 (2007). Failure to provide adequate notice under this statute is fatal to a plaintiff's claim against a government agency. *Id*. at 219. MCL 691.1404 provides in relevant part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3)[1] shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding.

Notice need not be provided in any particular form and is sufficient if it is timely and contains the requisite information. *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). The required information

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[1] Subsection 3 refers to injured claimants under the age of 18 and is not relevant to the instant case.

does not have to be contained within the plaintiff's initial notice; it is sufficient if a notice received by the governmental agency within the 120-day period contains the required elements. *Id*.

MCL 691.1404 is "straightforward, clear, unambiguous" and "must be enforced as written." *Rowland*, 477 Mich at 219. Although under some circumstances this Court will conclude that a notice is sufficient despite a technical defect, see *Plunkett v Dep't of Transp*, 286 Mich App 168, 176-177; 779 NW2d 263 (2009), the plaintiff must at least "adequately" provide the required information. *Id*. at 178. " ' "Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects." ' " *Id*. at 177, quoting *Jones v Ypsilanti*, 26 Mich App 574, 584; 182 NW2d 795 (1970), in turn quoting *Smith v City of Warren*, 11 Mich App 449, 455; 161 NW2d 412 (1968). Thus, in *Plunkett*, we found that any ambiguity in the plaintiff's description of the nature of the defect was remedied by the precise description of the defect's location, including the attached police report. *Id*. at 178-179.

A. NOTICE OF THE LOCATION AND NATURE OF THE DEFECT WAS SUFFICIENT

Defendant argues first that plaintiff did not describe the exact nature of the defect. We agree with the trial court that the description of the nature and location of the defect in the original notification letter sent to the city manager and mayor, which included color photographs of the defect, was sufficient. Although the written description of a "hazardous and defective city street," standing alone, would not provide sufficient notice of the exact nature of the defect, defendant was also provided with color photos of the defect, and a

description of the defect as being located "directly across the street from 1136 Mason, Dearborn, Michigan." The pictures show a hole in the concrete surface of the road and provide landmarks, such as a light post, a large line in the concrete, and the doorway of the building directly across the street, which would assist defendant's agents in finding and repairing the defect. There are also close-up pictures of the defect. Any deficiency in the written description is therefore remedied by the inclusion of the photographs. *Plunkett*, 286 Mich App at 178-179.

We decline to accept defendant's argument that plaintiff admitted at her deposition that the photos did not accurately depict the defect. Plaintiff stated, in her deposition taken three years after the accident, that the hole in the picture was not "as crumbled looking" as she recalled it looking on the day of the accident, and agreed that it did not really represent how it looked when she fell. She further stated that it looked as though it was "not as deep" and "it could have been filled in."

The purpose of requiring notice is to provide the governmental agency with an opportunity to investigate the claim while it is fresh and to remedy the defect before another person is injured. *Plunkett*, 286 Mich App at 176-177. Nothing in MCL 691.1404, or our caselaw, indicates that a plaintiff can "undo" the sufficiency of the notice provided to a governmental agency at their deposition, especially by stating that, according to their three-year-old recollection, they remembered a pothole being deeper or more crumbled. Plaintiff did not state that the pictures *did not show* the defect or that she was *unable to state* that the defect caused her injury—instead she merely remarked that it appeared less crumbled and/or deep than she remembered. We decline to base the sufficiency of notice provided under

MCL 691.1404 on the vagaries of human memory; indeed the purpose of the notice requirement is precisely to avoid the sort of imprecision that may occur when testimony is taken and evidence collected years later, by allowing claims to be investigated when they are still fresh. *Id*. The notice provided was sufficient in its description of the nature and location of the defect.

B. THE INITIAL NOTICE LACKED SUFFICIENT DESCRIPTION OF THE NATURE OF PLAINTIFF'S INJURY

Were that the only issue with the original notice, we likely would affirm the trial court. However, defendant also argues, and we agree, that plaintiff failed to describe "the injury sustained" as required by MCL 691.1404(1). Plaintiff stated in the initial notice that she had received "a significant injuries [sic]." This is a significant ambiguity that was not remedied by clarity in any other aspects of the notice. As we already noted, in 2010 plaintiff in fact alleged a whole host of injuries in her complaint; defendant was not provided with notice of those injuries. The description of plaintiff's injury contained in the original notice was thus wholly inadequate; plaintiff cannot be deemed to have complied, substantially or otherwise, with this statutory requirement. *Plunkett*, 286 Mich App at 176-177.

Plaintiff argues that she could not provide "an expert level of commentary" on her injury a mere five days after her accident, and invites this Court to consider a scenario in which she alleged that her ankle was sprained, only to lose her claim when it was discovered that her ankle was broken or that she had actually injured her tibia. This hypothetical situation is not before this Court. Rather, plaintiff knew, at a minimum, that she had fractured her left ankle, as she obtained medical treatment and x-rays the very day of the

accident. Yet the description of her injury did not even name a body part that was injured. Thus, while (and consistent with our precedents) we do not construe MCL 691.1404 in an overly restrictive manner, *Plunkett*, 286 Mich App at 176-177, so as to "make it difficult for the average citizen to draw a good notice," *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969) (quotation marks and citation omitted), neither do we accept plaintiff's invitation to allow the statutory requirement to be satisfied by the mere recitation of the phrase "significant injury." To do so would essentially render this aspect of the MCL 691.1404(1) notice requirement illusory or nugatory in contravention of our canons of statutory construction. See *Apsey v Memorial Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007).

C. THE LETTER TO BROADSPIRE WAS NOT SERVED IN ACCORDANCE WITH MCL 691.1404(2) AND MCR 2.105

Having determined that the initial notice to defendant was insufficient, we now determine whether the defect was cured by plaintiff's subsequent communication to defendant's TPA. Plaintiff is correct that all the information required by MCL 691.1404(1) does not have to be contained within the plaintiff's initial notice; it is sufficient if a notice received by the governmental agency within the 120-day period contains all the required elements. *Burise*, 282 Mich App at 654. However, we disagree that plaintiff's letter to Broadspire can be considered "notice" to defendant under MCL 691.1404(2). The statute provides that "notice may be served upon any individual . . . who may lawfully be served with civil process directed against the government agency . . . ." *Id*. MCR 2.105(G)(2) provides that service of process may be made on "the mayor, the city clerk, or the city attorney of a city." By the plain language of this statute and court rule, service on a TPA

is not sufficient. Judicial construction of MCL 691.1404 is not permitted. *Rowland*, 477 Mich at 219.

Plaintiff agrees that MCR 2.105(G)(2) does not provide for service of process on a TPA. However, plaintiff argues, for the first time on appeal, that MCR 2.105(H)(1) allows for such service in this case.[2] That court rule provides that service of process on a defendant may be made on "an agent authorized by written appointment or by law to receive service of process." *Id*.[3] Plaintiff argues that, by virtue of Broadspire's response to plaintiff's original letter, defendant represented to plaintiff that Broadspire was defendant's agent in this matter. Plaintiff cites *Burise*, 282 Mich App at 655, in support of this claim. In *Burise*, we held that a supplemental notice, *properly served*, may cure an inadequate initial notice. *Id*. Although the supplemental notice in *Burise* was served on defendant's representative, the issue in

[2] Plaintiff made no such argument in the trial court. The dissent nonetheless posits that the majority wrongly responds to this argument on behalf of defendant, since defendant had not addressed the argument before the trial court. The parties indeed confined their arguments before the trial court to whether service to Broadspire was valid under MCL 691.1404(2) and MCR 2.105(G)(2). And the plain language of that statute and court rule indicate that the service was defective. Plaintiff did not raise an argument under MCR 2.105(H)(1) until this appeal. Since plaintiff had not previously raised the argument, defendant properly responded to it for the first time on appeal. A party on appeal is not precluded from urging an "alternative ground for affirmance." *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998). It is in that context that we address, and reject, plaintiff's argument. The dissent makes reference to waiver of appellate issues; indeed, if anyone, it would be *plaintiff* who waived our review of this alternate ground for affirmance by failing to raise the argument before the trial court. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). We do not find that plaintiff waived this argument; but in considering it and rejecting it, we are confident that we do not overstep the role of this Court.

[3] As the dissent notes, this language also appears in MCL 600.1930.

Burise was whether MCL 691.1404(1) allowed piecemeal notice, not whether the service was defective. *Id*. As the *Burise* Court did not analyze whether service was proper under MCL 691.1404(2), and the opinion does not contain facts that indicate whether the defendant's representative was authorized to receive service under MCR 2.105(H)(1), we conclude that *Burise* does not aid plaintiff's position.

There is simply no record evidence in this case indicating that Broadspire was authorized by *written appointment* or *law* to accept service on behalf of defendant. MCR 2.105(H)(1). Plaintiff's claim appears to rest on the theory of apparent authority. *Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957), quoting 2 CJS, Agency, § 96 (b), pp 1210-1211 (" 'Whenever the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal . . . an apparent authority results which replaces that actually conferred as the basis for determining rights and liabilities.' ") However, the claim must fail in light of the clear language of the relevant court rule and MCL 691.1404(2).[4] In the absence of any evidence of a written appointment of Broadspire as defendant's agent (for purposes of receiving service of process), or any law granting Broadspire such authority, plaintiff's

[4] The dissent also appears to rely on a theory of apparent authority, as it states that language from the letter from Broadspire "permits an inference that the City had authorized Broadspire to act on its behalf" and that "a reasonable fact-finder could infer that the City granted this authority to Broadspire in a written agreement." However, defendant's apparent appointment of Broadspire as a third party administrator in no way suggests or equates to a "written appointment . . . to receive service of process." We reiterate that judicial construction of MCL 691.1404 and MCL 600.1930 is not permitted because they are clear and unambiguous. *Rowland*, 477 Mich at 219.

letter to Broadspire simply did not function as a supplemental notice under the statute.[5]

Plaintiff again invites this Court to consider a hypothetical scenario in which a defendant engages outside counsel to contact plaintiff for more information about the claim, arguably barring the plaintiff from dealing or communicating directly with the defendant. Such a situation is not before this Court; nor do the notice requirements of MCL 691.1404 or the service requirements of MCR 2.105, govern all dealings between the parties. We see no great injustice in requiring plaintiffs seeking to provide notice to defendants under the statute to serve their notices on the correct parties. Although plaintiff asserts that there "should be no requirement that the supplemental notice be served upon the same cast of persons as identified in MCR 2.105(G)," we are not in a position to re-write the statute or the court rule. We reiterate that our Supreme Court has found this notice provision to be both constitutional and unambiguous. *Rowland*, 477 Mich at 219.[6]

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[5] Additionally, we note that plaintiff's letter to Broadspire was not personally served, and the record does not contain evidence indicating it was served by "registered or certified mail" as required by MCR 2.105(A). Thus, even if we determined that Broadspire was authorized to accept service on behalf of defendant, that service would still have been defective under the relevant court rule.

[6] This is not to say that we are without sympathy for plaintiff's position. Indeed, we are troubled by the fact that plaintiff is seemingly penalized for doing that which defendant's TPA requested (in response to plaintiff's initial inadequate notice), i.e., providing additional information, only to determine later that it should have provided that information not to (or only to) the requesting TPA, but rather (or additionally) to such persons as may be "lawfully served with civil process" against defendant. MCL 691.1404(2). However, our sympathy is offset by the sheer inadequacy of the initially provided notice, as well as by the presumption that plaintiff knows the law. *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000). Our Supreme Court has held that the applicable statute, MCL 691.1404, is "straightforward, clear, unambiguous"

Finally, plaintiff's waiver argument is simply incorrect. Plaintiff claims that defendant never raised the issue of deficient service of process until its motion for reconsideration. However, the record indicates that defendant in fact raised the issue at the motion hearing on the parties' cross-motions for summary disposition:

> MR. IRVING [Attorney for defendant]: Thank you, your Honor. I just wanted to point out with respect to that second notice, we, that is Broadspire is a third-party administrator that the city has been using to adjust certain claims. We didn't get this notice from Broadspire. . . . I just wanted to point out to the Court as well that even if that, we don't concede that that's a timely or proper notice because it wasn't to the city, it was to a third party.
>
> * * *
>
> MR. IRVING: The statute requires service on the mayor, the clerk, or the city attorney of the notice.

Defendant also alleged in its first responsive pleading that plaintiff failed to give timely, adequate, and sufficient notice to defendant. There is no basis for concluding that defendant waived this issue, which was alleged in a responsive pleading and raised before and decided (at least implicitly) by the trial court in ruling on the parties' motions. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

IV. CONCLUSION

The unambiguous language of MCL 691.1404 requires this Court to reverse the trial court's denial of summary disposition on the grounds that plaintiff

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and "must be enforced as written." *Rowland*, 477 Mich at 219. MCR 2.105 is no less clear and unambiguous. Our decision is therefore compelled by the plain language of the statute and court rule, without regard to our sympathies.

failed to provide a description of the injury she allegedly suffered. Additionally, we hold that the defect in the original notice was not cured by plaintiff's subsequent communication with Broadspire.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

MURRAY, J., concurred with BOONSTRA, J.

M. J. KELLY, P.J. (*dissenting*). This appeal turns on whether defendant, city of Dearborn, established that it was entitled to summary disposition on the ground that plaintiff, Patricia McLean, failed to give proper notice of her claim as required by MCL 691.1404. On this limited record, I conclude that McLean—at the very least—established a question of fact as to whether she complied with the notice requirement by providing a supplemental notice to the city's third-party claims administrator, Broadspire. Accordingly, I must respectfully dissent from the majority's decision to reverse the trial court's denial of the city's motion for summary disposition.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation and application of both statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

The city moved for summary disposition on the ground that it was immune from suit under the undisputed facts. See MCR 2.116(C)(7). In reviewing a motion under MCR 2.116(C)(7), courts must accept the allegations stated in the plaintiff's complaint as true

unless contradicted by documentary evidence submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The moving party may support its motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Id*., citing MCR 2.116(G)(5). However, if it is not apparent on the face of the pleadings that the moving party is entitled to immunity as a matter of law, the moving party *must* support its motion with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3). In determining whether to dismiss a claim under MCR 2.116(C)(7), the reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party has immunity. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996).

Although governmental entities are generally immune from tort liability when "engaged in the exercise or discharge of a governmental function," MCL 691.1407, they remain liable for "bodily injury or damage" caused by their failure to keep highways under their jurisdiction in "reasonable repair," MCL 691.1402(1). However, the Legislature provided that, as a condition of recovery, a person injured by a governmental agency's failure to properly maintain a highway under its jurisdiction must serve the governmental agency with notice of the occurrence and the defect within 120 days of the injury occurring. MCL 691.1404(1). In the notice, the injured party must "specify the exact location and nature of the defect," must describe "the injury sustained," and must give the "names of the witnesses" about which the injured person knows at the time of the notice. *Id*.

The city moved for summary disposition on the grounds that McLean's notice was deficient. Specifically, the city argued that McLean's notice, which was dated July 16, 2008, did not include the exact nature of the defect and did not include a description of the injury that she sustained. The city attached a copy of the July 16, 2008 letter to its motion for summary disposition. On its face, that letter did not provide the city with an adequate description of McLean's injuries.

McLean argued in response to the city's motion that she had submitted two separate letters to the city, which together satisfied the notice requirements within the 120 period. *Burise v City of Pontiac*, 282 Mich App 646, 654-655; 766 NW2d 311 (2009). McLean attached the second letter to her brief; the second later was dated September 16, 2008, and addressed to Broadspire.

When McLean's September 16, 2008, letter is examined together with her letter from July 16, 2008, McLean plainly provided the city with the minimum notice required under MCL 691.1404. And the majority here seems to concede that the letters would, if read together, comply with the notice requirements. Nevertheless, the majority concludes that it cannot consider the second letter because McLean submitted the letter to Broadspire and—in its view—Broadspire could not accept the notice on the city's behalf.

The Legislature provided that the required notice "may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency . . . ." MCL 691.1404(2). In the case of a city, process must generally be served on the "mayor, city clerk, or city attorney." MCL 600.1925(2). But it can also be accomplished by sending it to the "person in charge of the office of any of the above-

described officers," MCL 600.1925, or to an "agent authorized by written appointment," MCL 600.1930.[1]

As can be seen from a cursory reading of these statutory provisions, McLean could properly serve her notice on persons other than the mayor, city clerk, or city attorney. Thus, the mere fact that she served her notice on someone other than the mayor, city clerk, or city attorney did not—standing alone—establish that her second notice was improperly served. Accordingly, the trial court correctly rejected the city's claim that it could not consider this letter because it was not addressed to the identified city officials.

Despite this, the majority rejects McLean's second letter because there "is simply no record evidence that Broadspire was authorized by *written appointment* or *law* to accept service" on the city's behalf. That is, the majority rejects the second letter because, in its view, McLean had the burden to present evidence that established that the city had authorized Broadspire to accept notice—and that it did so through a written instrument—before any notice sent to Broadspire could be considered. The problem with this contention is that the city never made that argument. The city never challenged Broadspire's authority to receive process; it merely argued that the notice had to be sent to its mayor, city clerk, or city attorney. And that argument was plainly incorrect. In engaging in the analysis that it does, the majority essentially faults McLean for failing to properly respond to a motion that the city never made—that is, the majority seems to anticipate the defect in the city's actual motion and solves that problem by making the argument that the city could have made had it thought to do so. But it is not this Court's obligation or

[1] These statutory provisions have been incorporated into our court rules at MCR 2.105(G) and MCR 2.105(H).

place to remedy the deficiencies in a party's position on a motion for summary disposition; rather, to ensure fundamental fairness in the litigation process, this Court will typically only consider the arguments actually made and the evidence actually presented in considering the propriety of a trial court's decision on a motion for summary disposition. See *Barnard Mfg*, 285 Mich App at 380-383 (stating that this Court will not consider evidence that was not actually identified by the parties and that it is not the courts' responsibility to advocate on a party's behalf); *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (noting that the parties must raise an issue before the trial court or waive appellate review).

Because the argument that the city actually made before the trial court was insufficient to warrant disregarding the letter to Broadspire, the trial court was not precluded from considering it. This is not to say that the city might not be able to establish that the second notice was invalid; it may be able to do just that in a properly supported motion for summary disposition, but the motion at issue here was not such a motion.

Even setting aside the fact that the city never made the argument on which the majority now relies to reverse the trial court's decision, I cannot agree with the majority's premise that McLean failed to minimally support her position with evidence that the city authorized Broadspire to receive process.

In response to the city's motion for summary disposition, McLean argued that she properly submitted a second notice to the city. In support of her contention, she attached her letter dated September 16, 2008, to her brief. She also provided evidence that the city's claims adjuster solicited this second letter in a letter dated August 7, 2008. When this letter is read in the light

most favorable to McLean, which we must do, see *Tryc*, 451 Mich at 134, a reasonable fact-finder could conclude that the city contractually delegated to Broadspire the authority to handle every aspect of all civil claims against the city—that is, a reasonable fact-finder could conclude that Broadspire was an agent for purposes of MCL 600.1930.

In the August 7, 2008, letter, Flory Morisette wrote to McLean's lawyer on Broadspire letterhead; she stated: "We are in receipt of your letter dated July 16, 2008 regarding the above claimant, Patricia McLean. We are the [third-party administrator] for the city of Dearborn under the self insured liability program." Morisette requested McLean's personal information and information about the accident and her medical treatment, including copies of her medical records and bills. Morisette closed the letter by requesting a meeting:

> We would like to meet at your office to talk with both you and your client. We will discuss her loss facts and injuries. Please contact your client to obtain several dates and times of availability and contact me immediately to schedule a meeting. We are looking forward to meeting you and your client in the very near future.

Morisette's statements strongly suggest that the city granted Broadspire the authority to handle McLean's civil claim. Although McLean sent her first letter to the city's mayor, Morisette stated that "we" (referring to Broadspire and its staff) are in "receipt" of that letter. A reasonable fact-finder could infer that Morisette was actually representing to McLean's lawyer that she and her company were the lawfully appointed representatives for the city; the fact-finder could also infer that Broadspire would not have had McLean's information or be "in receipt" of her first letter unless the city had *in fact* authorized Broadspire to act on the city's behalf.

A reasonable fact-finder could conclude that the administrator of a self-insured fund would have broad authority to handle claims, which may include the authority to receive future service of process. And this inference was further bolstered by Morisette's assertion that she—not an official from the city's office—wanted to meet with McLean and her lawyer to discuss McLean's injuries and the facts of her case. This last statement, again, permits an inference that the city had authorized Broadspire to act on its behalf. Finally, a reasonable fact-finder could infer that the city granted this authority to Broadspire in a written agreement. Thus, Broadspire's letter is evidence, however limited, that the city actually authorized Broadspire to act as the city's agent for purposes of MCL 600.1930. Consequently, the trial court could properly consider this second letter in determining whether McLean complied with the notice requirements.

On the record evidence and arguments properly before this Court, the city failed to establish that it was entitled to summary disposition on the ground that McLean did not give it proper notice under MCL 691.1404. Consequently, I would affirm.

JACKSON COUNTY v CITY OF JACKSON

JACKSON COFFEE COMPANY v CITY OF JACKSON

Docket Nos. 307685 and 307843. Submitted June 27, 2013, at Lansing. Decided August 1, 2013, at 9:05 a.m.

Jackson County brought an original action in the Court of Appeals against the city of Jackson, alleging that the city violated provisions of the Headlee Amendment, Const 1963, art 9, §§ 25-34, when it adopted an ordinance, Ordinance No. 2011.02, that created a storm water utility and imposed under the ordinance a storm water management charge on all property owners within the city to generate revenue to pay for the services provided by the storm water utility. The county alleged that the storm water management charge was actually a tax levied without voter approval in violation of § 31 of the Headlee Amendment, Const 1963, art 9, § 31. The county sought declaratory, injunctive, and monetary relief. (Docket No. 307685.)

Jackson Coffee Company and Klein Brothers, LLC, also brought an original action in the Court of Appeals against the city of Jackson, alleging essentially the same facts and seeking the same relief. (Docket No. 307843.) The Court of Appeals consolidated the actions.

The Court of Appeals *held*:

1. A charge that is a user fee is not affected by the Headlee Amendment. There is no bright-line test to distinguish a valid user fee from a tax that violates the Headlee Amendment. However, generally, a fee is exchanged for a service rendered or a benefit conferred and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. The three primary criteria of a fee are that it serves a regulatory purpose, it is proportionate to the necessary costs of the service, and it is voluntary. A tax, however, is designed to raise revenue.

2. The storm water management charge imposed in this case serves the dual purposes of furthering a regulatory purpose and raising revenue. The management charge has an overriding revenue-generating purpose that outweighs the minimal regulatory purpose of the charge. The storm water management charge is a tax, not a utility user fee.

3. A true fee confers a benefit on the particular person on whom it is imposed, whereas a tax confers a benefit on the general public. Although a regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character, a charge is not a regulatory fee in the first instance unless it is designed to confer a particularized benefit on the property owners who pay the charge. In these cases, the Court of Appeals could not identify any particularized benefit the charge confers on the property owners that is not also conferred on the general public. The lack of a correspondence between the management charge and a particularized benefit conferred to the parcels supports a conclusion that the charge is a tax.

4. A fee need not generate an amount equal to that required to support the services the ordinance regulates in order to survive scrutiny. However, where the revenue generated by a regulatory fee exceeds the cost of regulation, the fee is actually a tax in disguise. A permissible utility service charge is one that reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component.

5. The method used by the city to apportion the management charges among all urban properties emphasizes administrative convenience and ease of measurement and suggests an absence of a close proportional relationship between the amount of runoff attributable to a particular parcel and the management charge, as does the fact that the method fails to consider property characteristics relevant to runoff generation.

6. Capital reserves of public utilities are properly funded by true user fees closely calibrated to the actual use of the service or the price paid for a commodity. The management charge at issue in these cases is not a true user fee. The actual use of the storm water sewer system by each parcel is not accounted for with the requisite level of precision necessary to support a conclusion that the charge is proportionate to the costs of the services provided.

7. The ordinance is effectively compulsory. This lack of volition supports the conclusion that the management charge is a tax imposed in violation of § 31 of the Headlee Amendment.

A declaratory judgment entered in favor of plaintiffs; city ordered to cease collecting the charge and ordered to reimburse only plaintiffs for any charges paid to date.

1. TAXATION — HEADLEE AMENDMENT — CONSTITUTIONAL LAW.

Section 31 of the Headlee Amendment prohibits units of local

government from levying any new tax or increasing any existing tax above authorized rates without the approval of the electorate (Const 1963, art 9, § 31).

2. TAXATION — FEES — MUNICIPAL CORPORATIONS.

The three primary criteria of a fee are that it serves a regulatory purpose, is proportionate to the necessary costs of the service, and is voluntary; a tax is primarily designed to raise revenue; a true fee confers a benefit on the particular person on whom it is imposed, while a tax confers a benefit on the general public; although a regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory function, a charge is not a regulatory fee in the first instance unless it is designed to confer a particularized benefit on the individuals who must pay the charge.

3. TAXATION — FEES — MUNICIPAL CORPORATIONS.

Fees charged by a municipality for providing a service must be reasonably proportionate to the direct and indirect costs of providing the service; the fees need not generate the exact amount required to support the service provided, however, when the revenue generated by a fee exceeds the costs of providing the service, the fee may be a tax in disguise.

4. MUNICIPAL CORPORATIONS — UTILITY SERVICES CHARGES — USER FEES — CAPITAL RESERVES.

A permissible utility service charge is one that reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component; capital reserves of public utilities are properly funded by true user fees closely calibrated to the actual use of the service or the price paid for a commodity.

Cohl, Stoker & Toskey, PC (by *Timothy M. Perrone*), for Jackson County.

Brian W. Surgener for the Jackson Coffee Company and Klein Brothers, LLC.

Julius A. Giglio, City Attorney, *Bethany M. Smith*, Deputy City Attorney, and *Miller Canfield Paddock and Stone, PLC* (by *Michael P. McGee*, *Sonal Hope Mithani*, and *Jeffrey S. Aronoff*), for the city of Jackson.

Before: MURPHY, C.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM. Plaintiffs commenced these original actions in the Court of Appeals under Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment. The actions were consolidated by the Court of Appeals. The Jackson City Council adopted Ordinance No. 2011.02, pursuant to which the city created a storm water utility and imposed a storm water management charge on all property owners within the city to generate revenue to pay for the services provided by the utility, which include, among others, street sweeping, catch basin cleaning, and leaf pickup and mulching. The question posed by these actions is whether the city, by shifting the method of funding certain preexisting government activities from tax revenues to a utility charge, ran afoul of § 31 of the Headlee Amendment, Const 1963, art 9, § 31,[1] as construed and applied in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). We answer this question in the affirmative and hold that the city's storm water management charge is a tax, the imposition of which violates the Headlee Amendment because the city did not submit Ordinance 2011.02 to a vote of the qualified electors of the city. The charge is null and void.

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[1] Although plaintiffs allege a violation of § 25, Const 1963, art 9, § 25, their enforcement actions implicate only § 31. See, e.g., *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). Section 25 of the Headlee Amendment summarizes the "fairly complex system of revenue and tax limits" imposed by the amendment, *Durant v Michigan*, 456 Mich 175, 182; 566 NW2d 272 (1997), and is implemented through the other sections of the amendment, Const 1963, art 9, § 25. Additionally, we decline to address plaintiffs' claims that the imposition of the management charge violates Const 1963, art 4, § 32 and Const 1963, art 9, § 6 because these claims are outside the scope of our original jurisdiction conferred by § 32 of the Headlee Amendment, Const 1963, art 9, § 32.

I

The city maintains and operates separate storm water and waste water management systems. Various state permits authorize the city to discharge storm water through its separate storm water drainage system to the Grand River, as well as other waters of the state. Historically, the city has funded the operation and maintenance of its storm water management system with money from the city's general and street funds. The money in these funds is generated through the collection of ad valorem property taxes, gasoline taxes, and vehicle registration fees. With revenue from these taxes and fees in decline, the city retained an engineering and consulting firm to study the feasibility of establishing a storm water utility for the purpose of funding storm water management through dedicated "user fees." As acknowledged by the city in its Stormwater Management Manual,

> [w]hen subdivisions, roads and commercial developments are built or improved in the City of Jackson the City must pay for managing the resulting storm runoff. The City must install catch basins to capture storm water and storm sewers to convey the storm water to streams or rivers, ensuring it does not drain into the sanitary wastewater system and create sewer overflows. Furthermore the City must maintain the entire storm water collection system. In the past the City performed this work without a dedicated revenue source. The City used money from the general fund or the road budget, thus taking funds away from other critical programs. The storm water system is an expensive piece of the City's municipal infrastructure. The City's water and sanitary wastewater systems each have their own dedicated revenue sources derived from water and sanitary wastewater user fees. Water and sanitary wastewater users pay user fees that are partially calculated based on water consumption. However, this has not been the case with storm water management, which has had no

> user fees attached to it. Municipalities across the country are changing this. They now view their storm water systems as utilities similar to their water and sanitary wastewater systems. They are developing storm water user fee structures to pay for storm water planning, administration, construction and operation and maintenance.

Following the completion of the feasibility study, the city's Department of Public Works requested that the city create a storm water utility "to fund the activities currently included in the General Fund Drains at Large, Leaf Pickup, Mulching, Street Cleaning and Catch Basin Maintenance in the Major and Local Street accounts." The Jackson City Council adopted Ordinance 2011.02, known as the "Storm Water Utility Ordinance," at its January 11, 2011, meeting.

Ordinance 2011.02 establishes a storm water utility to operate and maintain the city's storm water management program. The ordinance funds this program through an annual storm water system management charge imposed on each parcel of real property, including undeveloped parcels, located within the city. All revenues generated by the storm water management charge are deposited in a storm water enterprise fund and "[n]o part of the funds . . . may be transferred to the general operating fund or used for any purpose other than undertaking the storm water management program, and operating and maintaining a storm water system." More specifically, the money in the enterprise fund may be used only to pay the "costs to acquire, construct, finance, operate and maintain a storm water system."

The management charge is computed using a formula developed by the engineering consultant that roughly estimates the amount of storm water runoff of each parcel. Anticipated storm water runoff is computed in terms of equivalent hydraulic area (EHA). This

method of computation involves an estimation of the amount of storm water leaving each parcel of property based on the impervious and pervious surface areas of each parcel. The ordinance defines the phrase "impervious area or surface" as "a surface area which is compacted or covered with material that is resistant to or impedes permeation by water, including but not limited to, most conventionally surfaced streets, roofs, sidewalks, patios, driveways, parking lots, and any other oiled, graveled, graded, or compacted surfaces." "[P]ervious area or surface" is "all land area that is not impervious."

The EHA base unit used to compute the amount of a management charge is the square footage for the average single family residential parcel. One EHA base unit is 2,125 sq. ft. The pervious and impervious areas of residential parcels with two acres or less of surface area are not measured individually. Instead, such parcels are assigned one EHA unit and charged a flat rate established by resolution of the city council, which is billed quarterly. For all other parcels, the management charge is based on the actual measurements of the pervious and impervious areas of each individual parcel. The number of EHA units for these latter parcels is calculated by multiplying a parcel's impervious area in square feet by a runoff factor[2] of 0.95 and the pervious area in square feet by a runoff factor of 0.15, adding these two areas and then dividing that total by 2,125 sq. ft. The number of EHA units is then multiplied by $2.70[3] to arrive at the monthly management charge.

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[2] The runoff factors are defined as the approximate fraction of rainfall that runs off the property to the storm drainage system.

[3] The city has reduced this figure to $2.50 since the filing of these suits. The city also has reduced the flat rate charged to the owners of residential property of two acres or less from $8 to $7.50.

The ordinance allows property owners to receive credits against the management charge for actions taken to reduce storm water runoff from their respective properties. At the time plaintiffs commenced these original actions, the ordinance allowed a residential property owner to receive a 50 percent credit against the charge by implementing city-approved "storm water best management practices" to capture and filter or store storm water. Such best practices include the creation of rain gardens or vegetated filter strips or the use of rain barrels or a cistern. The ordinance also allowed an owner of a nonresidential property to receive a credit against the service charge of between 37.5 and 75 percent for implementing best management practices designed to control storm water peak flows through the construction and use of detention or retention ponds. Schools could receive a 25 percent "education credit" for providing students with a regular and continuing program of education concentrating on the stewardship of the state's water resources. Finally, an owner of a parcel of real property that is contiguous to the Grand River could receive a credit of up to 75 percent for directly discharging storm water into the river. After the filing of these actions, and through amendments to the ordinance adopted by the city, the city increased the amount of credit allowed for certain property owners who engage in best management practices identified by the city.

Ordinance 2011.02 creates a right to an administrative appeal, but limits the scope of that appeal to "the grounds that the impervious and/or pervious area of the property is less than estimated by the Administrator or that the credit allowable to the property is greater than that estimated by the Administrator." Additionally, the ordinance authorizes the administrator of the utility to enforce payment of the management charge by discon-

tinuing water service to the property of a delinquent property owner, by instituting a civil action to collect any unpaid management charges, and by placing a lien against property for the unpaid charges and enforcing the lien "in the same manner as provided for the collection of taxes assessed upon such roll and the enforcement of the lien for the taxes."

The city began billing property owners for the management charge in May, 2011. Plaintiffs, who are property owners within the city, received invoices from the city for the management charges assessed against their respective properties, with their respective invoices for water service to their properties.

On December 16, 2011, plaintiff Jackson County commenced its instant Headlee Amendment enforcement action. Plaintiffs Jackson Coffee Company and Klein Brothers, LLC, commenced their enforcement action on December 28, 2011. Plaintiffs' claims for declaratory, injunctive, and monetary relief are predicated on the belief that the storm water management charge constitutes a disguised tax and, therefore, the imposition of the charge by the city violates § 31 of the Headlee Amendment because the city imposed the tax without a vote of the city's electorate.

II

Plaintiffs bear the burden of establishing the unconstitutionality of the city's storm water management charge. *Adair v Michigan*, 470 Mich 105, 111; 680 NW2d 386 (2004); *Kenefick v Battle Creek*, 284 Mich App 653, 655; 774 NW2d 925 (2009).

Plaintiffs' enforcement actions implicate § 31 of the Headlee Amendment, 1963 Const, art 9, § 31. An application of § 31 is triggered by the levying of a tax. *Bolt*, 459 Mich at 158-159. "Section 31 prohibits units of local

government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." *Durant v Michigan*, 456 Mich 175, 183; 566 NW2d 272 (1997). Thus, a tax imposed without voter approval "unquestionably violates" § 31. *Bolt*, 459 Mich at 158. However, a charge that is a user fee "is not affected by the Headlee Amendment." *Id*. at 159. "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id*. at 160. "Generally, a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id*. at 161 (quotation marks and citations omitted).

The seminal—and only—case addressing the distinction between a fee and a tax, in the context of storm water management, is our Supreme Court's decision in *Bolt*. In *Bolt*, the city of Lansing sought to limit the polluting of local rivers that resulted when heavy precipitation caused the city's combined storm water and sanitary sewer systems to overflow and discharge into those rivers combined storm water and untreated or partially treated sewage. *Id*. at 154-155. To this end, the city decided to separate the remaining combined storm and sanitary sewer system, at a cost of $176 million. *Id*. at 155. As a means to fund the costs of the sewer system separation,

> the Lansing City Council adopted Ordinance 925, which provides for the creation of a storm water enterprise fund "to help defray the cost of the administration, operation, maintenance, and construction of the stormwater system . . . ." The ordinance provides that costs for the storm water share of the CSO [combined sewer overflow] program (fifty percent of total CSO costs, including adminis-

tration, construction, and engineering costs) will be financed through an annual storm water service charge. This charge is imposed on each parcel of real property located in the city using a formula that attempts to roughly estimate each parcel's storm water runoff.

Estimated storm water runoff is calculated in terms of equivalent hydraulic area (EHA). As defined by the ordinance, EHA is "based upon the amount of pervious and impervious areas within the parcel multiplied by the runoff factors applicable to each." Impervious land area, which impedes water adsorption, thus increasing storm water runoff, is defined as

> [t]he surface area within a parcel that is covered by any material which retards or prevents the entry of water into the soil. Impervious land area includes, but is not limited to, surface areas covered by buildings, porches, patios, parking lots, driveways, walkways and other structures. Generally, all non-vegetative land areas shall be considered impervious.

Pervious land area is defined as "[a]ll surface area within a parcel which is not impervious[.]"

Residential parcels measuring two acres or less are not assessed charges on the basis of individual measurements, but, rather, are charged pursuant to flat rates set forth in the ordinance. These rates are based on a predetermined number of EHA units per one thousand square feet. For residential parcels over two acres, commercial parcels, and industrial parcels, the EHA for an individual parcel is calculated by multiplying the parcel's impervious area by a runoff factor of 0.95 and pervious area by a runoff factor of 0.15 and adding the two areas.

Charges not paid by the deadline are considered delinquent and subject to delayed payment charges, rebilling charges, property liens (if the charge remains unpaid for six months or more), and attorney fees if a civil suit is filed to collect delinquent charges. The ordinance further provides for a system of administrative appeals by property owners contending that their properties have been unfairly assessed. *Id*. at 155-157 (footnotes omitted).]

A taxpayer within the city of Lansing brought suit against the city on the ground that the storm water service charge constituted a tax disguised as a user fee that violated §§ 25 and 31 of the Headlee Amendment because the tax had not been submitted to or approved by a vote of the people. *Bolt*, 459 Mich at 154, 158. Our Supreme Court agreed, concluding that the storm water service charge was not a valid user fee, but, instead, was "a tax, for which approval is required by a vote of the people." *Id*. at 154. The Court reached this conclusion after considering a multiplicity of factors pertaining to the characteristics of fees and taxes, including the three primary criteria of a fee, which are: (1) a fee serves a regulatory purpose, (2) a fee is proportionate to the necessary costs of the service, and (3) a fee is voluntary. *Id*. at 161-162.

With regard to the first two criteria, the Court concluded that the storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service. Rather, the Court concluded that the service charge served a revenue-raising purpose. *Id*. at 163-167. According to the Court, " 'the "fee" is not structured to simply defray the costs of a "regulatory" activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens.' " *Id*. at 164, quoting *Bolt v City of Lansing*, 221 Mich App 79, 91; 561 NW2d 423 (1997) (MARKMAN, J., dissenting). The Court reached this conclusion, in part, because,

> [i]n instituting the storm water service charge, the city of Lansing has sought to fund fifty percent of the $176 million dollar cost of implementing the CSO control program over the next thirty years. A major portion of this cost (approximately sixty-three percent) constitutes capital expenditures. This constitutes an investment in infrastructure as

> opposed to a fee designed simply to defray the costs of a regulatory activity. [*Bolt*, 459 Mich at 163.]

For this same reason, the Court concluded that the " 'revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax.' " *Id*. at 164, quoting *Bolt*, 221 Mich App at 91 (MARKMAN, J., dissenting).

The Court further concluded that the storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service on the basis of the following two related failings of the ordinance:

> First, the charges imposed do not correspond to the benefits conferred. Approximately seventy-five percent of the property owners in the city are already served by a separated storm and sanitary sewer system. In fact, many of them have paid for such separation through special assessments. Under the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction. Moreover, the charge applies to all property owners, rather than only to those who actually benefit. A true "fee," however, is not designed to confer benefits to the general public, but rather to benefit the particular person on whom it is imposed. *Bray* [*v Dep't of State*, 418 Mich 149, 162; 341 NW2d 92 (1983); *Nat'l Cable Television Ass'n v United States & Federal Communications Comm*, 415 US 336, 340-342; 94 S Ct 1146; 39 L Ed 2d 370 (1974)].
>
> > The distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions, but according to some authorities, any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of

> maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax. [71 Am Jur 2d, State and Local Taxation, § 15, p 352.]

In this case, the lack of correspondence between the charges and the benefits conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public.

This conclusion is buttressed by the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. Improved water quality in the Grand and Red Cedar Rivers and the avoidance of federal penalties for discharge violations are goals that benefit everyone in the City, not only property owners. As stated by the Court of Appeals dissent[:]

> The extent of any particularized benefit to property owners is considerably outweighed by the general benefit to the citizenry of Lansing as a whole in the form of enhanced environmental quality. . . . When virtually every person in a community is a "user" of a public improvement, a municipal government's tactic of augmenting its budget by purporting to charge a "fee" for the "service" rendered should be seen for what it is: a subterfuge to evade constitutional limitations on its power to raise taxes. [*Bolt*, 221 Mich App at 96 (MARKMAN, J., dissenting).]

The second failing that supports the conclusion that the ordinance fails to satisfy the first two criteria is the lack of a significant element of regulation. See *Bray*, *supra* at 161-162; *Vernor* [*v Secretary of State*, 179 Mich 157, 167-169; 146 NW 338 (1914)]. The ordinance only regulates the amount of rainfall shed from a parcel of property as surface runoff; it does not consider the presence of pollutants on each parcel that contaminate such runoff and contribute to the need for treatment before discharge into navigable waters. Additionally, the ordinance fails to distinguish between those responsible for greater and lesser levels of runoff and excludes street rights of way from the

> properties covered by the ordinance. Moreover, there is no end-of-pipe treatment for the storm water runoff. Rather, the storm water is discharged into the river untreated. [*Bolt*, 459 Mich at 165-167.]

Next, the Court found that the charge lacked any element of voluntariness, which the Court found to be further evidence that the charge was a tax and not a user fee. The Court opined:

> One of the distinguishing factors of a tax is that it is compulsory by law, "whereas payments of user fees are only compulsory for those who use the service, have the ability to choose how much of the service to use, and whether to use it at all." Headlee Blue Ribbon Commission [, A Report to Governor John Engler, § 5, p 29]. The charge in the present case is effectively compulsory. The property owner has no choice whether to use the service and is unable to control the extent to which the service is used. The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property. [*Bolt*, 459 Mich at 167-168 (footnote omitted).]

Finally, the Court found that the following factors also supported the conclusion that the storm water charge was a tax: (1) the revenue generated by the charge was to be used on that portion of the project that had been previously funded by general fund revenue; (2) the indebtedness generated by the levying of the charge could be secured by a lien on property; and (3) the charge was billed through the city assessor's office and may be sent with the December property tax statements. *Id*. at 168-169.

The Court closed its opinion with the following admonition:

> We conclude that the storm water service charge imposed by Ordinance 925 is a tax and not a valid user fee. To conclude otherwise would permit municipalities to supplement existing revenues by redefining various government activities as "services" and enacting a myriad of "fees" for those services. To permit such a course of action would effectively abrogate the constitutional limitations on taxation and public spending imposed by the Headlee Amendment, a constitutional provision ratified by the people of this state. In fact, the imposition of mandatory "user fees" by local units of government has been characterized as one of the most frequent abridgments "of the spirit, if not the letter," of the amendment.
>
> > The danger to the taxpayer of this burgeoning phenomenon [the imposition of mandatory user fees] is as clear as are its attractions to local units of government. The "mandatory user fee" has all the compulsory attributes of a tax, in that it must be paid by law without regard to the usage of a service, and becomes a tax lien of the property. However, it escapes the constitutional protections afforded voters for taxes. It can be increased any time, without limit. This is precisely the sort of abuse from which the Headlee Amendment was intended to protect taxpayers. [Headlee Blue Ribbon Commission Report, *supra*, § 5, pp 26-27.] [*Bolt*, 459 Mich at 169.]

In the present cases, the documents provided this Court reveal that the management charge serves a dual purpose. The charge furthers a regulatory purpose by financing a portion of the means by which the city protects local waterways, including the Grand River, from solid pollutants carried in storm and surface water runoff discharged from properties within the city, as required by state and federal regulations. The charge also serves a general revenue-raising purpose by shifting the funding of certain preexisting government activities from the city's declining general and street fund revenues to a charge-based method of revenue genera-

tion. This latter method of revenue generation raises revenue for general public purposes by augmenting the city's general and street funds in an amount equal to the revenue previously used to fund the activities once provided by the city's Engineering and Public Work Departments and now bundled together and assigned to the storm water utility. Because the ordinance and the management charge serve competing purposes, the question becomes which purpose outweighs the other. *Id*. at 165-167, 169. We conclude that the minimal regulatory purpose served by the ordinance and the related management charge is convincingly outweighed by the revenue-raising purpose of the ordinance.

Ordinance 2011.02 suffers from the same lack of a significant element of regulation as the Lansing ordinance did. Although the ordinance confers the power of regulation on the utility's administrator, the ordinance contains few provisions of regulation and no provisions that truly regulate the discharge of storm and surface water runoff, with the exception of the provision that allows for credits against the management charge for the use of city-approved storm water best management practices. Moreover, as was the case in *Bolt*, the ordinance fails to require either the city or the property owner to identify, monitor, and treat contaminated storm and surface water runoff and allows untreated storm water to be discharged into the Grand River. *Bolt*, 459 Mich at 164-167. In these regards, the city's ordinance suffers from the same regulatory weaknesses as did the Lansing ordinance struck down as unconstitutional in *Bolt*.

Further, the documents generated by and on behalf of the city and provided this Court clearly show that the desire to protect the city's general and street funds from the costs of operating and maintaining the exist-

ing storm water management system constituted the most significant motivation for adopting the ordinance and management fee. As previously noted, before the adoption of the ordinance, the city paid the costs of operating and maintaining the storm water system, including the costs of street and catch basin cleaning and leaf pickup and mulching, with revenue from the city's general and street funds. In the documents supplied this Court, the city readily admits that the costs associated with maintaining the storm water system resulted in money from these funds being directed away from "other critical programs" and that budgetary pressures, including declining general fund revenue, necessitated the tapping of new sources of funding for the maintenance of the storm water system. Similarly, the storm water utility feasibility study commissioned by the city reflects that the primary purposes of the study were to devise a method of calculating a storm water management charge of sufficient amount to fund the preexisting services the city desired to delegate to the utility and to convince the city council that the imposition of the recommended management charge would not violate *Bolt* and the Headlee Amendment. The fact that the impetus for creating the storm water utility and for imposing the charge was the need to generate new revenue to alleviate the budgetary pressures associated with the city's declining general fund and street fund revenues, and the fact that the city's activities were previously paid for by these other funds are factors that support a conclusion that the management charge has an overriding revenue-generating purpose that outweighs the minimal regulatory purpose of the charge and, therefore, that the charge is a tax, not a utility user fee. The Headlee Amendment bars municipalities from supplementing their existing revenue

streams by redefining various government activities as services and then enacting "user fees" for those services. *Id*. at 169.

Likewise, the lack of a correspondence between the charge imposed and any particularized benefit conferred by the charge supports a conclusion that the charge is a tax and not a utility user fee. A true fee confers a benefit upon the particular person on whom it is imposed, whereas a tax confers a benefit on the general public. *Id*. at 165. Although a regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character, a charge is not a regulatory fee in the first instance unless it is designed to confer a particularized benefit on the property owners who must pay the fee. *Id*. at 165-166; *USA Cash #1, Inc v Saginaw*, 285 Mich App 262, 281; 776 NW2d 346 (2009). In the present cases, we cannot readily identify any particularized benefit the charge confers on the property owners that is not also conferred upon the general public. The city indicated in its original response to plaintiffs' complaints that the charge "assur[es] cleanliness and safety of the State's waters and watercourses." The city also indicated that the management charge enables the city to protect the public health and safety, to reduce the likelihood of flooding caused by excessive storm water runoff, to reduce the potential for land erosion, which can damage roads, bridges and other infrastructure and thereby endanger the public, and to prevent sewer overflows by providing a mechanism to collect and divert rain water runoff from the sanitary sewer system. We do not doubt that a well-maintained storm water management system provides such benefits. Nevertheless, these concerns addressed by the city's ordinance, like the environmental concerns addressed by Lansing's ordinance in *Bolt*,

benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway or across a city bridge, everyone who uses the Grand River for recreational purposes downriver from the city, and everyone in the Grand River watershed. This lack of a correspondence between the management charge and a particularized benefit conferred to the parcels supports our conclusion that the management charge is a tax. *Bolt*, 459 Mich at 166.

Our conclusion regarding the proportionality of the charge further buttresses the conclusion that the management fee is a tax.

"Fees charged by a municipality must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged." *Kircher v City of Ypsilanti*, 269 Mich App 224, 231-232; 712 NW2d 738 (2005). The fact that the fee only needs to be "reasonable proportionate" suggests that mathematic precision is not necessary in calculating the fee. *Graham v Kochville Twp*, 236 Mich App 141, 154-155; 599 NW2d 793 (1999). Thus, the fee need not generate an amount equal to that required to support the services the ordinance regulates in order to survive scrutiny; however, where the revenue generated by a regulatory "fee" exceeds the cost of regulation, the "fee" is actually a tax in disguise. *Westlake Transp, Inc v Pub Serv Comm*, 255 Mich App 589, 614-615; 662 NW2d 784 (2003). This Court must presume the amount of the fee to be reasonable, " 'unless the contrary appears upon the face of the law itself, or is established by proper evidence' . . . ." *Graham*, 236 Mich App at 154-155, quoting *Vernor v Secretary of State*, 179 Mich 157, 168;

146 NW 338 (1914); see also *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005).

A permissible utility service charge is one that " 'reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component . . . .' " *Bolt*, 459 Mich at 164-165, quoting *Bolt*, 221 Mich App at 92 (MARKMAN, J., dissenting). In the present cases, the management charge is predicated on the assumption that properties contribute to runoff, and, hence, storm sewer use, as a direct function of the size of a parcel's imperious and pervious areas. Despite this assumption, residential parcels measuring two acres or less are charged a flat rate based on the average EHA of all single family parcels, and not on the individual measurements of each parcel's impervious and pervious areas. Single family residential parcels account for 12,209 or 83 percent of the 14,743 parcels within the city. According to the city, it is cost-prohibitive to calculate the EHA units for each single family residential parcel on the basis of actual measurements of impervious and pervious areas of each parcel. In contrast, residential parcels measuring over two acres and commercial, industrial and institutional parcels of all sizes are assessed a management charge based on the individual measurements of each parcel's impervious and pervious areas. This method of apportioning the management charges among all urban properties emphasizes administrative convenience and ease of measurement and, thereby, suggests an absence of a close proportional relationship between the amount of runoff attributable to a particular parcel and the management charge, as does the fact that the method of calculating the charge fails to consider property characteristics relevant to runoff generation, such as a parcel's location in reference to storm gutters and drains and soil grade.

This lack of proportionality is further demonstrated by the fact that the charge generates sufficient revenue to allow the city to maintain a working capital reserve of 25 to 30 percent of the storm water utility's total expenses. Although maintaining a capital reserve is a common practice amongst rate-based public utilities that provides a degree of fiscal stability to utilities, see 73B CJS, Public Utilities, § 64; 64 Am Jur 2d, Public Utilities, § 107, those reserves are funded by true user fees closely calibrated to the actual use of the service or a price paid for a commodity. The management charge at issue in these cases in not such a fee. For these reasons, the actual use of the storm water sewer system by each parcel is not accounted for with the requisite level of precision necessary to support a conclusion that the charge is proportionate to the costs of the services provided.

Finally, our conclusion that the city's management charge is a tax is bolstered by the fact that Ordinance 2011.02, like Lansing Ordinance 925, is effectively compulsory. Although Ordinance 2011.02 allows property owners to receive credits against the management charge for actions taken to reduce runoff from their respective properties, it does not guarantee all property owners will receive a 100 percent credit. Indeed, if the ordinance realistically allowed for all property owners to receive a 100 percent credit, the credit system would undermine the central purpose of the ordinance, which is to generate dedicated funding to maintain and operate the current storm water management system. The city would be left with a storm water sewer system to operate and maintain and no dedicated revenue source to fund street sweeping, catch-basin cleaning, and leaf pickup, among other activities necessary to the city's stewardship of the system. More importantly, however, this system of credits effectively mandates that prop-

erty owners pay the charge assessed or spend their own funds on improvements to their respective properties, as specified by the ordinance and the city, in order to receive the benefit of any credits. In other words, property owners have no means by which to escape the financial demands of the ordinance. Additionally, the ordinance authorizes the administrator of the storm water utility to discontinue water service to any property owner delinquent in the payment of the fee, as well as to engage in various civil remedies, including the imposition of a lien and the filing of a civil action, to collect payment of past-due charges. All of these circumstances demonstrate an absence of volition. This lack of volition lends further support for our conclusion that the management charge is a tax. *Bolt*, 459 Mich at 168.

III

We enter a declaratory judgment in favor of plaintiffs. The city's storm water system management charge is a tax imposed in violation of § 31 of the Headlee Amendment. The city shall cease collecting the charge and shall reimburse only plaintiffs for any charges paid to date. *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 51-60; 604 NW2d 745 (1999). Plaintiffs may tax their costs, including a reasonable attorney fee. Const 1963, art 9, § 32; *Adair v Michigan*, 486 Mich 468, 494; 785 NW2d 119 (2010).

MURPHY, C.J., and HOEKSTRA and OWENS, JJ., concurred.

GORMAN v AMERICAN HONDA MOTOR CO, INC

Docket No. 303005. Submitted June 11, 2013, at Detroit. Decided August 6, 2013, at 9:00 a.m.

Stacey W. Gorman brought an action against American Honda Motor Co., Inc., and DMR Limited, alleging that a car she had purchased from DMR's Acura dealership had various defects that should have been covered under warranty. The court, Martha D. Anderson, J., granted defendants' motion for summary disposition of all plaintiff's claims under MCR 2.116(C)(8) and (C)(10), and also denied plaintiff's motion for reconsideration. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not err by granting summary disposition under MCR 2.116(C)(10) with respect to plaintiff's claim that defendants had failed to honor an express warranty. The evidence showed that defects brought to defendants' attention during the warranty period were repaired within a reasonable time and that the vehicle was returned to service without any further complaints from plaintiff. Plaintiff's arguments to the contrary were based on speculation and inadmissible evidence.

2. The trial court correctly granted defendants summary disposition under MCR 2.116(C)(10) of plaintiff's claim regarding breach of the implied warranty of merchantability because plaintiff failed to produce evidence that a defect existing during the warranty period went unrepaired for an unreasonable period of time.

3. The trial court did not err by ruling that plaintiff failed to notify defendants within a reasonable time of her breach of warranty claims. Rather than providing notice, the history of repairs to plaintiff's vehicle actually indicated that defendants honored the warranty that plaintiff was provided.

4. Plaintiff's unspecified allegation of error regarding the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*., was unsupported by any argument on appeal and was therefore deemed abandoned.

5. The trial court properly granted summary disposition of the claim plaintiff brought under the Michigan Consumer Protection

Act, MCL 445.901 *et seq*., because that claim was based on the breach-of-warranty claims that were properly dismissed.

6. The trial court correctly granted defendants summary disposition under MCR 2.116(C)(8) of plaintiff's claim that defendants breached their obligation of good faith because that claim did not constitute an independent cause of action.

Affirmed.

ACTIONS — CONTRACTS — WARRANTIES — UNIFORM COMMERCIAL CODE — OBLIGATION OF GOOD FAITH.

Michigan law does not recognize an independent cause of action for a breach of the obligation of good faith with regard to performance and enforcement of contracts and duties within the Uniform Commercial Code, MCL 440.1101 *et seq*. (former MCL 440.1203; MCL 440.1304; 2012 PA 86).

The Liblang Law Firm, PC (by *Dani K. Liblang*), for plaintiff.

Driggers, Schultz & Herbst, PC (by *James J. Majernik*), for defendant.

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

MARKEY, J. Plaintiff brought an action asserting breach of warranty and other claims against defendants, alleging that a 2007 Acura MDX she purchased from defendant Acura of Troy was defective. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(8) and (C)(10) and denied plaintiff's motion for reconsideration. Plaintiff appeals by right. We affirm.

Plaintiff purchased a new 2007 Acura MDX from defendant Acura of Troy on November 17, 2006. Plaintiff alleges that the dealer and defendant American Honda Motor Co., Inc. (Honda), provided warranties covering the vehicle "bumper to bumper" for 4 years or 50,000 miles, whichever came first. Defendants' warranty also extended to all parts installed by an Acura

dealer for one year or 12,000 miles, whichever came first. Plaintiff alleges that the primary defect in the vehicle, as demonstrated by its repair history, is the "active damper system" (ADS), which controls the struts and suspension system and gives the vehicle its smooth ride.

Plaintiff testified at her deposition that her Acura MDX had never broken down and that she had never contacted defendant Acura of Troy to request they take the vehicle back and reimburse her purchase price. Plaintiff also admitted that Acura of Troy had never improperly serviced her MDX.[1] She also testified that the SRS (air bag) message light would turn on and off. Plaintiff took the vehicle to Suburban Acura on April 1, 2010, where a faulty driver's seat sensor was found. Plaintiff testified that the air bag light's illuminating is what finally motivated her to file this lawsuit.

I. TRIAL COURT RULINGS UNDER MCR 2.116(C)(10)

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Under MCR 2.116(C)(10), the motion tests the factual adequacy of a complaint on the basis of the entire record, including affidavits, depositions, admissions, or other documentary evidence. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The trial court in deciding the motion must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d

[1] All repairs on the vehicle at issue were made by a nonselling dealer, Suburban Acura.

817 (1999). "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. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

Questions of law, including statutory interpretation, are reviewed de novo on appeal. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).

B. PLAINTIFF'S EXPRESS WARRANTY CLAIMS

Plaintiff first argues that the trial court erred by misconstruing what constitutes a breach of warranty. Specifically, plaintiff contends that while attempts were made to repair the vehicle's problems within the warranty period, the attempts were unsuccessful. Thus, plaintiff argues, the warranty failed its essential purpose. See *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 213; 457 NW2d 42 (1990). Plaintiff contends that a material question of fact exists regarding whether the cause of the vehicle's problems after the warranty expired were the result of a defect that existed during the warranty period that went unrepaired. Defendant Honda argues that it honored the manufacturer's obligations under the written warranty for all issues covered during the written warranty period. Thus, defendants contend that the trial court properly ruled: "There is simply no evidence of any breach [of warranty] on the part of either defendant." Defendants also note that plaintiff relies on an unsworn, unsigned affidavit of an expert, Anthony Zolinski, which cannot be considered on a motion for summary disposition.

We conclude that the trial court did not err by granting defendants summary disposition of plaintiff's express warranty claim on the basis that there was no evidence that defendants failed to honor it. The vehicle's repair history and putative expert testimony are insufficient to create a question of fact on plaintiff's express warranty claim. Plaintiff bore the burden of establishing that defendants breached the written limited warranty, i.e., that during the period of the warranty defendants were notified of a defect that they failed to repair. See MCL 440.2607(4); *American Bumper & Mfg Co v TransTechnology Corp*, 252 Mich App 340, 345; 652 NW2d 252 (2002); see also *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 317; 696 NW2d 49 (2005). Plaintiff does not argue, or identify evidence indicating, that the vehicle was out of service for an unreasonable period of time during the performance of warranty service. Therefore, this case is distinguished from cases like *Pack v Damon Corp*, 434 F3d 810 (CA 6, 2006) and *Kelynack v Yamaha Motor Corp*, 152 Mich App 105; 394 NW2d 17 (1986), in which vehicles were out of service for extended periods of time during repair efforts.

In this case, the undisputed evidence shows that defects brought to defendants' attention during the warranty period were repaired within a reasonable time and that the vehicle was returned to service without any further complaints from plaintiff. The present case is controlled by *Computer Network, Inc*, 265 Mich App 309, in which every time the plaintiff presented the vehicle to the dealer for service, repairs were made and there was "no evidence that the time allotted for the presented repairs was unreasonable under the particular circumstances." *Id*. at 315. Further, "the vehicle was always repaired, returned, accepted, and used. Because

there was no question of material fact, summary disposition under MCR 2.116(C)(10) was appropriate." *Id*.

Plaintiff's arguments to the contrary are based on speculation and inadmissible evidence. First, plaintiff relies on the vehicle's repair history after the warranty period expired in February 2009. In June and July 2009, when the vehicle had been driven more than 60,000 miles, it was serviced because the ADS message light illuminated. Suburban Acura found stored codes 6-2 and 7-2 caused by an open circuit in the left strut. Defendant Honda apparently agreed to replace the left front strut as a matter of good will, with plaintiff paying $100 toward the repair. On July 28, 2009, when the vehicle had been driven 62,357 miles, plaintiff complained that it was riding rough. Suburban Acura found that the vehicle's upper sway bar connection was loose and tightened it to within specifications. On January 8, 2010, with 72,576 miles on the odometer, plaintiff presented the vehicle to Suburban Acura because various dash warning lights, including the ADS light, were illuminating. Problems relating to the exhaust converter were found and repaired. Suburban Acura also found an unspecified stored code regarding the ADS system, cleared it, and it did not reset. On February 12, 2010, after the vehicle had been driven 74,171 miles, the ADS message light illuminated. Suburban Acura found a stored code of 7-9 and traced the problem to the need to replace the right front and right rear shock coils, which was done.

Plaintiff's reliance on the vehicle's postwarranty repair history is misplaced because there is no evidence of a causal link between them and an unrepaired defect that plaintiff brought to defendants' attention during the warranty period. In a breach of contract case, the plaintiff must establish a causal link between the as-

serted breach of contract and the claimed damages. See *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71-72; 817 NW2d 609 (2012). In this case, there is no evidence the same repairs were made during and after the warranty period, and if they were the same, there was no evidence that the postwarranty repairs were not normal maintenance items as opposed to an unrepaired defect, or that the postwarranty repairs were not necessitated by poor workmanship by nonparty Suburban Acura, which performed all the warranty repairs. " 'There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only.' " *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (citation omitted). "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Simply put, the postwarranty repair history creates only speculation and conjecture that defects disclosed to defendants during the warranty period went unrepaired; this is insufficient to create an issue of material fact to survive a motion for summary disposition. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 282; 807 NW2d 407 (2011).

Neither defendants' expert's report nor the unsigned affidavit of plaintiff's expert assist plaintiff in creating a material question of fact on her breach-of-warranty claim. The report of defendants' expert provided evidence only of the condition of plaintiff's vehicle when he inspected it on September 14, 2010, with 85,645 miles on the odometer. Defendant's expert was not deposed and provided no evidence of a link between the condition of the vehicle when he inspected it and an alleged defect that went unrepaired during the warranty pe-

riod. The report of defendant's expert is no more help to plaintiff in creating an issue of material fact on her claim of breach of warranty than the vehicle's postwarranty repair history.

With respect to the putative affidavit of plaintiff's expert, it was unsworn and unsigned when submitted to the trial court for consideration at the hearing on defendants' motion for summary disposition. Defendants correctly argue that an unsworn, unsigned affidavit may not be considered by the trial court on a motion for summary disposition. See *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33; 772 NW2d 801 (2009) ("unsworn statements . . . are not sufficient to create a genuine issue of material fact to oppose summary disposition under MCR 2.116(C)(10)"); *Pack*, 434 F3d at 815. Furthermore, appellate review of the trial court's decision is limited to the evidence that had been presented at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

Even if the unsigned affidavit of plaintiff's expert is considered, it provides evidence only of the condition of the vehicle at the time the expert inspected it on October 21, 2010. The unsworn statement of defendant's expert provides no evidence of a causal link between the condition of the vehicle when he inspected it and an unrepaired defect that plaintiff brought to defendants' attention during the warranty period that went unrepaired.

In sum, plaintiff produced evidence that created only speculation and conjecture that defects disclosed to defendants during the warranty period went unrepaired; therefore, the trial court correctly granted defendants summary disposition on plaintiff's express warranty claim.

C. PLAINTIFF'S IMPLIED WARRANTY CLAIMS

In general, a warranty of merchantability is implied when the seller is a merchant of the goods sold and provides that the goods will be of average quality within the industry. MCL 440.2314; *Guaranteed Constr Co v Gold Bond Prod*, 153 Mich App 385, 391; 395 NW2d 332 (1986). "Merchantable is not a synonym for perfect[.]" *Id*. at 392-393. We conclude that the trial court correctly granted defendants summary disposition as to plaintiff's claim regarding breach of the implied warranty of merchantability.

Pertinent statutes regarding the implied warranty of merchantability include MCL 440.2314(1), which provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." MCL 440.2314(2)(c) provides, "[g]oods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used[.]" If an express warranty is provided, it controls over the implied warranty of merchantability but not an implied warranty of fitness for a particular purpose.[2] MCL 440.2317(c). Also, 15 USC 2308(a) generally precludes a "supplier" from disclaiming or modifying an implied warranty if the supplier provides any written warranty or enters into a service contract with the consumer. An exception to the general rule is provided in 15 USC 2308(b), which states that "implied warranties may be limited in duration to

[2] Plaintiff does not assert a claim for breach of an implied warranty of fitness for a particular purpose. See MCL 440.2315 ("Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.").

the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty." Here, it is undisputed that defendants limited the implied warranty of merchantability to the duration of the express warranty.

"To establish a prima facie case of breach of implied warranty, a plaintiff must show that goods were defective when they left the possession of the manufacturer or seller[.]" *Guaranteed Constr Co*, 153 Mich App at 392. In this case, as discussed in part I(B), plaintiff failed to produce evidence that a defect existing during the warranty period went unrepaired for an unreasonable period of time. Plaintiff's circular argument that the limits on the duration of the implied warranty failed because defendants breached the express warranty is without merit. Plaintiff did not create a question of fact that the express warranty was breached. And plaintiff failed to produce any evidence that the vehicle was not "fit for the ordinary purposes for which such goods are used." MCL 440.2314(2)(c). Therefore, the trial court properly granted defendants summary disposition as to plaintiff's claim for breach of the implied warranty of merchantability.

D. REASONABLE NOTICE OF BREACH

Plaintiff argues that the trial court erred as a matter of law and fact in ruling that plaintiff failed to notify defendants within a reasonable time of her breach-of-warranty claims. Specifically, plaintiff argues that MCL 440.2607 does not apply to breach-of-warranty claims, but that if it does, she presented sufficient evidence to create a question of fact that defendant Honda was on notice that, in the words of the official comment to the

section of the Uniform Commercial Code from which MCL 440.2607 was derived, the transaction "is still troublesome and must be watched." UCC 2-607, Official Comment 4. Defendants argue that the statute provides no exception for breach-of-warranty claims and note that while the trial court stated that the "failure to notify the alleged breaching party within a reasonable period defeats Plaintiff's breach claims," it also ruled that "there is simply no evidence of any breach on the part of either defendant." Thus, defendant argues that plaintiff's failure to give defendants reasonable notice of her breach-of-warranty claims provided an alternative basis for the trial court to grant defendants summary disposition.

We conclude that the trial court did not err by ruling that plaintiff failed to give defendants reasonable notice of her breach-of-warranty claims and that lack of notice provides an alternative basis that bars her breach-of-warranty claims.

MCL 440.2607(3)(a) provides: "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy[.]" In this case, plaintiff never provided either defendant notice of her claim that they were in breach of warranty until she filed the instant lawsuit, 16 months and 30,000 miles after her vehicle's warranty expired. By any standard, the notice of alleged breach of warranty that plaintiff provided was not reasonable; the plain language of the statute bars plaintiff "from *any* remedy." *Id*. (emphasis added). We find that plaintiff's arguments to the contrary are without merit.

Plaintiff first argues that Michigan law does not require presuit notice of a breach-of-warranty claim, citing *King*, 184 Mich App at 211. That case, however,

did not concern whether the plaintiff had given sellers reasonable notice of an alleged breach of warranty as required by MCL 440.2607(3) but rather concerned a buyer's revocation of acceptance under MCL 440.2608(2), which requires that revocation of acceptance "must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." In *King*, the plaintiff drove the vehicle 6,000 to 7,000 miles over nine months before storing it because of numerous problems; the vehicle had a 12,000-mile or one-year "full warranty." *King*, 184 Mich App at 208-209. Plaintiff served the defendant with her complaint one month after storing the vehicle. *Id*. at 211. The Court concluded that the plaintiff's filing of her complaint "placed defendant on notice of [the] plaintiff's revocation within a reasonable time from when she discovered that the nonconformity substantially impaired the value of the vehicle." *Id*. Thus, *King* holds only that, on its facts, the plaintiff had given the defendant reasonable notice of revocation of acceptance as required by MCL 440.2608(2). *King* does not negate the requirement that a buyer give notice to a seller "within a reasonable time after he discovers or should have discovered *any breach* . . . or be barred from *any remedy*." MCL 440.2607(3)(a) (emphasis added).

Next, plaintiff attempts to distinguish *American Bumper* because that case involved a commercial buyer and a commercial seller. In *American Bumper* the plaintiff brought claims of "breach of express warranty, breach of implied warranties of fitness and merchantability, express indemnification, and implied indemnification," and the defendant sought summary disposition because the plaintiff had "failed to comply with the notice provision of . . . MCL 440.2607(3)(a), requiring a

buyer to notify a seller of a breach of contract within a reasonable time of discovering the breach, and that plaintiff was barred from any remedy." *American Bumper*, 252 Mich App at 344. The Court discussed comment 4 to UCC 2-607,[3] noting that some portions of the comment led courts to apply a lenient standard while other parts of the comment led courts to apply a strict standard regarding whether a buyer gave a seller reasonable notice of a breach. *American Bumper*, 252 Mich App at 345. The Court concluded that the notice in that case was not adequate because the notice did not satisfy the policies underlying the notice requirement[4]

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[3] Comment 4 to UCC 2-607 reads as follows:

> The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.
>
> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

[4] The stated policy reasons for the notice requirement were

> (1) to prevent surprise and allow the seller the opportunity to make recommendations how to cure the nonconformance, (2) to allow the seller the fair opportunity to investigate and prepare for litigation, (3) to open the way for settlement of claims through negotiation, and (4) to protect the seller from stale claims and provide certainty in contractual arrangements. [*American Bumper*, 252 Mich App at 346-347.]

and because the plaintiff's conduct did not satisfy the UCC's standard of commercial good faith. *Id*. The opinion does not suggest that MCL 440.2607(3)(a) applies only in transactions between commercial buyers and commercial sellers. Nothing in MCL 440.2607 excludes its application to consumer retail sales transactions. See, e.g., *Head*, 234 Mich App at 105 (applying MCL 440.2607(1) to a retail transaction and holding that once goods are accepted the buyer must pay for them and may only revoke acceptance under MCL 440.2608).

Plaintiff next argues that, relying on comment 4 and caselaw, notice is sufficient to create a question of fact if it places an authorized agent of a manufacturer on notice that the "transaction is still troublesome and must be watched." Plaintiff's reliance on the last quoted part of comment 4 is misplaced. See *K & M Joint Venture v Smith, Int'l, Inc*, 669 F2d 1106, 1111-1113 (CA 6, 1982) (rejecting the district court's reliance on this part of comment 4 and holding that the critical question under UCC 2-607 is whether the seller has been informed that the buyer considered the seller in breach). It is clear from reading comment 4 in its entirety that the seller must be given actual notice that the buyer believes that the seller is in breach. The bottom line of comment 4 provides: "The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."

Furthermore, plaintiff's position is not assisted by the unremarkable proposition that notice to an authorized agent may constitute notice to the principal. See *Halprin v Ford Motor Co*, 107 NC App 423, 426; 420 SE2d 686 (1992) (observing that most jurisdictions have

held that notice under UCC 2-607(3)(a) is sufficient if given to immediate sellers); *Malkamaki v Sea Ray Boats*, 411 F Supp 2d 737, 744-745 (ND Ohio, 2005) (ruling that the plaintiff presented sufficient evidence to create a question of fact regarding notice to the defendant through its authorized dealer or repair facility). In this case, plaintiff provided neither defendant Honda nor defendant Acura of Troy with any notice that she believed they were in breach until well after the vehicle's warranty had expired, and then only by filing her lawsuit. The history of repairs to plaintiff's vehicle does not provide notice that she believed defendants were in breach. To the contrary, the repair history indicates that defendants honored the warranty that plaintiff was provided: repairs were made, and the vehicle was returned to service without objection. Despite dicta regarding a new car buyer, *Standard Alliance Indus, Inc v Black Clawson Co*, 587 F2d 813, 825 (CA 6, 1978), which involved belated claims that repairs were inadequate, states the correct rule regarding notice:

> Section 2-607 expressly requires notice of "any" breach. Comment 4 says that notice "need only be such as informs the seller that the transaction is claimed to involve a breach." The express language of the statute and the official comment mandate notice regardless whether either or both parties had actual knowledge of breach. [*Id*.]

See also *K & M Joint Venture*, 669 F2d at 1112-1113.

Here, plaintiff provided defendants no notice at all that she believed defendants were in breach. Accordingly, plaintiff is "barred from any remedy." MCL 440.2607(3)(a). Therefore, in addition to correctly ruling that plaintiff failed to create a question of fact about whether defendants breached their warranty, the trial court also correctly ruled that plaintiff's failure to

notify defendants of their alleged breach within a reasonable period defeats plaintiff's breach claims.

E. PLAINTIFF'S MICHIGAN CONSUMER PROTECTION ACT CLAIM

We first note that although the question plaintiff presents for this issue includes an unspecified error by the trial court regarding the Magnuson-Moss Warranty Act, 15 USC 2301, *et seq*., plaintiff presents no argument at all on appeal in that regard. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

The Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., prohibits "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce[.]" MCL 445.903(1). The act defines "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(1)(g).

In this case, plaintiff alleged regarding her MCPA claim that defendants generally failed to inform her regarding purported defects in the vehicle that she purchased or failed to comply with express and implied warranties to repair defects. Responding to defendants' motion for summary disposition, plaintiff asserted regarding her MCPA claim that defendants failed to provide promised benefits, including benefits promised by operation of law, MCL 445.903(y), represented goods had qualities they do not have, MCL 445.903(c), and

omitted or failed to reveal material facts, MCL 445.903(s). Citing *Mikos v Chrysler Corp*, 158 Mich App 781, 784-785; 404 NW2d 783 (1987), plaintiff argued that defendants "represented that it provided . . . a warranty it is now refusing to honor and failed to honor throughout the warranty period." Plaintiff also argued that her claim for "frustrated expectations" survives without the need to show actual damages, citing *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 185-186; 341 NW2d 268 (1983), and that her vehicle had a defect that defendants cannot repair. At the hearing on the motion for summary disposition, plaintiff's counsel conceded that plaintiff's MCPA claim was based on "a failure of the promised benefit," i.e., the warranty that they would repair any defects.

Plaintiff first argues that the trial court erred by ruling (1) that proof of a breach of warranty is a necessary element of her MCPA claim and (2) that plaintiff did not create a question of fact regarding whether defendants breached their warranties. This argument fails because, as discussed already, the trial court correctly dismissed plaintiff's breach-of-warranty claims. While proof a breach of warranty will not always be necessary to establish a claim under the MCPA, plaintiff in this case based her MCPA claim on defendants' alleged breach of warranty. It follows that the trial court correctly granted defendants summary disposition on plaintiff's breach-of-warranty-based MCPA claim.

Next, relying on *Gadula v Gen Motors Corp*, unpublished opinion of the Court of Appeals, issued January 5, 2001 (Docket No. 213853), plaintiff argues that she can establish her MCPA claim without the necessity of showing a breach of warranty by proof that the vehicle did not meet her reasonable expectations. Plaintiff's reliance on

Gadula is misplaced. First, *Gadula* is unpublished and therefore is not binding precedent. MCR 7.215(C)(1). Second, unlike the present case, the plaintiff in *Gadula* did not fail to prove a breach of warranty; she failed to prove that she had suffered any damages as a result of the breach of warranty, and the trial court dismissed her warranty claims on this basis. *Gadula*, unpub op at 1. The *Gadula* Court affirmed on the same basis. *Id*. at 2-3. The plaintiff's breach-of-warranty claim under the MCPA survived, however, because nominal damages may be awarded under the MCPA without proof of actual damages. MCL 445.911(2).[5] Here, plaintiff failed to present evidence to establish her breach-of-warranty claims, which formed the basis of her MCPA claims. *Gadula* is inapposite. The trial court did not err by dismissing plaintiff's MCPA claims.

Plaintiff also argues, relying on *Mayhall*, that the frustration of her reasonable expectations alone supports her MCPA claim. The plaintiff in *Mayhall* purchased a diamond that was "guaranteed perfect" but it, in fact, was not. The Court held that the plaintiff could maintain an action for violation of the MCPA based on the frustration of the plaintiff's reasonable expectations without the necessity of proving actual economic damages. *Mayhall*, 129 Mich App at 180-181, 186. Like the plaintiff in *Gadula*, the plaintiff in *Mayhall* established a breach of promise but could not establish monetary damages. On this basis, *Mayhall*, like *Gadula*, is distinguishable from the present case, in which plaintiff failed to produce evidence raising a question of fact about whether defendants breached their promised

[5] MCL 445.911(2) provides: "[A] person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees."

warranty. Moreover, in this case, defendants' express promise was to repair defects during the period of the warranty, and defendants' implied promise was that the vehicle was merchantable, which is not the same as a promise that goods are perfect. See *Computer Network*, 265 Mich App at 317.

In sum, plaintiff's complaint and argument below were that her MCPA claims were based on defendants' breach of warranty. Because plaintiff's MCPA claim is based on her breach-of-warranty claims—and the trial court correctly granted defendants summary disposition on those claims—the trial court also correctly granted defendants summary disposition on plaintiff's MCPA claim.

II. TRIAL COURT RULINGS UNDER MCR 2.116(C)(8)

A. STANDARD OF REVIEW

MCR 2.116(C)(8) permits a trial court to grant summary disposition when an opposing party has failed to state a claim on which relief can be granted. Thus, a motion under this rule tests the legal sufficiency of a claim. *Computer Network*, 265 Mich App at 312. The motion may not be supported or opposed with affidavits, admissions, or other documentary evidence, and must be decided on the basis of the pleadings alone. *Id.*; MCR 2.116(G)(2). The trial court reviewing the motion must accept as true all factual allegations supporting the claim, and any reasonable inferences or conclusions that might be drawn from those facts. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008). A motion for summary disposition under MCR 2.116(C)(8) may be granted only when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify

recovery. *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1, 8; 807 NW2d 343 (2011).

B. PLAINTIFF'S CLAIM FOR BREACH OF THE OBLIGATION OF GOOD FAITH

Plaintiff argues that a right under the UCC is enforceable by an action unless specifically excluded pursuant to MCL 440.1106(2).[6] Thus, plaintiff asserts she may maintain an independent action for a breach of the obligation of good faith that was provided for in MCL 440.1203 when she brought her claims: "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."[7] At the relevant times, MCL 440.2103(b) defined "good faith" for merchants as meaning "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Plaintiff argues that the trial court erred in dismissing her claim for breach of the obligation of good faith by relying on *Belle Isle Grill Corp v Detroit*, 256 Mich App 463; 666 NW2d 271 (2003), and *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991), because these cases address common-law claims for breach of good faith. In sum, plaintiff contends that the UCC imposes a duty on a merchant to act in good faith and that the failure of a merchant to comply with this duty imposed by law is actionable. Plaintiff cites *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002), *KLT Industries, Inc v Eaton Corp*, 505 F Supp 1072, 1078 (ED Mich, 1981), and *Kovack v DaimlerChrysler*

[6] This provision was redesignated MCL 440.1305(2) effective July 1, 2013. See 2012 PA 86.

[7] This statutory obligation now appears at MCL 440.1304, which is identical but for the final phrase, which now reads "performance *and* enforcement." See 2012 PA 86 (emphasis added).

Corp, unpublished opinion of the Court of Appeals, issued May 11, 2006 (Docket No. 265761), in support of her argument.

Defendants, of course, argue that the trial court properly relied on *Belle Isle Grill*, 256 Mich App at 476, and *Ulrich*, 192 Mich App at 197, each holding that Michigan does not recognize a cause of action for breach of an implied covenant of good faith and fair dealing, in dismissing plaintiff's claim pursuant to MCR 2.116(C)(8). Defendants assert the Court's opinion in *General Motors Corp*, 466 Mich at 236, which indicates that a party may be sued and the obligation of good faith argued to the jury, does not recognize a separate cause of action for a breach of the duty of good faith. Defendants further argue that while the obligation of good faith was applied in a breach of contract cause of action in *KLT Industries*, nothing in that decision creates a separate cause of action for the breach of good faith.

We conclude that the trial court correctly granted defendants summary disposition under MCR 2.116(C)(8) because Michigan does not recognize, nor does the UCC create, an independent cause of action for a breach of the obligation of good faith it imposes. The obligation of good faith is not an independent duty, but rather a modifier that requires a subject to modify. It is a principle by which contractual obligations or other statutory duties are to be measured and judged. Thus, while the obligation of good faith under the UCC may affect the construction and application of UCC provisions governing particular commercial transactions in various situations, it has no life of its own that may be enforced by an independent cause of action. Caselaw and the UCC itself provide no basis to infer that the obligation of good faith should be applied differently

than the common-law implied covenant of good faith and fair dealing, which the parties agree is not enforceable as an independent cause of action. See *Belle Isle Grill*, 256 Mich App at 476; *Ulrich*, 192 Mich App at 197. A close examination of the cases on which plaintiff relies confirms that the obligation of good faith has no application apart from some other contractual obligation or statutory duty.

First, *KLT Industries*, 505 F Supp 1072, is not precedentially binding and carries authority only to the extent it is persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). While the district court in *KLT Industries* discussed the UCC's obligation of good faith, it did so only in the context of deciding the parties' competing claims of breach of contract. *KLT Indus*, 505 F Supp at 1078-1079. Specifically, the obligation of good faith required that the defendant in that case give reasonable notice of the termination of the contract. The case did not recognize an independent action for breach of the obligation of good faith.

Similarly, *Kovack* "is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). As in the present case, the plaintiff brought claims of breach of express and implied warranty, a claim for violation of the MCPA, a claim under the lemon law, MCL 257.1401 *et seq*., and a claim for breach of the duty of good faith. The trial court granted the defendant summary disposition as to all claims, and this Court affirmed. Whether the UCC creates an independent cause of action for the breach of its obligation of good faith was not presented to or decided by the *Kovack* Court. The questioned presented was whether the trial court correctly dismissed this claim, and the *Kovack* Court held that the answer to that question was yes. While the Court ruled

on the basis of the undisputed facts, the Court's holding that the defendant was entitled to judgment as a matter of law confirms that the obligation of good faith arises only in relation to another contractual obligation or a statutory duty. The *Kovack* Court held that "because no genuine issue of material fact existed regarding breaches of express or implied warranties, plaintiff's claim of breach of the duty of good faith also fails." *Kovack*, unpub op at 4. This statement supports the conclusion that the obligation of good faith is not independently actionable because without the claims for breach of warranty, the good-faith claim failed.

The use-tax case that plaintiff cites, which held that vehicle components and parts General Motors provided to customers as part of GM's goodwill adjustments policy, *Gen Motors Corp*, 466 Mich at 233, likewise does not hold that the UCC's obligation of good faith creates an independent cause of action if breached. Rather, the Court held that GM's goodwill policy was an extension of GM's written limited warranties, *id*. at 234, and was "part of the consideration flowing to GM customers when they purchase a GM vehicle that is taxed pursuant to the [General Sales Tax Act, MCL 205.51 *et seq*.] at retail sale." *Id*. at 242-243. Consequently, when the Court refers to the UCC's obligation of good faith and states that GM could be sued if GM did "not consider complaints under the goodwill adjustment policy in good faith," *id*. at 240, the suit would be for breach of contract in general, not an independent suit for breach of the obligation of good faith.

Finally, the plain text of the UCC can be read in no other way than that the obligation of good faith is inextricably part of a contract or other statutory obligation, not a freestanding obligation that may support an independent cause of action. "Every *contract* or *duty*

within this act imposes an obligation of good faith *in its performance or enforcement*." Former MCL 440.1203 (emphasis added).[8] Stated otherwise, there must be a contract or statutory duty on which the obligation of good faith is imposed. The UCC defines "good faith" in the case of a merchant to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Former MCL 440.2103(1)(b); see also MCL 440.4605(1)(f) (omitting "in the trade").[9] The official comment to the analogous section of the UCC explains that the section states a basic principle "that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties." Official Comment 1 to former UCC 1-203, current 1-304. Thus, the focus of the obligation of good faith is on the manner in which the *agreement* or *other duty* is performed or enforced. Consequently, nothing in the UCC supports the proposition that the obligation of good faith may be enforced independently from a claim for breach of contract or other statutory duty.

We affirm. Defendants, as prevailing parties, may tax costs pursuant to MCR 7.219.

JANSEN, P.J., and CAVANAGH, J., concurred with MARKEY, J.

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[8] The fact that the final "or" in this provision has been changed to "and" does not alter our analysis. See MCL 440.1304.

[9] The current version of Michigan's UCC similarly defines "good faith." MCL 440.1201(2)(t) states: " 'Good faith', except as otherwise provided in article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing." Article 5, which relates to letters of credit, defines "good faith" as meaning "honesty in fact in conduct or transaction concerned." MCL 440.5102(1)(g).

SILICH v RONGERS

Docket No. 305680. Submitted May 7, 2013, at Grand Rapids. Decided August 8, 2013, at 9:00 a.m.

Rudy Silich brought an action in the St. Joseph Circuit Court against John Rongers to partition a cottage they jointly owned. Rongers obtained his share of the property from his father in 2007. Silich obtained his share from his mother (Rongers's sister) in 2007. The court, Paul E. Stutesman, J., found that various expenses related to the property had been shared equally beginning in 2000, but Rongers had still done all the work of maintaining the property. There was also an issue regarding the personal property in the cottage. The court found that Rongers or his family exclusively owned the vast majority of the personal property except for a few pieces that Rongers stipulated belonged to Silich's family. The court ordered that the cottage be sold in lieu of partition, and Silich purchased it at the subsequent auction. The court awarded Silich attorney fees under MCR 3.403(C), limited to those involved in organizing the partition sale and excluding fees incurred in litigating the dispute regarding the distribution of sale proceeds and the personal property. Because the invoices submitted by Silich's attorney did not differentiate his fees for those matters, the court awarded attorney fees for twice the amount of time spent by the partition commissioner, reasoning that Silich's attorney had needed more time than the commissioner to prepare his materials. After the commissioner's expenses, Silich's attorney fees, and the costs Silich incurred obtaining the partition were deducted from the proceeds of the auction, the judgment awarded 75 percent of the remaining proceeds to Rongers and 25 percent to Silich. The court denied Silich's request for additional attorney fees arising from litigation of the partition and also rejected Rongers's argument that some of Silich's claims were frivolous. Silich appealed, seeking an equal division of the partition proceeds and additional attorney fees. Rongers cross-appealed, seeking attorney fees.

The Court of Appeals *held*:

1. It was improper for the trial court to grant Rongers more than 50 percent of the proceeds from the sale of the property when it was undisputed that Silich had paid his share of the expenses for

all years that he was a coowner and Rongers's maintenance contributions were *de minimis*. Actions to partition land are equitable in nature. MCR 3.403(D)(3) provides that two parties who each own a 50 percent interest in property to be sold in lieu of partitioning the property will each receive 50 percent of the proceeds, but MCL 600.3336(2) provides that when partitioning the premises or dividing among the parties the money received from a sale of the premises, the court may take into consideration the equities of the situation, such as the value of the use of the premises by a party or the benefits that a party conferred on the premises. In this case, the trial court found that Rongers had conferred sufficient benefits on the premises to deserve 75 percent of the proceeds from the sale. The trial court, however, should have considered only benefits conferred on the premises after Silich became coowner with Rongers. No caselaw supported the proposition that in a partition action a subsequent owner may be held liable, even in equity, for the debts of a prior owner. Nor was there authority allowing the trial court to charge Silich with his parent's debts.

2. MCR 3.401(B) states that if the trial court determines that the premises can be partitioned, MCR 3.402 governs further proceedings. If the court determines that the premises cannot be partitioned without undue prejudice to the owners, it may order the premises sold in lieu of partition under MCR 3.403. The small property at issue in this case could not have been partitioned. The trial court therefore ordered it sold and properly proceeded under MCR 3.403 instead of MCR 3.402. While Rongers argued that MCR 3.402 governed the time before court's determination that the property should be sold, the court rule itself states that it governs only if the court determines that the premises can be partitioned. Under MCR 3.403(C), the person conducting the sale must deduct the costs and expenses of the proceeding, including the plaintiff's reasonable attorney fees as determined by the court, from the proceeds of the sale and pay them to the plaintiff or the plaintiff's attorney. Silich argued that the term "proceeding" in MCR 3.403(C) means the entire case, including all related litigation. That court rule, however, covers the expenses necessary to the sale of the premises. Because a sale in lieu of partition requires a court order, one of the parties must first bring an action, which benefits all owners of the property by liquidating their interests in the property. Therefore, the party who brought the action must be compensated for bearing the necessary legal expenses. Extending the definition of "proceeding" to cover all disputes that are tangentially related to the sale of the property, however, would overturn the American rule (which provides that fees are not

generally recoverable unless a statute, court rule, or common-law exception provides otherwise) for no reason. MCR 3.403(C) authorizes the award of fees only to cover the plaintiff's expense in filing the suit and arranging the partition sale.

3. The trial court did not clearly err when it calculated Silich's reasonable attorney fees related to the sale of the premises. A review of the commissioner's reports revealed no work performed that was unnecessary to the sale. Therefore, it was not unreasonable for the trial court to base its calculation on the commissioner's invoices. Although the calculation of the number of hours spent by Silich's attorney was imprecise, the trial court explained that the invoices submitted by Silich's attorney did not sufficiently differentiate between fees that were recoverable and those that were not. This was a failure of the proofs, and better evidence would have allowed more precision by the trial court, but given what it had to work with, the trial court's conclusions were reasonable.

4. The trial court did not err when it denied Rongers's request for attorney fees. MCL 600.2591 allows an award of fees against a party who files a frivolous action. Under MCL 600.2591(3)(a), a claim is frivolous if (1) the party's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party, (2) the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true, or (3) the party's legal position was devoid of arguable merit. The trial court did not clearly err by finding that Silich had a reasonable basis to believe the facts underlying his position and that his legal position was not devoid of arguable merit on the basis of those facts.

Affirmed in part, reversed in part, and remanded.

1. REAL PROPERTY — PARTITION — SALE OF PROPERTY IN LIEU OF PARTITION — DIVISION OF PROCEEDS — BENEFITS CONFERRED ON PROPERTY BY COOWNER.

Actions to partition land are equitable in nature; MCR 3.403(D)(3) provides that two parties who each own a 50 percent interest in property to be sold in lieu of partitioning the property will each receive 50 percent of the proceeds; MCL 600.3336(2) further provides that when partitioning the premises or dividing among the parties the money received from a sale of the premises, the trial court may take into consideration the equities of the situation, such as the value of the use of the premises by a party or the benefits that a party conferred on the premises, but the court may properly consider only benefits conferred on the premises after the

parties became coowners and a subsequent owner may not be held liable, even in equity, for the debts of a prior owner.

2. REAL PROPERTY — PARTITION — SALE OF PROPERTY IN LIEU OF PARTITION — ATTORNEY FEES.

MCR 3.403(C) provides that the person conducting a sale of property in lieu of partitioning the property must deduct the costs and expenses of the proceeding, including the plaintiff's reasonable attorney fees as determined by the court, from the proceeds of the sale and pay them to the plaintiff or the plaintiff's attorney; MCR 3.403(C) authorizes the award of fees only to cover the plaintiff's expense in filing the suit and arranging the partition sale and does not cover all disputes that are tangentially related to the sale of the property.

Property Law Solutions, PLC (by *Philip J. Sheridan*) for plaintiff.

Robert R. Kopen for defendant.

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

PER CURIAM. This case involves the partition of a cottage property on the St. Joseph River jointly owned by the parties. The trial court ordered that the property be sold, and plaintiff purchased the property at the subsequent auction. The trial court awarded 75 percent of the proceeds from the auction to defendant, after deducting the partition commissioner's expenses and $8,359.20 for plaintiff's attorney fees and costs "incurred obtaining the partition of the premises." The court denied plaintiff's request for additional attorney fees arising from litigation of the partition, and also rejected defendant's argument that some of plaintiff's claims were frivolous. Plaintiff filed this appeal, seeking to divide the partition proceeds equally and also seeking his remaining attorney fees. Defendant filed a cross-appeal, also primarily seeking attorney fees. We hold that the trial court erred by granting defendant more

than half of the proceeds because it was undisputed that plaintiff paid his share of all expenses after he became the coowner. We affirm the trial court's rulings regarding attorney fees.

I. FACTS

The property was originally purchased by defendant's father, Michael Rongers, along with Rudolph Silich, Jr. (Rudy Jr.), plaintiff's father. Rudy Jr. was Michael's son-in-law, married to Michael's daughter, Carole. Michael and Rudy Jr. added their wives' names to the property deed, so that Michael, his wife, his daughter (Carole), and Carole's husband (Rudy Jr.) each owned a share. Michael's wife and Rudy Jr. passed away, leaving Michael and Carole as the coowners. Michael sold his share of the cottage to defendant for $1 in 2000. Defendant is Michael's son and Carole's brother. Carole transferred her ownership share of the cottage to plaintiff, her son, by means of a quitclaim deed in 2007. Defendant is the uncle of plaintiff.

Neither Carole nor plaintiff used the cottage much between 1992 and 2007. Plaintiff admitted that there was a period when his parents did not pay their half of the property taxes, insurance, or maintenance expenses. Plaintiff admitted that his mother had originally intended to pay back any missed payments from her share of the cottage once the cottage was sold. He testified that she changed her mind when Michael transferred his full share to defendant instead of splitting it among all his children (including Carole).

Defendant testified that Carole admitted to him that she owed insurance and taxes for all the years that she and her husband had not helped pay them. Defendant stated specifically that he paid all insurance and taxes from 2000, when he acquired his interest, through

2005. He also testified that his father alone had paid for the land in 1960, along with 90 percent of the construction materials, and that Rudy Jr. had made only minor contributions at the time. Defendant reported that he and his father had handled maintenance through the years, including cleaning up after a flood, various storm damages, a raccoon infestation, and ice damage to the pier on the river. He stated that Carole first started contributing in 2006 or 2007, when the roof was replaced. However, defendant does concede that plaintiff later made contributions sufficient to cover his and Carole's share of the expenses going back to 2000.

The trial court found that the expenses were shared equally beginning in 2000, but that defendant still did all the work of maintaining the property. There was also an issue at trial regarding the personal property in the cottage. The trial court found that the vast majority of the personal property was owned exclusively by defendant or his family, except for a few pieces that defendant stipulated belonged to plaintiff's family.

Under MCR 3.403(C), the trial court also awarded plaintiff attorney fees. It limited the fees awarded to those involved in organizing the partition sale and excluded fees incurred in litigating the dispute between plaintiff and defendant regarding the distribution of sale proceeds and the personal property. Because the invoices submitted by plaintiff's attorney did not make this differentiation, the trial court simply awarded fees for twice the amount of time spent by the partition commissioner, reasoning that plaintiff's attorney would have needed more time than the commissioner in order to prepare his materials. The fees and costs awarded to plaintiff totaled $8,359.20.[1]

[1] This amount includes $134.20 that defendant was directed to pay plaintiff because defendant had failed earlier to pay that amount to the partition commissioner.

II. STANDARD OF REVIEW

Actions to partition land are equitable in nature. MCL 600.3301; *In re Temple Marital Trust*, 278 Mich App 122, 141; 748 NW2d 265 (2008). "[E]quitable actions are reviewed de novo with the trial court's findings of fact reviewed for clear error . . . ." *Id.* at 142. Interpretation of a statute or court rule constitutes a question of law that is also reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

III. DIVISION OF PROCEEDS

While MCR 3.403(D)(3) provides that two parties who each own a 50 percent interest in property to be sold in lieu of partition will each receive 50 percent of the proceeds, MCL 600.3336(2) provides:

> When partitioning the premises or dividing the money received from a sale of the premises among the parties the court may take into consideration the equities of the situation, such as the value of the use of the premises by a party or the benefits which a party has conferred upon the premises.

In this case, the trial court found that defendant had conferred sufficient benefits on the premises to deserve 75 percent of the proceeds from the sale.

Plaintiff argues that the trial court should have considered only benefits conferred on the premises after plaintiff became coowner with defendant, citing *Fenton v Miller*, 116 Mich 45, 51; 74 NW 384 (1898), and *Jones-Collier v Cunningham*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 289915). *Fenton* is not directly on point, and *Jones-Collier* is not binding. MCR 7.215(C)(1). Nonetheless, we find plaintiff's argument persuasive.

Fenton appears to be the only Michigan case involving a situation in which one of the parties at the time of partition was not a coowner at the time benefits were conferred on the property. In *Fenton*, the plaintiff sued for partition, naming Annie Wendell and her daughters, Eva and Romain, as defendants. The defendants had been living in the property, and Fenton argued that he was entitled to the rental value of the property because they had excluded him from using it, though he owned a $^{13}/_{21}$ share of the property. Defendants argued that Fenton should be required to pay his share of improvements that Annie had made during the same period.

During the proceedings, Romain acquired Annie's and Eva's interests so that at the time of partition only Fenton and Romain had ownership interests in the property. Nevertheless, the circuit court concluded that assessments for rents or improvements were to be assessed between Fenton and Annie, the respective owners at the time in which the rents and improvements had been incurred.[2] The Supreme Court agreed that rents due to Fenton and the value of improvements made by Annie should each be charged and should be offset against each other. While the issue whether Romain could be made liable for the rents was not squarely before it, the Supreme Court did not criticize the circuit court's decision that the issue of rents and improvements was to be resolved between the parties who owned the property when they were incurred and not between their successors. *Fenton*, 116 Mich at 48-51. The *Jones-Collier* Court cited *Fenton* in stating that a party should not be charged for costs that did not benefit that party. *Jones-Collier*, unpub op at 9.

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[2] The daughters, while apparently already coowners, had lived in the house as minors in their mother's household, and not independently.

Defendant offers no caselaw in support of the proposition that in a partition action a subsequent owner may be held liable, even in equity, for the debts of a prior owner. The trial court also did not cite any authority that would allow it to charge plaintiff with his parent's debts. It is particularly inappropriate to allow defendant more than half of the proceeds in this case because Carole Silich was still alive when this litigation began and he could have sued her to recover any benefits he conferred on her share of the property. Moreover, defendant himself did not gain an ownership interest in the property until 2000, yet he concedes that plaintiff has repaid his mother's share of the expenses going back to 2000—expenses that were not chargeable to plaintiff anyway. Thus the trial court actually compensated defendant for expenses incurred by defendant's predecessor in interest and charged plaintiff for the debts of his.

The statute allows adjustments for benefits conferred on the premises by "a party," but when we remove the unequal contributions of the prior owners from the equation, defendant did not spend any more money on the property than plaintiff or Carole after he became coowner. Thus, there is no adjustment to be made on the basis of expenditures. There was testimony that defendant also personally performed maintenance work on the property, but those contributions were *de minimis* and mostly occurred before either party to this litigation had any ownership rights to the property. Further, any credit for maintenance work is counterbalanced by the fact that defendant enjoyed unfettered use of the property, rather than being forced to share it with Carole or plaintiff.

We hold that it was improper for the trial court to grant defendant more than 50 percent of the proceeds

from the sale of the property when it was undisputed that plaintiff had paid his share of the expenses for all the years he was a coowner, and even all the years during which defendant was a coowner, and defendant did not provide any law by which the trial court could hold a subsequent owner liable for the debts of a prior owner.

IV. PLAINTIFF'S ATTORNEY FEES

The trial court granted plaintiff fees and costs totaling $8,359.20. Plaintiff contends that MCR 3.403(C) required the court to award him *all* of his attorney fees, rather than just those related to filing the suit and arranging the partition sale. Defendant contends that the fees were properly restricted to those related to the actual partition sale, but that the trial court erroneously calculated the amount of fees that reasonably fall into that category.

A. SCOPE OF ATTORNEY FEES

MCR 3.401(B) states:

> If the court determines that the premises can be partitioned, MCR 3.402 governs further proceedings. If the court determines that the premises cannot be partitioned without undue prejudice to the owners, it may order the premises sold in lieu of partition under MCR 3.403.

Neither party suggests that the small property at issue here could have been partitioned. The trial court therefore ordered it sold and proceeded under MCR 3.403 instead of MCR 3.402. Defendant argues that MCR 3.402 governed the time before the court's determination that the property should be sold. This is incorrect. The rule states that MCR 3.402 governs only if the court determines that the premises can be partitioned.

Because the trial court found that the premises could not be partitioned, it did not err by ignoring MCR 3.402.

Under MCR 3.403(C),

> [t]he person conducting the sale shall deduct the costs and expenses of the proceeding, including the plaintiff's reasonable attorney fees as determined by the court, from the proceeds of the sale and pay them to the plaintiff or the plaintiff's attorney.

Neither party cites any cases interpreting this rule, nor could we discover any. Plaintiff argues that the term "proceeding" means the entire case, including all related litigation. The trial court, on the other hand, essentially interpreted the term to encompass bringing the partition suit and organizing the sale of the property, while excluding expenses incurred in litigating the questions of who owned the personal property on the land and what percentage of the proceeds each party should receive.

The court rule directs that the "person conducting the sale shall deduct the costs and expenses of the proceeding . . . from the proceeds of the sale . . . ." *Id*. The only reasonable interpretation of this directive is that it covers the expenses that are necessary to the sale of the premises. Because the sale in lieu of partition requires a court order, one of the parties must first bring an action. Bringing the action benefits all owners of the property to be sold by liquidating their interests in the property. It therefore follows that the party who brought the action should be compensated for bearing the necessary legal expenses, and this is provided for by the rule.

It does not, however, make sense to extend the definition of "proceeding" to cover all disputes that are tangentially related to the sale of the property. Michigan generally follows the "American rule" regarding attorney fees, which provides that fees are not generally

recoverable unless a statute, court rule, or common-law exception provides otherwise. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). The interpretation advanced by plaintiff, while not implausible on its face, would overturn the American rule for no reason. The language of a statute should be read in light of previously established rules of common law, including common-law adjudicatory principles. *Valeo Switches & Detection Sys*, *Inc v EMCom*, *Inc*, 272 Mich App 309, 318; 725 NW2d 364 (2006).

Moreover, plaintiff's interpretation would overturn the American rule in a one-sided way, since only the plaintiff would ever be entitled to attorney fees. This reading would completely drain the value of the property in cases, such as this one, in which the parties litigate multiple issues at length. Plaintiff's interpretation would lead to a plaintiff receiving all the benefit simply because he or she filed the suit, without regard for whether the plaintiff's position was at all meritorious. In the present case, for example, the cottage sold for $69,000, and plaintiff would have received more than $60,000 of that money in attorney fees alone. Defendant then would have received less than $10,000, despite the fact that the trial court found that he was entitled to 75 percent of the proceeds of the sale.

Thus, the trial court's interpretation of the rule is plainly correct. We hold that MCR 3.403(C) authorizes the award of attorney fees only to cover the plaintiff's expense in filing the suit and arranging the partition sale, which theoretically benefits all parties to the proceeding.

B. AMOUNT OF ATTORNEY FEES

Defendant also argues that even though the trial court correctly interpreted MCR 3.403, the court none-

theless awarded an improper amount of attorney fees given the facts of the case. The court stated that it was impossible to determine from his invoices how much time plaintiff's attorney spent on activities that were compensable under MCR 3.403(C). Instead, the trial court noted that the partition commissioner spent 19.2 hours carrying out the sale of the premises, reasoned that plaintiff's attorney would have needed more time for his related responsibilities, and therefore simply estimated a figure of 40 hours. The parties agreed that the attorney's rate of $200 an hour was reasonable, so the court awarded $8,000 plus certain incidental costs.

Defendant argues that it was improper to base the calculation on the work performed by the commissioner because some of his work was unrelated to the sale of the property and was properly governed by MCR 3.402 rather than MCR 3.403. However, as previously discussed, MCR 3.402 has no bearing on this proceeding because the premises could not be partitioned. Further, a review of the reports the commissioner made to the court does not reveal that any of his work was unnecessary to the sale. Therefore, it was not unreasonable for the trial court to base its calculation on the commissioner's invoices.

Smith v Khouri, 481 Mich 519, 530-531; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.), calls for the trial court to determine a reasonable hourly rate and multiply it by the reasonable number of hours expended. Although the calculation of the number of hours was imprecise, the trial court explained that the invoices submitted by plaintiff's attorney did not sufficiently differentiate between fees that were recoverable and those that were not. This is a failure of the proofs, and better evidence would have allowed more precision by the trial court. Given what it had to work with, the trial

court's conclusions were reasonable.[3] The trial court did not clearly err by finding $8,000 to be plaintiff's reasonable attorney fees related to the sale of the premises.

V. DEFENDANT'S ATTORNEY FEES

Defendant argues that plaintiff's claim for the personal property located at the cottage was frivolous and that defendant is therefore entitled to his attorney fees for time spent defending that portion of the lawsuit. MCL 600.2591 allows an award of fees against a party who files a frivolous action. Under MCL 600.2591(3)(a), a claim is frivolous if one of the following is true:

> (*i*) The party's primary purpose in initiating the action . . . was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable merit.

The trial court did not clearly err by holding that plaintiff's claim was not frivolous. Plaintiff may reasonably have believed, on the basis of his mother's affidavit (exhibit 3 to plaintiff's motion for summary disposition), that the personal property was jointly owned. If that had been the case, plaintiff's legal position that the property could be partitioned or sold would have been correct. That is, the trial court did not clearly err by finding that plaintiff had a reasonable basis to believe the facts underlying his position (his mother's affidavit) and that his legal position was not devoid of arguable merit on the basis of those facts.

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[3] This may not always be the case, and attorneys should keep careful and proper time records.

Defendant also argues that plaintiff intended the claim to harass or injure him, but plaintiff did attempt to abandon the personal property claim in his own motion for summary disposition. Even if it is true that plaintiff inflated the value of the personal property in his claim, that is insufficient to prove that the trial court clearly erred when it found that plaintiff did not bring the relevant claim for an improper purpose. The trial court's factual finding that plaintiff's claim was not frivolous was not clearly erroneous. Therefore, the trial court did not err when it denied defendant's request for attorney fees.

VI. REMAINING ISSUES

Defendant also argues that the trial court erred by ordering the sale of the premises before determining the parties' relative entitlement to the proceeds. Defendant argues that MCR 3.401 requires the court to determine the parties' relative shares in the property before the property is sold. MCR 3.401(A) states that the court shall make certain determinations, and MCR 3.401(B) states that the court may order the property sold if it cannot be partitioned. However, the rule does not expressly require the court to finish its determination of the parties' relative rights before ordering the sale; it only requires that the court must first decide that the property cannot be partitioned. Defendant states that knowing the trial court's decision on the latter point would have better enabled him to determine whether to bid on the property himself. This might be true, and it might be better practice to proceed as defendant suggests, but the rule does not *require* such a procedure. Further, defendant concedes that, because the property has already been sold, this Court cannot grant him any remedy. An issue is moot if this

court cannot fashion a remedy. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994).

Finally, defendant asserts that plaintiff's appeal was vexatious. The appeal was not vexatious. Plaintiff was correct that defendant was not entitled to 75 percent of the proceeds from the sale of the cottage, and plaintiff's argument regarding MCR 3.403(C) was not groundless, though it was ultimately unsuccessful.

VII. CONCLUSION

The trial court erred by granting 75 percent of the proceeds to defendant. Because defendant has not shown that equity requires the trial court to unequally divide the proceeds of the partition, each party is entitled to 50 percent of the proceeds. The trial court correctly determined the scope of attorney fees to be awarded to plaintiff under MCR 3.403(C) and did not clearly err in its calculation of the specific amount allowed in this case. We also affirm the trial court's refusal to grant attorney fees to defendant.

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

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

PODMAJERSKY v DEPARTMENT OF TREASURY

Docket No. 310996. Submitted August 6, 2013, at Lansing. Decided August 13, 2013, at 9:00 a.m.

John Podmajersky and Laughing Dolphin LLC filed a petition in the Tax Tribunal, challenging the Department of Treasury's final assessment of use tax under the Use Tax Act (UTA), MCL 205.91 *et seq*., for petitioners' use and storage of a boat in Michigan in 2006. Podmajersky, a majority interest holder in Laughing Dolphin and an Illinois resident, purchased the boat in Rhode Island on July 7, 2006, with an intended destination of Chicago, Illinois. The boat broke down on August 16, 2006 because of water infiltration into the fuel tanks, and the boat was towed to Harbor Springs, Michigan for repairs, where it remained until September 3, 2006. The boat was moved to Macatawa, Michigan on September 4, 2006 after a failed open-water engine test, moved to Chicago on October 1, 2006, and returned to Macatawa 17 days later, where it was stored for the winter. An attorney for Laughing Dolphin LLC informed the Illinois Department of Revenue in April 2009 that the boat was not subject to Illinois' use tax because it had not been in Illinois for more than 30 days in 2006, 2007, or 2008, and spent most of its time in Michigan. The Illinois Department of Revenue forwarded this information to the Treasury, and petitioners were issued a bill of taxes due in October 2009 for the use and storage of the boat in 2006. The tribunal granted summary disposition in favor of respondent, rejecting petitioners' exceptions to the hearing officer's proposed judgment in favor of respondent. Petitioners appealed.

The Court of Appeals *held*:

1. Under MCL 205.93(1) of the UTA, tangible personal property that is purchased is presumed to have been acquired for storage, use, or other consumption in Michigan and is subject to the use tax if it is brought into Michigan within 90 days of the purchase date. For purposes of MCL 205.92(c), "storage" is defined as a keeping or retention of property in Michigan for any purpose after the property loses its interstate character; the storage may be for all purposes, without limitation, and includes storage necessitated by the property's mechanical breakdown. Whether an owner

had the subjective intent to use, store, or otherwise consume the tangible property in Michigan at the time of its purchase is irrelevant for the purpose of determining if a presumption of taxation arose under MCL 205.93(1)(a) when the boat was brought to Michigan within 90 days of purchase. In this case, petitioners failed to rebut the presumption of taxation that arose under MCL 205.93(1)(a). There was competent, material, and substantial evidence on the record to support the tribunal's conclusion that petitioners brought the boat into Michigan within 90 days of its purchase and used and stored the boat in Michigan in 2006; the UTA does not provide a use tax exemption for storage that is necessitated by mechanical breakdown. Although it occurred more than 90 days after its purchase, the use and storage of the boat in Michigan after its return from Chicago in October 2006, was relevant on the ultimate issue of whether the petitioner used, stored, or consumed tangible property in Michigan. The 90-day period was relevant only to the issue of whether the presumption of taxation arose under MCL 205.93(1)(a).

2. The tribunal did not err by relying on petitioners' letter to the Illinois Department of Revenue. The document could have been authenticated by an Illinois Department of Revenue representative, MRE 901(b)(1), and it was an admission of a party-opponent and therefore not hearsay, MRE 801(d)(2).

3. MCL 205.94(1)(d) provides in part that property that is brought into Michigan by a nonresident person for storage, use, or consumption while temporarily within the state is exempt from the UTA. Evidence of whether the use or storage of property in Michigan by a nonresident is temporary is not limited by the 90-day period that applies to the presumption of taxation or exemption that arises under MCL 205.93(1)(a) or (b)(1)(*i*). In this case, the tribunal did not clearly err by concluding that the boat was not exempt from taxation under MCL 205.94(1)(d). The tribunal's conclusion that the boat was not used and stored temporarily in Michigan was supported by competent, material, and substantial evidence on the record. Evidence of where the boat was used and stored within and after 90 days of petitioners' purchase was relevant in analyzing whether petitioners' use of the boat in Michigan was temporary for purposes of the MCL 205.94(1)(d) exemption.

4. MCL 205.93(1)(b)(*i*) provides that tangible personal property used solely for personal, nonbusiness purposes that is purchased outside Michigan is exempt from the UTA if (1) the property is purchased by a person who is a nonresident at the time of purchase, and (2) the property is brought into the state more

than 90 days after the date of purchase; section (1)(b)(*i*) provides a presumption of exemption, it is not an automatic exemption. In this case, because the boat was used and stored in Michigan within 90 days of purchase, the MCL 205.93(1)(b)(*i*) exemption did not apply; it was irrelevant that petitioners took the boat to Illinois during the 90-day period and did not return until after that period had expired.

Affirmed.

TAXATION — USE TAX — PRESUMPTION — INTENT OF OWNER AT TIME OF PURCHASE.

The Use Tax Act, MCL 205.91 *et seq*., imposes a tax on the privilege of using, storing, or consuming personal property in Michigan; under MCL 205.93(1), tangible personal property that is purchased is presumed to have been acquired for storage, use, or other consumption in Michigan and is subject to the use tax if it is brought into Michigan within 90 days of the purchase date; for purposes of MCL 205.92(c), "storage" is defined as a keeping or retention of property in Michigan for any purpose after the property loses its interstate character and the storage may be for all purposes, without limitation; whether an owner had the subjective intent to use, store, or otherwise consume the tangible property in Michigan at the time of its purchase is irrelevant for the purpose of determining if a presumption of taxation arose under MCL 205.93(1)(a).

Miller, Canfield, Paddock & Stone, PLC (by *Gregory A. Nowak* and *Jackie J. Cook*), for John Podmajersky and Laughing Dolphin LLC.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for the Department of Treasury.

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

PER CURIAM. Petitioners, John Podmajersky and Laughing Dolphin LLC, appeal as of right a judgment of the Michigan Tax Tribunal (MTT), which affirmed an assessment of use tax by respondent, Department of Treasury (Treasury), under Michigan's Use Tax Act

(UTA), MCL 205.91 *et seq*. The MTT concluded that petitioners were subject to use tax for using and storing a boat in Michigan between 2006 and 2008. Finding no error warranting reversal, we affirm.

I. BASIC FACTS

Laughing Dolphin LLC is a Rhode Island limited liability company. Podmajersky is a member of the Laughing Dolphin LLC and has held a majority interest in the company since its formation in 2002. He is an Illinois resident, has never been a Michigan resident, and currently resides in Chicago.

On July 7, 2006, Podmajersky purchased a 65-foot yacht (the boat) in Rhode Island. According to Podmajersky, at the time of purchase he intended to take the boat to Chicago. Petitioners hired a professional captain to transport the boat from Rhode Island to Chicago, traveling through New York and then through the Great Lakes. The boat departed Rhode Island on July 31, 2006. Between August 11 and August 13, the boat stopped in Cleveland, Ohio to pick up Podmajersky and three guests for the remainder of the trip.

According to Podmajersky, on August 16, 2006, a guest traveling on board the boat mistakenly pumped hundreds of gallons of water into the fuel tanks, causing a catastrophic breakdown in Lake Michigan and necessitating a tow. A tug boat arrived several hours later and towed the boat to the Irish Boat Shop in Harbor Springs, Michigan.

The boat remained in Harbor Springs from August 16, 2006 to September 3, 2006, while it underwent repairs to remove water from the fuel tanks and fuel systems. The Irish Boat Shop performed a number of mechanical repairs to address the water infiltration concerns and also

performed some nonessential repairs to the television and stereo, as well as some cosmetic work to improve the appearance of the boat.

It appears that Podmajersky went back to Chicago while the boat repairs were being performed in Harbor Springs. In an e-mail to the boat captain dated August 25, 2006, Podmajersky stated: "We are on the way out the[] door to go to Harbor Springs. I will be back on Monday afternoon. Hopefully we can speak on Tuesday and settle up our account. Still trying to get a slip in Chicago. I don't know if we will be settl[]ing in Holland or closer to home."

On September 3, 2006, after the repairs were complete, Podmajersky took the boat back out onto Lake Michigan. According to Podmajersky, "[a]fter being underway for some time, the vessel service indicators again began to alert us to water in the fuel lines. The vessel engines were not operating properly, and it was clear that the water had not been fully removed from the fuel system." Podmajersky further averred: "The fuel filters on the vessel continued to fill with water and numerous systems indicators represented that water remained a safety hazard for the boat." "I had to stop the boat every 15 minutes to clear water and algae from the fuel filters."

On September 4, 2006, Podmajersky docked the boat in Macatawa, Michigan, approximately 85 nautical miles from Chicago. According to Podmajersky, the boat was diverted to Macatawa to "avoid the potential of another catastrophic breakdown that could again strand Laughing Dolphin on the open waters of Lake Michigan." In his original affidavit, Podmajersky indicated that "extensive repairs to fix the continuing water damage to the fuel system were undertaken at Eldean's ship yard in Macatawa, Michigan from September 4, 2006 through October 1, 2006." However, an invoice from Eldean's Shipyard indicates that the only work Eldean's Shipyard performed on the boat was related to

a sewage smell. Eldean's Shipyard replaced a 24-volt bilge pump; the total cost, including parts and labor, was $133.18. In an attempt to explain this apparent discrepancy, petitioner Podmajersky submitted a second affidavit, in which he averred:

> While the boat was in Macatawa, from September 4, 2006 through October 1, 2006, I traveled to Macatawa on the weekends in order to personally replace numerous fuel/water separator filters and to conduct test runs of the vessel on the inland waters of Lake Macatawa in order to drain the remaining water from the fuel system and to test the seaworthiness of the vessel before determining that it was safe to depart for Illinois. This practice was partially successful as we started to observe a reduction in the amount of contamination to the extent that I felt it would be possible to make an offshore passage on a day offering completely calm seas and maximum visibility.

On October 1, 2006, Podmajersky left Macatawa and proceeded to Chicago. However, "halfway through the journey, onboard service indicators again began to detect water in the fuel filters. [Podmajersky] made the decision to proceed to Chicago." Upon arrival, Podmajersky was accommodated with transient docking in the Chicago Harbor System. The boat remained in Chicago for 17 days before it returned to Macatawa, where it was stored at Eldean's Shipyard for the winter. Podmajersky explained that indoor storage was required by his insurance company.

An invoice from Eldean's Shipyard indicates that it performed work to the boat's fuel system on May 15, 2007. The work was completed in one day.

II. PROCEDURAL HISTORY

Sometime in 2009, the Illinois Department of Revenue inquired whether the boat was subject to Illinois

use tax. In a letter dated April 15, 2009, an attorney who indicated that he was "Power of Attorney for Laughing Dolphin LLC," represented that the boat was not subject to Illinois use tax because it was used almost exclusively in Michigan. The letter provides in relevant part: "It is the taxpayer's position that the Laughing Dolphin was never used more than 30 accumulated days in any calendar year in Illinois since its purchase in July 2006 and, thus, has never been subject to Illinois use tax." The letter continues, "at no time was the boat in Illinois for more than 30 days in 2006, 2007 or 2008. As you can see, the Laughing Dolphin spends most of its time in Michigan. Therefore, the taxpayer was not subject to the Illinois Use Tax in 2006 through 2008."

The Illinois Department of Revenue forwarded this information to the Michigan Department of Treasury, which then began an inquiry to determine whether the boat was subject to Michigan's use tax. On October 12, 2009, Treasury issued a bill of taxes due for the 2006 tax year in the amount of $98,557.97, representing $66,000 in tax due, $16,500 in penalties, and $16,057.97 in interest.

Petitioners protested the assessment, and in a letter dated December 9, 2009, Podmajersky, through his attorney, opined that the boat was not subject to the UTA because its presence in Michigan within 90 days of purchase was temporary and necessitated by catastrophic breakdowns.

An informal conference was held on April 27, 2010. Following the conference, the hearing referee recommended that the assessment be cancelled, finding that the boat was exempt from use tax under the "temporary use" exemption, MCL 205.94(1)(d).

On September 15, 2010, Treasury issued a decision and order of determination rejecting the hearing refer-

ee's recommendation and, on September 22, 2010, Treasury issued a final bill of taxes against petitioner in the amount of $101,105.29.

On October 27, 2010, petitioners filed for review with the tax tribunal. After conducting discovery, petitioner filed a motion for summary disposition under MCR 2.116(C)(10). Petitioners argued that the boat was not subject to the UTA because, according to petitioners, it was not "brought" into Michigan within 90 days of purchase because the boat's presence in Michigan was the result of a catastrophic breakdown. Further, petitioners argued, even if the boat was brought into Michigan within 90 days of purchase, the boat was not subject to the UTA because petitioners did not acquire it for storage, use, or consumption in Michigan. Petitioners argued that the evidence clearly demonstrated that it was intended the boat would be used in Illinois and was diverted to Michigan only due to catastrophic breakdowns.

Podmajersky acknowledged that he had brought the boat back to Michigan for winter storage in October 2006; however, petitioners emphasized that this occurred after the 90 day period expired. Therefore, petitioners argued that the boat was exempt from use tax under MCL 205.93(1)(b)(*i*), which provides a presumption of exemption if "[t]he property is purchased by a person who is not a resident of this state at the time of purchase and is brought into this state more than 90 days after the date of purchase." Finally, petitioners argued that the boat was exempt under MCL 205.94(d) because it was brought into the state by a nonresident while temporarily in the state.

On April 12, 2012, the hearing officer issued a proposed judgment denying petitioners' motion for summary disposition and granting summary disposi-

tion in favor of Treasury under MCR 2.116(I). The hearing officer concluded that the presumption of taxation arose when the boat entered Michigan in August 2006 and stayed for the balance of the year, with the exception of 17 days in Chicago. The hearing officer rejected petitioners' breakdown/necessity defense: "Although it may have been a practical necessity to repair the boat in Michigan, that does not change the fact that keeping the boat here for those purposes constitutes storage and use." The hearing officer drew an analogy from tort law: "It has been held that a person is liable for damages caused by a trespass notwithstanding that he or she was forced by a storm to remain moored to a dock on the property of another in order to prevent injury or loss of life. *Vincent v Lake Erie Transp Co*, 109 Minn 456; 124 NW 221 (1910)." The hearing officer determined that, "[a]ssuming arguendo that there is any validity to Petitioner's 'break-down' defense, that defense vanished when the craft returned to Michigan after a brief trip to Chicago."

The hearing officer further rejected petitioners' claims that the boat was exempt under MCL 205.93(1)(b)(*i*) and MCL 205.94(d). The hearing officer reasoned that the MCL 205.93(1)(b)(*i*) exemption did not apply because it only applies to property brought into the state after 90 days, and petitioner had brought the boat into the state *within* 90 days of its purchase. The hearing officer also determined that MCL 205.94(d) was not applicable because petitioners' use and storage of the boat in Michigan was not temporary.

On May 3, 2012, petitioners filed exceptions to the proposed order, arguing that: (1) the hearing officer erred by determining that petitioners' intent was not a consideration in determining whether a presumption of taxation arose from the boat being brought into Michi-

gan within 90 days of purchase; (2) the proposed order improperly relied on assumptions as to petitioners' intent; (3) the hearing officer improperly considered petitioners' use of the boat in Michigan after 90 days from the date of purchase; and (4) the hearing officer improperly relied on a Minnesota decision from 1910.

On June 6, 2012, the tribunal issued a final opinion and judgment rejecting petitioners' exceptions and adopting the proposed judgment granting summary disposition in favor of Treasury.

Petitioners now appeal as of right.

III. STANDARD OF REVIEW

Appellate review of the tribunal decision is limited. Unless fraud is alleged, an appellate court reviews the decision for a "misapplication of the law or adoption of a wrong principle." *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008) (quotation marks and citation omitted). The tribunal's factual findings are deemed conclusive provided they are supported by competent, material, and substantial evidence on the whole record. *Id*. When statutory interpretation is at issue, appellate review of the tribunal's decision is de novo. *Id*. In an appeal from an order of the Tax Tribunal, the appellant bears the burden of proof. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005).

IV. ANALYSIS

The UTA imposes a tax on "the privilege of the using, storing, or consuming tangible personal property" in Michigan. MCL 205.93(1); *Terco, Inc v Dep't of Treasury*, 127 Mich App 220, 226; 339 NW2d 17 (1983). "The use tax complements the sales tax and was designed to

govern those transactions not covered by the General Sales Tax Act." *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 249; 621 NW2d 450 (2000). MCL 205.93(1)(a) provides in pertinent part:

> (1) There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property . . . . For the purpose of the proper administration of this act and to prevent the evasion of the tax, all of the following shall be presumed:
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> (a) That tangible personal property purchased is subject to the tax if brought into this state within 90 days of the purchase date and is considered as acquired for storage, use, or other consumption in this state.

MCL 205.92(b) and (c) define "use" and "storage" as follows:

> (b) "Use" means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given. Converting tangible personal property acquired for a use exempt from the tax levied under this act to a use not exempt from the tax levied under this act is a taxable use.
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> (c) "Storage" means a keeping or retention of property in this state for any purpose after the property loses its interstate character.

A. PETITIONERS FAILED TO REBUT THE PRESUMPTION OF TAXATION THAT AROSE AS SOON AS THE BOAT ENTERED MICHIGAN

The boat was brought into Michigan within 90 days of purchase. Petitioners argue that MCL 205.93(1)(a) contains an element of intent; that is, before assessing the use tax, Treasury must first establish that petitioners acquired the property with the intent to use or store

it in Michigan. Petitioners would thus impose two requirements for the presumption under MCL 205.93(1)(a) to arise: (1) the taxpayer must bring the property into Michigan within 90 days of purchase; and (2) the taxpayer must have acquired the property for use, storage, or other consumption in Michigan.

Contrary to petitioners' argument, nothing in MCL 205.93(1)(a) requires that Treasury establish the taxpayer's subjective intent when bringing the property into the state. Rather, under MCL 205.93(1)(a) it is presumed that property is acquired for use, storage, or other consumption in Michigan and is therefore subject to taxation if the taxpayer brings the property into the state within 90 days of purchase. See *Guardian Indus Corp*, 243 Mich App at 250-251 ("[T]he language [of MCL 205.93(1)(a)] merely provided that tangible personal property brought into the state within ninety days of purchase was presumed to be acquired for storage, use, or other consumption in this state."). See also *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 493; 516 NW2d 108 (1994) ("There is no dispute that the aircraft in this case were brought into Michigan within ninety days of purchase. Hence, it is presumed that they were subject to use tax.").

Because petitioners brought the boat into Michigan within 90 days of purchase, it is presumed that the boat is subject to use tax. Thus, it is petitioners who had the "burden of overcoming the presumption of taxation, or establishing that an exemption applies." *Id*. at 493. Petitioners argue that the presumption was overcome because the evidence showed that the use and storage of the boat in Michigan was necessitated by catastrophic engine failure. Petitioners' argument is unpersuasive.

Petitioners argue in essence that they are exempt from the UTA. "Tax exemptions are disfavored, and the

burden of proving an entitlement to an exemption is on the party claiming the right to the exemption. Tax exemptions are strictly construed against the taxpayer because they represent the antithesis of tax equality." *Guardian Indus Corp*, 243 Mich App at 249 (quotation marks and citation omitted).

Nothing within the UTA provides an exemption for storage, use, or consumption when said storage, use, or consumption is necessitated by mechanical breakdown. Indeed, the act defines "storage" to mean "a keeping or retention of property in this state *for any purpose* after the property loses its interstate character." MCL 205.92(c) (emphasis added). The plain and ordinary meaning of the phrase "for any purpose" evidences a legislative intent that the storage be for all purposes without limitation. See *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010).

The record contains competent, material, and substantial evidence that the boat was both used and stored in Michigan in 2006. The boat entered Michigan waters as early as August 16, 2006, and it remained in Michigan until October 1, 2006. During this time, petitioners used the boat on Lake Michigan and Lake Macatawa. In his second affidavit, Podmajersky averred that between September 4, 2006 and October 1, 2006, petitioner "traveled to Macatawa on the weekends . . . to conduct test runs of the vessel on the inland waters of Lake Macatawa . . . ." Further, the boat was stored at the Irish Boat Shop in Harbor Springs and Eldean's Shipyard in Macatawa. Petitioner's reason for storage—the alleged mechanical breakdowns—is irrelevant.

Although the boat left Michigan on October 1, 2006, it returned to Macatawa, Michigan on October 17, 2006, for heated indoor storage. Since the boat's return to Michigan, petitioner used and stored it almost exclu-

sively in Michigan. In the April 15, 2009 letter to the Illinois Department of Revenue, petitioners stated that "at no time was the boat in Illinois for more than 30 days in 2006, 2007 or 2008." The letter provided a detailed account of the boat's activity after October 17, 2006. "As you can see," the letter concludes, "the [boat] *spends most of its time in Michigan*."

Petitioners argue that use and storage of the boat in Michigan after October 17, 2006, is irrelevant because it did not occur within 90 days of purchase. The 90-day period, however, is only relevant to the issue of whether the presumption of taxation arises under MCL 205.93(1). If the property is brought into the state within 90 days of its purchase, the presumption of taxation applies. MCL 205.93(1)(a). If the property is brought into the state after 90 days, the presumption of taxation does not apply; rather, the property is presumed exempt. MCL 205.93(1)(b)(*i*). Evidence of what occurred during and after the 90-day period is still relevant to the ultimate issue of whether the taxpayer used, stored, or consumed tangible personal property in Michigan.

We reject petitioners' argument that the tribunal erred by relying on petitioners' letter to the Illinois Department of Revenue. Treasury received the document pursuant to a file sharing agreement between Michigan and Illinois and there is no reason why the letter could not be authenticated at a hearing. The representative from Treasury who received the letter from the Illinois Department of Revenue could testify that the document is what it is claimed to be. MRE 901(b)(1). Alternatively, a representative from the Illinois Department of Revenue could provide an appropriate foundation that the letter is what it is claimed to be. *Id*. Further, the document is not inadmissible hearsay.

MRE 801(d)(2) excludes admissions by party-opponents from the definition of hearsay. The letter was offered against petitioners. *Id*. Further, it was written by petitioners' attorney pursuant to a power of attorney, i.e. "a person authorized by the party to make a statement concerning the subject." MRE 801(d)(2)(C).

Accordingly, the presumption of taxation arose as soon as the boat entered Michigan, which petitioners failed to rebut. The record contains competent, material, and substantial evidence that the boat was both used and stored in Michigan in 2006 and thereafter. Therefore, the boat is subject to use tax unless otherwise exempt.

B. PETITIONERS ARE NOT EXEMPT FROM USE TAX UNDER MCL 205.94(1)(d)

MCL 205.94(1)(d) provides as follows:

> (1) The following are exempt from the tax levied under this act, subject to subsection (2):
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> * * *
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> (d) Property that is brought into this state by a nonresident person for storage, use, or consumption while temporarily within this state, except if the property is used in this state in a nontransitory business activity for a period exceeding 15 days.

We reject petitioners' argument that the use and storage of the boat in Michigan was "temporary" while it made its journey to Chicago. Petitioners focus only on the boat's use and storage in Michigan within 90 days of purchase. As noted above, the 90-day period is only relevant to the issue of whether the presumption of taxation or exemption arises under MCL 205.93(1)(a) and (b)(1)(*i*). The "temporary use" exemption contains

no limitation period. Thus, the 90-day period is largely irrelevant. Evidence of what occurred within and after 90 days of purchase is relevant to the ultimate issue of whether the taxpayer used, stored, or consumed tangible personal property in Michigan.

The record contains competent, material, and substantial evidence to support the tribunal's conclusion that the boat was not used and stored "temporarily" in Michigan. As previously discussed, the boat entered Michigan waters as early as August 16, 2006, and it remained in Michigan until October 1, 2006. Although the boat left Michigan on October 1, 2006, it returned 17 days later and it has remained almost exclusively in Michigan since its return. On the basis of the evidence in the record, the tribunal did not clearly err when it concluded that the boat was not exempt from taxation under MCL 205.94(1)(d).

C. PETITIONERS ARE NOT ENTITLED TO THE PRESUMPTION OF EXEMPTION UNDER MCL 205.93(1)(b)(*i*)

MCL 205.93(1)(b)(*i*) provides:

> (1) There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property . . . . For the purpose of the proper administration of this act and to prevent the evasion of the tax, all of the following shall be presumed:
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> * * *
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> (b) That tangible personal property used solely for personal, nonbusiness purposes that is purchased outside of this state and that is not an aircraft is exempt from the tax levied under this act if 1 or more of the following conditions are satisfied:

> (*i*) The property is purchased by a person who is not a resident of this state at the time of purchase and is brought into this state more than 90 days after the date of purchase.

Contrary to petitioners' argument, MCL 205.93(1)(b)(*i*) does not provide an automatic exemption from taxation. Rather, it merely provides a presumption of exemption. And the presumption arises only if "the property is used solely for personal, nonbusiness purposes" and "is purchased by a person who is not a resident of this state at the time of purchase and is brought into this state more than 90 days after the date of purchase." In the present case, the boat was used and stored in Michigan within 90 days of the date of purchase. Therefore, the presumption does not apply. It is irrelevant that petitioner later took the boat to Illinois and did not bring it back to Michigan until after the 90 day period expired.

Affirmed.

SAAD, P.J., and K. F. KELLY and GLEICHER, JJ., concurred.

BLOOMFIELD TOWNSHIP v KANE

Docket No. 308241. Submitted July 10, 2013, at Detroit. Decided August 13, 2013, at 9:05 a.m.

Jordan Kane was charged with operating a motor vehicle while intoxicated in violation of MCL 257.625(1) and Bloomfield Township Ordinances, § 36-19, which adopts the Michigan Vehicle Code, MCL 257.1 *et seq*., as an ordinance of Bloomfield Township, after he was involved in a single-vehicle accident. A laboratory analysis indicated that defendant had 250 nanograms of Zolpidem, a sedative used to treat insomnia, per milliliter of blood in his system. Defendant moved to dismiss the charges in the 48th District Court, asserting that Zolpidem was not a controlled substance listed on schedules 1 to 5 of article 7 of the Public Health Code, MCL 333.7101 *et seq*. The court, Diane D'Agostini, J., denied the motion. Defendant appealed in the Oakland Circuit Court, Rudy J. Nichols, J., which reversed, holding that Zolpidem was not listed by statute as a controlled substance, that MCL 257.625(1) did not incorporate the rules promulgated by the Board of Pharmacy and, thus, that the prosecution could not establish the elements of the offense. The prosecution appealed by leave granted and defendant cross-appealed.

The Court of Appeals *held*:

1. Under MCL 257.625(1) of the Michigan Vehicle Code, a person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles if the person is operating while intoxicated. Under MCL 257.625(1)(a), a person is operating while intoxicated if the person is under the influence of a controlled substance. The Michigan Vehicle Code defines the term "controlled substance" by reference to the definition contained in the Public Health Code. MCL 333.7104(2) of the Public Health Code defines "controlled substance" as a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 of the Public Health Code, MCL 333.7201 *et seq*. Zolpidem is not listed on the statutory schedules. The Public Health Code, however, delegates the classification of additional substances to the Board of Pharmacy, which classified Zolpidem as a schedule-4 controlled substance in Mich Admin

Code R 338.3123(1)(aaa). Administrative rules have the force and effect of law. Accordingly, the circuit court erred by dismissing the charged offense on the basis that Zolpidem was not listed by statute as a controlled substance.

2. Under MCL 257.625(8) a person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles if the person has in his or her body any amount of a schedule-1 controlled substance under MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in MCL 333.7214(a)(*iv*). Defendant contended that because subsection (8) specifically refers to the administrative rules but subsection (1) does not, under the doctrine of *expressio unius est exclusio alterius*, the lack of a reference to the administrative rules in subsection (1) meant that he could not be convicted of violating subsection (1) for driving under the influence of a substance that is only classified as a controlled substance in the administrative rules. The doctrine, however, could not be used to defeat clear legislative intent. The plain language of MCL 257.625 indicates that subsection (1) governs operating a vehicle while intoxicated generally, while subsection (8) is a zero-tolerance provision specifically relating to schedule-1 substances, including those identified in administrative rules promulgated under MCL 333.7212, and to certain schedule-2 substances. The fact that subsection (1) fails to refer to a schedule or to the administrative rules does not prevent criminal prosecution pursuant to the terms of that general provision.

3. A party cannot claim lack of notice when the assertion is belied by the pleadings he or she has filed in the case. In this case, although defendant contended that he lacked notice of the requisite charge, his brief on appeal and lower court pleadings identified the statute at issue, alleged that the statute was inapplicable to the substance ingested, and contested whether he had the requisite *mens rea*. Thus, defendant's argument that he lacked notice of the charge was belied by his pleadings. In addition, defendant alleged that Bloomfield Township's adoption of the entire motor vehicle code failed to provide notice of the specific crime that he was charged with. The adoption of the Michigan Vehicle Code by local ordinance, however, did not leave defendant to wonder what violation was at issue given the specific citation in the misdemeanor complaint to the Michigan Vehicle Code violation, MCL 257.625(1).

Reversed and remanded for further proceedings including reinstatement of the charged offense.

CRIMINAL LAW — OPERATING WHILE INTOXICATED — CONTROLLED SUBSTANCES — ADMINISTRATIVE RULES.

Under MCL 257.625(1) of the Michigan Vehicle Code, a person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles if the person is operating while intoxicated; under MCL 257.625(1)(a), a person is operating while intoxicated if the person is under the influence of a controlled substance; the Michigan Vehicle Code defines the term "controlled substance" by reference to the definition contained in the Public Health Code, which, in MCL 333.7104(2), defines "controlled substance" as a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 of the Public Health Code, MCL 333.7201 *et seq*.; the Public Health Code delegates the classification of additional substances to the Board of Pharmacy; substances included in the schedules under administrative rules promulgated by the Board of Pharmacy may be used to support a charge of operating while intoxicated.

Secrest Wardle (by *Vahan C. Vanerian*) for Bloomfield Township.

Foley & Mansfield, PLLP (by *Howard I. Wallach*), for Jordan Kane.

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM. The prosecution appeals by leave granted the circuit court opinion and order dismissing the charge of operating a motor vehicle while intoxicated[1] in violation of MCL 257.625(1) and Bloomfield Township Ordinances, § 36-19.[2] We reverse the judgment of the Oakland Circuit Court and remand this case to the 48th District Court for reinstatement of the charge and for proceedings consistent with this opinion.

[1] A person is "operating while intoxicated" if he or she is "under the influence of . . . a controlled substance . . . ." *People v Koon*, 494 Mich 1, 6 n 14; 832 NW2d 724 (2013) (citation and quotation marks omitted).

[2] The local ordinance adopts the Michigan Vehicle Code, MCL 257.1 *et seq*., as an ordinance of Bloomfield Township.

I. BASIC FACTS AND PROCEDURAL HISTORY

On October 6, 2010, Officer Steve Sherwood of the Bloomfield Township Police Department was informed of a disabled vehicle on the Interstate-75 business loop at Opdyke Road.[3] Upon arriving at the scene, the officer found defendant trying to start the vehicle, which had extensive damage including damage to the driver's side wheels. Defendant informed the officer that he was driving when he suddenly hit the guardrail. The officer noted that defendant had difficulty maintaining his balance and that his speech was impaired. Defendant allegedly told the officer that he takes Ritalin, although he had not taken the drug in some time, but that his mother had given him Xanax, which caused his driving accident. Defendant was transported to a hospital where a blood sample was taken. The lab results indicated that defendant had 250 nanograms of Zolpidem per milliliter of blood in his system. Zolpidem is a sedative used to treat insomnia that is sold under the brand name Ambien. Defendant was initially charged with operating a vehicle with a controlled substance in his system, MCL 257.625(8), but that charge was dismissed, and he was instead charged with operating while intoxicated, specifically while under the influence of a controlled substance, MCL 257.625(1)(a). Defendant moved to dismiss the charges in district court, alleging that Zolpidem was not a controlled substance contained in schedules 1 to 5 of the controlled substances act, MCL 333.7101 *et seq*. In an affidavit,

[3] An evidentiary hearing was not conducted in the lower courts, and a police report of the incident is not contained in the lower court record. Accordingly, this statement of facts was crafted using facts found in the prosecution's brief on appeal, the arguments made during the hearing on the motion to dismiss held in district court, and defendant's affidavit. Defendant did not dispute the basic facts delineated in the prosecution's brief on appeal.

defendant further asserted that he had mistakenly ingested Zolpidem and, therefore, he did not have the requisite *mens rea* to support the elements of the offense. The district court denied the motion to dismiss, holding that the regulation of Zolpidem by administrative rule was sufficient to support the elements of the offense. The district court did not rule on the *mens rea* issue. On appeal, the circuit court reversed, holding that Zolpidem was not listed by statute as a controlled substance, and the offense at issue, MCL 257.625(1), did not incorporate the rules promulgated by the Board of Pharmacy; therefore, the prosecution could not establish the elements of the offense of operating a vehicle while under the influence of a controlled substance. We granted the prosecution's application for leave to appeal.[4]

II. STANDARD OF REVIEW AND STATUTORY CONSTRUCTION

The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *People v Zajaczkowski*, 493 Mich 6, 12; 825 NW2d 554 (2012). "[T]he intent of the Legislature governs the interpretation of legislatively enacted statutes." *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). The intent of the Legislature is expressed in the statute's plain language. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. *Id*. If a statute specifically defines a term, the statutory definition is controlling. *People v Williams*, 298 Mich App 121, 126; 825 NW2d 671 (2012). When "terms are not expressly

[4] *Bloomfield Twp v Kane*, unpublished order of the Court of Appeals entered September 28, 2012 (Docket No. 308241).

defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used." *Zajaczkowski*, 493 Mich at 13. However, technical words and phrases that have acquired a peculiar and appropriate meaning in law shall be construed and interpreted in accordance with that meaning. See MCL 8.3a; *Bylsma*, 493 Mich at 31. Additionally, when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). The court's reliance on dictionary definitions assists the goal of construing undefined terms in accordance with their ordinary and generally accepted meanings. *People v Morey*, 461 Mich 325, 330-331; 603 NW2d 250 (1999). "However, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself." *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).

When interpreting a statute, the court must avoid a construction that would render part of the statute surplusage or nugatory. *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011). "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). "When the Legislature adopts or incorporates by reference a provision of an existing statute, regulation, or rule, the separate provision that is adopted or incorporated becomes part of the legislative enactment as it existed at the time of the legislation, and any subsequent amendment of the incorporated provision has no effect." *Jager v Rostagno Trucking Co, Inc*, 272 Mich App 419, 423; 728 NW2d 467 (2006). "The Legislature is presumed to act with knowledge of appel-

late court statutory interpretations, and silence by the Legislature for many years following judicial construction of a statute suggests consent to that construction." *People v Higuera*, 244 Mich App 429, 436; 625 NW2d 444 (2001) (citation omitted). When two statutes or provisions lend themselves to a construction that avoids conflict, that interpretation is controlling. *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997).

Statutes that relate to the same matter are considered to be *in pari materia*. *People v Perryman*, 432 Mich 235, 240; 439 NW2d 243 (1989). "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). This general rule of statutory interpretation requires courts to examine the statute at issue in the context of related statutes. *Id*.

> Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other. [*Detroit v Mich Bell Tel Co*, 374 Mich 543, 558; 132 NW2d 660 (1965), overruled on other grounds by *City of Taylor v Detroit Edison Co*, 475 Mich 109, 120; 715 NW2d 28 (2006).]

When statutes relate to the same subject matter, they must be construed together for purposes of determining legislative intent. *Van Antwerp v Michigan*, 334 Mich 593, 605; 55 NW2d 108 (1952). The objective of the *in pari materia* rule is to give effect to the legislative purpose as found in statutes addressing a particular subject. *World Book, Inc v Dep't of Treasury*, 459 Mich

403, 416; 590 NW2d 293 (1999). "Conflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies whenever possible." *Id*. at 416. See also *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010).

When the Legislature delegates power to a commissioner, the commissioner is authorized to adopt rules and regulations as the commissioner deems necessary to give effect to the purposes underlying the laws of this state. See *American Community Mut Ins Co v Comm'r of Ins*, 195 Mich App 351, 360; 491 NW2d 597 (1992). These rules and regulations must be promulgated in accordance with the provisions of the Administrative Procedures Act.[5] *Id*. at 360-361. Each agency subject to the provisions of the Administrative Procedures Act must adopt rules governing the procedures prescribed or authorized thereby. *New Prods Corp v State Hwy Comm'r*, 352 Mich 73, 79; 88 NW2d 528 (1958). "A rule adopted by an agency in accordance with the Administrative Procedures Act, MCL 24.201 *et seq*., is a legislative rule that has the force and effect of law." *Morley v Gen Motors Corp*, 252 Mich App 287, 290; 651 NW2d 808 (2002). "Since the adoption of a rule by an agency has the force and effect of law and may have serious consequences of law for many people, the Legislature has [prescribed] an elaborate procedure for rule promulgation." *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 177; 428 NW2d 335 (1988). The rulemaking process includes "public hearings, public participation, notice, approval by the joint committee on administrative rules, and preparation of statements, with intervals between each process." *Id*. at 177-178. These require-

[5] MCL 24.201 *et seq*.

ments were imposed to account for the delegation by legislative bodies to administrative agencies the "authority to make public policy . . . ." *Id*. at 178. Further, these requirements assure that the essential functions of the legislative process are not forfeited when agencies perform lawmaking functions that were previously carried out by the Legislature. *Id*. "In construing administrative rules, courts apply principles of statutory construction." *Id*. at 185. Under the Administrative Procedures Act, "any statutory definitions of words, phrases, or rules of construction made applicable to all statutes also apply to rules unless it is clear that such definition or construction was not intended." *Id*. at 185; see also MCL 24.232(1).

Article 7 of the Public Health Code, MCL 333.7101 *et seq*., governs controlled substances. MCL 333.7201 provides that the "administrator shall administer this article and may add substances to, or delete or reschedule all substances enumerated in the schedules in [MCL 333.7212, MCL 333.7214, MCL 333.7216, MCL 333.7218, and MCL 333.7220] in compliance with the administrative procedures act of 1969." The "administrator" is defined as "the Michigan board of pharmacy or its designated or established authority." MCL 333.7103(2); see also *People v Turmon*, 417 Mich 638, 645; 340 NW2d 620 (1983). When making a determination regarding the classification of a substance, the Board of Pharmacy must consider: (1) the actual or relative potential for abuse, (2) the scientific evidence of its pharmacological effect, (3) the current scientific knowledge regarding the substance, (4) the history and current pattern of abuse, (5) the scope, duration, and significance of abuse, (6) the risk to the health of the general public, (7) the potential for the substance to create dependence, and (8) whether the substance is an immediate precursor to a substance already controlled

under MCL 333.7201 *et seq*. MCL 333.7202(1); *Turmon*, 417 Mich at 646. If the substance presents an imminent danger, the Board of Pharmacy may schedule or reschedule the substance by emergency rule. MCL 333.7203(2). A scientific commission advises and consults with the Board of Pharmacy with regard to the classification of substances as controlled substances. MCL 333.7206; *Turmon*, 417 Mich at 646. The classification of a substance as a controlled substance is premised on the possession of certain characteristics. *Turmon*, 417 Mich at 646. The Legislature created clear, detailed standards to guide the Board of Pharmacy and to facilitate judicial review. *Id*. at 647. Because new drugs are developed and introduced at a rapid rate and incredible ingenuity is exhibited in the discovery of new methods to abuse drugs, it is necessary to employ "a measure of flexibility in the area of drug regulation." *Id*. at 647-648.

In *Turmon*, *id*. at 643, the defendant was charged with possession with intent to deliver 22 tablets of phenmetrazine and possession with intent to deliver 43 tablets of pentazocine. He pleaded guilty to the reduced charge of possession of pentazocine and was sentenced to two years' probation. *Id*. On appeal, the defendant alleged that the Legislature's delegation of authority to the Board of Pharmacy to schedule controlled substances was improper and further asserted that he was not given notice that possession of pentazocine was a criminal act. *Id*. Specifically, the defendant alleged that the Legislature could not delegate power to the Board of Pharmacy to create criminal offenses, and administrative amendments to the controlled substances act deprived him of fair notice that possession of pentazocine was a criminal offense. *Id*. at 643, 649, 655. In a concise statement, our Supreme Court rejected the defendant's challenges:

> We hold that the Legislature's delegation of authority to add controlled substances to pre-existing schedules in accordance with specific criteria is not an unlawful delegation of power despite the fact that penal consequences flow from violation of the board's rules. The statute contains sufficient standards and safeguards to avoid infirmity under both separation of powers and due process challenges. Additionally, the board did not abuse its discretion in the promulgation of the rule. [*Id*. at 641-642.]

Our Supreme Court examined the Board of Pharmacy's eight-factor test for determining if a substance should be added, deleted, or reclassified among the schedules. The Court noted that the board was assisted by a commission that included medical professionals, and that the Board of Pharmacy could only include a substance on a schedule if it determined the substance possessed certain characteristics found within that schedule. For example, a schedule-3 substance must have less of a potential for abuse than substances listed on schedules 1 and 2, must have a currently accepted medical use, and it must be true that abuse of the substance might lead to moderate or low physical dependence or high psychological dependence. *Id*. at 646-647. In light of these safeguards to agency action, the Court rejected the assertion that the board was permitted to act in an arbitrary or discriminatory manner. *Id*. at 647-648.

> [T]he power to define crimes, unlike some legislative powers, need not be exercised exclusively and completely by the Legislature. Provided sufficient standards and safeguards are included in the statutory scheme, delegation to an executive agency is appropriate, and often necessary, for the effectuation of legislative powers.
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> Clearly, the controlled substances act is premised on a legislative design . . . . The Legislature formulated a comprehensive group of crimes dealing with controlled substances. An index of drugs adjudged dangerous or harmful

> was compiled, and the drugs were graduated according to potential for abuse. Penalties, including fines and incarceration, were coordinated to reflect the gravity of the offense and the seriousness of the controlled substance involved. Finally, the Board of Pharmacy, an eight-member board consisting of six pharmacists and two public members, was given the strictly controlled authority to modify the controlled substances schedule to [ensure] that it reflect current developments in the drug industry.
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> . . . While it is true that more serious consequences flow from a felony conviction under the controlled substances act, we find no meaningful distinction between the delegation of power to make rules regarding misdemeanor offenses and the delegation of rulemaking relative to felony offenses. The severity of the penalty does not destroy the accountability of the Legislature nor the safeguards provided to protect the public. Therefore, the Legislature has not unconstitutionally delegated a nondelegable power. [*Id*. at 652-653.]

Our Supreme Court also rejected the defendant's claim that he lacked notice of the violation of law because the classification was contained in an administrative rule and the schedule statutes were not amended to reflect the inclusion of new controlled substances, *id*. at 655-658. The Court stated:

> We do not find it unreasonable to expect the people of this state to acquire familiarity with its laws through reference to a compilation published by the state. Reference to the controlled substances act would lead the reader to conclude that the schedules are continually being modified by the Board of Pharmacy and that the agency's supplementation should be sought elsewhere. . . .
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> . . . [P]ublication of the rule in the administrative code provided sufficient notice that defendant's conduct was proscribed. [*Id*. at 657, 660.]

III. APPLICATION OF LAW TO THE FACTS

In the present case, defendant was charged with violating MCL 257.625(1). MCL 257.625 addresses offenses involving the operation of a vehicle while under the influence and provides in relevant part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following:
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> (a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance or other intoxicating substance.
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> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2018, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
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> * * *
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> (8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214.

In the present case, defendant was ultimately charged with violating MCL 257.625(1)(a) for having Zolpidem

in his system when he was involved in the accident. In order to evaluate the validity of his defense, we must examine the relevant provisions of the Michigan Vehicle Code[6] and the Public Health Code[7] *in pari materia* because they address the same subject matter. *Harper*, 479 Mich at 621. Although MCL 257.625(1)(a) does not define the term "controlled substance," MCL 257.8b of the Michigan Vehicle Code defines the term as "a controlled substance or controlled substance analogue as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws."[8] MCL 333.7104(2) of the Public Health Code defines "controlled substance" as "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 [MCL 333.7201 *et seq*.]."

As previously noted, article 7 of the Public Health Code governs controlled substances. MCL 333.7101 *et seq*. Although the code contains five schedules listing regulated substances,[9] Zolpidem, the substance ingested by defendant, is not listed on those schedules. However, our inquiry does not conclude with the examination of the schedules. Rather, the Michigan Vehicle Code requires that for purposes of determining what constitutes a controlled substance, the health code must be examined, and the health code appropriately delegates classification of additional drugs through the use of administrative rules, and administrative rules have the force and effect of law. *Turmon*, 417 Mich at

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[6] MCL 257.1 *et seq*.

[7] MCL 333.1101 *et seq*.

[8] Defendant contends that the Michigan Vehicle Code does not define "controlled substance." On the contrary, MCL 257.8b defines the term "controlled substance" by reference to the Public Health Code.

[9] See MCL 333.7212, MCL 333.7214, MCL 333.7216, MCL 333.7218, and MCL 333.7220.

652-653; *Morley*, 252 Mich App at 290. In the area of drug regulation, resort to the flexibility of administrative rules is necessary because new drugs are developed and introduced at a rapid rate. *Turmon*, 417 Mich at 647-648. Therefore, the Legislature's delegation to the Board of Pharmacy the authority to create penal consequences from board rules is not constitutionally infirm. Zolpidem is classified as a schedule-4 controlled substance pursuant to Mich Admin Code R 338.3123(1)(aaa). Accordingly, the circuit court erred by dismissing the charged offense.

Defendant contends that the plain language of MCL 257.625 demonstrates that the prosecution cannot prove the elements of the offense. Specifically, defendant was originally charged with violating MCL 257.625(8), which contains an express reference to schedule 1 of the Public Health Code as well as the rules promulgated under that section, however, MCL 257.625(1) contains no reference to the schedules or the administrative rules. Therefore, defendant submits, the doctrine of "*expressio unius est exclusio alterius*" applies to bar his prosecution under MCL 257.625(1). Under the doctrine, "the express mention in a statute of one thing implies the exclusion of other similar things . . . ." *People v Jahner*, 433 Mich 490, 500 n 3; 446 NW2d 151 (1989). However, this maxim is merely an aid to interpreting legislative intent and cannot govern if the result would defeat the clear legislative intent. *American Federation of State, Co & Muni Employees v Detroit*, 267 Mich App 255, 260-261; 704 NW2d 712 (2005).

In this case, we cannot apply this doctrine because it would render MCL 257.625(1) surplusage or nugatory. *Huston*, 489 Mich at 462. The plain language of MCL 257.625 indicates that MCL 257.625(1) governs operat-

ing a vehicle while intoxicated generally, while MCL 257.625(8) is a zero-tolerance provision specifically relating to schedule-1 substances, including those identified in rules promulgated under MCL 333.7212, and to certain schedule-2 substances. The reason specific schedules and rules are mentioned in MCL 257.625(8) is to narrow the applicability of that zero-tolerance provision. The fact that MCL 257.625(1) fails to refer to a schedule or the administrative rules does not prevent criminal prosecution pursuant to the terms of that broader provision. The doctrine of "*expressio unius est exclusio alterius*" is inapplicable here.

Next, defendant alleges that Bloomfield Township's adoption and citation of the entire Michigan Vehicle Code failed to provide notice of the crime that he was charged with, thereby depriving him of notice of the charged offense and impacting his ability to defend against the charge. We disagree. A review of the misdemeanor complaint reveals that defendant was charged with violating the local ordinance as well as MCL 257.625(1). The adoption of the Michigan Vehicle Code by local ordinance did not leave defendant to wonder what violation was at issue because of the specific citation to the Michigan Vehicle Code violation, MCL 257.625(1). Additionally, although defendant contends that he lacks notice of the charge, his brief on appeal and lower court pleadings identified the statute at issue, alleged that the statute was inapplicable to the substance ingested, and contested whether he had the requisite *mens rea*. A party cannot claim lack of notice when the assertion is belied by the pleadings he or she has filed in the case. See *DeGeorge v Warheit*, 276 Mich App 587, 592-593; 741 NW2d 384 (2007). This claim of error is without merit.[10]

[10] We also note that defendant contends that it is "undisputed" that he did not have the requisite *mens rea* to commit the offense. This issue was

Reversed and remanded for reinstatement of the charged offense and for proceedings consistent with this opinion. We do not retain jurisdiction.

FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ., concurred.

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not ruled upon by the lower courts, and we are an error-correcting court. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). "[U]nder MCL 257.625(1), [conviction of operating a motor vehicle while intoxicated] requires proof of three elements: (1) the defendant operated a motor vehicle (2) on a highway or other place open to the general public or generally accessible to motor vehicles (3) while under the influence of liquor or a controlled substance, or a combination of the two, or with a blood alcohol content of 0.08 grams or more per 100 milliliters of blood." *People v Hyde*, 285 Mich App 428, 448; 775 NW2d 833 (2009) (emphasis omitted). The offense of operating a motor vehicle while under the influence is "not a specific intent crime . . . ." See *People v Raisanen*, 114 Mich App 840, 844; 319 NW2d 693 (1982). "[U]nder the influence" effectively means that the defendant was "substantially deprived of normal control or clarity of mind." See *id*. The elements of the offense do not contain a requirement that the defendant knowingly ingest a controlled substance. However, we do not have undisputed record evidence to apply this law to the facts of this case. The credibility of an assertion presents an issue for the trier of fact. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). In light of the limited record, we cannot analyze whether a mistaken ingestion occurred, an issue for the trier of fact, and whether the factual predicate of the defense of mistake could be supported at trial. Therefore, we do not resolve this issue.

MICHIGAN COALITION OF STATE EMPLOYEE UNIONS v
STATE OF MICHIGAN

Docket No. 314048. Submitted June 12, 2013, at Lansing. Decided August 13, 2013, at 9:10 a.m. Leave to appeal sought.

Michigan Coalition of State Employee Unions, International Union UAW and Local 6000, Michigan Corrections Organization/SEIU, Michigan Public Employees/SEIU Local 517M, Michigan State Employees Association, AFSCME Local 5, Michigan AFSCME Council 25, and others filed an action in the Court of Claims against the state of Michigan, State Employees Retirement System, State Employees Retirement System Board, Department of Technology, Management and Budget, Director of the Department of Technology, Management and Budget, Director of Retirement Services Office and the state Treasurer, claiming that challenged portions of 2011 PA 264, which amended the State Employees' Retirement Act (SERA), MCL 38.1 *et seq*., were unconstitutional because they regulated conditions of employment without the State Civil Service Commission's approval as required by Const 1963, art 11, § 5, and challenging the manner in which overtime was applied to the calculation of final average compensation. In two orders, the trial court, Joyce A. Draganchuk, J., granted plaintiffs summary disposition, determining that the 2011 PA 264 amendments to MCL 38.35a, and MCL 38.50a violated 1963 Const, art 11, § 5 because the four percent contribution mandate altered a rate of compensation or condition of employment for classified civil servants, which only the commission had authority to do, not the Legislature. The court concluded that MCL 38.1e, as amended by 2011 PA 264, was similarly unconstitutional because the change in how overtime was calculated for pension purposes constituted a change in compensation without the required approval or input by the commission. Defendants appealed.

The Court of Appeals *held*:

1. MCL 38.35a and MCL 38.50a, as amended by 2011 PA 264, in part require employees hired before April 1, 1997, who had maintained membership in the state's defined benefit plan to choose to either contribute 4 percent of their income to that plan or to switch to the 401(k) defined contribution plan that was

applicable to state employees hired on or after April 1, 1997 without a required contribution. Compensation is something given or received for services, debt, loss, injury, etc. Pension benefits, insurance premium payments, uniforms, and other fringe benefits are part of an employee's compensation. An employer's ability to legally discontinue pension benefits does not render the benefit outside the scope of compensation. However, if an employer changes the amount, nature, or quality of a pension benefit, the employer is changing the amount, nature, or quality of compensation, as well as a condition of employment. In this case, the ratifiers of the 1963 Constitution would have considered that the fringe benefits provided to civil service employees, which includes the pension plan offered as part of the compensation package, constituted rates of compensation or conditions of employment for purposes of the SERA. Changing the nature of the plan changed the nature of the benefit. The 2011 PA 264 amendments to MCL 38.35a and MCL 38.50a violate Const 1963, art 11, § 5 because only the commission, not the Legislature, has authority to change a civil service employees' rate of compensation or the conditions of employment.

2. MCL 38.1e(1), as amended by 2011 PA 264, alters the manner in which overtime compensation is applied to the calculation of final average compensation for purposes of retirement benefits. Rather than looking at the three highest-paid consecutive years for overtime, the amended statute looks back six years and averages the overtime for that period. Wages, hours, and other conditions of employment are mandatory subjects of collective bargaining and the phrase "wages, hours, and other terms and conditions of employment" is comparable to the phrases "rates of compensation" and "all conditions of employment" over which the commission has plenary authority under Const 1963, art 11, § 5. The 2011 PA 264 amendment to MCL 38.1e violates Const 1963, art 11, § 5 because the calculation of pension benefits is within the commission's authority, not the Legislature's.

3. Under MCL 8.5, if invalid or unconstitutional language can be deleted from an act and still leave it complete and operative, the remainder of the act is permitted to stand. The trial court erred by declaring 2011 PA 264 unconstitutional in its entirety without determining whether the MCL 38.1e, MCL 38.35a, and MCL 38.50a amendatory language deemed unconstitutional could be struck from the act while preserving the remainder.

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

CONSTITUTIONAL LAW — CIVIL SERVICE COMMISSION — CIVIL SERVICE EMPLOYEES — RATES OF COMPENSATION — PENSION BENEFITS — CHANGE IN CALCULATION OF PENSION BENEFITS.

Under 1963 Const, art 11, § 5, only the Michigan Civil Service Commission may alter civil service employees' rates of compensation and conditions of employment; for purposes of the State Employees' Retirement Act, MCL 38.1 *et seq*., compensation is something given or received for services, debt, loss, injury, etc.; pension benefits, insurance premium payments, uniforms, and other fringe benefits are part of an employee's rates of compensation or conditions of employment; the Legislature may not promulgate acts that alter a civil service employee's pension plan, including the manner in which overtime compensation is calculated for purposes of pension benefits, because the commission has plenary authority to alter rates of compensation and conditions of employment.

William A. Wertheimer for all plaintiffs.

Michael B. Nicholson and *Ava R. Barbour* for International Union UAW and Local 6000.

Sachs Waldman, P.C. (by *Mary Ellen Gurewitz* and *Marshall J. Widick*), for SEIU Local 517M and Michigan Corrections Organization.

Frazer, Trebilcock, Davis & Dunlap, P.C. (by *Michael E. Cavanaugh* and *Brandon W. Zuk*), for Michigan Coalition of State Employee Unions.

Miller Cohen, PLC (by *Robert D. Fetter* and *Keith D. Flynn*), for Michigan AFSCME Council 25.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, *Frank J. Monticello*, and *Larry F. Brya*, Assistant Attorneys General, for the State of Michigan, State Employees Retirement System, State Employees Retirement System Board, Department of Technology Management and Budget and its Director, Direct of Retirement Services Office, and State Treasurer.

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

PER CURIAM. Defendants appeal by right the trial court's order holding 2011 PA 264 unconstitutional because it violates Const 1963, art 11, § 5. 2011 PA 264 amended the State Employees' Retirement Act (SERA), MCL 38.1 *et seq*. Plaintiffs challenged those changes that required employees hired before April 1, 1997, who had maintained membership in the state pension system (the "defined benefit pension plan" or "DB plan") to choose either to contribute 4 percent of their income to that plan or to switch to the 401(k) plan (the "defined contribution plan" or "DC plan," applicable for state employees hired on or after April 1, 1997) without a required contribution.[1] They also challenged the change in the way overtime is applied to the calculation of "final average compensation."

For the reasons set forth below, we affirm the trial court's determination that the challenged portions of 2011 PA 264 are unconstitutional because they are incompatible with Const 1963, art 11, § 5. However, we reverse the trial court's determination that 2011 PA 264 is void in its entirety and remand the case to the trial court for a determination regarding the severability of the remaining portions of 2011 PA 264, pursuant to MCL 8.5. On remand the trial court must determine

[1] The state retirement system is consistent with the common understanding of these terms:

> [A] "defined contribution plan" or "individual account plan" promises the participant the value of an individual account at retirement, which is largely a function of the amounts contributed to that account and the investment performance of those contributions. A "defined benefit plan," by contrast, generally promises the participant a fixed level of retirement income, which is typically based on the employee's years of service and compensation. [*LaRue v DeWolff, Boberg & Assoc, Inc* 552 US 248, 250 n 1; 128 S Ct 1020; 169 L Ed 2d 847 (2008).

whether any additional portions of the act must be deleted in light of this opinion, and if so, whether 2011 PA 264 can be permitted to stand as redacted.

I. FACTS

A. LEGISLATIVE BACKGROUND OF 2011 PA 264

As an initial matter, we take note of the history of SERA and the State Civil Service Commission ("the Commission"). The Commission was created in 1940 by a voter-initiated amendment to the 1908 Constitution that ended the wasteful spoils system of state employment rampant at the time. Subsequently, and with the Commission's authorization, the Legislature passed 1943 PA 240, which created SERA, a system for employee retirement benefits. The Commission's power and authority was subsequently modified by Const 1963, art 11, § 5 when the state Constitution was overhauled in 1963. That provision states, in relevant part:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.
>
> * * *
>
> Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of

> his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

The 2011 PA 264 provisions at issue in this case added language to MCL 38.1e, MCL 38.35a, and MCL 38.50a. SERA, as amended by 2011 PA 264, states in relevant part:

> Sec 1e. (1) "Final average compensation" means the average of those years of highest annual compensation paid to a member during a period of 5 consecutive years of credited service; or if the member has less than 5 years of credited service, then the average of the annual compensation paid to the member during the member's total years of credited service. For a person whose retirement allowance effective date is on or after October 1, 1987, "final average compensation" means the average of those years of highest annual compensation paid to a member during a period of 3 consecutive years of credited service; or if the member has less than 3 years of credited service, then the average of the annual compensation paid to the member during the member's total years of credited service. *Beginning January 1, 2012, compensation used to compute final average compensation shall not include includable overtime compensation paid to the member on or after January 1, 2012, except that a member's final average compensation that is calculated using any time period on or after January 1, 2012 shall also include, as prorated for the time period, the*

average of annual includable overtime compensation paid to the member during the 6 consecutive years of credited service ending on the same final date as used to calculate the final average compensation or, if the calculation date is before January 1, 2015, the average of the annual includable overtime compensation paid to the member on or after January 1, 2009 and before the final date as used to calculate the final average compensation. [MCL 38.1e(1) (emphasis added).]

* * *

Sec 35a. (1) Beginning with the first pay date after April 1, 2012 and ending upon the member's termination of employment or attainment date, as applicable under [MCL 38.50a], *each member who made the election under* [MCL 38.50a] *shall contribute an amount equal to 4% of his or her compensation to the employees' savings fund to provide for the amount of retirement allowance that is calculated only on the credited service and compensation received by that member after March 31, 2012.* The member shall not contribute any amount under this subsection for any years of credited service accrued or compensation received before April 1, 2012. [MCL 38.35a(1) (emphasis added).]

* * *

Sec 50a. (1) *The retirement system shall permit each member who is a member on December 31, 2011 to make an election with the retirement system to continue to receive credit for any future service and compensation after March 31, 2012, for purposes of a calculation of a retirement allowance under this act. A member who makes the election under this section shall make the contributions prescribed in* [MCL 38.35a].

(2) As part of the election under subsection (1), the retirement system shall permit the member to make a designation that the contributions prescribed in [MCL 38.35a] shall be paid only until the member's attainment

date.[2] A member who makes the election under subsection (1) and who makes the designation under this subsection shall make the contributions prescribed in [MCL 38.35a] only until the member's attainment date. A member who makes the election under subsection (1) and who does not make the designation or rescinds the designation under this subsection shall make the contributions prescribed in section 35a until termination of employment.

* * *

(4) *A member who does not make the election under this section* or who rescinds an election on or before the close of the election period under this section is subject to all of the following:

(a) He or she *ceases to receive credit for any future service and compensation for purposes of a calculation of a retirement allowance* as prescribed in [MCL 38.20j], beginning 12 midnight on March 31, 2012.

(b) He or she *becomes a qualified participant in Tier 2* beginning 12:01 a.m. on April 1, 2012.

(c) He or she shall receive a retirement allowance calculated under [MCL 38.20] that is based only on credited service and compensation allowed under [MCL 38.20j(1) and (2)]. This subdivision does not affect a person's right to health insurance coverage provided under [MCL 38.20d] or credit for service provided under [MCL 38.20j(3)].

(5) A member who makes the election under this section and the designation under subsection (2) and who does not rescind the election and designation on or before the close of the election period under this section is subject to all of the following:

(a) He or she ceases to receive credit for any future service and compensation for purposes of a calculation of a

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[2] As defined in MCL 38.20j(9), " 'attainment date' means the final day of the pay period in which the member attains 30 years of credited service or the date the member terminates employment, whichever first occurs."

> retirement allowance as prescribed in [MCL 38.20j], beginning 12 midnight on the member's attainment date.
>
> (b) He or she becomes a qualified participant in Tier 2 beginning 12:01 a.m. on the day after the attainment date if he or she remains employed by this state.
>
> (c) He or she shall receive a retirement allowance calculated under [MCL 38.20] that is based only on credited service and compensation allowed under [MCL38.20j(5) and (6)]. This subdivision does not affect a person's right to health insurance coverage provided under [MCL 38.20] or credit for service provided under [MCL 38.20j(7)].
>
> * * *
>
> (9) As used in this section, "attainment date" means that term as defined in [MCL 38.20j]. [MCL 38.50a(1), (2), (4), (5), and (9) (emphasis added).]

In sum, SERA, as amended by 2011 PA 264, requires a DB member to elect to remain in the DB plan and contribute four percent of his or her compensation to the employees' savings fund until termination or until reaching his or her attainment date, if the latter was designated by the employee. MCL 38.50a(1) and MCL 38.35a(1). Accordingly, an election to remain in the DB plan would effectively reduce the employee's immediate compensation. The legislation also changed from three to six the number of years to be averaged when calculating the amount of overtime pay to be included when determining an employee's final average compensation. MCL 38.1e(1). Therefore, any employee who remained in the DB plan also had their final average compensation reduced. An employee who did not make the election was switched to the "Tier 2" DC plan, for which no contribution was required. MCL 38.50a(4).

II. PROCEDURAL HISTORY

Plaintiffs filed the instant lawsuit on February 13, 2012, alleging that 2011 PA 264 was enacted in violation of Const 1963, art 11, § 5 because it lacked the Commission's approval or input and it purported to regulate conditions of employment. Plaintiffs specifically alleged that the four percent contribution required of DB plan members violated Const 1963, art 11, § 5 because only the Commission has authority to fix rates of compensation, unless 2/3 of the Legislature voted to reject or reduce an increase.

The parties filed cross motions for summary disposition, and the trial court heard oral argument on June 20, 2012. In its written opinion and order, the court concluded that "[b]y mandating that members contribute four percent of their compensation to the employees' savings fund, the Legislature reduced the compensation of classified civil servants—an act that is within the sphere of authority vested in the [Commission]." The trial court disagreed with defendants' argument that the term compensation, as used in art 11, § 5, meant only what employees are paid, noninclusive of fringe benefits, and cited opinions of the Attorney General that have held the term compensation includes fringe benefits. The court concluded that requiring members to pay four percent for a benefit that formerly had cost them nothing was not equivalent to a voluntary election to purchase service credit. The court also found that 2011 PA 264 was not cloaked in the legitimacy of the mandatory contribution provision of the original SERA, which was the cooperative and collaborative product of the Commission and the Legislature. By contrast, there was no evidence of Commission input to or approval of 2011 PA 264. The court concluded that, being in conflict with Const 1963, art 11, § 5, 2011 PA 264 was

void. Accordingly, the trial court denied defendants' motion and granted plaintiffs' motion for summary disposition.

The trial court held a hearing on defendants' motion to stay, but it denied the motion because the September 25, 2012 order was not a final order. Plaintiffs then moved for partial summary disposition on the claim that MCL 38.1e of 2011 PA 264 is unconstitutional because its purported change in the way overtime is calculated for pension purposes constitutes a change in a condition of employment that the Legislature made without the Commission's approval. Plaintiffs also sought voluntary dismissal without prejudice of any other claims arising out of 2011 PA 264. At the motion hearing, the trial court indicated that MCL 38.1e was unconstitutional for the same reasons that applied to Sections 35a and 50a and that "the point here is that the Civil Service Commission has plenary authority to fix rates of compensation and conditions of employment." The court reasoned that because "compensation includes fringe benefits which includes pension benefits," the Legislature "cannot alter these rates of compensation or conditions of employment without some form of approval, consent, or input from the Civil Service Commission." The trial court granted summary disposition on the issue of the unconstitutionality of MCL 38.1e "for the reasons stated on the record."

II. ANALYSIS

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

"[A]n issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). In

this case, the trial court expressly decided that the Legislature's enactment of MCL 38.1e, MCL 38.35a, and MCL 38.50a (changing the overtime calculation and requiring DB members to switch to the DC plan or to contribute 4 percent of their salaries to continue membership in the DB plan) violated Const 1963, art 11, § 5. Plaintiffs' other potential claims arising from the legislation were dismissed without prejudice. Accordingly, the only issue before this Court is whether the amendments to MCL 38.1e(1), MCL 38.35a, and MCL 38.50a by 2011 PA 264 without the approval or consent of the Commission violates Const 1963, art 11, § 5. See *Polkton Twp* 265 Mich App at 95.

This case requires the review of a decision on a motion for summary disposition, and also presents questions of statutory and constitutional interpretation. This Court reviews de novo all of these matters. *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 8; 818 NW2d 337 (2011).

> When interpreting a constitutional provision, the primary goal is to determine the initial meaning of the provision to the ratifiers, the people, at the time of ratification. *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 67; 748 NW2d 524 (2008). "[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law." *Id*. To effectuate this intent, the appellate courts apply the plain meaning of the terms used in the constitution. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 11; 743 NW2d 902 (2008). When technical terms are employed, the meaning understood by those sophisticated in the law at the time of enactment will be given unless it is clear that some other meaning was intended. *Id*. To clarify the meaning of the constitutional provision, the court may examine the circumstances surrounding the adoption of the provision and the purpose sought to be achieved. *Traverse City Sch Dist*

> *v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). An interpretation resulting in a holding that the provision is constitutionally valid is preferred to one that finds the provision constitutionally invalid, and a construction that renders a clause inoperative should be rejected. *Id*. at 406. Constitutional convention debates are relevant, albeit not controlling.[3] *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Every provision in our constitution must be interpreted in light of the document as a whole, and "no provision should be construed to nullify or impair another." *Id*. "Statutes are presumed constitutional unless the unconstitutionality is clearly apparent." *Toll Northville Ltd*, 480 Mich at 11. The court's power to declare a law unconstitutional is exercised with extreme caution and is not exercised where serious doubt exists regarding the conflict. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). [*AFSCME Council 25*, 294 Mich App at 8-9.]

B. DISCUSSION

1. MCL 38.35a AND MCL 38.50a

The central question with regard to these provisions of 2011 PA 264 is whether changing the nature of the contribution-free retirement plan constitutes a change in rate of compensation or a condition of employment. To that end, defendants first argue that MCL 38.35a and MCL 38.50a do not violate art 11, § 5 because in 1940, when the Commission was created, compensation was not understood to include fringe benefits, in part due to the fact that at that time pensions were a rarity. We disagree.

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[3] Our Supreme Court has stated on this matter, "the Address to the People and the constitutional convention debates may be highly relevant in determining the meaning of particular constitutional provisions to the *ratifiers*." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 309 n 13; 806 NW2d 683 (2011).

Defendants rely on *Brown v Highland Park*, 320 Mich 108; 30 NW2d 798 (1948) for support.[4] In *Brown*, the Michigan Supreme Court determined that "a pension granted by public authorities is not a contractual obligation, that the pensioner has no vested right, and that a pension is terminable at the will of a municipality, at least while acting within reasonable limits." *Id*. at 114. In short, it concluded that a retiree had no right to enforce payment of pension benefits. Significantly, however, *Brown's* holding does not directly address whether the term compensation includes pension plans. Contrary to defendants' rarity arguments, the defendant in *Brown* had a pension provision in its city charter since 1918. *Id*. at 110. Additionally, *Brown* relied on *Bowler v Nagel*, 228 Mich 434, 436, 442; 200 NW 258 (1924), which upheld the pension plan enacted by Detroit for its civil servants in 1923. *Bowler* identified a number of cases upholding government service pension plans, including *United States v Hall*, 98 US 343; 25 L Ed 180 (1878). In addition, the federal Civil Service Retirement Act was enacted on May 22, 1920. PL 20-215, 41 Stat 614. Michigan enacted a teachers' retirement system in 1915,[5] and by 1940 also had in place statutory schemes for the retirement plans of firefighters and police officers, 1937 PA 345, and city library employees, 1927 PA 339. In sum, while *Brown* held that a retiree had no right to receive pension benefits (unless provided for by

[4] *Brown* was later superseded by Const 1963, art 9, § 24. *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 662-663; 209 NW2d 200 (1973).

[5] In *Attorney General v Chisholm*, 245 Mich 285, 291-292; 222 NW 761 (1929), the Supreme Court held that 1915 PA 174, which enacted the teachers' retirement system, had been repealed by 1927 PA 319, and that even if repealment had been an unintended effect of the 1927 act, it was up to the Legislature to correct it. Two months later, the Legislature enacted another teachers' retirement system, 1929 PA 5.

contract), it in no way established that "pensions did not generally exist" in 1940.

However, regardless of the meaning of the term compensation in 1940, the issue before the Court today is what was the common understanding of the citizens who adopted the 1963 Constitution. *Nat'l Pride At Work, Inc*, 481 Mich at 67 (noting that when interpreting a constitutional provision, the primary goal is to determine the initial meaning of the provision to the ratifiers, the people, at the time of ratification). When the 1963 Constitution was considered, SERA had been in place for twenty years. In *Kane v City of Flint*, 342 Mich 74, 83; 69 NW2d 156 (1955), our Supreme Court upheld the city's authority to take into account the additional retirement pension benefits granted firefighters and police officers when the city created for its employees a "like compensation" pay system that differentiated the compensation of firefighters and police officers from other city employees. The Court noted that the applicable ordinance mandated that, "[l]ike classifications of work are to receive like compensation," and the plaintiff-firefighters argued that the pay differential violated this requirement. *Id*. at 79. The plaintiffs argued that compensation included only salaries or wages. The Court disagreed with such a narrow definition of the term compensation:

> We do not agree with plaintiffs that charter retirement pensions, insurance premium payments and the furnishing of uniforms cannot be considered as "compensation." Nor is there merit to plaintiffs' argument that such benefits, admittedly still being received by the plaintiffs, cannot be included as compensation on the ground that they are not contractual and that the city can discontinue them. *Conceding that the city can legally discontinue retirement pension benefits, group insurance and furnishing of uni-*

> *forms, these still are benefits while being received by the firemen and policemen*. [*Id*. at 80 (emphasis added).]

The Court then examined secondary authority and concluded that pension benefits are part of the employees' compensation. *Id*. at 80-81, citing Cyclopedic Law Dictionary (3d ed), p 211, 3 McQuillin Municipal Corporations (3d ed), pp 499-500, and *Bowler*, 228 Mich at 440-441. The Court reasoned:

> The alternative, if these benefits which the plaintiffs receive were not to be considered as being part of plaintiffs' compensation, would seem to be that they would have to be considered as gratuities. If that were true, it would follow that the retirement pension plan here involved would be *ultra vires* and void, the city lacking the power to pay gratuities, under *Bowler*. [*Kane*, 342 Mich at 81.]

Kane did not purport to overrule *Brown*, and the outcomes of the two cases are not in direct conflict. *Brown* was concerned with paying benefits to *pensioners*; *Kane* dealt with the definition of the term compensation in the context of *current employees* and whether that included the existence of a pension system from which future benefits might be paid. Additionally, *Kane* specifically concluded that the city's ability to legally discontinue pension benefits did not render those benefits outside the scope of compensation.

Indeed, more recent case law also supports the proposition that an employee's compensation includes fringe benefits. In *AFSCME Council 25*, 294 Mich App at 26 n 3, this Court addressed the issue of "the validity of the *process* of removing three percent of employee compensation and directing it to retiree health care without regard to Const 1963, art 11, § 5." Consistent with *Kane*, the Court defined compensation as " 'something given or received for services, debt, loss, injury, etc.' " *Id*. at 23, quoting *Random House Webster's College*

Dictionary (2001), p 271. Under *Kane*, an employer's provision of a pension plan to employees is a benefit similar to insurance premium payments or uniforms. Thus, if the employer changes the amount, nature, or quality of that benefit, then the employer is changing the amount, nature, or quality of compensation.

Moreover, defendants make no argument that the nature of the pension plan is not within the definition of "conditions of employment." See *Mt Clemens Fire Fighters Union, Local 838, IAFF v City of Mt Clemens*, 58 Mich App 635, 645; 228 NW2d 500 (1975) (holding that in the labor law context "a change in the retirement plan constitutes a change in conditions of employment"). Thus, whether it concerns "rates of compensation" or "conditions of employment," the statutory pension plan provisions may not be altered through 2011 PA 264 by the Legislature acting without the approval of the Commission.

In sum, we conclude that the ratifiers in 1963 would have considered rates of compensation to include fringe benefits provided to civil service employees, and that would include the pension plan offered as part of the compensation package. Changing the nature of the plan changes the nature of the benefit, and thus it amounts to a change in the rate of compensation or in the conditions of employment. This is within the authority of the Commission, not the Legislature, and therefore MCL 38.35a and MCL 38.50a are unconstitutional.

2. MCL 38.1e

MCL 38.1e, unlike MCL 38.35a and MCL 38.50a, addresses whether overtime pay is included in the definition of compensation. Before amendment, MCL 38.1e computed "final average compensation" using the yearly average of the employee's highest three-

consecutive-year compensation. In other words, the total of earnings in whatever three-year period in which the employee earned the most was divided by three to arrive at the average annual compensation for that period. Under 2011 PA 264's amendment, this part of the calculation remains the same, but now overtime is treated differently. Instead of looking at the three highest-paid consecutive years for overtime, the calculation looks back six years and averages the overtime for that period.

We conclude that because MCL 38.1e—like MCL 38.35a and MCL 38.50a—makes a change to a fringe benefit, it improperly invades the authority of the Commission and therefore is unconstitutional. Mandatory subjects of collective bargaining are those concerning "wages, hours, and other terms and conditions of employment." MCL 423.215(1). The phrase "wages, hours, and other terms and conditions of employment" is comparable to the "rates of compensation" and "all conditions of employment" over which the Commission has plenary authority. Const 1963, art 11, § 5; *Womack-Scott v Dep't of Corrections*, 246 Mich App 70, 79; 630 NW2d 650 (2001). Thus, we conclude that the calculation of pension benefits is within the authority of the Commission, not the Legislature.

We agree with defendants that the Commission's authority over legislation affecting state employees is not unlimited, and that "there have been many statutes found constitutional when they affected State civil service employees despite of the Commission's authority under article 11, § 5." For example, defendant notes that the Civil Rights Commission has authority over the same state employees regarding issues of discrimination, *Dep't of Civil Rights ex rel Jones v Dep't of Civil Serv*, 101 Mich App 295; 301 NW2d 12 (1980); that

"compensation," as used in art 11, § 5 does not include the disability compensation included in MCL 330.1113, *Oakley v Dep't of Mental Health (On Remand)*, 136 Mich App 58; 355 NW2d 650 (1984); and that other statutes affecting civil service workers are constitutional, *Dep't of Transp v Brown*, 153 Mich App 773; 396 NW2d 529 (1986), *Walters v Dep't of Treasury*, 148 Mich App 809; 385 NW2d 695 (1986), and *Marsh v Civil Serv Dep't*, 142 Mich App 557; 370 NW2d 613 (1985). However, 2011 PA 264 is distinguishable from the types of legislation validated in the *Jones*, *Walters*, *Marsh*, *Oakley*, and *Dep't of Transp* cases cited by defendants, because the legislation at issue in those cases concerned laws applicable to all employers, public and private. The role of the state in those cases was that of "employer," and in the context of taxes, civil rights, and occupational safety, the employer of civil servants is treated in large part like any other employer. However, the Legislature cannot control the specific terms of a private employer's retirement plan (nor that of a public employer at the municipal or county level). Legislation that attempts to exercise that kind of control over state employees would seem to usurp the power the ratifiers intended to give the Commission.

3. SEVERABILITY AND THE DISPOSITION OF THE CASE

Relying on *AFSCME Council 25*, 294 Mich App at 29, the trial court concluded that 2011 PA 264 unconstitutionally conflicted with Const 1963, art 11, § 5, and declared it void. But *ASFCME Council 25* did not declare an entire *public act* unconstitutional. In *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 345-349, the Michigan Supreme Court addressed the severability of the parts of 2011 PA 38 it found unconstitutional. There, as here,

the public act contained no express severability clause. Accordingly, the Court applied the severability provision of MCL 8.5, which states, in relevant part:

> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

The Supreme Court acknowledged this when it "recognized that it is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 345 (quotation marks, brackets, and citation omitted). Accordingly, it struck from the act only the language found to be in contravention of the Constitution. *Id*. at 347-349.

In the instant case, the act includes amendments to other provisions in SERA that refer to the unconstitutional sections. However, the parties have not given guidance regarding the validity of specific language that might be struck from 2011 PA 264 while preserving the remainder. Accordingly, we reverse the trial court's determination that 2011 PA 264 is void in its entirety and remand the case to the trial court for a determination regarding the severability of the remaining portions of 2011 PA 264. Specifically, we remand for a determination regarding whether additional portions of the act must be deleted in light of this opinion, and if so, whether such deletions "still leave [2011 PA 264] complete and operative" and thus permitted to stand. *In re*

Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 490 Mich at 345 (quotation marks and citation omitted).

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, a public question being involved.

OWENS, P.J., and GLEICHER and STEPHENS, JJ., concurred.

TYRA v ORGAN PROCUREMENT AGENCY OF MICHIGAN

Docket No. 298444. Submitted April 4, 2013, at Detroit. Decided August 15, 2013, at 9:00 a.m. Leave to appeal sought.

Lisa Tyra filed an action against Organ Procurement Agency of Michigan, Stephen Cohn, M.D., William Beaumont Hospital, Dillip Samara Pungavan, M.D., and John Doe in the Oakland Circuit Court, alleging medical malpractice. Plaintiff sent notices of intent to defendants pursuant to MCL 600.2912b, and filed her complaint 112 days later, rather than waiting the 182 or more days required by MCL 600.2912b(1). Defendants filed a motion for summary disposition, claiming that the action should be dismissed with prejudice because plaintiff had prematurely filed her complaint and the limitations period had expired. Plaintiff argued that defendants had waived the notice-period affirmative defense because their responsive pleading had failed to put her on notice that she had failed to comply with the requirement. The trial court, Nanci J. Grant, J., granted defendants summary disposition, concluding that defendants' failure to provide detailed facts concerning the affirmative defense did not waive the defense. Plaintiff appealed.

The Court of Appeals *held*:

1. MCR 2.111(F) provides that a defendant waives any affirmative defense not set forth in the defendant's first responsive pleading. MCR 2.111(F)(3) requires the party to state the facts constituting the affirmative defense raised to provide the opposing party with sufficient facts to permit that party to take a responsive position. A plaintiff's failure to comply with the MCL 600.2912b procedural prerequisites for commencing a medical malpractice action constitutes an affirmative defense that must be raised by a defendant in the first responsive pleading to avoid waiver under MCR 2.111(F). In this case, defendants' statements that (1) plaintiff failed to comply with the notice provisions of MCL 600.2912b, and (2) the action was time-barred, were insufficient to raise the affirmative defense of failure to comply with the notice period; defendants failed to provide an adequate statement of facts in support of the affirmative defense. Had plaintiff's action not

been dismissed for other reasons, under MCR 2.111(F), defendants would have waived the affirmative defense.

2. MCL 600.2912b provides that a plaintiff must provide to a health professional or health facility defendant written notice of intent to commence suit in a medical malpractice action 182 or more days before filing the complaint. Under MCL 600.5856(d), the two-year period of limitations for medical malpractice actions is tolled during the notice period if notice is given in compliance with MCL 600.2912b. The Supreme Court's rulings in *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005) and *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007) are binding; regardless of whether the defendants were prejudiced, plaintiff's medical malpractice complaint, which was filed prior to the expiration of the MCL 600.2912b waiting period, did not commence an action that tolled the running of the two-year statute of limitations pursuant to MCL 600.5856(a).

3. Under MCL 600.2301, the court in which any action or proceeding is pending, has the power to allow the amendment of any pleading or proceeding in such action or proceeding so long as the amendment was in the interests of justice and did not affect the substantial rights of the other party. The power to amend pleadings or proceedings under MCL 600.2301 applies to the entire notice process of MCL 600.2912b(1). In this case, the trial court erred by granting summary disposition in favor of defendants because it had discretion to allow plaintiff to amend her complaint so as to comply with the MCL 600.2912b(1) notice requirements. Although plaintiff's prematurely filed complaint did not commence an action for purposes of MCL 600.2912b, the proceeding was underway because plaintiff had properly filed the notice of intent. Because the proceeding was underway, the trial court had discretion under MCL 600.2301 to allow plaintiff to amend the filing date of her complaint and affidavit of merit to comply with MCL 600.2912b(1).

Reversed and remanded for further proceedings.

WILDER, P.J., dissenting, would have affirmed the trial court order granting summary disposition in favor of defendants on the basis, that because plaintiff prematurely filed her complaint, the action was not properly commenced and the malpractice period of limitation was not tolled. He also would have concluded that defendants did not waive their affirmative defense that the action was not properly commenced because the issue of a plaintiff failing to comply with MCL 600.2912b can be raised irrespective of whether the defendant properly asserts it. Judge WILDER would have held that plaintiff's complaint could not be amended under

MCL 600.2301 because a proceeding is not pending in the court; the limitations period expired without commencement of a medical malpractice action because plaintiff filed her complaint prematurely.

Mark Ganzotto, P.C. (by *Mark Granzotto*) and *Cutler & Cutler PLLC* (by *Donald M. Cutler*), for Lisa Tyra.

Lipson, Neilson, Cole, Seltzer & Garin, PC (by *Karen A. Smyth* and Mark E. Phillips), for Organ Procurement Agency of Michigan.

O'Connor, DeGrazia, Tamm & O'Connor, PC (by *Julie McCann O'Connor* and *Richard M. O'Connor*), for Dr. Steven Cohn and William Beaumont Hospital.

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. In this medical malpractice action, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). Plaintiff's action arose out of a kidney transplant; she suffered injury because the kidney was not properly checked for a "cross-match" prior to transplantation, and it was subsequently discovered that there was a positive match. Plaintiff sent notices of intent to defendants pursuant to MCL 600.2912b, but filed her complaint 112 days later instead of waiting 182 days or more as required by statute, MCL 600.2912b(1). Although the trial court otherwise reached the only result possible under the currently binding caselaw precedent, the trial court erred by failing to afford plaintiff an opportunity to pursue the possibility of amending the filing date of the complaint pursuant to MCL 600.2301. We therefore reverse and remand.

Plaintiff received her kidney transplant on June 9, 2007. On April 23, 2009, she sent defendants notices of intent to file a claim, pursuant to MCL 600.2912b. Plaintiff filed the complaint on August 13, 2009. Consequently, plaintiff filed her complaint 112 days after serving the notices of intent, rather than at the end of the 182-day period called for by MCL 600.2912b(1). Defendants do not, at least for purposes of the instant motion proceedings, dispute the propriety and sufficiency of the notices of intent. Defendants eventually filed a motion for summary disposition on the theory that because plaintiff had failed to wait either the full 182-day period or the shortened 154-day period permitted if a defendant failed to respond to a notice of intent, MCL 600.2912b(1) and (8), plaintiff's complaint was insufficient to commence the action. Because the limitations period had expired by then, defendants argued that dismissal must be with prejudice. Plaintiff contended that because defendants' responsive pleadings asserting their affirmative defenses failed to set forth sufficient facts to put plaintiff on notice that she had failed to comply with the notice-period requirement, defendants had waived that affirmative defense pursuant to MCR 2.111(F). The trial court, relying on *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), concluded that the failure to provide detailed facts constituting the affirmative defense did not waive the defense. The trial court therefore granted summary disposition in favor of defendants, and this appeal followed.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the

contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. This Court likewise reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co*, *Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). This Court may not depart from the literal language of an unambiguous statute merely because the result would be absurd, *People v McIntire*, 461 Mich 147, 155-156, n 2; 599 NW2d 102 (1999), but if it proves necessary to interpret ambiguous language, then an absurd or unjust result should be avoided to the extent possible. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). Interpretation of a court rule follows the general rules of statutory construction. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000).

It has essentially always been the rule in Michigan that defendants must "apprise the plaintiff of the nature of the defense relied upon, so that he might be prepared to meet, and to avoid surprise on the trial." *Rosenbury v Angell*, 6 Mich 508, 513 (1859). Today, MCR 2.111(F) provides that a defendant waives any affirmative defense not set forth in the defendant's first responsive pleading. *Electrolines*, *Inc v Prudential Assurance Co*, *Ltd*, 260 Mich App 144, 164; 677 NW2d 874 (2003). An affirmative defense presumes liability and accepts a plaintiff's prima facie case, but asserts that the defendant is not liable for other reasons not set forth in the plaintiff's pleadings. *Citizens Ins Co of America v Juno Lighting*, *Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001). We hold that failure to comply with purely procedural prerequisites for commencing a

medical malpractice action is therefore an affirmative defense that must be raised to avoid waiver under MCR 2.111(F).

We note, however, that although *Electrolines*, *Inc* did not so mention, affirmative defenses are not necessarily waived by failing to state them in a first responsive pleading at the time that pleading is originally filed. Pursuant to MCR 2.111(F)(3), "[a]ffirmative defenses must be stated in a party's responsive pleading, either as originally filed *or as amended in accordance with MCR 2.118*" (emphasis added). Likewise, a defense "not asserted in the responsive pleading *or by motion as provided by these rules* is waived . . . ." MCR 2.111(F)(2) (emphasis added). Although affirmative defenses are not "pleadings," *McCracken v City of Detroit*, 291 Mich App 522, 528; 806 NW2d 337 (2011), the court rules unambiguously permit them to be amended in the same manner as pleadings. This is noteworthy in part because the practice of filing "boilerplate" affirmative defenses consisting of generic, unsupported, bald assertions of every conceivable affirmative defense irrespective of, and possibly even contrary to, any known facts is not only unnecessary, but wasteful, counterproductive, and in some instances possibly even contrary to MCR 2.114(D). Rather, a defendant may move to amend their affirmative defenses to add any that become apparent at any time, and any such motion should be granted as a matter of course so long as doing so would not prejudice the plaintiff. See MCR 2.118(A)(2).

Furthermore, MCR 2.111(F)(3) requires that the party "*must state the facts constituting*" any affirmative defense so raised (emphasis added). The purpose of this requirement is to provide the opposing party with sufficient notice of the alleged affirmative defenses to permit that party to take a responsive position, and a

stated affirmative defense that does so will not be deemed insufficient. *Hanon v Barber*, 99 Mich App 851, 856; 298 NW2d 866 (1980). However, "[j]ust as the plaintiff must plead something beyond a general the 'defendant injured me,' the defendant must plead something more specific than, 'I deny I'm liable.' " *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 318; 503 NW2d 758 (1993). Put another way, a statement of an affirmative defense must contain facts setting forth *why and how* the party asserting it believes the affirmative defense is applicable.

In this case, one group of defendants presented a list of affirmative defenses that, in relevant part, stated, "Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A.2912b and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition." The other group of defendants did not even mention MCL 600.2912b at all. The latter group seems to assert that their affirmative defenses were sufficient because another defendant's affirmative defenses were sufficient. The former group of defendants asserts that their affirmative-defense statement was sufficient because the "notice provisions of MCL 600.2912b" include the waiting period—which is described as a "notice period" in the statute. We disagree with both assertions. The affirmative defenses presented in this case were not sufficient to raise the affirmative defense of failure to comply with the notice period; consequently, that affirmative defense should be deemed waived.[1]

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[1] As the dissent notes, and as we discuss later, our Supreme Court in *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007), stated its approval of a dissent in an unpublished opinion of this Court and held that a defendant may raise the MCL 600.2912b notice-period defense, irrespective of their failure to comply with the plain and unambiguous requirements of MCR 2.111, because MCR 2.111 does not apply if the

MCL 600.2912b(4) specifically addresses "the notice given to a health professional or health facility." An ordinary reading of the affirmative defense alongside the statute could reasonably induce a reader to believe that plaintiff's only alleged violation of MCL 600.2912b—specifically, the "notice provisions" thereof—pertained to the notice *itself*, as distinct from the notice period. It is true that "the primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke*, 200 Mich App at 317, citing 1 Martin, Dean & Webster, Michigan Court Rules Practice, p 186. Therefore, by extension to other filings, the statement of facts required under MCR 2.111(F) is not extensive or detailed. However, the statement here is merely a conclusion, not even a vague statement of "facts *constituting*" an affirmative defense. MCL 2.111(F)(3). The statement fails to explain why defendants believed plaintiff "failed to comply with the notice provisions of MCL 600.2912b." Rather, it is merely the equivalent of a plaintiff baldly stating that the "defendant breached the standard of care" and leaving it at that.

A plaintiff *may* move for a more definite statement if the statement is vague or ambiguous. MCR 2.115(A). Plaintiff did not at that time move to strike any affirmative defenses as insufficient or request more

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lawsuit was not properly commenced. We and the trial court are bound by that decision; the waiver here is, therefore, of no practical legal effect. However, we are concerned that while an attorney owes no specific duty to opposing counsel or parties, *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 383; 354 NW2d 341 (1984), deeming such a waiver irrelevant will impair our overall public policy of preferring to resolve disputes on the merits instead of technicalities. See *Huggins v MIC Gen Ins Corp*, 228 Mich App 84, 86; 578 NW2d 326 (1998) (noting that while determining issues on their merits is generally favored, the decision whether to set aside a default is within the trial court's discretion).

detail. However, a failure to move for a more definite statement is not proof that the filing was adequate to begin with. See *Dacon v Transue*, 441 Mich 315, 334-335 n 20; 490 NW2d 369 (1992). Consequently, failing to move to strike or for a more definite statement does not establish the sufficiency of the affirmative defenses as filed.[2] This is particularly the case where a party somehow induces the other party to believe that doing so is unnecessary. See *Hill v Freeman*, 117 Mich App 788, 792-793; 324 NW2d 504 (1982). Failing to move for a more definite statement *may* mean that the other party was not confused, but it may also mean that the other party was so confused that it was not aware that it was confused. In this case, the affirmative-defense statement as written, without reference to a factual basis, or even to a correctly specific portion of the statute, naturally leads to the conclusion that the stated affirmative defense was alleging that the notice itself was deficient. A statement likely to induce a party to take a responsive position that is unrelated to what the party now claims to have meant is not, in any meaningful sense, sufficient.

Because defendants failed to provide any, let alone a comprehensible or adequate, statement of facts supporting the relevant affirmative defense, we find the affirmative-defense statement by the defendants insufficient to raise the affirmative defense of plaintiff's failure to comply with the notice-*period* requirement of

[2] As noted, it is apparently standard practice to file borderline-nonsensical boilerplate lists of possible affirmative defenses with little, if any, anticipation that most of them have the slightest factual basis. Deeming them adequate unless challenged would unleash a wasteful avalanche of equally *pro forma* challenges and, quite possibly, sanctions. Furthermore, it may be impossible for a party to determine which bare assertions of affirmative defenses might have any merit in the absence of meaningful supporting facts offered for any of them.

MCL 600.2912b. Under a plain application of MCR 2.111(F), the affirmative defense would be waived.

Defendants alternatively argue that the trial court constructively granted leave to amend their affirmative defenses by considering the merits of defendants' assertions that plaintiff failed to comply with MCL 600.2912b. As discussed, a party may amend filings as long as doing so will not prejudice the opposing party. MCR 2.118; MCL 600.2301; *Stanke*, 200 Mich App at 321. The record discloses no reason why the trial court could not have permitted defendants to amend their affirmative defenses at any time *before* it became "too late" for plaintiff to correct her error. However, there is no indication that the trial court or the parties believed that any amendment transpired. Defendants' reliance on *Cole v Ladbroke Racing Mich*, *Inc*, 241 Mich App 1; 614 NW2d 169 (2000), is misplaced, because in that case, the trial court explicitly "recognized that [the] defendant needed the court's permission to assert the affirmative defense, and then stated, 'Let's go ahead' " and heard the motion on the basis of that defense. *Id*. at 9. Consequently, the trial court in *Cole* engaged in overt action that constructively granted leave to amend. We do not believe that in this case the trial court's actions should be justified after the fact because of the theoretical existence of an alternative course of action the trial court could have taken but did not in any way suggest that it actually did. In any event, amendment of defendants' affirmative defenses *after* the expiration of the limitations period unambiguously worked to the prejudice of the other party and therefore would not have been permissible. MCR 2.118(A)(2).

However, defendants also argue that even if their affirmative defenses were insufficient, summary disposition was nevertheless warranted because, ultimately,

plaintiff's complaint, which was filed before the 182-day notice period mandated by MCL 600.2912b(1) had elapsed, simply failed to commence the action. Therefore, the trial court had no other alternative to dismissing the action. Under the current state of binding case law, we are compelled to agree.

In *Auslander v Chernick*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2007 (Docket No. 274079), the plaintiffs failed to file an affidavit of merit with their medical malpractice complaint. The defendants' affirmative defenses included statements that the plaintiffs' claim was " 'barred by the statute of limitations as it applies to malpractice actions' " and that the plaintiffs' affidavit of merit " 'fail[ed] to meet the requirements of MCL §600.2912a; MCL §600.2912d, and other provisions as set forth in the Tort Reform Acts of 1993 and 1995.' " The defendants moved for summary disposition after the expiration of the limitations period, arguing that the plaintiffs had failed to file affidavits of merit with the complaint. The Plaintiffs responded that the defendants had waived any such defense because the defendants had not stated the facts forming the basis for that affirmative defense in compliance with MCR 2.111(F). The trial court agreed and concluded that if strict compliance was required of the plaintiffs, it was also required of the defendants, and so it denied the motion for summary disposition.

A majority of a panel of this Court affirmed. However, in a dissenting opinion, Judge JANSEN stated,

> I fully acknowledge that a defendant must raise certain defenses in its first responsive pleading, and that a failure to do so may result in the waiver of those defenses. See MCR 2.111(F)(2); MCR 2.111(F)(3). However, I conclude that [the] defendants were never required to raise or plead

> their asserted defenses in the first instance because this medical malpractice action was never properly commenced.
>
> [The] [p]laintiffs' claims arose, at the latest, at the time of the myocardial infarction in March 2003. "[T]he mere tendering of a complaint without the required affidavit of merit is insufficient to commence [a medical malpractice] lawsuit," and therefore does not toll the two-year period of limitations. *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000). In this case, plaintiffs wholly omitted to file the requisite affidavits of merit, and their complaint of September 2004 was therefore insufficient to toll the limitations period. *Id*. Regardless whether [the] defendants properly raised and preserved the statute-of-limitations and affidavit-of-merit defenses in their first responsive pleading, the period of limitations was not tolled by [the] plaintiffs' complaint, and [the] plaintiffs' claims were already time-barred at the time of the circuit court's ruling. *Id*. at 553. I would reverse and remand for dismissal with prejudice of [the] plaintiffs' claims. MCR 2.116(C)(7); *Scarsella*, [461 Mich] at 551-552.

On appeal, our Supreme Court reversed "for the reasons stated in the Court of Appeals dissenting opinion." *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007). Orders from our Supreme Court constitute binding precedent to the extent they can be understood as having a holding based on discernible facts and reasoning. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002). Our Supreme Court's order of reversal in *Auslander* can be understood as adopting the reasoning of the dissenting opinion from this Court in that case, and that dissent consequently constitutes binding precedent despite originally having been unpublished and not binding pursuant to MCR 7.215(C)(1).

This conclusion appears to do violence to what otherwise appears to be the plain and unambiguous requirements of the court rule. It is especially concerning

because there is no indication that defendants suffered any actual prejudice. Conversely, had defendants actually articulated the fact that plaintiff had filed a premature complaint in their affirmative defenses, plaintiff would have still been able to correct the deficiency by filing a properly timed complaint. Rather, defendants only articulated the prematurity after the limitations period had expired. Consequently, permitting defendants to utilize this affirmative defense despite failing to comply with the clear and mandatory requirement of MCR 2.111(F) that they state the facts constituting that defense, encourages gamesmanship and resolution of cases on the basis of technicalities that harmed no party, rather than on any merits whatsoever. Nevertheless, this Court is bound to follow holdings of our Supreme Court. *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). Notwithstanding the plain language of the court rule, a plaintiff's failure to comply with MCL 600.2912b remains available as a defense to a defendant irrespective of whether the defendant properly asserts it.

Pursuant to MCL 600.2912b, a medical malpractice action cannot be commenced unless the plaintiff first provides to health professional or health facility defendants a written notice of intent to commence suit and then waits 182 days before filing the complaint. *Burton*, 471 Mich at 751. "MCL 600.5856(d) provides that the two-year period of limitations for medical malpractice actions is tolled during the notice period if notice is given in compliance with MCL 600.2912b." *Id*. at 752. Generally, the statute of limitations is then further tolled pursuant to MCL 600.5856(a) by the filing of a complaint and affidavit of merit. *Kirkaldy v Rim*, 478 Mich 581, 585; 734 NW2d 201 (2007). Pursuant to *Burton*, 471 Mich at 751-756, a medical malpractice complaint filed prior to the expiration of the

MCL 600.2912b waiting period does not commence the action and does not toll the running of the limitations period pursuant to MCL 600.5856(a). The *Burton* Court further held that whether a defendant was prejudiced was immaterial. *Id*. at 753. Plaintiff's argument is essentially that *Burton* is no longer entirely "good law" in this latter respect.

Burton relied to some extent on analogous reasoning in *Scarsella*, wherein the Court had "concluded that the filing of a complaint without the required affidavit of merit was insufficient to commence the lawsuit." *Burton*, 471 Mich at 752, citing *Scarsella*, 461 Mich at 549. The Court in *Burton* went on to state that "[t]he filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit." *Burton*, 471 Mich at 754. The Court further relied on *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66-68; 642 NW2d 663 (2002), which held that complete compliance with MCL 600.2912b was mandatory before the limitations period would be tolled. *Burton*, 471 Mich at 753.

As applied to the instant case, because plaintiff's prematurely filed complaint did not toll the running of the limitations period, that period eventually expired. Defendants moved for summary disposition after that expiration. However, because the limitations period had expired, plaintiff could not refile and the dismissal was with prejudice.

Plaintiff argues that the relevant portion of *Roberts* on which *Burton* relied was subsequently overruled when our Supreme Court later concluded that, on the basis of subsequent legislative changes, a defective notice of intent *would* toll the running of the statute of limitations. *Bush v Shabahang*, 484 Mich 156, 170 n 26;

772 NW2d 272 (2009). Our Supreme Court also explained that because MCL 600.2912b was intended to promote settlement and reduce costs of litigation, failure to comply with the statute was not per se a basis for dismissal with prejudice. *Id*. at 174-175, citing Senate Legislative Analysis, SB 270, August 11, 1993, and House Legislative Analysis, HB 4403 to 4406, March 22, 1993. Finally, the Court explained that notices of intent could be amended pursuant to MCL 600.2301. *Id*. at 176-178.

Plaintiff contends that because *Burton* analogized a prematurely filed complaint to a defective notice of intent, which at the time was held not to toll the limitations period but now is deemed to toll the limitations period, a prematurely filed complaint should likewise be deemed to toll the limitations period, at least until such time as it is successfully challenged. See, by analogy, *Kirkaldy*, 478 Mich at 586 (holding that a defective affidavit of merit tolls the limitations period until it is successfully challenged). We are unaware of any readily apparent reason why a defective affidavit of merit or a defective notice of intent are sufficient to toll a limitations period but a defective complaint is not. Furthermore, it appears to us that our Supreme Court rejected the plain language of MCL 600.5856(a) in *Burton*, 471 Mich at 752-754. MCL 600.5856(a) *explicitly* states that the limitations period is tolled, "[A]t the time the complaint is filed," *not* "when the claim is commenced" or "when the complaint is properly and/or timely filed." A prematurely filed complaint could not, in the words of MCL 600.2912b, "commence an action;" however, nothing in MCL 600.2912b prohibits filing a complaint, and nothing in MCL 600.5856(a) concerns itself with the propriety of the complaint or whether the action has actually been

commenced. Indeed, MCL 600.2912b(3)(c) explicitly draws a distinction between "fil[ing] a complaint" and "commenc[ing] an action."

However, regardless of our Supreme Court's reasoning, *Burton* has not been overturned. Even if the underpinnings of the relevant holding have been eviscerated, the case itself remains binding. This Court has no power or authority to disregard the plain holding of a decision by our Supreme Court merely because that holding no longer seems valid; only our Supreme Court can do that. *Mitchell*, 428 Mich at 369-371. Moreover, citing to *Burton*, our Supreme Court recently reaffirmed that "when a plaintiff fails to strictly comply with the notice waiting period under MCL 600.2912b, his or her prematurely filed complaint fails to commence an action that tolls the statute of limitations." *Driver v Naini*, 490 Mich 239, 256; 802 NW2d 311 (2011).[3] Irrespective of the language used in the relevant statutes, it therefore remains binding precedent that a prematurely filed complaint does not commence a medical malpractice action or toll the running of the limitations period.

Nevertheless, plaintiff argues that she should be permitted to amend her complaint pursuant to precedent from this Court. In *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), the plaintiff inadvertently filed her complaint and affidavit of merit 181 days after serving her notice of intent, rather than the required 182 days. The record in that case revealed that the plaintiff's counsel had done so in good faith and purely by accident, and the prematurity had absolutely no

[3] *Driver* involved an untimely notice of intent given to a nonparty the plaintiffs sought to add as a party after the limitations period had expired; the plaintiffs sought to amend the notice to date back to the timely notice they had provided to the other defendants. Our Supreme Court held that the plaintiffs could not do so because the claim was already time-barred as to the nonparty the plaintiffs sought to add.

adverse effect on the defendants or on any of the purposes MCL 600.2912b was intended to accomplish, e.g., it did not increase costs or interrupt settlement negotiations. *Id*. at 41, 49-51. This Court concluded that dismissing the case "would fly directly in the face of the Legislature's intent to have injured parties receive compensation for *meritorious* claims." *Id*. at 49. In reliance on *Bush*, this Court concluded that, because no substantial right of the defendants was affected and resolving the matter on its merits was in the interests of justice, and because MCL 600.2301 was applicable to the entire notice process, see *Bush*, 484 Mich at 176-178, the plaintiff was entitled to amend the filing date of the complaint and affidavit of merit pursuant to MCL 600.2301.

In *Driver*, 490 Mich at 254, our Supreme Court explained that "MCL 600.2301 only applies to actions or proceedings that are *pending*." Although an untimely complaint cannot commence an *action*, the *proceedings* here are underway. In *Driver*, the plaintiffs were barred from the initial step of the proceedings of filing the notice of intent, whereas here, there is no dispute that the notice of intent was proper. The dissent apparently concludes that MCL 600.2301 cannot apply because no *action* was underway. We disagree: MCL 600.2301 cannot be used to create a filing out of whole cloth, but no such bootstrapping would occur here, where all the requisite documents actually exist. In any event, MCL 600.2301 merely affords plaintiff the opportunity to make an argument. We see no value in attempting, on this record, to determine whether defendants' substantial rights would truly be invaded if they are ultimately required to address the merits of the claim instead of relying on legal technicalities to avoid doing so. As we discuss, whether amendment would further the inter-

ests of justice or prejudice defendants is a question to be put to the trial court's discretion on remand.

Notably, the applicability of *Zwiers* to the instant case is unclear. Most glaringly, the plaintiff in *Zwiers* filed an action that was prematurely filed by a single day, whereas here, the prematurity was 70 days. Defendants correctly point out that plaintiff's complaint was too soon even for the shortened 154-day period afforded to medical malpractice defendants to provide a written response to the plaintiff. MCL 600.2912b(7). A plaintiff may commence suit immediately upon the expiration of those 154 days if the defendant has failed to provide that written response. MCL 600.2912b(8). It is not clear from the record whether any of the defendants filed such a response; nevertheless, plaintiff's prematurity in this case is vastly more egregious than that in *Zwiers*. Again, the present record simply does not provide us with any basis for evaluating whether defendants' substantial rights were actually affected by the premature filing. See *Zwiers*, 286 Mich App at 50-51.

The record likewise does not show whether plaintiff made a good-faith attempt to comply with MCL 600.2912b. See *Bush*, 484 Mich at 178. It can reasonably be presumed that very few attorneys would deliberately scuttle a client's case. Furthermore, there is no indication in the record that plaintiff's attorney filed the complaint prematurely on the belief that doing so would achieve some manner of tactical advantage. In short, the record in *Zwiers* showed good faith on the part of the plaintiff; the record here is silent on that point—one way or the other.

We conclude that if a complaint that is filed one day prematurely may be amended pursuant to MCL 600.2301, then it is not possible to foreclose out of hand the possibility that an action that is filed prematurely

by 70 days may also be amended pursuant to MCL 600.2301. Whether such amendment can, and therefore should, be granted in any particular case will, of course, depend on an evaluation of the specific facts and circumstances of each case. In particular, the court must examine whether the party seeking amendment lacked good faith and whether the party opposing amendment will suffer prejudice that cannot be remedied by a lesser sanction than dismissal. That evaluation must initially be made by the trial court after the parties have had an opportunity to be heard on the question.

In interpreting a predecessor statute to MCL 600.2301, our Supreme Court explained that the purpose of the statute was "to abolish technical errors in proceedings and to have cases disposed of as nearly as possible in accordance with the substantial rights of the parties," that the statute should be construed liberally, and that the "right to permit amendments, in accordance with the statute, is vested in the sound judgment and discretion of the trial court." *M M Gantz Co v Alexander*, 258 Mich 695, 697; 242 NW 813 (1932). The failure to exercise discretion when called on to do so is inherently an abuse of discretion. *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990). On this record, we are unable to determine whether plaintiff can make the requisite showing, and we decline to make any presumptions. We therefore conclude that on the basis of both *Zwiers* and the purpose behind MCL 600.2301, the trial court erred by failing to at least consider the possibility of allowing plaintiff to amend her complaint and afford plaintiff the opportunity to present an argument.

The trial court correctly determined that, all other matters being equal, dismissal with prejudice was the only possible outcome of this matter. However, plaintiff

should be afforded the opportunity to make an argument in support of amending the filing date of her complaint and affidavit of merit, including the presentation of evidence should the trial court deem doing so appropriate,[4] and the trial court should exercise its discretion by either granting or denying that amendment pursuant to MCL 600.2301 and *Zwiers*. We therefore reverse the grant of summary disposition in favor of defendants and remand for further proceedings consistent with this opinion and as the trial court deems necessary or proper. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

STEPHENS, J., concurred with RONAYNE KRAUSE, JJ.

WILDER, P.J. (*dissenting*). I respectfully dissent from the majority opinion, which reverses the trial court's order granting summary disposition in favor of defendants and remands for further proceedings on the basis of *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), and MCL 600.2301. Because *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), and *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), continue to be binding on this Court, I would affirm.

I

MCL 600.2912b(1) "unequivocally provides" that a plaintiff " 'shall not' commence an action alleging medical malpractice . . . until the expiration of the statutory notice period." *Burton*, 471 Mich at 752. As the majority recognizes, even though a defective notice of intent (NOI) tolls the applicable limitations period, *Bush v*

[4] Obviously, defendants are equally entitled to present their own arguments and, as applicable, evidence on this matter.

Shabahang, 484 Mich 156, 170; 772 NW2d 272 (2009), a prematurely filed complaint does not toll the period of limitations, *Burton*, 471 Mich at 752. Our Supreme Court in *Driver*, 490 Mich at 257-258, found no conflict with these parameters and found that *Burton* is still good law:

> Nothing in *Bush* altered our holding in *Burton*. The central issue in *Bush* involved the effect an NOI had on tolling when the NOI failed to comply with the *content* requirements of MCL 600.2912b(4). The central issue in *Burton* involved the effect the plaintiff's failure to comply with the *notice-waiting-period* requirements had on tolling. Indeed, the *Bush* Court repeatedly emphasized that the focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b. In contrast to placing doubt on the viability of *Burton*, this aspect of *Bush* aligned with *Burton's* holding that a plaintiff must comply with the notice waiting period to ensure the complaint tolls the statute of limitations.

Plaintiff filed her complaint and affidavit of merit in this case only 112 days after serving the notices of intent on defendants in contravention of MCL 600.2912b(1), which requires that a plaintiff wait at least 182 days before "commenc[ing]" an action.[1] Thus, I would find that we are bound to conclude that plaintiff's action was not properly commenced. MCL 600.2912b(1); *Burton*, 471 Mich at 752.

Further, I disagree with the majority's conclusion that defendants waived, or even could have waived, an affirmative defense that plaintiff's complaint was prematurely filed. In its order in *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007), the Supreme Court concluded that a defendant can still raise the issue of a plaintiff failing to comply with MCL 600.2912b irre-

[1] Certain conditions can reduce this waiting period. See, e.g., MCL 600.2912b(3) and (7).

spective of whether the defendant properly asserts it. Because the order in *Auslander* is also binding on this Court, see *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369-370; 817 NW2d 504 (2012), I would further conclude that defendants did not waive their affirmative defenses that the instant medical malpractice action was not properly commenced.

II

The majority also reverses and remands on the basis of this Court's ruling in *Zwiers*, 286 Mich App 38 and MCL 600.2301. I disagree with this disposition. Although not a medical malpractice statute, MCL 600.2301 does apply to medical malpractice actions because it applies where "*any* action or proceeding is pending." (Emphasis added.) The statute provides in full:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

Thus, "MCL 600.2301 only applies to actions or proceedings that are *pending*." *Driver*, 490 Mich at 254. The Supreme Court concluded in *Driver* that MCL 600.2301 was inapplicable under the facts of that case because, since "an NOI is part of a medical malpractice 'proceeding' " and the applicable limitations period had already expired by the time the defendant was served with the NOI, there was no existing "proceeding" in that case. *Id*. The Court noted that the NOI could not

have been part of any "proceeding" because plaintiff's claim was already time-barred when plaintiff served the NOI. *Id*.

Applying the Supreme Court's analysis in *Driver* to the facts in this case, plaintiff's complaint cannot be resurrected under MCL 600.2301. I agree that at the time plaintiff properly served NOIs to defendants, a *proceeding* was pending to which MCL 600.2301 would have been applicable. However, the limitations period expired without commencement of a medical malpractice action because plaintiff's complaint was filed prematurely. Since " '[a]n action is not "pending" if it cannot be [or was not] "commenced," ' " *id*., there was no *action* pending in the trial court to which MCL 600.2301 could be retroactively applied. Moreover, retroactive application of MCL 600.2301 would affect defendant's substantial rights because defendant would be "denied its right to a statute-of-limitations defense," which is plainly contrary to, and not in furtherance of, the Legislature's intent in enacting MCL 600.2912b. *Id*. at 255.[2]

In this regard, this Court's holding in *Zwiers*, 286 Mich App 38, is significantly undermined by our Supreme Court's later decision in *Driver*. In *Zwiers*, the plaintiff timely filed her NOI but had inadvertently filed her complaint 181 days after serving the NOIs on the defendants instead of the statutorily prescribed 182 days. *Id*. at 39. The trial court granted the defendants' motion for summary disposition on the basis that the complaint failed to commence the action and toll the

[2] Thus, even assuming the expiration of the limitations period did not also extinguish the proceeding which commenced with the filing of the NOI, any amendment of plaintiff's complaint in an attempt to retroactively meet the requisite limitations period would also affect defendant's substantial rights by depriving it of a valid statute of limitations defense, such that MCL 600.2301 would be inapplicable.

limitations period. *Id*. at 40. Finding that no substantial right of the defendants was affected, that resolving the case on the merits was in the interests of justice, and that MCL 600.2301 was applicable to the entire notice process, the *Zwiers* Court found that under MCL 600.2301, the plaintiff was entitled to amend the filing date of the complaint and affidavit of merit. *Id*. at 50-52.

Zwiers was undermined by the Supreme Court's subsequent decision in *Driver* for several reasons. First, because the plaintiff in *Zwiers* prematurely filed her complaint, no *action* was commenced by the plaintiff before the limitations period expired, and therefore, no *action* was ever pending such that the trial court would be authorized under MCL 600.2301 to permit an amendment of the complaint by which plaintiff attempted to commence the action. *Driver*, 490 Mich at 254. Second, *Driver's* holding, that a statute of limitations defense is a substantial right to which a defendant is entitled, contradicts the finding in *Zwiers* that no substantial right of the defendants was affected by permitting the filing of an amended complaint pursuant to MCL 600.2301.[3]

For the reasons stated herein, I respectfully dissent and would affirm the trial court's order granting summary disposition in favor of defendants.

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[3] Notably, unlike the Supreme Court in *Driver*, the *Zwiers* Court did not address the impact of the defendants' right to a statute of limitations defense on the trial court's ability to utilize MCL 600.2301 to resurrect the plaintiff's cause of action; instead, it only focused on the fact that "[t]here was no evidence of interrupted settlement negotiations on the date of filing[] and [that the] defendants had the time and opportunity to investigate plaintiff's allegations as evidenced by defendants' response to plaintiff's NOI under MCL 600.2912b(7)." *Zwiers*, 286 Mich App at 51.

MATTHEW R ABEL, PC v GROSSMAN INVESTMENTS COMPANY

Docket No. 308939. Submitted July 17, 2013, at Detroit. Decided August 15, 2013, at 9:05 a.m.

Matthew R. Abel, PC (Abel), brought an action in the 48th District Court against Grossman Investments Company (GIC). The district court entered a judgment against GIC for $12,353.23. After awaiting payment for a decade, Abel renewed the judgment and moved for the appointment of a receiver to assist with the collection efforts. In 2010, the district court granted the motion and appointed a receiver. The receiver hired three attorneys or their professional corporations to assist his efforts. In 2011, GIC tendered the full judgment amount, with interest, of $17,258.30, which was placed in escrow with the district court. The receiver then sought fees and costs totaling $24,000, including $18,601.30 for Michael Tindall, acting through his professional corporation, Tindall & Company, PC, whom the receiver had hired to assist his efforts. GIC objected to the requested fees. The district court, Diane D'Agostini, J., conducted hearings regarding the fee request and entered an opinion and order that, in relevant part, granted Tindall a fee award in an amount far less than he had sought. Abel, the receiver, and the other two attorneys or their professional corporations hired by the receiver did not appeal. Tindall sought to appeal in the Oakland Circuit Court with regard to the matter of his fees. GIC moved to dismiss on the basis that Tindall lacked standing because he was not an aggrieved party. The circuit court, Colleen A. O'Brien, J., granted the motion to dismiss. The Court of Appeals granted Tindall's application for leave to appeal limited to the issue whether the circuit court erred by dismissing the appeal. *Abel v Grossman Investments Co*, unpublished order, entered November 14, 2012 (Docket No. 308939).

The Court of Appeals *held*:

1. The circuit court erred by holding that Tindall lacked standing to challenge the district court's order in the circuit court. To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility

arising from some unknown and future contingency. By virtue of an order granting, denying, or setting fees, an attorney or a receiver gains a pecuniary interest in such a court ruling. Tindall is an aggrieved party with standing to appeal because he suffered a concrete and particularized injury arising from the district court's order. Postjudgment orders awarding attorney fees or costs are final orders appealable as of right.

2. Tindall was not required to move in the district court to intervene in the action as a prerequisite for appellate standing. Tindall's claim for fees was justiciable, however, Tindall may not name a new, previously uninvolved party in this appeal.

Reversed and remanded.

1. APPEAL — STANDING TO APPEAL — AGGRIEVED PARTIES.

A litigant must be an aggrieved party in order to have standing to appeal; a litigant, to be aggrieved, must have some interest of a pecuniary nature in the outcome of the case and not a mere possibility arising from an unknown or future contingency; a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case.

2. APPEAL — STANDING TO APPEAL — ATTORNEYS — RECEIVERS — FEES.

An attorney or a receiver has a pecuniary interest in an order granting, denying, or setting the fees of the attorney or receiver; an attorney or receiver suffers a concrete and particularized injury when a court orders that the attorney or receiver receive less than he or she had sought.

3. APPEAL — STANDING TO APPEAL — ATTORNEY FEE — AWARDS — INTERVENTION.

An attorney is not required to intervene in an action as a prerequisite for standing to appeal the attorney fee awarded the attorney in the action.

4. APPEAL — POSTJUDGMENT ORDERS — ATTORNEY FEES — FINAL ORDERS.

Postjudgment orders awarding attorney fees or costs are final orders that are appealable as of right (MCR 7.203[A][1]).

Tindall & Company, PC (by *Michael E. Tindall*), for Tindall & Company, PC.

Vezina Law, PLC (by *J. Laevin Weiner* and *Louis C. Szura*), for Grossman Investments Company.

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

PER CURIAM. The issue presented in this case is whether an attorney (here acting through his professional corporation) retained by a court-appointed receiver may appeal a trial court's fee award. The receiver hired attorney Michael Tindall of Tindall & Company, PC (Tindall), to assist in collecting a judgment. When the debt was collected, the receiver sought fees for himself and Tindall. The district court granted Tindall a fee award far below that which he had sought. Tindall sought to appeal in the circuit court, which dismissed based, in part, on Tindall's nonparty status. Because Tindall is an aggrieved party, he may appeal the district court order. Accordingly, we reverse the order of the circuit court and remand to that court for continued appellate proceedings.

I. BACKGROUND

In the early 1990s, plaintiff, Matthew R. Abel, PC (Abel), brought an action in the 48th District Court against defendant, Grossman Investments Company (GIC). In 1993, Abel secured a $12,353.23 judgment against GIC. After awaiting payment for a decade, Abel renewed that judgment. Abel's counsel, attorney Issa Haddad, struggled to collect the judgment because he could not serve GIC or its resident agent, Gordon Grossman, with process. Haddad moved in the district court for the appointment of a receiver to assist with the collection efforts. See MCL 600.2926; MCL 600.6104(4) (governing court appointment of receivers). In 2010, the district court granted Haddad's request in a one-sentence order stating simply, "Plaintiff's motion to appoint Gregory Saffady as receiver is hereby Granted."

Saffady encountered similar difficulties in serving GIC. He hired three attorneys or their professional corporations to assist with the collection efforts, including Tindall. Tindall is also a certified public accountant and has experience in conducting fraud investigations. Only Tindall's claim for fees remains unresolved.

In July 2011, GIC finally tendered the full judgment amount, with interest, of $17,258.30. This sum was placed in escrow with the district court. Saffady then sought fees and costs totaling approximately $24,000, including Tindall's fee of $18,601.30. These costs, if awarded, would be charged to GIC. GIC objected to the requested fees and moved for an evidentiary hearing regarding their reasonableness.

Saffady and Tindall objected to an evidentiary hearing, insisting that GIC lacked standing to challenge the reasonableness of Saffady's fee and costs request. In support of their position, Saffady and Tindall invoked MCR 2.622, which generally sets forth the powers and duties of a receiver. Essentially, Saffady and Tindall argued that because GIC failed to appear in response to Abel's motion to appoint a receiver and never objected to the appointment, it waived any challenges to the receiver's fees. The district court ruled that it would not "sign a blank check" in favor of Saffady and Tindall, rejected their standing argument, and commenced a fee hearing pursuant to *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

It appears from the district court docket sheet that the fee hearing was held over three days in August, September, and October 2011. The full transcripts of the hearings have not been presented to this Court, however. In its October bench opinion, the district court summarized the evidence produced at the evidentiary hearings and found the bills submitted by Tindall and Saffady unreasonable, particularly because the fees far

exceeded the approximately $12,000 judgment. The district court's order stated, in relevant part:

> Pursuant to hearings held August 11, 2011, September 8, 2011 and October 6, 2011, and a review of exhibits and testimony, concerning Defendant/Judgment Debtor [GIC's] Objection to Receiver Fees and Administration Expenses, this Court rules as follows:
>
> $6950.00 total shall be awarded to the Receiver to be allocated as follows:
>
> -$3450.00 as Receiver Fees.
>
> -$3500.00 as Administration Expenses (legal fees incurred for Tindall, P.C.)[.]
>
> All other monetary requests made by the Receiver, his attorneys and others are hereby Denied. The $17,258.30 deposited in escrow with the Receiver shall be paid to Plaintiff Matthew Abel, P.C. in full satisfaction of the judgment.

Tindall thereafter sought to appeal this decision in the circuit court, addressing only the matter of his fees. Plaintiff Abel, the court-appointed receiver, and the other two attorneys or their professional corporations hired by the receiver chose not to pursue appeals. The circuit court initially rejected Tindall's claim of appeal "for failure to comply with MCR 7.101(C)(2)([b])," which required the appellant to file a bond, but Tindall subsequently cured this defect.[1]

GIC then moved to dismiss Tindall's appeal, arguing that Tindall lacked standing because he was not an

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[1] The bond requirements are now found in MCR 7.104(E)(3) and MCR 7.108. By accepting Tindall's late-posted bond, the circuit court implicitly found the timing issue irrelevant. Moreover, "a bond is required to secure a stay of proceedings to enforce the judgment during the appeal, it is not a condition of the right to appeal." *Wright v Fields*, 412 Mich 227, 228; 313 NW2d 902 (1981). Tindall's failure to timely file a bond does not negate his right to appeal.

"aggrieved party" under the court rules.[2] The circuit court granted GIC's motion and dismissed Tindall's appeal based on his nonparty status by signing a form order stating merely that "[t]he court adopts the arguments of the defendant/appellee." This Court granted Tindall's application for leave to appeal limited "to the issue of whether the circuit court erred by dismissing appellant's appeal from the district court. MCR 7.205(D)(4)." *Abel v Grossman Investments Co*, unpublished order of the Court of Appeals, entered November 14, 2012 (Docket No. 308939).

II. APPELLATE STANDING

The circuit court erred by dismissing an appeal taken by an individual (or his professional corporation) directly, personally, and financially affected and bound by the district court's order. Such an individual or entity has "standing" to challenge that order in a higher court. We review de novo issues that implicate the constitutional authority of the judiciary, such as whether a matter is properly placed before a court by a person with standing. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). We also review de novo the interpretation of statutes and court rules. *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 123-124; 693 NW2d 374 (2005), overruled in part on other grounds *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371 & n 18 (2010).

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[2] GIC also argued that Tindall's appeal should be dismissed because he failed to order the "full transcript" of the district court proceedings, as required by former MCR 7.101(C)(2)(d), and failed to timely file a bond for costs, as required by former MCR 7.101(C)(2)(b). The circuit court declined to reach the merits of the appeal, rending the lack of a full record moot. If Tindall fails to remedy this hole in the record, the circuit court will need to address that issue on remand.

Circuit courts have jurisdiction conferred by statute to hear appeals from the district court. MCL 600.8342(1). Appeals to the circuit court from final judgments in the district court "shall be as of right and all other appeals shall be by application." MCL 600.8342(2).[3]

The procedures for appeals from the district to the circuit court are governed by a series of court rules. Those rules were substantially rewritten in 2011, with an effective date of May 1, 2012. Because the circuit court dismissed this appeal in January 2012, the preamendment court rules govern this case. The fundamental legal principles governing appellate standing remain unaffected by changes in the language of the applicable court rules.

The prior version of MCR 7.101(A)(1) provided, in relevant part: "This rule applies to appeals to the circuit court from the district court and probate court, each referred to as 'trial court' in MCR 7.101 and 7.103." The prior rule continued:

> (2) An order or judgment of a trial court reviewable in the circuit court may be reviewed only by an appeal.
>
> (3) This rule does not restrict or enlarge the right of review provided by law or make an order or judgment reviewable if it is not otherwise reviewable.[4]

Former MCR 7.101(C), headed "Manner of Taking Appeal; Appeal of Right" provided, in relevant part:

> (1) *Claim of Appeal*. To appeal of right, within the time for taking an appeal, an appellant must file a claim of

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[3] The statute provides one exception to this rule: "All appeals from final orders and judgments based upon pleas of guilty or nolo contendere shall be by application." MCL 600.8342(4).

[4] The current MCR 7.101(A) simply states: "Scope of Rules. The rules in this subchapter govern appeals to the circuit court."

> appeal with the circuit court clerk and pay the fee, if required by law. The parties are named in the same order as they appeared in the trial court, but with the added designation "appellant" or "appellee". The claim must state:
>
> "[*Name of aggrieved party*] claims an appeal from the [*judgment or order*] entered [*date*] in [*name of the trial court*]."

Other than these provisions, the prior court rules did not address the scope of the circuit court's appellate jurisdiction.

Currently, MCR 7.103(A)(1) affords the circuit court jurisdiction "of an appeal of right filed by an aggrieved party" from "a final judgment or final order of a district or municipal court[.]" MCR 7.203(A)(1), governing appeals as of right in this Court, has provided at all relevant times for jurisdiction in an appeal as of right "filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court . . . ."

The former version of the court rules governing appeals from the district to the circuit court did not use the term "aggrieved party" to describe who may claim an appeal, other than the reference in MCR 7.101(C)(1). Nevertheless, it is appropriate to evaluate Tindall's ability to bring an appeal under the "aggrieved party" rubric, as it generally applies to any appeal. This conclusion is buttressed by the Supreme Court's 2006 decision in *Federated Ins Co*, 475 Mich 286.

In *Federated Ins Co*, 475 Mich at 288, the Supreme Court considered whether the Attorney General could appeal as an intervenor in the Supreme Court "when the named losing parties did not themselves seek review in this Court." In answering this question in the negative, the Supreme Court employed three legal analyses:

"standing, the 'aggrieved party' concept, and what constitutes a justiciable controversy." *Id*. at 290.

Standing, the Supreme Court explained, "refers to the right of a party plaintiff *initially* to invoke the power of the court to adjudicate a claimed injury in fact." *Id*. In the appellate context, "a similar interest is vindicated by the requirement that the party seeking appellate relief be an 'aggrieved party' under MCR 7.203(A) and our case law." *Id*. at 290-291. Thus, the Supreme Court equated standing to bring suit as a plaintiff with being an "aggrieved party" as an appellant.

" 'To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.' " *Id*. at 291, quoting *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948). The Supreme Court continued:

> An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a *litigant* on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Federated Ins Co*, 475 Mich at 291-292 (emphasis added).]

In addition to satisfying these "aggrieved party" requirements, an appellant must also demonstrate that the underlying controversy is justiciable.

> [I]f a court would not otherwise have subject matter jurisdiction over the issue before it or, if the issue is not justiciable because it does not involve a genuine, live controversy between interested persons asserting adverse

> claims, the decision of which can definitively affect existing legal relations, a court may not declare the rights and obligations of the parties before it. [*Allstate Ins Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993).]

By virtue of an order granting, denying, or setting fees, an attorney (or a receiver) gains a pecuniary interest in such a court ruling. Because Tindall received less remuneration than he sought, he suffered "a concrete and particularized injury" arising from the district court's order. *Federated Ins Co*, 475 Mich at 291.[5] This injury arose from the actions of the district court's judgment rather than from the underlying facts of the case. Accordingly, pursuant to *Federated Ins Co*, Tindall is an aggrieved party with standing to appeal.

GIC first contends that Tindall is not an "aggrieved party" because he failed to move for intervention in the underlying action. Indeed, there are cases positing that intervention is a necessary prerequisite for appellate standing, such as *American States Ins Co v Albin*, 118 Mich App 201, 210; 324 NW2d 574 (1982). *American States* arose from a personal injury action involving a fight between two children. The defendant's insurance company filed a separate action seeking a declaratory judgment under its policy. *Id*. at 204-205. The plaintiff in the underlying action (John Kuehne, the father of the injured minor) attempted to intervene in the declaratory judgment action but did so untimely, one day after summary disposition had been granted in favor of the insurance company. *Id*. at 205. This Court held that the trial court did not err by denying the application for

[5] To the extent that the standing doctrine announced in *Lansing Sch* may apply to the determination of an "aggrieved party" under the court rules, Tindall would certainly meet the less stringent standard of establishing that he suffered a "special injury" and was "detrimentally affected in a manner different from the citizenry at large . . . ." *Lansing Sch*, 487 Mich at 372.

intervention, and refused to consider on appeal whether the trial court had incorrectly granted summary disposition: "Since plaintiff Kuehne never perfected his status as an intervening defendant in the declaratory judgment action, he is not an aggrieved party within the meaning of GCR 1963, 806.1 and therefore has no right to appeal to this Court." *Id*. at 209-210.

The intervention cases are readily distinguishable from cases involving claims for attorney or receivership fees. In *American States*, Kuehne had an interest in the subject of the declaratory judgment action itself: the question whether coverage existed. Here, Tindall had no interest in Abel's claim until the district court issued an order denying part of the fees he had requested. Furthermore, intervention is simply not a necessary prerequisite for standing to appeal an attorney fee award.

The Supreme Court has repeatedly recognized that, in certain situations, attorneys may seek payment for services without becoming parties to the litigation. In *Merkel v Long*, 372 Mich 144, 154-155; 125 NW2d 284 (1963), the Supreme Court permitted attorneys who had litigated the rights of various claimants to an estate to seek payment of their fees from the trust corpus despite that the attorneys were not parties of record in the underlying action. It bears emphasis that in cases involving postjudgment attorney fee disputes, an individual attorney's interest arises only *after* entry of an order distributing fees, which generally occurs long after the underlying dispute has been adjudicated or settled. See, e.g., *Reynolds v Polen*, 222 Mich App 20; 564 NW2d 467 (1997). At that point, it makes little sense to require a disgruntled attorney (or receiver) to formally seek intervention in a case that has otherwise closed.

Moreover, postjudgment orders awarding attorney fees or costs constitute final orders appealable as of right under MCR 7.203(A)(1). See *West Mich Mech, Inc v West Mich Mech Servs, LLC*, 480 Mich 916 (2007). And although MCR 7.203(A)(1) governs appeals to this Court, we perceive no logical reason that a different rule should apply in appeals from the district to the circuit court.

Analogous federal caselaw also does not support GIC's mandatory intervention argument. In *Devlin v Scardelletti*, 536 US 1, 3; 122 S Ct 2005; 153 L Ed 2d 27 (2002), the United States Supreme Court considered whether the petitioner, a participant in a retirement plan, could appeal the approval of a class action settlement despite that the petitioner was not a named class representative and had unsuccessfully moved to intervene in the litigation. The Supreme Court first observed that the petitioner clearly had an interest in the settlement, satisfying the federal constitutional standing requirements. *Id*. at 6-7. Nor did the petitioner's failure to gain status as a "party" to the underlying litigation doom his ability to appeal: "We have never . . . restricted the right to appeal to named parties to the litigation." *Id*. at 7. In the cases cited by the Court as support for this proposition, the appellants were parties "only in the sense that they were bound by the order from which they were seeking to appeal." *Id*. at 8. The term "party," the Supreme Court noted, "does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id*. at 10. Thus, "nonnamed class members are parties to the proceedings in the sense of being bound by the settlement." *Id*. The *Devlin* petitioner's interest therefore sufficed to allow his appeal.

GIC next invokes *Federated* as support for its argument that because neither Abel nor GIC elected to appeal the district court's order, Tindall's claim for fees is not justiciable. GIC misapprehends *Federated*. There, the Supreme Court held that the *merits* of the case ceased to be justiciable once the parties failed to appeal from precisely the same order that the Attorney General then sought to challenge. Here, Tindall seeks appellate consideration of an entirely different controversy. Tindall's claim is justiciable because it constitutes a genuine, live dispute arising from an issue separate from the amount of the judgment. And an appellate ruling concerning Tindall's fees and costs will not alter the terms of that judgment.

Ironically, GIC itself previously espoused a position directly supporting Tindall's right to directly beseech the court for its requested fees. As noted, Tindall challenged GIC's standing to contest its fee request in the district court. In response to Tindall's argument, GIC asserted:

> It is both unsupported and unsupportable to take the position that it is only the Receiver that can interact with the Court, the decision maker as to the question of the fees and costs prayed for by that receiver. Surely, when other parties are clearly impacted by that consideration and determination, to deny them a voice and position belies the concept of due process. Who is to be paid, what is to be paid, in what amounts, and, in what order, each and all are within the sole discretion of the Court. Respectfully, the Court has the right and the obligation to consider all voices raised in support and objection to those elements of relief.

While Tindall was not a named party in the underlying action, he has a special, concrete, and particularized interest no different than GIC's asserted "right" to weigh in on "the question of the fees and costs." That said, we agree with GIC that Tindall lacks the power to

bootstrap nonparty appellees to his claim. In Tindall's circuit court claim of appeal he named "Gordon Grossman and all Related persons/Entities" as appellees. Grossman is a principal of GIC. However, Grossman was not a party to the underlying lawsuit and has not consented to the court's jurisdiction over him personally. Tindall has no legal basis for naming a new, previously uninvolved party in this appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER, P.J., and BECKERING and SHAPIRO, JJ., concurred.

UAW v GREEN

Docket No. 314781. Original action filed February 14, 2013. Submitted without oral argument April 11, 2013. Decided August 15, 2013, at 9:10 a.m. Leave to appeal sought.

The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America; UAW Local 6000; Michigan Corrections Organization, SEIU Local 526; Michigan Public Employees, SEIU Local 517M; and Michigan State Employees Association, AFSCME, Local 5 brought an action in the Court of Appeals against Michigan Employment Relations Commission members Nino E. Green, Edward D. Callaghan, and Robert LaBrant; the Governor; and the Attorney General, seeking declaratory relief that portions of the amendments of the public employment relations act (PERA), MCL 423.201 *et seq*., enacted by 2012 PA 349 were unconstitutional with respect to employees in the classified state civil service. MCL 423.210(3)(d), as amended by 2012 PA 349, provides that a public employer may not require governmental employees to join a union or pay union dues, fees, or other expenses as a condition of obtaining or continuing public employment. Plaintiffs asserted that with respect to state civil service employees, the amendments intruded on the authority of the Civil Service Commission (CSC) under Const 1963, art 11, § 5 to regulate all conditions of those individuals' employment and that the CSC rather than the Legislature has the authority to decide whether payments to unions by civil service employees should be mandatory or voluntary.

The Court of Appeals, without hearing oral argument, *held*:

1. The Legislature has the authority to enact legislation with regard to agency fees, and the amendments enacted by 2012 PA 349 apply to employees in the classified state civil service.

2. Const 1963, art 11, § 5 provides that the CSC shall regulate all conditions of employment in the classified state civil service. With regard to public employees, Const 1963, art 4, § 48 states that the Legislature may enact laws providing for the resolution of disputes concerning public employees except those in the classified state civil service. However, with regard to all employees, Const 1963, art 4, § 49 provides that the Legislature may enact laws

relative to the hours and conditions of employment. 2012 PA 349 did not address the resolution of public employee labor disputes and therefore did not come within the restriction of Const 1963, art 4, § 48. Pursuant to MCL 423.204a, the Legislature's powers apply to civil service employees to the extent that the Legislature has the power to control state employment under Const 1963, art 4, § 49. Thus, certain provisions of PERA apply to employees in the classified civil service, including those enacted by 2012 PA 349.

3. Civ Serv R 6-7.2 states that a governmental employer may enter into an agreement with a union that as a condition of continued employment, an employee who chooses not to join the union must pay a service fee to the union, which directly conflicts with the amendments enacted by 2012 PA 349. That act, however, was a proper exercise of the Legislature's constitutional authority under Const 1963, art 4 § 49 to enact laws relative to conditions of employment. The ratification of Const 1963, art 4, §§ 48 and 49 and art 11, § 5 clearly indicates that the people of Michigan intended for the Legislature to retain authority over public employment disputes involving employees outside the classified state civil service and over the hours and conditions of employment of all employees, without excluding those in the classified state civil service. By ratifying a Constitution containing all three provisions, the people demonstrated their intent to distinguish civil service employees from other public employees in some, but not all, contexts and impose legislative checks and balances on the CSC's authority. "Regulate," the term used in Const 1963, art 11, § 5 with respect to the CSC's authority, means to govern, direct, or control according to rule, law, or authority. Therefore, the CSC's power to issue rules governing civil service employment is not limitless in scope, but is subject to and in accordance with the Legislature's power to enact laws regarding conditions of employment. The Legislature has the broad power to enact laws relative to the conditions of all employment, whereas the CSC has the narrow power to regulate conditions of civil service employment.

GLEICHER, J., dissenting, would have held that the agency-fee restrictions of 2012 PA 349 unconstitutionally infringed the CSC's power under Const 1963, art 11, § 5 to regulate all conditions of employment in the classified state civil service, in violation of the separation of powers. The CSC determined that collective bargaining enhances the employment conditions of its work force. Because this judgment comported with the CSC's constitutional authority, Civ Serv R 6-7.2 constituted a legitimate exercise of the CSC's power and the agency fees it authorized were not subject to legislative elimination.

PUBLIC EMPLOYMENT — CLASSIFIED CIVIL SERVICE — UNIONS — MANDATORY AGENCY FEES — LEGISLATIVE POWER TO PROHIBIT.

Const 1963, art 11, § 5 provides that the Civil Service Commission regulates all conditions of employment in the classified state civil service; Const 1963, art 4, § 48 states that the Legislature may enact laws providing for the resolution of disputes concerning public employees except those in the state classified civil service, but with regard to all employees, Const 1963, art 4, § 49 provides that the Legislature may enact laws relative to the hours and conditions of employment; MCL 423.210(3)(d), as amended by 2012 PA 349, which provides that a public employer may not require governmental employees to join a union or pay union dues, fees, or other expenses as a condition of obtaining or continuing public employment, is thus within the scope of the Legislature's power to control state employment and is constitutional.

William A. Wertheimer, *Michael B. Nicholson*, and *Ava R. Barbour* for the UAW and UAW Local 6000.

William A. Wertheimer and *Sachs Waldman, PC* (by *Andrew Nickelhoff*), for Michigan Corrections Organization, SEIU Local 526; and Michigan Public Employees, SEIU Local 517M.

William A. Wertheimer and *Fraser, Trebilcock, Davis & Dunlap, PC* (by *Michael E. Cavanaugh* and *Brandon W. Zuk*), for Michigan State Employees Association, AFSCME, Local 5.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Ann M. Sherman* and *Margaret A. Nelson*, Assistant Attorneys General, for Nino E. Green, Edward D. Callaghan, Robert LaBrant, the Governor, and the Attorney General.

Amicus Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Michael J. Hodge* and *Scott R. Eldridge*), for the Civil Service Commission.

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

SAAD, P.J.

I. INTRODUCTION

As an intermediate appellate court, we typically decide appeals of orders issued by lower courts. But here, the Legislature placed in this Court exclusive original jurisdiction over challenges to 2012 PA 349 (PA 349), colloquially called a "right to work" law. MCL 423.210(6). PA 349 amends the public employment relations act (PERA), MCL 423.201 *et seq*.,[1] and states that public employers—that is, the government—cannot require governmental employees to join a union or pay union dues, fees, or other expenses "as a *condition of obtaining or continuing public employment* . . . ." MCL 423.210(3)(d) (emphasis added).

Also, typically, courts entertain constitutional challenges to substantive provisions of legislation. However, this action does not challenge the Legislature's public-policy decision to amend public-sector labor law to make financial contributions to unions voluntary instead of compulsory. Nor does it challenge the Legislature's right to make such laws applicable to public employees. Rather, plaintiff unions challenge the Legislature's constitutional authority to pass PA 349 and defendants' right to enforce it with respect to a subset of public-sector employees—those in the classified state civil service. Plaintiffs premise this challenge on the Constitution's carveout for a civil service system and the Michigan Civil Service Commission (CSC). Unlike other governmental employees, those workers identified in Const 1963, art 11, § 5 are part of the classified

[1] Unless otherwise noted, all references to or citations of PERA in this opinion are to that act as amended by 2012 PA 349.

civil service, and they work under the aegis of the CSC. Pursuant to article 11, § 5, the CSC has the authority to "regulate all conditions of employment" for this group of governmental employees. Plaintiff unions and the CSC, as amicus curiae, argue that, within this limited arena, PA 349 intrudes on the CSC's sphere of authority. Defendants respond that, under the Michigan Constitution, the Legislature has the power to make laws applicable to all employees, public and private, including classified civil service employees. Defendants further maintain that the Legislature has done so in the past with the approval of our courts.

Since the most recent adoption of the Michigan Constitution in 1963 and the 1965 passage of PERA, our courts have not addressed the specific question before us. That is, in light of this historical, constitutional sharing of responsibilities for rulemaking by the CSC with respect to classified employees and lawmaking by the Legislature with respect to all employees, the issue of first impression is which governmental actor—the Legislature or the CSC—has the power to decide whether the payment of fees by classified civil service employees to unions should be mandatory or voluntary. This is the limited, narrow question we address as the statute directs, and as the parties ask.

II. STANDARDS OF REVIEW

Because the arguments raised involve the interpretation of provisions of the Michigan Constitution, we turn to the principles set forth in *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405-406; 185 NW2d 9 (1971), which addresses the "construction of a constitution":

> The primary rule is the rule of "common understanding" described by Justice COOLEY:

> A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it*. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed." (Cooley's Const Lim 81). (Emphasis added.)

* * *

A second rule is that to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered. On this point this Court said the following:

> In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished. *Kearney* v. *Board of State Auditors* (1915), 189 Mich 666, 673 [155 NW 510].

A third rule is that wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does. Chief Justice Marshall pursued this thought fully in *Marbury* v. *Madison* (1803), 5 US (1 Cranch) 137 (2 L Ed 60), which we quote in part:

> If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, * * *.

And while we recognize the political, economic, and social controversies underlying the enactment of PA 349, they are unrelated to our duty to apply these

principles of constitutional interpretation. Indeed, "when a court confronts a constitutional challenge it must determine the controversy stripped of all digressive and impertinently heated veneer lest the Court enter—unnecessarily this time—another thorny and trackless bramblebush of politics." *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999), quoting *Taylor v Dearborn Twp*, 370 Mich 47, 50; 120 NW2d 737 (1963) (BLACK, J., joined by T. M. KAVANAGH, J.) (citation and quotation marks omitted).

Moreover, when 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." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). As our Supreme Court further explained in *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307-308; 806 NW2d 683 (2011):

> "We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). " '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.' " *Id.* at 423, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). 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) . . . . "[W]hen considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation." *Taylor*, 468 Mich at 6.

Thus, in keeping with the law that governs our review of this legislation, we begin with the presumption that PA 349 is constitutional and proceed with the utmost caution to determine whether the plaintiff unions have met their burden of proof to show otherwise.

III. DISCUSSION

A. THE MICHIGAN CONSTITUTION, THE ESTABLISHMENT OF THE CSC, AND THE ENACTMENT OF PERA

Our analysis necessarily begins with the Constitution itself and the particular sections applicable to the dispute. Pursuant to Const 1963, art 3, § 2:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

"Subject only to limitations and restrictions imposed by the State or Federal Constitutions, the State legislature is the repository of all legislative power." *Huron-Clinton Metro Auth v Bds of Supervisors of Five Cos*, 300 Mich 1, 12; 1 NW2d 430 (1942). Indeed, as our Supreme Court has explained, with these limitations, the Michigan Legislature "possesses all of the power possessed by the parliament of England," *Doyle v Detroit Election Comm*, 261 Mich 546, 549; 246 NW 220 (1933), and "can do anything which it is not prohibited from doing by the people through the Constitution of the State or of the United States," *Attorney General, ex rel O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936). Thus, " '[t]he purpose and object of a State Constitution are not to make specific grants of legislative power, but to limit that power when it would otherwise be

general or unlimited.' " *Young v Ann Arbor*, 267 Mich 241, 244; 255 NW 579 (1934) (citation omitted).

With regard to public employees, Const 1963, art 4, § 48 states that "[t]he legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." However, with regard to all employees, the Constitution provides, pursuant to article 4, § 49, that "[t]he legislature may enact laws relative to the hours and conditions of employment."

The civil service system was originally created by the Legislature "to eliminate the spoils system and prohibit participation in political activities during the hours of employment." *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 10; 818 NW2d 337 (2011). A report drafted by a group appointed by then Governor Frank Fitzgerald had revealed:

> "The spoils system presupposes the existence of government jobs to be filled with loyal party workers who can be counted on not to do the state job better than it can be done by others, but rather to do the party work or the candidate work when elections roll around. The state office buildings are nearly empty during political conventions, and state money has always been used—indirectly of course—to enable state employees to move about the state and keep political fences in repair.
>
> "It is impossible to estimate the loss to the state of this kind of political activity, but the most inexperienced know that the amount is considerable. Not only is the regular work of the state interrupted or interfered with, but its services and funds are put at the disposal of political parties." [*Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 397 n 10; 292 NW2d 442 (1980), quoting Report of the Civil Service Study Commission, July 20, 1936.]

The essence of the legislation that followed, 1937 PA 346, was preventing state workers from engaging in

political activities during working hours. However, in the next session in 1939, the new Legislature made various changes, in evident opposition to the reforms intended by 1937 PA 346, including making a significant number of positions exempt from classified civil service. *Council No 11*, 408 Mich at 399-400. "Finally, in 1940, apparently dissatisfied with four years of political maneuvering and legislative advance and retreat on the civil service system issue, the people of Michigan adopted a constitutional amendment establishing a constitutional state civil service system, superseding the 1939 legislation." *Id*. at 400-401. The amendment, Const 1908, art 6, § 22, focused not on barring employees from political activities, but on establishing a merit system for hiring, promotions, demotions, and terminations. *Id*. at 401. Thus, the fundamental purpose of the amendment was to provide for an unbiased commission to promulgate and enforce rules to ensure a merit-based system of governmental hiring and employment. The people adopted the civil service provisions in much the same form in the 1963 Constitution. Specifically, Const 1963, art 11, § 5, provides, in part:

> The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

* * *

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce

> increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.
>
> * * *
>
> The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.
>
> To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.
>
> The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

As our Supreme Court has observed, the CSC is a constitutionally established administrative agency that is part of and within the executive branch. *Straus*, 459 Mich at 537; see also *House Speaker v Governor*, 443 Mich 560, 587 n 33; 506 NW2d 190 (1993). However, that the CSC exists within the Constitution does not, as plaintiffs would suggest, elevate the CSC to a fourth branch of government because no fourth branch exists and because to do so would directly violate the separation of powers provision in article 3, § 2. *Straus*, 459 Mich at 535-537. Nonetheless, the CSC indisputably has the power to "regulate all conditions of employment

in the classified civil service." Const 1963, art 11, § 5; see *Mich State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 163-164; 365 NW2d 93 (1984); *Plec v Liquor Control Comm*, 322 Mich 691, 694; 34 NW2d 524 (1948).

PA 349 is an amendment of PERA, which was enacted in 1965 pursuant to the "explicit constitutional authorization" in Const 1963, art 4, § 48 ("The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service."). *Local 1383, Int'l Ass'n of Fire Fighters v City of Warren*, 411 Mich 642, 651; 311 NW2d 702 (1981). PERA's dispute resolution provisions do not apply to employees in the classified civil service pursuant to the plain language of article 4, § 48. *Viculin v Dep't of Civil Serv*, 386 Mich 375, 393; 192 NW2d 449 (1971) ("The Civil Service Commission is a constitutional body possessing plenary power and may determine, consistent with due process, the procedures by which a state civil service employee may review his grievance."). Again, however, the Legislature, pursuant to article 4, § 49, has "the sovereign police power to regulate the terms and conditions of employment for the welfare of Michigan workers . . . ." *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 536; 565 NW2d 828 (1997).

Section 4a of PERA states that "[t]he provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the power exists in the legislature to control employment by the state or the emoluments thereof." MCL 423.204a. The parties disagree about the proper interpretation and application of these provisions. Plaintiffs and the CSC argue that article 4, § 48 precludes legislative involvement within the sphere of the

CSC's constitutional authority, and they extend this argument to § 4a of PERA by maintaining that all areas of civil service employment are exempt from all provisions of PERA and that PERA has no application to the civil service because it was born from the Legislature's purportedly limited power under article 4, § 48.

The plain and unambiguous language of article 4, § 48 grants the Legislature the power to enact a statutory scheme for resolving public-sector-employee disputes that arise outside the classified civil service. Clearly, PA 349 does not address resolution of public-employee labor disputes, and therefore does not come within the article 4, § 48 restriction. Moreover, the plain language of MCL 423.204a—"[t]he provisions of this act as to state employees within the jurisdiction of the civil service commission *shall be deemed to apply in so far as the power exists in the legislature to control employment by the state*"—clearly expresses that the legislative powers apply to civil service employees *to the extent that* the Legislature has the power to control state employment. (Emphasis added.) See, e.g., Const 1963, art 4, § 49. Plaintiffs' interpretation of § 4a as a nullification of legislative power over the civil service contravenes the plain meaning of the statutory language. Additionally, § 1 of PERA defines "public employee" as follows:

> "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions . . . . [MCL 423.201(e).]

The three enumerated exceptions are as follows: (1) employees of a private entity under a time-limited

contract with the state, (2) public-school administrators in specific circumstances, and (3) graduate student research assistants when there are insufficient indicia of an employer-employee relationship. MCL 423.201(e)(*i*) through (*iii*). Civil service employees are public employees within the definition in MCL 423.201(e), and civil service employees do not come within any of the enumerated exceptions.

Despite the plain constitutional provision (article 4 § 49) and statutory language reserving a degree of legislative control over civil service employment (MCL 423.204a), plaintiffs cite cases that purportedly hold that PERA has no application to civil service employees, but all those cases involved civil service employees and resolution of employment *disputes*. For example, to the extent *Bonneville v Mich Corrections Org*, 190 Mich App 473, 477; 476 NW2d 411 (1991), made the assertion that PERA does not apply to classified civil service employees, *Bonneville* involved grievance resolution, so this statement was dicta to the extent that it exempts civil service employees from all provisions of PERA. Further, contrary to the CSC's argument, *SEIU Local 79 v State Racing Comm'r*, 27 Mich App 676, 681; 183 NW2d 854 (1970), does not broadly preclude application of all provisions of PERA to all employees under the CSC's jurisdiction. It only stated that PERA and the Michigan Employment Relations Commission's jurisdiction did not apply to the resolution of the dispute between the employee veterinarians and the employer racing commissioner because the employees were under the CSC's jurisdiction. For these reasons, and those that follow, we read article 11, § 5 and article 4 § 49 in harmony and hold that, as correctly stated in MCL 423.204a, certain provisions of PERA apply to employees in the classified civil service, including those in PA 349.

B. CIVIL SERVICE RULE 6-7.2 AND 2012 PA 349

Plaintiffs and the CSC contend that the imposition of an agency fee is a "condition of employment" as contemplated by article 11, § 5 and, therefore, that PA 349 impermissibly infringes on a matter within the CSC's constitutional authority. Defendants respond that, pursuant to Const 1963, article 4, § 49, "[t]he legislature may enact laws relative to . . . conditions of employment" and that the CSC's power to "regulate" conditions of employment does not supersede or negate the Legislature's authority to enact PA 349.

The CSC has adopted rules giving it "sovereign authority" to approve, reject, or modify a negotiated collective-bargaining agreement. Civ Serv R 6-3.1, 6-3.5, and 6-3.6. The Civil Service Rules further state that civil service employees have the right to "organize, form, assist, join, or refrain from joining labor organizations." Civ Serv R 6-5.1. However, Civ Serv R 6-7.2 states that a governmental employer may enter into an agreement with a union which provides that "as a condition of continued employment," an employee who chooses not to join the union "shall pay a service fee" to the union.[2]

For decades, MCL 423.209 has granted public employees the right to form, join, or assist in labor organizations and engage in activities related to the collective-bargaining process. MCL 423.209, as added by 1965 PA 379; MCL 423.209(1)(a); *City of Escanaba v Labor Mediation Bd*, 19 Mich App 273, 280; 172 NW2d 836 (1969). Importantly, PA 349 preserves these rights, but also grants public employees the right to "[r]efrain

[2] The amount of the fee "cannot exceed the employee's proportionate share of the costs of the activities that are necessary to perform its duties as the exclusive representative in dealing with the employer on labor-management issues." Civ Serv R 6-7.3.

from any or all" of these activities. MCL 423.209(1)(b). PA 349 also added subsections (2) and (3) to section 9, which provide as follows:

> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
>
> (b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.
>
> (c) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.
>
> (3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state. [MCL 423.209(2) and (3).]

Before PA 349, MCL 423.210(1) included a provision similar to Civ Serv R 6-7.2, that a public employer could agree with a union that those employees who chose not to join a union must pay "a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." MCL 423.210(1), as amended by 2012 PA 53. PA 349 amended § 10 by granting rights to individual public employees, with the exception of certain police and fire employees, as follows:

> (3) Except as provided in subsection (4), an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:

> (a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.
>
> (b) Become or remain a member of a labor organization or bargaining representative.
>
> (c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.
>
> (d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative. [MCL 423.210(3).]

These legislative amendments change Michigan law regarding compulsory union fees with respect to all public-sector employees and employers and, therefore, directly conflict with the CSC's rule that permits the government to enter into agreements with unions to require compulsory union contributions by nonunion public employees.

C. CONSTITUTIONAL ANALYSIS

The arguments presented are rooted in a dispute over the phrase "conditions of employment" which appears in both article 4, § 49 and article 11, § 5. As discussed, Const 1963, art 11, § 5 confers on the CSC the power to "regulate all conditions of employment in the classified service," but article 4, § 49 confers on the Legislature the power to "enact laws relative to the hours and conditions of employment."

Plaintiff unions urge that the decision whether to impose agency fees on nonunion employees constitutes a condition of employment. Were we to accept this as true, it is equally clear that what Civ Serv R 6-7.2

authorizes also amounts to a condition *for* employment, because it permits a governmental employer to require an agency fee payment "as a condition *of continued* employment," thus permitting termination for failure to comply. (Emphasis added.) In either case, the characterization does not render PA 349 unconstitutional. Indeed, we hold that, regardless of whether the mandatory payment of agency fees by nonunion civil service employees amounts to a condition of employment or a condition to obtain or retain employment, PA 349 is a proper exercise of the Legislature's constitutional authority to "enact laws relative to . . . conditions of employment." Const 1963, art 4, § 49.

Our holding is compelled by a plain reading of our Constitution and an interpretation that reasonable minds and the great mass of people would give it. As noted, Const 1963, art 4, § 48 provides that "[t]he legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service*." (Emphasis added.) Const 1963, art 4, § 49 provides that "[t]he legislature may enact laws relative to the hours and conditions of employment." The language of these two paragraphs, read together and in conjunction with article 11, § 5, clearly indicate that the people of Michigan intended for the Legislature to retain authority over public-employment disputes involving employees outside the classified state civil service and over the hours and conditions of employment of all employees, without excluding those in the classified civil service. By ratifying a Constitution containing all three provisions, the people evinced their intent to distinguish classified civil service employees from other public employees in some, but not all, contexts and impose legislative checks and balances on the CSC's authority.

Clearly, article 4, § 49 confers on the Legislature the power to enact laws ("may enact"), specifications, and requirements governing employment generally, including civil service employment, while article 11, § 5 requires the CSC to *regulate* conditions of employment ("shall regulate") consistently with the legislative enactments. Again, when we interpret a provision of the Michigan Constitution, the words of that provision "must be given their ordinary meanings." *Co Rd Ass'n of Mich v Governor*, 260 Mich App 299, 306; 677 NW2d 340 (2004) (citation and quotation marks omitted). The ordinary meaning of the word "regulate" can be found in the first definition of "regulate" in *Merriam-Webster's Collegiate Dictionary*:

> **1 a** : to govern or direct according to rule **b** (1) : to bring under the control of law or constituted authority (2) : to make regulations for or concerning . . . **2** : to bring order, method, or uniformity to . . . **3** : to fix or adjust the time, amount, degree, or rate of . . . . [*Merriam-Webster's Collegiate Dictionary* (11th ed, 2006) p 1049.]

Thus, the ordinary meaning of the word "regulate" is to govern, direct, or control *according to rule, law, or authority*. Therefore, the CSC's power to issue rules governing civil service employment is not limitless in scope, but is subject to and in accordance with the Legislature's power to "enact laws" regarding "conditions of employment." Const 1963, art 4, § 49.

Plaintiffs argue that defendants' emphasis on the meaning of "regulate" imposes a "hyper-technical" construction that is contrary to the common understanding of the people who ratified the Constitution and contrary to the caveat against finding a "dark and abstruse meaning" in constitutional language. *Traverse City*, 384 Mich at 405 (citation and quotation marks omitted). "Regulate" is not an obscure word, and its meaning as

compared to the phrase "enact laws" is not subtle. Clearly, the choice of words—*regulate* for the CSC and *enact laws* for the Legislature—renders article 11, § 5 and article 4, § 49 consistent. Plaintiffs attempt to minimize the significance of article 4, § 49 by arguing that this provision is merely a holdover from the 1908 Constitution and the Progressive Era, when the ratifiers granted the Legislature the power to "enact laws relative to the hours and conditions under which men, women, and children may be employed." Const 1908, art 5, § 29. Plaintiffs state that this provision was intended only to clarify that the right to freedom of contract did not override the Legislature's police power to enact wage, hour, and safety laws for the benefit of workers. Plaintiffs' argument ignores the plain language of article 4, § 49, which grants the Legislature the power to enact laws "relative to the hours *and conditions* of employment." (Emphasis added.) If the ratifiers had intended for article 4, § 49 to limit the Legislature's powers to enacting wage and hour requirements, they could have so limited the Legislature's authority in the Constitution.

Moreover, in contrast to article 4, § 48, which confers on the Legislature the power to "enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service," article 4, § 49 does not provide an exception for civil service employees. We cannot assume that the exception for civil service employees, which was purposely placed in § 48, was inadvertently omitted from § 49. See *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). Plaintiffs argue that the civil service carveout in § 48 was included because § 48 pertained only to public employees and that the omission of the carveout in § 49 is therefore of no significance because § 49 applies generally to public- and private-sector employees. How-

ever, the breadth of § 49 actually strengthens defendants' argument. The Legislature's authority to enact statutes relative to the conditions of employment for *all* employees, without distinguishing between the private and public sectors, negates any inference that the Legislature's authority applies equally to private and non-civil-service employment, with an implied and unstated exception for civil service employment.

The reference to "conditions of employment" in both Const 1963, art 4, § 49 and art 11, § 5 can be read consistently and without deviating from either section's plain language and without encroaching on or expanding the authority granted constitutionally to either the Legislature or the CSC. Const 1963, art 4, § 49 authorizes the Legislature to enact laws relative to the hours and conditions of employment generally, subject only to the CSC's authority to *regulate* conditions of employment in the classified civil service, in addition to performing other specifically enumerated duties. "Where as here, there is a claim that two different provisions of the constitution collide, we must seek a construction that harmonizes them both. This is so because, both having been adopted simultaneously, neither can logically trump the other." *Straus*, 459 Mich at 533 (citation and quotation marks omitted).

In its amicus curiae brief, the CSC extensively quotes the Official Record of the 1961 Constitutional Convention; the *Report of the Michigan Citizens Advisory Task Force on Civil Service Reform: Toward Improvement of Service to the Public*, *During the Decade of the '80's* (July 1979); and the *Citizen's Advisory Task Force on State Labor-Management Relations: Report to Governor James J. Blanchard* (September 1987). The CSC emphasizes that these historical sources reveal an intent to limit legislative oversight of the CSC. We agree that

these historical authorities reflect the framers' and ratifiers' intent to grant the CSC full authority over the areas of compensation, determination of qualifications, and other specifications of civil service employment. However, neither plaintiffs nor the CSC offers a satisfactory explanation of how Const 1963 art 4, § 49 can coexist with Const 1963, art 11, § 5 if the latter completely exempts the civil service from the former. The CSC argues that article 4, § 49 is a general provision, whereas article 11, § 5 is a specific provision and that specific provisions must control in a case relating to their subject matter. *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-640; 272 NW2d 495 (1978). The CSC's general/specific dichotomy, however, would be more accurately characterized as a broad/narrow dichotomy. The Legislature possesses the broad power to enact laws relative to the conditions of *all* employment, whereas the CSC possesses the narrow power to regulate conditions of civil service employment. The CSC's power to act in its limited sphere thus does not trump the Legislature's broader constitutional powers.

D. CASES ADDRESSING THE AUTHORITY OF THE LEGISLATURE AND THE CSC

Our courts have recognized the broad and exclusive authority Const 1963, art 5, § 11 grants the CSC to govern the *internal conditions* of civil service employment. "The Civil Service Commission is a constitutional body possessing plenary power and may determine, consistent with due process, the procedures by which a state civil service employee may review his grievance." *Viculin*, 386 Mich at 393; see also *Dudkin v Civil Serv Comm*, 127 Mich App 397, 407; 339 NW2d 190 (1983) (concluding that the CSC could fashion rules with regard to agency shop fees at a time when such fees were permitted under a

former version of MCL 423.210(1)).[3] Our courts have also acknowledged that the CSC's power and authority are derived from the Constitution and that "its valid exercise of that power cannot be taken away by the Legislature." *Hanlon v Civil Serv Comm*, 253 Mich App 710, 717; 660 NW2d 74 (2002); see also *Crider v Michigan*, 110 Mich App 702, 723-724; 313 NW2d 367 (1981) (upholding the CSC's constitutional authority to impose periodic one-day layoffs to reduce payroll costs). However, the CSC's "powers are not unlimited." *Oakley v Dep't of Mental Health (On Remand)*, 136 Mich App 58, 62; 355 NW2d 650 (1984).

In *Council No 11*, our Supreme Court addressed a conflict between a statute, MCL 15.401 *et seq*. (1976 PA 169, the political freedom act), and a CSC rule restricting civil service employees' participation in political activities. *Council No 11*, 408 Mich at 390-391. The statute provided that a civil service employee had the right to join a political party committee authorized under state election laws, serve as a delegate to a political party's convention, and run for office without first obtaining a leave of absence from employment, while CSC Rule 7 prohibited such activities. *Id*. The plaintiff unions filed a complaint against the CSC on the ground that Rule 7 conflicted with 1976 PA 169 and Const 1963, art 11, § 5, which guaranteed freedom of expression rights. *Id*. at 391-392.

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[3] Though plaintiffs rely on it, the Court in *Dudkin* did not address the issue raised here, namely, the CSC's authority to impose or permit agency shop fees under the catchall phrase "regulate all conditions of employment in the classified service" in Const 1963, art 11, § 5. At the time this Court decided *Dudkin*, MCL 423.210(1), as amended by 1973 PA 25, specifically permitted collective-bargaining agreements to require payment of a service fee as a condition of employment. Accordingly, *Dudkin* did not involve the conflict between the Legislature and the CSC presented here.

The Court held that the ratifiers of article 11, § 5 clearly did not intend to grant the CSC the power to abridge civil service employees' right to participate in the political process:

> We are persuaded that neither the history of the adoption of a civil service system in Michigan, including as it does the voice of the people expressed indirectly through the Legislature in 1937 and 1939 and directly in the 1940 constitutional amendment and the 1963 constitution, nor a common-sense reading of the "plain language" of art 11, § 5, interpreted according to familiar rules of constitutional construction, support the defendant's claim of authority to regulate, indeed prohibit, any off-duty political activity by state classified employees. [*Id*. at 403.]

After discussing the historical context of the 1940 amendment, the Court opined that the plain language of Const 1963, art 11, § 5, and "more precisely the meaning we think [the constitutional language] had for the people who adopted it," was of greater significance than the history of civil service in Michigan. *Id*. at 404-405 (emphasis omitted). Reviewing the rules of constitutional interpretation, the Court concluded that "[a] grant of power to an administrative agency to pervasively curtail the political freedoms of thousands of citizens should not be easily inferred from a constitutional provision so facially devoid of any such language." *Id*. at 406. The Court was unable to "conclude, with any degree of confidence, that 'the great mass of the people themselves would' understand the language of art 11, § 5, upon which defendants rely, to be a grant of power to defendants to forbid off-duty political activity." *Id*. The Court stated that interpreting the language of article 11, § 5 "as a grant of power to curtail political freedom of speech and association, at home, off-duty, would indeed assign the words used a 'dark [and] abstruse meaning'." *Id*. (alteration in original).

While the CSC has a grant of plenary power, "it is to be exercised with respect to determining the conditions '*of* employment', not conditions *for* employment." *Id*. The Court ruled that the CSC's power does not include the power to prohibit off-duty political activities. *Id.* at 407.

Council No 11 resolved a direct conflict between a CSC rule and a legislative enactment, holding the legislation valid. Other cases have addressed the Legislature's power to enact laws applicable to all employees, including those in the classified civil service. In *Dep't of Civil Rights ex rel Jones v Dep't of Civil Serv*, 101 Mich App 295, 297-298; 301 NW2d 12 (1980), three female civil service employees filed complaints with the Michigan Department of Civil Rights alleging that the long-term disability insurance plan the Department of Civil Service offered to employees discriminated against women by denying disability benefits for disabilities related to pregnancy, childbirth, miscarriage, or abortion. After the Michigan Civil Rights Commission (CRC) determined that the disability plan violated the Fair Employment Practices Act, MCL 423.301 *et seq*., and its successor statute, the Michigan Civil Rights Act, MCL 37.2102 *et seq*., the Department of Civil Service filed an appeal in circuit court for de novo review. The circuit court reversed the CRC's order, concluding that the civil rights statutes did not apply to classified state employees. *Jones*, 101 Mich App at 298. On appeal, this Court rejected the argument that the CSC's plenary jurisdiction under article 11, § 5 precluded the CRC's jurisdiction over a civil rights dispute in the civil service. Citing *Council No 11*, 408 Mich 385, the Court noted that "the civil service's powers are not without limit." *Jones*, 101 Mich App at 300. The Court held that "[t]he establishment of the CRC expressed the intent of the people of Michigan to end invidious forms of discrimination through the efforts of a single commission" and

that the CRC's authority "to carry out its constitutional mandate to end discrimination" would be weakened if the CSC had exclusive jurisdiction over all employment concerns. *Id.* at 301.

In *Marsh v Dep't of Civil Service*, 142 Mich App 557, 559-560; 370 NW2d 613 (1985), the CSC denied the plaintiff's grievances for race, sex, and disability discrimination in promotion. The plaintiff filed suit in circuit court alleging violations of the Michigan Civil Rights Act and what was then called the Handicappers' Civil Rights Act (now the Persons with Disabilities Civil Rights Act), MCL 37.1101 *et seq*. *Id*. at 560. The circuit court dismissed the lawsuit on the ground that the CSC held exclusive subject-matter jurisdiction over the plaintiff's claims. *Id.* at 560-561. Similar to the position the CSC takes here, the Department of Civil Service argued that the antidiscrimination statutes did not apply to state employees in the classified state civil service because article 11, § 5 preempted and superseded any legislation governing employment conditions of civil service employees. *Id.* at 563. This Court adopted the reasoning that it employed in *Jones*, 101 Mich App 295. The Court in *Marsh* stated:

> Although Const 1963, art 4, § 48, precludes the Legislature from enacting laws providing for the resolution of employment disputes concerning public employees in the state classified civil service, this provision must be read in conjunction with the provision creating the Civil Rights Commission and the equal protection/antidiscrimination provision of our constitution. Provisions of the constitution should be read in context, not in isolation, and they should be harmonized to give effect to all. *Saginaw County v State Tax Comm*, 54 Mich App 160; 220 NW2d 706 (1974), *vacated on other grounds* 393 Mich 779; 224 NW2d 283 (1974), *aff'd sub nom Emmet County v State Tax Comm* 397 Mich 550; 244 NW2d 909 (1976). [*Marsh*, 142 Mich App at 566.]

At the heart of these cases is "the fact that the constitution expressly mandates the Legislature to implement constitutional provisions prohibiting discrimination and securing civil rights of all persons." *Dep't of Transp v Brown*, 153 Mich App 773, 781; 396 NW2d 529 (1986). Therefore, in addition to the fundamental constitutional principles articulated in *Council No 11*, defendants' position is supported by caselaw holding that laws of general application do not encroach on the CSC's jurisdiction when applied to civil service employees. In *Jones*, 101 Mich App 295, and *Marsh*, 142 Mich App 557, this Court held that the Civil Rights Commission held exclusive subject-matter jurisdiction over the plaintiffs' claims of employment discrimination arising under statutory civil rights laws and rejected the CSC's claim that the CSC held exclusive jurisdiction over employment disputes in the civil service.

Plaintiffs argue that these cases are not relevant because the decisions in *Jones* and *Marsh* were based on the constitutional authority of the Civil Rights Commission, which placed the Civil Rights Commission on equal footing with the CSC. Plaintiffs' argument misses the salient point, however, that the civil rights *statutes* enacted by the Legislature to ban workplace discrimination applied equally to civil service employees, notwithstanding the CSC's authority to "regulate all conditions of employment in the classified service." Const 1963, art 11, § 5. If the antidiscrimination statutes had encroached on the CSC's exclusive jurisdiction to regulate, it would not have been necessary for the Court to resolve the dispute over the proper forum for resolving disputes under the civil rights statutes.

Indeed, a wide array of statutes governing employment apply with equal force to private-sector and

public-sector employees, with no exception for civil service employees. See, e.g., the Worker's Disability Compensation Act, MCL 418.101 *et seq*. (stating in MCL 418.111 that "[e]very employer, public and private, and every employee, unless herein otherwise specifically provided, shall be subject to the provisions of this act and shall be bound thereby"), and the Michigan Employment Security Act, MCL 421.1 *et seq*. Availability of benefits to compensate injured workers and unemployed workers are part of employment conditions, and the statutes providing these benefits apply to civil service employees. Moreover, the Legislature has passed other laws related to hours and conditions of employment that affect private-sector, governmental, and classified civil service employees alike, including laws relating to licensing, public health, child labor, political freedoms, and occupational health and safety. Thus, while the CSC has the specific and plenary power to regulate conditions of employment, the Legislature has regularly exercised, and our courts have upheld, its broad constitutional authority to enact laws, including those affecting the hours and conditions of employment for classified civil service employees.

E. THIS ISSUE IS UNIQUELY WITHIN THE PROVINCE OF THE LEGISLATURE

As discussed, our Constitution confers on the CSC the power to regulate conditions of employment in the classified civil service, and the Legislature has the authority to enact laws affecting conditions of employment. This leads to the specific question here, which is where agency fees fit within this "sharing" of constitutional responsibilities and whether the Legislature acted within its constitutional authority in enacting PA 349 as it pertains to the classified civil service. In further considering whether this is within the province

of the Legislature or the CSC, we must examine the nature of agency fees and what interests are affected by PA 349.

In the arena of public-sector employment, the government is, quite obviously, the employer. It is well settled that the government may not violate the free speech or free association rights of its citizens, and employees are citizens subject to protection. Further, the government, as employer, may not compel speech it favors or prohibit speech it disfavors by forcing employees to support or prohibiting employees from supporting ideological or political causes. To do so would violate the civil liberties and First Amendment rights of employees.

On the basis of these principles, it has long been the subject of litigation whether a governmental employer may require an employee to pay money to a union if the worker opposes the political or ideological views of the union. While various state and federal courts have questioned the constitutionality of agency fee provisions in the public sector, regardless of the merits of the underlying debate the question of their elimination is certainly one that implicates significant constitutional and public-policy questions. For more than 35 years, from *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), to *Knox v SEIU, Local 1000*, 567 US ___; 132 S Ct 2277; 183 L Ed 2d 281 (2012), the United States Supreme Court has reiterated that compulsory funding of unions by public-sector employees raises critical First Amendment concerns. The primary concern repeatedly advanced by nonunion plaintiffs in *Abood* and its progeny is that unions indisputably spend union dues on political and ideological causes with which employees may disagree. *Abood*, 431 US at 212-213. And as the *Abood* Court opined:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. *Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment*. [*Id*. at 233-234 (citations omitted) (emphasis added).]

Since *Abood*, the Supreme Court has endeavored to protect the First Amendment rights of governmental employees through the requirement of procedural safeguards from "compulsory subsidization of ideological activity." *Id*. at 237; see also *Chicago Teachers Union v Hudson*, 475 US 292; 106 S Ct 1066; 89 L Ed 2d 232 (1986).

Part of the law in this area is settled, and part remains in flux. What is settled is that a governmental employer cannot force a dissenting worker, as a condition of employment, to financially support political causes of the union. However, the governmental employer may require the employee to pay a fee for the union's costs for collective bargaining as long as the fee is not used to advance political or ideological causes to which the worker objects. The question that remains in contention is how a union accounts for that portion of an agency fee that is spent on constitutionally permissible collective bargaining versus unconstitutional expenditures on politics, how an employee may pursue the question of how fees are spent, and to what extent a union must reveal its expenditures. Those who oppose compulsory union fees assert that there is no adequate system to account for whether the fees are used only for collective bargaining and that, in reality, as a condition of remaining employed, employees must financially support political causes, which violates their First Amendment rights of free speech and political associa-

tion. Those who support mandatory agency fees contend that failing to require payments from each employee permits free riders who pay nothing for collective bargaining but enjoy the benefits of union-backed negotiations and that the methods used to determine how agency fees are spent interfere with union support of political and other causes, thus infringing on their rights of free speech and association.

Michigan has decided to leave the fray. With PA 349, the Legislature has made all contributions to public-sector unions voluntary, thus removing political and ideological conflict from public employment and eliminating the repeated need to decide, on a case-by-case basis, whether unions have properly allocated funds. The government as employer may no longer require public employees to pay money to unions whose politics or ideological causes the employees oppose, and, at the same time, unions will no longer have to be wary of potential challenges to their financial contributions and may spend voluntary member dues as they see fit, without governmental oversight.

Importantly, the very reason the people adopted Const 1963, art 11, § 5 was to provide for a merit-based system of governmental hiring and employment, eliminate politics, and provide for an apolitical body to regulate issues regarding employee qualifications, promotion, and pay, which are matters completely outside the substance and application of PA 349. Further, as discussed, if agency fees are a condition of employment, as plaintiffs suggest, they are also, undoubtedly, a condition *for* employment when an employee may be terminated for failure to pay. In *Council No 11*, our Supreme Court made clear that the CSC may regulate conditions *of* employment, not conditions *for* employment, which are matters for the Legislature. *Coun-*

cil No 11, 408 Mich at 406. Thus, the elimination of compulsory agency fees was well within the Legislature's authority. Further, because the United States Supreme Court has long held that agency fees implicate governmental employees' constitutional rights and important questions of public policy, the principle applies with equal force that matters like the one at issue here are within the province of the Legislature:

> The power, indeed the duty, to protect and insure the personal freedoms of all citizens, including the rights of free speech and political association, is reposed in the Legislature as one of the three co-equal branches of government by art 1 of the Michigan Constitution. The enactment of laws designed to assure the protection and enhancement of such rights is therefore a particularly proper legislative concern. [*Id*. at 394-395.]

And beyond the constitutional concerns implicated by the imposition of agency fees by governmental employers and unions, as a matter of public policy the decision whether to continue the practice is also within the Legislature's power. As the United States Supreme Court explained in *Abood*:

> Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. [*Abood*, 341 US at 225 n 20.]

Accordingly, we hold that, contrary to plaintiffs' claim, it is within the authority of the Legislature to pass laws on public-policy matters in general and particularly those, as here, that unquestionably implicate constitutional rights of both union and nonunion public employees. The language of Const 1963, art 11, § 5, the history of civil service laws in the state of Michigan, and the

language of Const 1963, art 4, §§ 48 and 49 do not preclude the Legislature from enacting PA 349 and applying this statute to the classified civil service. The CSC's power to regulate civil service employment does not infringe on the legislative power under article 4, § 49 to enact laws relative to conditions of employment, and applying those laws toward all employment in the state, public and private, civil service or not civil service. Finally, Michigan caselaw fully supports the principle that the Legislature, as the policymaking branch of government, has the power to pass labor laws of general applicability that also apply to classified civil service employees. For these reasons, we hold that 2012 PA 349 is constitutional as applied to classified civil service positions in Michigan.

IV. RESPONSE TO THE DISSENT

Respectfully, our dissenting colleague gives the impression that agency fees are akin to CSC rules requiring a certain educational degree for promotion, specifying procedures for drafting qualifying examinations, or establishing job performance ratings. If that were true, there would be no demonstrations in Lansing or, indeed, across the country about the very nature of the fees at issue and the myriad constitutional and public-policy questions that flow from their imposition or abolishment. Importantly, our holding does not seek to devalue, avoid, or undermine the power of the CSC as the dissent would suggest. Rather, while recognizing the complexity of the issue before us, we acknowledge that, in varying ways, both the CSC and the Legislature have authority over the welfare of Michigan employees but, on this particular issue, we hold that the decision whether public-sector employees, including those in the

classified civil service, must pay fees to unions is within the Legislature's scope of authority.

The dissent relies on quotations about the CSC's authority in support of the notion that the CSC "reigns supreme" in all aspects of civil service employment, but the quotations are dicta and the cases are simply inapposite. The dissent cites *Dudkin* as a "particularly pertinent case" regarding the CSC's authority but, as the Court itself explained, the issue in *Dudkin* was whether the CSC "*failed to follow its own rules and regulations* in promulgating a rule permitting negotiation of an agency shop fee with the union." *Dudkin*, 127 Mich App at 401 (emphasis added). The case arose when the CSC unilaterally changed a rule to dispense with its own requirement that a majority of employees must agree before an agency fee could be imposed. *Id*. at 401-403. This Court held that the CSC's own rules did not require the CSC to notify each employee about rule changes and that the new rule did not violate the CSC's obligations under article 11, § 5. *Id*. at 406-407. The panel noted that the imposition of agency fees was upheld in *Abood* and observed that designating a union and imposing "an agency shop fee clearly bears on the efficiency of civil service operations." *Id*. at 408-409.

The dissent's reliance on *Dudkin* is misplaced because not only is it not binding on this Court under MCR 7.215(J)(1), the law has since changed. *Dudkin* was decided at a time when our Legislature explicitly permitted governmental employers and unions to impose agency fees on public employees under the former version of MCL 423.210(1), but this is no longer the law. *Dudkin* was also decided before the United States Supreme Court established the procedural safeguards in *Hudson*, which not only supersede any civil service rule to the contrary, but also include notice require-

ments for the collection of fees from nonunion employees, specifically to avoid infringement of their constitutional rights. *Hudson*, 475 US at 303. Moreover, *Dudkin* did not address, much less decide, a dispute over the rulemaking power of the CSC and the lawmaking power of the Legislature that would, in any way, answer whether the Legislature's enactment of PA 349 applies to classified civil service employees.

The same holds true of *Crider*, 110 Mich App 702. Because of a state financial crisis, and to avoid long-term layoffs, in *Crider* the CSC bypassed its own rules and enacted a new rule permitting layoffs for classified employees who were not performing immediate essential public services and who were not covered by contrary collective-bargaining agreements. *Id*. at 708-709. Michigan State Police command officers sued the CSC and argued that the CSC exceeded its powers under article 11, § 5. *Id*. at 710, 714-715. This Court ruled that the CSC had the authority to temporarily suspend its own rules and regulations in an emergency financial situation and that, pursuant to its authority to regulate conditions of employment, the CSC could impose a layoff program for certain classified employees. *Id*. at 723-730.

Crider did not involve agency fees or legislation conflicting with a CSC rule, and it appears that the dissent cites it, along with *Dudkin*, in a search for any available language stating that the CSC has broad constitutional powers. We do not dispute the cited language or the point that the CSC has extensive power within its scope of authority, but the dissent seems unable to tolerate the notion that *both* the CSC and the Legislature have constitutional authority over public-employment matters. Indeed, notably absent from the dissenting opinion is an acknowledgement of the many

Michigan appellate decisions upholding legislative "incursion" into what the dissent describes as the CSC's constitutional "domain." The Legislature has enacted various laws that apply to all Michigan employees, including those in the classified civil service, related to equal protection, antidiscrimination, civil rights, disability rights, political freedom, occupational health and safety, and others.[4] Again, as the opinion states, we recognize the authority of both the CSC and the Legislature and, while the dissent declines to do the same, the critical and difficult question here is the nature of the matter at issue and whether it falls within the province of the Legislature or the CSC.

In addition to its denial of any overlapping or shared authority, it appears that the dissent underplays the importance of agency fees on the basis of its fundamentally erroneous view that our courts have "resoundingly" decided that agency fees do not burden the exercise of First Amendment rights. To the contrary, as the United States Supreme Court made clear in *Knox*,

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[4] See *Council No 11*, 408 Mich 385; *Marsh*, 142 Mich App 557; *Jones*, 101 Mich App at 301, 304 (holding that the Civil Rights Commission has jurisdiction over discrimination claims brought by classified civil service employees and that the Department of Civil Service's failure to provide benefits violated the antidiscrimination provisions of the Fair Employment Practices Act and the successor Civil Rights Act); *Brown*, 153 Mich App at 782 ("In light of Const 1963, art 4, § 51, which directs the Legislature to protect and promote public health for all persons, we conclude that the prohibition of legislation for resolution of employment disputes of classified civil service employees does not extend to the area of occupational health and safety.") (citation omitted); *Civil Serv Comm v Dep't of Labor*, 424 Mich 571, 625; 384 NW2d 728 (1986) ("[T]he power of the Civil Service Commission to 'regulate all conditions of employment in the classified service' does not preclude the Legislature from eliminating a position once it is classified as within the civil service system."); *Walters v Dep't of Treasury*, 148 Mich App 809, 815; 385 NW2d 695 (1986) ("[T]he state, its subdivisions and agencies are 'employers' covered by the [Civil Rights Act].").

> [w]hen a State establishes an "agency shop" that exacts compulsory union fees as a condition of public employment, "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Ellis* [*v Brotherhood of Railway, Airline & Steamship Clerks*, 466 US 435, 455; 104 S Ct 1883; 80 L Ed 2d 428 (1984)]. Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, . . . the compulsory fees constitute a form of compelled speech and association that imposes a "significant impingement on First Amendment rights." [*Id*.] Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake. [*Knox*, 567 US at ___; 132 S Ct at 2289.]

Thus, in direct opposition to the dissent's assertion, the Supreme Court has explicitly declared that agency fees impose a "significant" burden on "critical" First Amendment rights. *Id*. at ___; 132 S Ct at 2289. That fact has been decisively established. What remains in continual litigation is how to determine when agency fees are spent on matters not germane to purposes of collective bargaining, how to protect the constitutional rights of those employees who oppose funding speech on political or ideological matters the union espouses, and how to also protect the constitutional rights of employees who wish to join unions and support those views. That is, since *Abood*, our courts have repeatedly grappled with questions about which public-sector union expenses are chargeable to nonmembers, which are nonchargeable, and how employees may vindicate their rights.[5]

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[5] *Knox*, 567 US ___; 132 S Ct 2277; *Davenport v Washington Ed Ass'n*, 551 US 177; 127 S Ct 2372; 168 L Ed 2d 71 (2007); *Air Line Pilots Ass'n v Miller*, 523 US 866; 118 S Ct 1761; 140 L Ed 2d 1070 (1998); *Lehnert v Ferris Faculty Ass'n*, 500 US 507; 111 S Ct 1950; 114 L Ed 2d 572 (1991);

In light of the First Amendment rights at stake, the Michigan Legislature has made the policy decision to settle the matter by giving all employees a right to choose. This is quite the opposite of "advanc[ing] a political agenda" as described by the dissent; to the contrary, it is a decision to further remove politics from public employment and to end all inquiry or debate about how public-sector union fees are spent. Again, at issue here is whether our Legislature may prohibit agency fees for classified civil service employees when a civil service rule permits them. The CSC is an agency created to ensure a merit system in public employment and abolish political cronyism in hiring and promotion, which it does through rules regarding matters such as pay grades, conditions for promotion, and dispute resolution. A legislature in a representative constitutional republic speaks for the people on matters of significant public concern. Our conclusion, as fully set forth in this

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Hudson, 475 US 292; *Abood*, 431 US 209; *Merritt v Int'l Ass'n of Machinists & Aerospace Workers*, 613 F3d 609 (CA 6, 2010); *Scheffer v Civil Serv Employees Ass'n*, 610 F3d 782 (CA 2, 2010); *Locke v Karass*, 498 F3d 49 (CA 1, 2007); *Cummings v Connell*, 402 F3d 936 (CA 9, 2005); *Otto v Pennsylvania State Ed Ass'n-NEA*, 330 F3d 125 (CA 3, 2003); *Wessel v City of Albuquerque*, 299 F3d 1186 (CA 10, 2002); *Shea v Int'l Ass'n of Machinists & Aerospace Workers*, 154 F3d 508 (CA 5, 1998); *Abrams v Communications Workers of America*, 313 US App DC 385; 59 F3d 1373 (1995); *Dashiell v Montgomery Co*, 925 F2d 750 (CA 4, 1991). Further, while the United States Supreme Court has thus far declined to rule agency fees unconstitutional per se, it is clear that a "union's 'collection of fees from nonmembers is authorized by an act of legislative grace' . . . ." *Knox*, 567 US at ___; 132 S Ct at 2291 (citation omitted.) And a state legislature clearly has the constitutional right to make the policy decision to abolish the requirement of union membership and prohibit compulsory agency fees. *Davenport*, 551 US at 184; *Lincoln Fed Labor Union v Northwestern Iron & Metal Co*, 335 US 525; 69 S Ct 251; 93 L Ed 2d 212 (1949). Moreover, though the dissent wrongly urges that it makes no difference whether agency fees constitute a condition "of" employment or "for" employment, again, our Supreme Court stated otherwise in *Council No 11*, 408 Mich at 406.

opinion, is premised on the authoritative boundaries of the Legislature and the CSC as defined in our Constitution, but the dissent begs further comment on the effect of its position. By enacting PA 349, the Legislature made a choice and thereby spoke for the people of Michigan. A subsequent, duly elected Legislature may decide that PA 349 is contrary to the will of the people and can change the law or, if dissatisfied, citizens themselves may reject PA 349 through referendum or propose a new law through initiative. Simply stated, it would strip this power away from the people and eliminate their collective voice on a matter of constitutional importance were we to accept the dissent's view that four unelected, unaccountable members of an executive agency have the authority to decide the matter, outside the public arena, when the Constitution gives that agency no such power. While we do not question the CSC's authority within the limited scope set forth by the people in our Constitution, *Viculin*, 386 Mich at 393, for the reasons set forth in the opinion, we hold that the Legislature has the authority to enact legislation with regard to agency fees and that the legislation, 2012 PA 349, applies to employees in the classified state civil service.

DONOFRIO, J., concurred with SAAD, P.J.

GLEICHER, J. (*dissenting*). Article 11, § 5 of the 1963 Michigan Constitution establishes the Civil Service Commission (CSC) as an independent constitutional entity and broadly empowers the CSC to govern the classified state civil service. A comment in the Address to the People explained that the CSC's constitutional framework was "designed to continue Michigan's national leadership . . . in public personnel practice, and to foster and encourage a career service in state govern-

ment." 2 Official Record, Constitutional Convention 1961, p 3405. An integral component of article 11, § 5 vests the CSC with the authority to "make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service."

Pursuant to its regulatory authority, the CSC authorizes "employees in eligible positions to engage in a form of collective bargaining . . . ." Civ Serv R 6-1.1. Eligible classified employees "may organize, form, assist, join, or refrain from joining labor organizations." Civ Serv R 6-5.1. If a union-eligible employee opts out of union membership, Civ Serv R 6-7.2 permits the CSC to collect from the employee a service fee, also called an agency fee.[1] Agency fees defray the costs associated with collective bargaining and other union activities.

2012 PA 349 (PA 349) amended the public employment relations act (PERA), in part prohibiting public employers from requiring union membership and assessing agency fees against nonunion employees. The issue presented in this declaratory judgment action is whether PA 349's agency-fee provision applies to the classified civil service.

The majority holds that because article 4, § 49 of the 1963 Michigan Constitution permits the Legislature to "enact laws relative to the hours and conditions of employment," PA 349 trumps the CSC's agency-fee rule: "the CSC's power to issue rules governing civil

[1] Specifically, the rule provides:

> Nothing in this rule precludes the employer from making an agreement with an exclusive representative to require, as a condition of continued employment, that each eligible employee in the unit who chooses not to become a member of the exclusive representative shall pay a service fee to the exclusive representative. [Civ Serv R 6-7.2.]

service employment is not limitless in scope, but is subject to and in accordance with the Legislature's power to 'enact laws' regarding 'conditions of employment.' " Despite the expansive rulemaking power vested in the CSC by article 11, § 5, the majority asserts that "it is within the authority of the Legislature to pass laws on public-policy matters in general and particularly those, as here, that unquestionably implicate constitutional rights of both union and nonunion public employees."

I believe that 2012 PA 349 unconstitutionally infringes on the CSC's power to "regulate all conditions of employment in the classified service." Const 1963, art 11, § 5. That agency fees may "implicate" constitutional rights does not empower the Legislature to exceed its constitutional authority. Therefore, I respectfully dissent.

I. THE CONSTITUTIONAL FRAMEWORK

Const 1963, art 11, § 5 describes the scope of the classified civil service, establishes the CSC's powers, and invests the CSC with regulatory independence. Its 12 paragraphs elucidate the CSC's unique, autonomous role in our constitutional system. The Constitution's framers anticipated that the CSC would remain detached from partisanship ("The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year."). Promotion or appointment in the civil service hinges on merit rather than "religious, racial or partisan considerations." Compensation increases recommended by the CSC may be rejected only upon a $^2/_3$ vote of "the members elected to and serving in each

house . . . ." The Legislature's power to limit the CSC's own budget is also substantially constrained ("To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission."). These elements of article 11, § 5 animate the framers' intent to shield this State's skilled, loyal, high quality work force from politically motivated meddling.

The 1963 Constitution established the CSC's unique independence to ensure that the political preferences of the Governor or the Legislature would not infect the administration of the classified work force. Article 11, § 5 deliberately insulates the management of the classified civil service from political partisanship. The majority's acknowledgment that PA 349's substance has engendered "demonstrations in Lansing [and], indeed, across the country" confirms the fundamentally *political* nature of the statute and decisively contradicts the majority's claim that the Legislature acted merely to "remove politics from public employment."

The fourth paragraph of article 11, § 5 is at the center of this dispute. This provision enables the CSC to wield the comprehensive authority bestowed upon it by the Constitution:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, *make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.* [Emphasis added.]

The CSC's prerogative to allow the assessment of agency fees flows from this delegation of regulatory power.

The majority asserts that PA 349 constitutes a "proper exercise of the Legislature's constitutional authority" because it embodies a law relative to the hours and conditions of employment. Furthermore, the majority reasons, the statute falls "uniquely within the province of the Legislature" because the Legislature possesses " '[t]he power, indeed the duty, to protect and insure the personal freedoms of all citizens, including the rights of free speech and political association . . . .' " Quoting *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 394; 292 NW2d 442 (1980).

In my view, the majority misapprehends the Legislature's constitutional role, disregards the plain language of Const 1963, art 11, § 5, and ignores basic separation-of-powers principles.

II. THE LEGISLATURE'S CONSTITUTIONAL ROLE

The majority's first fundamental error casts the Legislature as the branch of government "uniquely" assigned by the Constitution to ascertain the constitutional merits and demerits of the CSC's agency-fee rule. Whether agency fees actually violate First Amendment rights is first and foremost a legal question. The judicial branch has resoundingly answered that question in the negative. No less an authority than the United States Supreme Court has repeatedly reaffirmed that a state employer may require the payment of agency fees as long as the union uses the fees for nonideological, nonpolitical collective-bargaining activity. *Lehnert v Ferris Faculty Ass'n*, 500 US 507; 111 S Ct 1950; 114 L Ed 2d 572 (1991); *Chicago Teachers Union v Hudson*, 475 US 292; 106 S Ct 1066; 89 L Ed 2d 232 (1986);

Abood v Detroit Bd of Ed, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977).[2] Public-sector agency fees devoted to collective-bargaining purposes are wholly unobjectionable from a First Amendment standpoint. Indeed, none of the parties in this case has even hinted that the CSC's agency-fee rule improperly imposes charges used for political activity or that the rule conflicts in any manner with the First Amendment. This salient fact reinforces that the Legislature's decision to abolish mandatory agency fees rests solely on a political calculus born of a dislike for unions rather than a First Amendment analysis. Cloaking PA 349 in "right to choose" garb cannot disguise that its purpose is to interfere with the CSC's judgment that agency fees serve a positive, productive purpose in the classified work force.

This case does not involve a substantive challenge to the CSC's agency-fee rule. Rather, the Legislature's ability to abolish agency fees in the civil service must be measured against the Legislature's constitutional authority to make a different political choice than that made by the CSC. Accordingly, whether regulation of

[2] Notably *Abood* and *Lehnert* involved the constitutionality of previous versions of PERA. In *Abood*, the United States Supreme Court generally upheld the constitutionality of PERA's agency-shop provision. In *Lehnert*, the United States Supreme Court considered the constitutionality of PERA's compulsory agency fees. The Court held in part that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Lehnert*, 500 US at 524. More recently, the Supreme Court held that public-sector unions may collect agency fees as long as the unions observe various procedural requirements "to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes." *Davenport v Washington Ed Ass'n*, 551 US 177, 181; 127 S Ct 2372; 168 L Ed 2d 71 (2007).

agency fees falls within the province of the Michigan Legislature depends on the manner in which the Michigan Constitution separates and delegates power. Our Constitution disperses the powers of government and limits their exercise pursuant to article 3, § 2: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." "Because the [CSC's] grant of power is derived from the constitution, its valid exercise of power cannot be taken away by the Legislature." *Livingston Co Bd of Social Servs v Dep't of Social Servs*, 208 Mich App 402, 408; 529 NW2d 308 (1995).

Thus, the Legislature's interest in vindicating the First Amendment rights of certain classified civil servants remains subject to the Legislature's constitutional ability to exercise its lawmaking authority in the CSC's field. I believe that the Legislature lacks the power to advance a political agenda by intruding on the constitutional prerogatives expressly reserved to the CSC by Const 1963, art 11, § 5. That the civil service rule admits of no First Amendment infirmity reinforces my conclusion.

Agency fees subsidize collective bargaining. The CSC has determined that collective bargaining enhances the employment conditions of its work force. Because this judgment comports with the CSC's constitutional authority to "regulate all conditions of employment" applicable to the classified civil service, Civ Serv R 6-7.2 constitutes a legitimate exercise of the CSC's power.[3] By

[3] To borrow the majority's term, any incursion into the CSC's collective-bargaining rules also "implicates" article 4, § 48, which permits the Legislature to pass laws "providing for the resolution of disputes concerning public employees, *except those in the state classified civil*

overriding the CSC's judgment concerning the need for agency fees, the Legislature has unconstitutionally usurped the CSC's constitutionally granted rulemaking authority. I would hold that Const 1963, art 11, § 5 divests the Legislature of the power to impose the agency-fee restrictions contained in 2012 PA 349 on the classified civil service.

III. THE CSC'S CONSTITUTIONAL ROLE

The CSC's establishment as a constitutional entity reflects a purposeful determination that the CSC would possess "plenary and absolute powers in its field." *Viculin v Dep't of Civil Serv*, 386 Mich 375, 393, 398; 192 NW2d 449 (1971). Consequently, the Legislature is "without power to regulate the internal procedures of the [CSC] and this fact is recognized in Const 1963, art 4, § 48[.]" *Id.* at 393.

The Supreme Court and this Court have repeatedly reiterated that Michigan's Constitution confers on the CSC expansive and exclusive authority to regulate the workings of the classified civil service. "We do not question the [CSC's] authority to regulate employment-related activity involving *internal matters* such as job specifications, compensation, grievance procedures, discipline, *collective bargaining* and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance." *Council No 11*, 408 Mich at 406 (emphasis added). Const 1963, art 11, § 5 contemplates an autonomous administrative agency vested with "absolute power in its field." *AFSCME Council 25 v State*

service." (Emphasis added). Agency-fee rules "implicate" collective bargaining and the dispute resolution process created by the CSC. These "implications" supply separate grounds for holding PA 349 unconstitutional.

Employees' Retirement Sys, 294 Mich App 1, 15; 818 NW2d 337 (2011). And "[b]ecause the CSC's power and authority is derived from the constitution, its valid exercise of that power cannot be taken away by the Legislature." *Hanlon v Civil Serv Comm*, 253 Mich App 710, 717; 660 NW2d 74 (2002).

In *Council No 11*, the Supreme Court considered "a conflict between the rule-making power of the [CSC] and the law-making power of the legislature . . . ." *Council No 11*, 408 Mich at 390. Specifically at issue were a civil service rule prohibiting classified civil servants from engaging in political activities both on- and off-duty and a statute generally permitting political activity. *Id.* at 390-391. The Supreme Court held that the CSC's rulemaking power did not extend to "the blanket prohibition of off-duty activities," observing that "[w]hat an employee does during his off-duty hours is not of proper concern to the [CSC] unless and until it is shown to adversely affect job performance." *Id.* at 407. Thus, the Court upheld the constitutionality of a statute permitting members of the classified civil service "to enjoy the exercise of freedom of speech and expression involved in off-duty political activity, including running for public office . . . ." *Id.* at 393-394, 409.

Notwithstanding this rebuke of the CSC, the Supreme Court emphatically underscored the CSC's supremacy in its constitutionally assigned field:

> We do not wish to be understood as qualifying in any way this Court's earlier holding that
>
> > the Civil Service Commission by [the constitutional grant of authority] is vested with plenary powers *in its sphere of authority*. (Emphasis added.) *Plec v Liquor Control Comm*, 322 Mich 691; 34 NW2d 524 (1948).
>
> Since that grant of power is from the Constitution, any executive, legislative or judicial attempt at incursion into

> that "sphere" would be unavailing. We intend, rather, to be understood as emphasizing that the commission's "sphere of authority" delimits its rule-making power and confines its jurisdiction over the political activity of classified personnel to on-the-job behavior related to job performance. [*Id.* at 408.]

While *Council No 11* does not countenance curtailing a civil servant's civil right to engage in off-duty political activity, that case nowhere even hints that the Legislature may interfere with the CSC's authority to regulate on-duty employment concerns.[4]

This Court has repeatedly rebuffed challenges to the CSC's authority to perform its constitutional function. In one particularly pertinent case, *Dudkin v Civil Serv Comm*, 127 Mich App 397, 408; 339 NW2d 190 (1983), this Court examined whether Const 1963, art 11, § 5 prohibited "discharge for failure to pay any agency shop fee because civil service employment is to be governed strictly on merit principles." This Court unqualifiedly confirmed that the CSC's power encompassed the ability to regulate agency-shop fees:

> Designation of an exclusive representative and imposition of an agency shop fee clearly bears on the efficiency of civil service operations. The [CSC] has reserved the right to promulgate "such additional rules as it may deem neces-

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[4] Citing *Council No 11*, the majority observes that the CSC's agency-fee rule serves as both a "condition of" and a "condition for" employment and asserts that "the CSC may regulate conditions *of* employment, not *for* employment . . . ." No authority supports that the CSC lacks the ability to regulate a condition "of" employment that concomitantly qualifies as a condition "for" employment, regardless of the inapplicable dicta in *Council No 11*. Job qualification requirements (for example, licensure in a certain field) constitute conditions "of" and "for" continued employment. Continuing-education requirements or certain minimal exam scores qualify as conditions "of" and "for" employment. That these conditions "of" employment overlap conditions "for" employment hardly renders them illegal usurpations of power.

> sary to insure the effective and orderly operation of the meet and confer system established by these regulations". The director has general authority to issue other employee relations regulations consistent with the rules. . . .
>
> *Finally, imposition of agency shop fees on non-union members has been upheld in the public employee context. [Abood, 431 US 209]; Eastern Michigan Univ Chapter of American Ass'n of Univ Professors v Morgan, 100 Mich App 219; 298 NW2d 886 (1980).*
>
> *We conclude that the* [*CSC*] *is constitutionally authorized to impose an agency shop fee pursuant to efficient civil service operations.* [*Dudkin*, 127 Mich App at 408-409 (emphasis added).][5]

Crider v Michigan, 110 Mich App 702, 723; 313 NW2d 367 (1981), further supports that in the realm of labor relations within the classified civil service, the CSC reigns supreme. The plaintiffs in *Crider* were laid off pursuant to "a statewide program of one-day layoffs." *Id.* at 706. The CSC exempted from layoff those employees "covered by [a previously existing] collective bargaining agreement limiting the right to lay off." *Id.* at 709 (quotation marks and citation omitted; emphasis omitted). This Court found no merit in a host of challenges to this civil service rule, including that it "violate[d] the right to equal protection of the employees laid off pursuant to it, and it violate[d] the employees' right to due process." *Id.* at 717. Fundamental constitutional principles united this Court's examina-

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[5] The majority attempts to distinguish *Dudkin* on the basis that the CSC justified the fees by relying on the language "merit, efficiency and fitness" of Const 1963, art 11, § 5 rather than the language "regulate conditions of employment" plaintiffs now invoke. Respectfully, the majority has missed the forest for the trees. *Dudkin* stands for the proposition that the CSC may constitutionally make rules regarding agency fees. Whether that power derives from one phrase found in article 11, § 5 rather than another does not change the central fact that the CSC operates within its authority when imposing agency fees.

tion of the multiple, disparate issues it considered. For all of those issues, this Court set the analytical stage as follows: "A court of this state cannot substitute its judgment for that of an administrative board or commission acting within its duly granted powers. *Indeed, even the Legislature is without power to regulate the internal procedures of the CSC*." *Id.* at 716 (citation omitted; emphasis added). This Court elaborated:

> [G]iven the broad scope of the CSC's constitutional authority to regulate the compensation and working conditions of classified state employees, defendants correctly argue that the CSC's decisions regarding the compensation of covered employees are entitled to at least as much deference as decisions of other administrative commissions. This is particularly true in light of the above-quoted section of the state constitution [article 11, § 5] that gives the CSC great discretion over most, if not all, aspects of state civil service employment. [*Id.*]

These cases instruct that the CSC enjoys comprehensive regulatory prerogatives in the realm of the classified civil service. The CSC may adopt rules, fix rates of compensation, and generally control the conditions of employment for the civil service work force. And because the Constitution grants the CSC "plenary and absolute powers in its field," *Viculin*, 386 Mich at 398, the Legislature "cannot by statute usurp [the CSC's] constitutional authority," *Ins Comm'r v Mich State Accident Fund Advisory Bd*, 173 Mich App 566, 583; 434 NW2d 433 (1988).[6]

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[6] Nor do *Dep't of Civil Rights ex rel Jones v Dep't of Civil Serv*, 101 Mich App 295; 301 NW2d 12 (1980), and *Marsh v Dep't of Civil Serv*, 142 Mich App 557; 370 NW2d 613 (1985), avail the majority's argument. Neither case involved a CSC rule regulating a "condition of employment." *Jones* involved a discriminatory long-term-benefit plan "made available" to classified employees. *Jones*, 101 Mich App at 297. *Marsh* applied the Civil Rights Act to the classified civil service, holding that the

IV. 2012 PA 349 AS APPLIED TO THE CLASSIFIED CIVIL SERVICE

The majority asserts that in enacting PA 349, the Legislature appropriately weighed in on a matter of constitutional import: "With PA 349, the Legislature has . . . remov[ed] political and ideological conflict from public employment and eliminate[ed] the repeated need to decide, on a case by case basis, whether unions have properly allocated funds." Because "agency fees implicate governmental employees' constitutional rights and important questions of public policy," the majority opines, "matters like the one at issue here are within the province of the Legislature[.]" Thus, the majority concludes, "it is within the authority of the Legislature to pass laws on public policy matters in general and particularly those, as here, that unquestionably implicate constitutional rights of both union and nonunion public employees."

In my view, the majority has lost sight of the principle that "[t]he Michigan Constitution is not a grant of power to the Legislature as is the United States Constitution, but rather, it is a limitation on general legislative power." *Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311, 317-318; 254 NW2d 544 (1977). The Legislature may wield its power only in the manner prescribed by Michigan's Constitution. It may not infringe on a sphere of power belonging to another constitutional body. See *Federated Publications, Inc v Mich State Univ Bd of Trustees*, 460 Mich 75; 594 NW2d 491 (1999) (holding that while the Legislature has some power to control public universities, it may not interfere with those functions constitutionally placed under the

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CSC's power to resolve employment disputes "does not extend to the area of employment discrimination." *Marsh*, 142 Mich App at 569. In neither case did the legislative enactment at issue clash with a civil service rule concerning the classified work force's conditions of employment.

universities' governance). Regardless of the Legislature's perception that the CSC's agency-fee rule is wrongheaded, the 1963 Constitution places "regula-[tion of] all conditions of employment in the classified service" in the hands of the CSC. Const 1963, art 11, § 5. This limitation of power does not magically evaporate when the Legislature chooses to place its thumb on the scale in favor of a particular political preference. Nor does cloaking the Legislature's motives in civil-rights garb eliminate a separation-of-powers conflict.

Many employment matters "implicate" constitutional rights. For example, an employee's right to a full and fair termination procedure implicates the Due Process Clause. Arbitration clauses implicate the Seventh Amendment's right to jury trial. Whether a public-sector employee may be compelled to submit to drug testing implicates the Fourth Amendment. Antinepotism rules may implicate the constitutionally protected freedom to marry. The CSC could, and perhaps has, generated rules in all of these arenas. But that an employment rule promulgated by the CSC "implicates" or may "impact" an intact constitutional right does not authorize the Legislature to pass laws invading territory confined by the Constitution to an independent constitutional body. Michigan's Constitution carves out for the CSC *alone* the constitutional prerogative to "regulate all conditions of employment in the classified service."[7]

The majority minimizes the CSC's authority, asserting that despite the plain language of article 11, § 5, a different constitutional provision—Const 1963, art 4, § 49—"authorizes the Legislature to enact laws relative to the hours and conditions of employment generally,

[7] Should the CSC overstep constitutional bounds, the judicial branch may supply correction and a remedy.

subject only to the CSC's authority to *regulate* conditions of employment in the classified civil service, in addition to performing other specifically enumerated duties." According to the majority, the "collid[ing]" constitutional provisions invest "specific and plenary power" in the CSC "to regulate conditions of employment," while preserving for the Legislature the "broad constitutional authority to enact laws, including those affecting the hours and conditions of employment for classified civil service employees." 2012 PA 349, the majority insists, corresponds with the Legislature's authority to pass laws that "unquestionably implicate" constitutional rights.

"The public policy of this state as to labor relations in public employment is for legislative determination. The sole exception to the exercise of legislative power is the state classified civil service, the scheme for which is spelled out in detail in Article 11 of the Constitution of 1963." *Eastern Mich Univ Bd of Control v Labor Mediation Bd*, 384 Mich 561, 566; 184 NW2d 921 (1971). As explained in *Dudkin* and reemphasized here by amicus curiae CSC, efficient civil service operations justify the imposition of agency shop fees. One likely motivation for the CSC's policy choice is to avoid the resentment and hostilities generated by free riders. The 1963 Constitution makes it clear that the CSC's labor-relations judgments trump those of the Legislature, regardless of the reasons offered by the Legislature for drafting a "better" or "fairer" rule.

Accordingly, the majority's perceived "colli[sion]" between article 11, § 5 and article 4, § 49 must be resolved in favor of the CSC. A "fundamental rule of constitutional construction . . . requires this Court to construe every clause or section of a constitution consistent with its words or sense so as to protect and guard its

purposes." *In re Proposals D & H*, 417 Mich 409, 421; 339 NW2d 848 (1983). "[N]o court should so construe a clause or section of a constitution as to impede or defeat its generally understood ends when another construction thereof, equally concordant with the words and sense of that clause or section, will guard and enforce those ends." *Mich Farm Bureau v Secretary of State*, 379 Mich 387, 393; 151 NW2d 797 (1967). Respect for each provision mandates affirmative recognition "that all constitutional provisions enjoy equal dignity." *Proposals D & H*, 417 Mich at 421.

"[T]he separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998). A specific, limited grant of authority to one branch "does not create encroachment or aggrandizement of one branch at the expense of the other . . . ." *Id.* at 297. When feasible, "a sharing of power may be constitutionally permissible." *Id.*

Application of these principles avoids a fatal collision. The Legislature enjoys a *general* mandate to "enact laws relative to the hours and conditions of employment," Const 1963, art 4, § 49, while the CSC alone regulates "all conditions of employment in the classified service," Const 1963, art 11, § 5. Thus, both entities share some authority to regulate "conditions of employment." As long as the Legislature's exercise of its power neither contradicts nor nullifies the CSC's regulation of a condition of employment, no conflict arises. However, when the Legislature passes a law directly clashing with a CSC work rule, it does so at its peril. The statute construed in *Council No 11* survived because it concerned a subject *outside* the CSC's jurisdiction. In contrast, legislative incursion into the CSC's constitu-

tional domain that transgresses the CSC's constitutional bailiwick is improper. To hold otherwise is to write out of the Constitution the regulatory authority of the CSC. Thus, the majority's pronouncement that the Legislature's authority includes enacting politically motivated laws contradicting civil service rules cannot be squared with separation-of-powers principles. The justness of the Legislature's cause does not alter its role in our constitutional system. Because PA 349 indisputably intrudes on the CSC's express power to "regulate all conditions of employment in the classified service," it is unconstitutional as applied to the classified civil service.[8]

The majority holds that Const 1963, art 4, § 49 authorizes the Legislature to override the CSC's authority whenever it finds a "public policy" justifying the displacement of a civil service rule. I submit that when the CSC acts to regulate conditions of employment in the classified civil service, the Legislature must respect the CSC's constitutional authority to make public-policy choices contrary to those preferred by the Legislature. And here, it cannot seriously be questioned that imposition of an agency fee constitutes a regulation of a condition of employment.

Citing the 2006 edition of *Merriam-Webster's Collegiate Dictionary*, the majority maintains that "the ordinary meaning of the word 'regulate' is to govern, direct, or control *according to rule, law or authority*." Although the majority's point is not altogether clear, it appears to reject that the CSC's agency-fee rule

[8] The majority acknowledges that "[t]he Legislature possesses the broad power to enact laws relative to the conditions of *all* employment, whereas the CSC possesses the narrow power to regulate conditions of civil service employment." If this specific power grant to the CSC must give way whenever the Legislature disagrees with the CSC's policy choice, article 11, § 5's empowerment of the CSC is purely illusory.

qualifies as a regulation of a condition of employment, adopting defendants' argument that the CSC's regulatory authority is subservient to the Legislature's power to enact general laws concerning conditions of employment.

I note preliminarily that the majority has not accurately parsed its own dictionary source; it has blended together alternative definitions to find a preferred meaning.[9] Notwithstanding the majority's fictive definition, the dictionary gambit is inappropriate and unnecessary. When construing the Constitution, we must "discern the original meaning attributed to the words of a constitutional provision by its ratifiers." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Rather than use dictionaries, "we apply the rule of 'common understanding.' " *Id.* "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *Id.* at 573-574, quoting 1 Cooley, Constitutional Limitations (6th ed), p 81.

"Regulate" is such a commonly understood word that dictionaries are superfluous. To regulate is simply to control by rulemaking. This meaning of the term "regulate" guides my interpretation of the phrase "regulate all conditions of employment in the classified service." Const 1963, art 11, § 5. Simply put, the CSC may make rules controlling the conditions of employment in the classified civil service.

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[9] The alternative definitions set forth in the majority's selected dictionary source are "**1 a** : to govern or direct according to rule" and "**b** (1) : to bring under the control of law or constituted authority." *Merriam-Webster's Collegiate Dictionary* (11th ed, 2006), p 1049.

Nor is the phrase "conditions of employment" difficult to parse. In *Council No 11*, the Supreme Court identified as falling within the CSC's regulatory authority "job specifications, compensation, grievance procedures, discipline, *collective bargaining* and job performance . . . ." *Council No 11*, 408 Mich at 406 (emphasis added). Historically, Michigan has broadly interpreted a closely related phrase, "other terms and conditions of employment." *Central Mich Univ Faculty Ass'n v Central Mich Univ*, 404 Mich 268, 277; 273 NW2d 21 (1978).

Agency fees readily fall within the "all conditions of employment" rubric. The majority concedes this point by relying on article 4, § 49, which uses precisely the same phrase. In *Locke v Karass*, 555 US 207, 213; 129 S Ct 798; 172 L Ed 2d 552 (2009), the United States Supreme Court explained that "the First Amendment burdens accompanying the [agency-fee] payment requirements are justified by the government's interest in preventing freeriding by nonmembers who benefit from the union's collective-bargaining activities and in maintaining peaceful labor relations." In *Abood*, the Supreme Court similarly recognized that agency fees play an important role in labor peace by "distribut[ing] fairly" the cost of representational activities advantaging all employees while simultaneously "counteract[ing] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Abood*, 431 US at 222. In *Railway Employees' Dep't v Hanson*, 351 US 225, 234; 76 S Ct 714; 100 L Ed 1112 (1956), the Supreme Court reasoned that "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What

would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." Michigan's Constitution appoints the CSC as the policymaker for the classified civil service.

The CSC has determined that agency fees foster harmonious labor relations. Civ Serv R 6-7.2 is fully consonant with the CSC's constitutional place in our system of divided powers. In my view, neither the majority nor the Legislature may cast aside the CSC's choice based on an alternative political preference. Rather than honoring the specific and exclusive delegation of power to the CSC in article 11, § 5, the majority's approach strips the CSC of its regulatory supremacy. Because agency fees constitute a condition of employment in the classified civil service, they are not subject to legislative elimination. I would hold that if applied to the civil service, PA 349 would transgress the CSC's constitutional authority to make rules governing all conditions of employment and respectfully dissent from the majority's contrary conclusion.

ADAIR v STATE OF MICHIGAN

Docket No. 302142. Submitted July 25, 2013, at Lansing. Decided August 22, 2013, at 9:00 a.m. Leave to appeal sought.

Daniel Adair, the Fitzgerald Public Schools, and others brought a declaratory judgment action in the Court of Appeals against the state of Michigan and several state departments and officials, alleging that defendants had violated the prohibition of unfunded mandates (POUM) in Const 1963, art 9, § 29, part of the Headlee Amendment, by failing to fully fund, among other things, the costs of collecting, maintaining, and reporting information to the Center for Educational Performance and Information (CEPI) as MCL 388.1694a requires. The Court referred the matter to a special master, Michael Warren, J., who issued a series of advisory rulings and ultimately directed a verdict in favor of defendants on the ground that, because some money had been appropriated for the costs of compliance with the CEPI mandates, plaintiffs were required to establish the specific dollar amount of the funding insufficiency and had failed to do so.

The Court of Appeals *held*:

1. The special master's findings of fact and conclusions of law were adopted with the exception of the master's characterization of plaintiffs' burden of proof.

2. The special master erred by directing a verdict in favor of defendants because plaintiffs were not required to establish the specific dollar amount of the alleged underfunding of the appropriations that would be required to comply with the CEPI reporting requirements, even though some money had been appropriated. Rather, plaintiffs were required to present evidence that was sufficient to allow the trier of fact to conclude that the method the Legislature employed to determine the amount of the appropriation was so flawed that it failed to reflect the actual cost to the state if the state were to provide the activity or service at issue. The matter was remanded to the special master for the reopening of proofs and the finding of facts regarding plaintiffs' claim that the existing appropriations did not fully fund the necessary costs of the CEPI mandates.

3. The special master properly concluded that the Legislature

had not imposed unfunded mandates on the school districts in violation of the POUM provision when it enacted 2011 PA 100 through 103, which amended various statutes governing teachers' employment and tenure, because none of these acts imposed new or increased activities on the school districts within the meaning of the POUM provision.

4. The special master properly concluded that plaintiffs' challenge to the constitutionality of the Legislature's funding scheme to reimburse school districts for the costs they incurred by complying with the CEPI recordkeeping mandates failed under *Durant v Michigan*, 251 Mich App 297 (2002), and *Durant v Michigan (On Remand)*, 238 Mich App 185 (1999), which held that the state's funding obligations under the Headlee Amendment could be satisfied by reallocating a portion of the funds that are appropriated and disbursed annually to local school districts under § 11 of the State School Aid Act, MCL 388.1601 *et seq*.

5. The special master correctly concluded that plaintiffs' action was not barred by the doctrine of res judicata because their claims did not arise from the same transactional setting as the previously litigated Headlee challenge and arose well after that challenge was resolved.

6. The special master correctly rejected the state's defense that the discretionary funds appropriated in § 22 of both 2010 PA 217 and 2011 PA 62 satisfied the state's POUM obligation because that argument was expressly rejected in *Adair v Michigan (On Second Remand)*, 279 Mich App 507 (2008).

Declaratory judgment granted in part; matter remanded to the special master for further findings of fact; jurisdiction retained.

CONSTITUTIONAL LAW — PROHIBITION OF UNFUNDED MANDATES — HEADLEE AMENDMENT — BURDEN OF PROOF — SPECIFIC DOLLAR AMOUNTS.

To establish that the state violated the constitutional prohibition of unfunded mandates, a plaintiff need not establish the specific dollar amount of the alleged underfunding of the state's appropriation and disbursal of funds to pay for the costs necessitated by the new or increased activity or service that the state required of a local unit of government; instead, a plaintiff must present evidence that is sufficient to allow the trier of fact to conclude that the method the Legislature employed to determine the amount of the appropriation was so flawed that it failed to reflect the actual cost to the state if the state were to provide the activity or service at issue (Const 1963, art 9, § 29; MCL 21.233[6]).

Secrest Wardle (by *Dennis R. Pollard* and *Mark A. Roberts*) for plaintiffs.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Timothy J. Haynes* and *Jonathan S. Ludwig*, Assistant Attorneys General, for defendants.

Before: O'CONNELL, P.J., and TALBOT and OWENS, JJ.

PER CURIAM. This original taxpayer action is brought pursuant to the provisions of the Headlee Amendment, Const 1963, art 9, §§ 25 through 34. The action addresses the parameters of the state's funding obligations under the second sentence of § 29 of the amendment—commonly referred to as the "prohibition of unfunded mandates" or POUM provision—and Proposal A, Const 1963, art 9, § 11. Our Supreme Court held that the state violated the POUM provision when it required plaintiff school districts to collect, maintain, and report to the Center for Educational Performance and Information (CEPI) certain types of data for use by the state, without providing funds to reimburse the school districts for the necessary increased costs they would incur in order to comply with those recordkeeping mandates. *Adair v Michigan*, 486 Mich 468, 494; 785 NW2d 119 (2010) (*Adair I*). Thereafter, our Legislature appropriated $25,624,500 to reimburse plaintiff school districts for the compliance costs incurred during the 2010-2011 school year. The Legislature increased the appropriation to $34,064,500 for the 2011-2012 school year, which also included an allocation of $8,440,000 to reimburse the school districts for the costs of complying with the new CEPI mandate to report student performance data to the Teacher Student Data Link. Plaintiffs, who are 465 school districts

and a representative taxpayer from each district, now challenge the constitutionality of the method by which the Legislature funded these appropriations. They also challenge the adequacy of the amount of each appropriation. Finally, plaintiffs allege that the Legislature violated the POUM provision by imposing new or an increased level of activities on the districts through amendments to several provisions of the Revised School Code, MCL 380.1 *et seq*., the teacher tenure act, MCL 38.71 *et seq*., and the public employment relations act (PERA), MCL 423.201 *et seq*., without appropriating any funding to reimburse the school districts for the necessary costs associated with satisfying the new mandates. We referred this matter to a special master, who made a series of advisory rulings that ultimately resulted in the entry of a directed verdict in favor of the state.

We adopt the findings of fact and conclusions of law of the special master, with the exception of the special master's characterization of plaintiffs' burden of proof. Accordingly, we enter a declaratory judgment, in part, in favor of the state, but also remand this matter to the special master to take additional proofs and conduct further fact-finding. The motion to expedite is denied as moot. We decide this case without oral argument pursuant to MCR 7.214(E).

I

The special master convened an evidentiary hearing, the subject of which was plaintiffs' claim that the existing appropriations do not fully fund the necessary costs of the CEPI mandates as the POUM provision requires. Plaintiffs' lead counsel asserted during his opening statement that, in order to sustain this claim, plaintiffs must show only that the amounts appropri-

ated for the two fiscal years "are inadequate," that is, that they do not represent full state financing as required by §§ 25 and 29 of article 9.[1] Counsel explained that plaintiffs would carry this burden by presenting expert testimony that would show that the method employed by the Legislature to determine the amount of the challenged appropriations was flawed and that the use of this flawed method resulted in a level of appropriation that was "grossly below" the amount of funding needed to reimburse the cost of all the activities associated with the collection, maintenance, and reporting of the data. Counsel rejected the proposition that plaintiffs were required to establish the exact amount of the alleged underfunding and candidly admitted that plaintiffs could not do so. Immediately following this opening statement, the state sought a directed verdict in its favor. According to the state, plaintiffs bore the burden of showing the specific dollar amount of the alleged underfunding of the state's POUM funding obligation. Because plaintiffs admitted that they could not do so, plaintiffs could not sustain their challenge to the adequacy of the appropriations, and the state was entitled to a directed verdict. The special master agreed and directed a verdict for the state. We conclude that the special master held plaintiffs to a higher standard of

[1] Section 25 of the Headlee Amendment summarizes the "fairly complex system of revenue and tax limits" imposed by the provisions of the amendment, *Durant v Michigan*, 456 Mich 175, 182; 566 NW2d 272 (1997), and provides, in part, that "[t]he state is prohibited from requiring any new or expanded activities by local governments without full state financing," Const 1963, art 9, § 25. This prohibition is implemented through the POUM provision of § 29. Const 1963, art 9, § 25; *Durant*, 456 Mich at 183. Reading §§ 25 and 29 together, a new or expanded activity or service is fully financed by the state when the state pays the "necessary increased costs" resulting from compliance with the mandate. Const 1963, art 9, § 29; see also *Adair I*, 486 Mich at 479.

proof than required by *Adair I* and, therefore, that the special master erroneously directed a verdict in favor of the state.

Our Supreme Court granted leave in *Adair I*, in part, to determine "whether plaintiffs must introduce evidence of a specific, quantified increase in costs resulting from a violation of the Headlee Amendment provision prohibiting unfunded mandates to establish entitlement to a declaratory judgment" when the plaintiffs had alleged that the state had failed to appropriate any funding to reimburse the school districts for complying with the CEPI recordkeeping mandates. *Adair I*, 486 Mich at 472. The majority answered this question in the negative. According to the majority,

> to establish a violation of the POUM provision, a plaintiff must show that the state required a new activity or service or an increase in the level of activities or services. If no state appropriation was made to cover the increased burden on local government, the plaintiff need not show the amount of increased costs. It is then the state's burden to demonstrate that no state funding was required because the requirement did not actually increase costs or the increased costs were not necessary. [*Id*. at 480.]

The majority rejected the state's claim that it was the school districts' burden, and not its burden, to demonstrate that any additional costs incurred in order to comply with the recordkeeping mandates met the definition of "necessary cost" under MCL 21.233(6) and were not *de minimis* under MCL 21.232(4). The majority explained:

> Neither Const 1963, art 9, § 29 nor MCL 21.233 suggests that plaintiffs bear the burden of proving precisely how much the school districts' costs increased as a result of the mandate. In fact, the language of MCL 21.233 implies the opposite. That section defines "necessary cost" as the "net cost of an activity or service provided by a local unit of

> government." The "net cost" is defined as "the actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . ." [*Adair I*, 486 Mich at 486-487.]

Likewise, the majority rejected the state's argument that the school districts were required to produce evidence of specific dollar-amount increases in the costs incurred by the districts in order to comply with the CEPI mandates. The majority indicated that the conclusion that "a plaintiff does not have the burden to make such a showing to establish entitlement to a declaratory judgment under the POUM provision . . . is axiomatic from the language of Const 1963, art 9, § 29, previous caselaw involving the Headlee Amendment, and the underlying purpose for seeking a declaratory judgment." *Adair I*, 486 Mich at 488. The majority elaborated:

> The terms "net cost" and "actual cost" suggest a quantifiable dollar amount. However, nothing in MCL 21.233 suggests that it was intended to change the burden of proof in Const 1963, art 9, § 29. The specific costs that would be incurred are defined by reference to what costs the state would incur if it had to pay for the increased costs itself. Thus, it is the Legislature's burden to demonstrate that those costs were not "necessary" under one or more of the exceptions in MCL 21.233(6)(a) to (d). Otherwise, the Legislature must determine what dollar amount is necessary, then appropriate that amount to the school districts.
>
> This is so because MCL 21.233(6) defines "net cost" as "the actual cost to the state" if the state were to provide the activity or service required. Clearly, the Legislature is in a position far superior to plaintiffs' to determine what the actual cost to itself would be if it performed the increased recordkeeping and reporting duties. Proofs on this point are easily accessible to the state because it could ascertain the costs it would incur if it provided the new activity. The dispositive issue is the cost to the state if it were to provide

the new or increased activity or service, not the cost incurred by the local governmental unit.

To impose such a requirement on plaintiffs would be illogical and inconsistent with the purposes of the POUM provision of the Headlee Amendment. We have noted that the POUM provision is intended to address future services and activities. Plaintiffs in this case filed suit fewer than two months after EO 2000-9 took effect. The parties stipulated at trial that plaintiff school districts were not required to begin complying with the order's recordkeeping requirements until two years later.

Therefore, had this case been resolved in a timely fashion, EO 2000-9 would not have required plaintiffs to demonstrate specific amounts of necessary costs incurred. Moreover, it would have been difficult for them to do so. . . .

Finally, plaintiffs in this case seek a declaratory judgment, not monetary damages. An action for a declaratory judgment is typically equitable in nature and subject to different rules than other causes of action. "The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." We have also consistently held that "a court is not precluded from reaching issues before actual injuries or losses have occurred."

Defendants claim that a finding of necessary increased costs cannot be established without a comparison between the specific net costs before and after the required change in activities. For the reasons stated previously, we reject this argument. Had this action proceeded to a prompt resolution, plaintiffs could not have demonstrated such a side-by-side comparison of the "before and after" costs incurred to meet the recordkeeping requirements. It would be nonsensical to impose this additional evidentiary requirement on plaintiffs here when, in another case, it would be impossible for the plaintiffs to make such a showing. [*Adair I*, 486 Mich at 488-491 (citations omitted).]

The special master in this case concluded that plaintiffs bore the burden of showing the amount of the purported underfunding "[b]ecause the Legislature has funded the mandate in question[.]" He reached this conclusion in reliance on footnote 29, wherein the *Adair I* majority observed: "However, if the state did appropriate funds for the new or increased activity or service, the plaintiff would likely have a higher burden in order to show a POUM violation." *Adair I*, 486 Mich at 480 n 29. The special master reasoned:

> In the instant case, the Plaintiffs' Second Amended Complaint ("SAC") acknowledges that the Legislature appropriated funds to pay for the CEPI/Data Link Mandates. Consequently, the Plaintiffs have a "higher burden" which requires them to produce evidence of specific dollar-amount increases in the costs incurred in order to comply with the CEPI requirements. [*Adair I*, 486 Mich at 480 n 29, 488.] Such a ruling is consistent not only with *Adair I*, but with [*Adair v Michigan*, 470 Mich 105, 111, 119-120; 680 NW2d 386 (2004) (*Adair II*)].[2] The Plaintiffs' poignant argument that the general direction of *Adair I* mitigates requiring them to establish the insufficiency of the amount of appropriation overlooks the factual distinction between *Adair I* (no appropriation made) and this case (tens of millions of dollars of appropriations made). Furthermore, once the state establishes an appropriation, the Plaintiffs are equipped to attack whether the amount is sufficient and the extent of any such deficiency. In fact, the Plaintiff's [sic] expert's report does attack the methodology used by the state and concludes that the mandate was not fully funded. Unfortunately for their case, the Plaintiffs have failed to do anything else. Instead, they concede that they cannot establish a Specific Number. As such, the case is fatally flawed, and dismissal of the claim is warranted. Cf. *Adair I*, [486 Mich] at 480 n 29; *Id*. at 508 (Markman, J., dissenting).

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[2] Although *Adair II* preceded *Adair I*, this opinion refers to them as indicated for the sake of consistency with the special master's references.

> To hold otherwise could subject the taxpayers, courts, and parties to a cycle of never ending lawsuits in which the Plaintiffs only seek to prove that appropriations do not amount to full funding, while depriving the courts [of] the ability to declare what a full level of funding would be. This undermines the entire purpose of the Headlee Amendment and the efficient administration of justice.

The special master correctly recognized that *Adair I* is factually distinguishable from the instant case. In *Adair I*, the Legislature failed to appropriate any funding to reimburse the school districts for the necessary increased costs associated with the CEPI recordkeeping mandates. In this case, plaintiffs readily concede that the state has appropriated funding. The special master also correctly recognized that the *Adair I* majority intimated that in circumstances where an appropriation had been made, as in this case, a plaintiff asserting a POUM violation "would likely have a higher burden in order to show a POUM violation" because "[u]nder those circumstances, the state would not have violated the POUM provision per se by failing to provide funding." *Id*. at 480 n 29.

We conclude that the special master relied too heavily on the distinguishing factual circumstances present in this case when determining the nature of plaintiffs' burden of proof. Although the *Adair I* majority qualified its ruling that a "plaintiff need not show the amount of increased costs" with the prefatory phrase "[i]f no state appropriation was made to cover the increased burden on local government," *id*. at 480, the majority based its ultimate ruling on legal and not factual grounds. Indeed, the *Adair I* majority expressly and broadly ruled that neither Const 1963, art 9, § 29 nor MCL 21.233 impose on a plaintiff the burden of proving "how much the school districts' costs increased as a result of the mandate" or the "specific-dollar amount increases in

the costs incurred in order to comply with the CEPI requirements." *Adair I*, 486 Mich at 486-487, 488; see also *id*. at 491, 494. This rule is based on the language of the POUM provision and the enacting statutes, not any specific set of factual circumstances, including whether the Legislature appropriated any funding. This rule remains a constant by which this Court is bound, regardless of whether the Legislature has appropriated any funding, unless our Supreme Court revisits the issue of burden of proof and issues a ruling overruling *Adair I*. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). The "higher burden" imposed on the school districts by the special master is contraindicated by the *Adair I* majority's ruling.

Because the *Adair I* majority did not address what burden a plaintiff may bear when challenging the adequacy of an existing appropriation under the POUM provision, we are now tasked with doing so. Generally, a plaintiff seeking a declaratory judgment bears the affirmative duty to prove the existence or nonexistence of a fact or facts alleged and in dispute concerning an issue raised between the parties; i.e., plaintiffs must plead and prove facts that "indicate an adverse interest necessitating the sharpening of the issues raised." *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). Consistently with this general rule, our Supreme Court has ruled that a plaintiff alleging a violation of the POUM provision "must show that 'the state-mandated local activity was originated without sufficient state funding after the Headlee Amendment was adopted or, if properly funded initially, that the mandated local role was increased by the state without state funding for the necessary increased costs.' " *Adair I*, 486 Mich at 479, quoting *Adair II*, 470 Mich at 111. This is because a new or expanded activity or service

can be said to be fully financed by the state for purposes of the POUM provision only when the state pays the "necessary increased costs" resulting from compliance with the state's mandate. Const 1963, art 9, § 29; *Adair I*, 486 Mich at 479. The *Adair I* majority clearly indicated that "the Legislature is in a position far superior to plaintiffs' to determine what the actual cost to itself would be if it performed the increased recordkeeping and reporting duties." *Id*. at 489. Indeed, the majority opined that "[t]he dispositive issue is the cost to the state if it were to provide the new or increased activity or service, not the cost incurred by the local governmental unit." *Id*.

With these principles in mind, and considering the *Adair I* majority's ruling that the POUM provision did not place the burden on plaintiffs to show a quantified dollar amount of any increase in necessary costs associated with complying with a state mandate, we conclude that plaintiffs' "higher burden" must be something less than proving "how much the school districts' costs increased as a result of the mandate" or of "specific dollar-amount increases in the costs incurred in order to comply with the CEPI requirements." *Adair I*, 486 Mich at 486-487, 488. We also conclude that the higher burden borne by plaintiffs is the burden to present sufficient evidence to allow the trier of fact to conclude that the method employed by the Legislature to determine the amount of the appropriation was so flawed that it failed to reflect the "actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . ." MCL 21.233(6). We further conclude, after reviewing the report of plaintiffs' cost accounting expert, that plaintiffs stood ready to present some evidence that, if determined credible by the trier of fact, would have undermined the validity of the method used by the Legislature to

determine the amount of the appropriations at issue and that would have shifted the burden of going forward with evidence to the state to present some evidence that the appropriations do fully fund the state's obligation under the POUM provision. Accordingly, we remand this matter to the special master for the reopening of proofs and the finding of facts regarding plaintiffs' claim that the existing appropriations do not fully fund the necessary costs of the CEPI mandates.[3]

II

We agree with the special master, however, that the Legislature did not impose unfunded mandates upon the school districts in violation of the POUM provision, as a matter of law, when it enacted 2011 PA 100 through 2011 PA 103. None of these public acts imposes new or increased activities on the school districts within the meaning of the POUM provision and, therefore, the POUM provision is not implicated.

The Headlee Amendment requires the state to fund the necessary costs of new or increased activities or services mandated by the state, *Adair I*, 486 Mich at 478-479; *Adair II*, 470 Mich at 110, as reflected by the following language of the amendment:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. [Const 1963, art 9, § 29.]

[3] For these same reasons, we reject the state's claim that the special master erred when he failed to summarily dismiss the school districts' challenge to the adequacy of the appropriation earlier in the proceedings on the basis of the districts' inability to prove an actual quantified amount of underfunding.

Section 34 of the Headlee Amendment obligates the Legislature to implement §§ 25 through 33 of the Amendment. Const 1963, art 9, § 34; *Owczarek v Michigan*, 276 Mich App 602, 604; 742 NW2d 380 (2007). Pursuant to this grant of authority, the Legislature enacted 1979 PA 101, MCL 21.231 *et seq*., which includes, inter alia, several definitions for terms used in the various sections of the Headlee Amendment. MCL 21.232; MCL 21.233; MCL 21.234; *Owczarek*, *supra*. Included in these provisions is the definition of the term "activity," which the Legislature has defined as "a specific and identifiable administrative action of a local unit of government." MCL 21.232(1). The next sentence clarifies that "[*t*]*he provision of a benefit for, or the protection of, public employees of a local unit of government is not an administrative action*." *Id*. (emphasis added).

Plaintiffs assert that the four public acts at issue mandate new or increased activities or services within the meaning of the POUM provision. These public acts amend various provisions of the Revised School Code, the teacher tenure act, and PERA. Generally, among other activities, the amendments require the implementation of an annual employee evaluation system for teachers and certain school administrators, allow a tenured teacher to be demoted or discharged upon a showing that the reason for demotion or discharge is not "arbitrary and capricious," and add new subjects that may not be topics of collective bargaining between a public school employer and a bargaining representative of its employees. The special master rejected plaintiffs' position for the reason that "the Tenure Reforms involve benefits for employees and do not involve state mandated services or activities that require payment under the Headlee Amendment." The special master correctly determined that the public acts at issue do not

impose state-mandated activities within the meaning of MCL 21.232(1)[4] and the POUM provision.

Michigan jurisprudence has long recognized that the teacher tenure act protects public teachers from the arbitrary and capricious employment practices of school boards. *Tomiak v Hamtramck Sch Dist*, 426 Mich 678, 686-687; 397 NW2d 770 (1986); *Rehberg v Melvindale Bd of Ed, Ecorse Twp Sch Dist No 11*, 330 Mich 541, 548; 48 NW2d 142 (1951); *Goodwin v Kalamazoo Bd of Ed*, 82 Mich App 559, 573; 267 NW2d 142 (1978). Regardless of whether the challenged amendments to the tenure act reduce or increase the protections afforded to tenured teachers, the simple fact of the matter is that the public acts merely modify existing protections and, thus, still provide a level of protection to tenured public teachers against the arbitrary and capricious employment practices of administrators and school boards. Under such circumstances, the new requirements imposed by the amended tenure act do not constitute activities under MCL 21.232(1) and, hence, the POUM clause.

Similarly, the revisions made to the Revised School Code do not implicate the POUM provision. The mandated teacher and administrator evaluation processes impose standardized evaluation processes on the school districts, pursuant to which the effectiveness of teachers and administrators may be documented and rewarded. In addition, the processes provide a means by

[4] The Legislature defined the term "service" for purposes of § 29 as a "program of a local unit of government which is available to the general public or is provided for the citizens of the local unit of government." MCL 21.234(1). Because the evaluation and tenure processes are not available to or provided for the general public, these processes do not constitute a program, and MCL 21.234(1) is not implicated on the facts of this case. We decline to address the constitutionality of MCL 21.234(1) when the statute has no application.

which to identify ineffective teachers and administrators and to provide those employees so identified with plans designed to improve their effectiveness. Thus, much like the modifications to the tenure act, the revisions to the Revised School Code provide protections to public employees. The question is not whether the state mandate has some adverse fiscal consequence on the unit of local government, but instead, whether the mandate imposes new or increased activities within the meaning of the POUM provision. In this case, this question must be answered in the negative.

Plaintiffs assert, however, that the public employee benefit or protection exception found in the last sentence of MCL 21.232(1) is facially unconstitutional because the exception precludes the school districts from recovering from the state the necessary supervisory and administrative costs of complying with the new or increased activities mandated by the public acts. According to plaintiffs, this exception violates the intent of the voters who ratified the Headlee Amendment, because those voters did not intend any exceptions to an application of the POUM provision, as revealed by the clear and plain language of the provision, which sets forth no exceptions.

Plaintiffs correctly observe that "[t]he state may not avoid the clear requirements of art 9, § 29 either by specific statute or by implementation of definitions adverse to the mandate of the people." *Durant v State Bd of Ed*, 424 Mich 364, 392; 381 NW2d 662 (1985) (*Durant I*). The definitions found in MCL 21.232(1) and MCL 21.234(1) are not adverse to the mandate of the people, however. This Court has previously determined that MCL 21.232(1) and MCL 21.234(1) "are correct in their construction of the constitutional language" of § 29. *Detroit Mayor v Michigan*, 228 Mich App 386, 399

n 8; 579 NW2d 378 (1998), aff'd 459 Mich 291 (1998), mod 460 Mich 590 (1999). Also, in *Owczarek*, 276 Mich App at 611, this Court determined that the Legislature's codification of "an existing traditional remedy for the protection of a public employee whose termination or suspension under 2005 PA 130 is subsequently vacated" did not constitute an "activity" or "service" within the meaning of the POUM clause. This ruling establishes at least one circumstance under which an application of the benefit and protection exception is valid. *In re Request for Advisory Opinion*, 479 Mich 1, 11; 740 NW2d 444 (2007) (stating that a party challenging the facial constitutionality of a statute must establish that no circumstances exist under which it would be valid). Thus, plaintiffs' challenge to the constitutionality of MCL 21.232(1) fails.

Finally, the revision of PERA does not implicate the POUM provision. The addition of subjects that may not be topics of collective bargaining between a public school employer and a bargaining representative of its employees does not impose any state-mandated "activity" or "service." Rather, 2011 PA 103 merely removes any impediments to the implementation of the amendments to the teacher tenure act and the Revised School Code by preventing a public school employer and a bargaining representative of its employees from entering into a collective bargaining agreement, the terms of which would render null the new requirements imposed by the Legislature under the school code and the tenure act.

III

We also agree with the special master that our prior decisions in *Durant v Michigan (On Remand)*, 238 Mich App 185; 605 NW2d 66 (1999) (*Durant II*), and *Durant*

v Michigan, 251 Mich App 297; 650 NW2d 380 (2002) (*Durant III*) require us to reject plaintiffs' challenge to the constitutionality of the funding scheme employed by the Legislature to reimburse the school districts for the necessary increased costs they incurred in order to comply with the CEPI recordkeeping mandates.

The Legislature appropriates and disburses school funding through annual amendments to the State School Aid Act, MCL 388.1601 *et seq*. *Schmidt v Dep't of Ed*, 441 Mich 236, 244; 490 NW2d 584 (1992); *Durant II*, 238 Mich App at 194. The Legislature appropriates total annual school funding through MCL 388.1611, which is § 11 of each annual act. See 2010 PA 217, § 11; 2011 PA 62, § 11. From § 11(1), the Legislature then allocates to § 152a the funding to reimburse the school districts for compliance with the CEPI recordkeeping mandates, as required by *Adair I*. The Legislature allocated $25,624,500 from § 11 to § 152a for the 2010-2011 school year and $34,064,500 from § 11 to § 152a for the 2011-2012 school year. See § 152a of 2010 PA 217 and 2011 PA 62; MCL 388.1752a. Each allocation is accompanied by the restriction that the funds be "used solely for the purpose of paying necessary costs related to the state-mandated collection, maintenance and reporting of data to the state" as required by *Adair I*. See § 152a of 2010 PA 217 and 2011 PA 62. The funds for the 2010-2011 and 2011-2012 § 152a allocations were obtained by a reallocation of a portion of the annual per pupil foundation allowance through § 11d(1), 2010 PA 217, MCL 388.1611d(1).

Plaintiffs allege that these § 152a allocations violate Const 1963, art 9, §§ 25 and 29 because the allocations reduce the overall aid to local schools appropriated in § 11 of the State School Aid Act and thereby shift the tax burden for the necessary costs of the recordkeeping

mandates to local schools by allowing the state to use general operating revenue of the school districts to pay for those mandates. Plaintiffs further allege that these § 152a allocations violate Proposal A because the allocations reduce the general per pupil foundation allowance allocation, which is constitutionally guaranteed to be provided to each school district solely for the school operating purposes of each district, by reallocating these otherwise guaranteed funds to a separate categorical funding allocation for the CEPI mandates. According to plaintiffs, because the § 152a allocations were unconstitutionally funded, the Legislature actually provided no funding to reimburse the school districts for the necessary cost of complying with the recordkeeping mandates.

In *Durant III*, 251 Mich App at 304-310, this Court ruled that the Legislature may allocate that portion of the per pupil Proposal A foundation allowance over and above the base level required by Proposal A to satisfy the state's funding obligations under the Headlee Amendment. Likewise, in *Durant II*, 238 Mich App at 206-209, this Court ruled that § 29 of the Headlee Amendment did not preclude use of the foundation allowance to fund the state's Headlee obligations. This panel is bound under the rule of stare decisis to honor the precedential effect of *Durant II* and *Durant III*. MCR 7.215(C)(2). Consequently, like the special master, we reject plaintiffs' challenge to the constitutionality of the funding scheme employed in 2010 PA 217 and 2011 PA 62 in reliance on *Durant II* and *Durant III*.

IV

We also reject, as did the special master, the state's claim that plaintiffs' action is barred by an application of the doctrine of res judicata.

The rules governing the application of the doctrine of res judicata were cogently summarized in *Adair II*, 470 Mich at 121, as follows:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first instance. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

" 'Whether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit . . . .' " *Adair II*, 470 Mich at 125, quoting 46 Am Jur 2d, Judgments § 533, p 801.

Plaintiffs' challenge to the constitutionality of the teacher and administrator evaluation requirements is not barred by res judicata. The Legislature initially enacted these evaluation requirements in 2009 PA 205, which became effective on January 4, 2010, a decade after the passage of the legislation that is the subject of *Adair I*, 18 months after this Court issued the declaratory judgment in favor of the *Adair I* plaintiffs on July 3, 2008, *Adair v Michigan (On Second Remand)*, 279 Mich App 507; 760 NW2d 554 (2008), aff'd in part and rev'd in part 486 Mich 468 (2010), and just six months before our Supreme Court affirmed the entry of the declaratory judgment in *Adair I*. Under these circum-

stances, plaintiffs' claims relating to the teacher and administrator evaluation mandates do not "form a convenient trial unit" with the claims raised by the plaintiffs in *Adair I* because the latter claims were all resolved by the time any constitutional claims relating to 2009 PA 205 accrued and, thus, the claims do not arise from the same transactional setting as the Headlee challenge litigated in *Adair I*. See *Mich Adventure, Inc v Dalton Twp*, 290 Mich App 328, 333; 802 NW2d 353 (2010) (stating that a final judgment is a court's last action that settles the rights of the parties and disposes of all issues in controversy, except for an award of costs and sometimes attorney fees). A res judicata defense is unavailable to the state on these facts.

Likewise, plaintiffs' claim that the Legislature failed to fully fund the necessary costs of the recordkeeping mandates is not barred by an application of res judicata. As previously observed, plaintiffs allege the amounts appropriated by the Legislature in § 152a of 2010 PA 217 and in § 152a of 2011 PA 62 are insufficient to fully reimburse the school districts for the necessary costs of the recordkeeping mandates, that § 152a violates the POUM provision for this reason, and that § 152a violates § 25 of the Headlee Amendment by reducing the proportion of state aid to local schools and shifting the tax burden for that reduced aid to local taxpayers. 2010 PA 217 became effective on December 3, 2010, almost five months after our Supreme Court's decision in *Adair I* issued. 2011 PA 62 became effective on June 21, 2011, almost one year after our Supreme Court's decision in *Adair I* issued. Consequently, any cause of action for underfunding associated with these public acts arose well after the resolution of the claims that were the subject of the *Adair I* litigation. The instant claims are not related to the claims in *Adair I* in time, space, and origin. Moreover, a challenge predicated on a claim

that a mandated activity or service is not fully funded as required by the POUM provision, which is asserted after a judicial determination that the challenged activities or services are state mandates for purposes of the Headlee Amendment, is generally brought as a new action. See, e.g., *Durant III*, 251 Mich App 297.

V

Finally, the state argues as a defense that the $3 billion-plus appropriation of discretionary funds found in § 22 of both 2010 PA 217 and 2011 PA 62 satisfies the state's obligation under the POUM provision for the 2010-2011 and 2011-2012 school years. The special master rejected this argument, as do we. The state's argument was expressly rejected in *Adair (On Second Remand)*, 279 Mich App at 521-525. Our ruling remains unaltered by the Supreme Court. Thus, we are bound by our prior decision. MCR 7.215(C)(2).

VI

A declaratory judgment is granted, in part, to the state consistent with this opinion. We remand this matter to the special master to reopen proofs and to make factual findings regarding plaintiffs' claim that the existing appropriations do not fully fund the necessary costs of the CEPI mandates. We retain jurisdiction.

O'CONNELL, P.J., and TALBOT and OWENS, JJ., concurred.

PEOPLE v PROMINSKI

Docket No. 309682. Submitted June 11, 2013, at Grand Rapids. Decided August 22, 2013, at 9:05 a.m.

John J. Prominski, a pastor at Resurrection Life Church, was charged in the 64th District Court with violating the Child Protection Law, MCL 722.621 *et seq*., by failing to report child abuse after a member of the church expressed her concerns to defendant that her husband might be sexually abusing their daughters. The court, Raymond P. Voet, J., granted defendant's motion to dismiss the charge, concluding that the communication was privileged and that the privilege was not abrogated by MCL 722.631 because it was a confession or similarly confidential communication. The Ionia Circuit Court, Suzanne H. Kreeger, J., affirmed. The prosecution appealed by leave granted.

The Court of Appeals *held*:

Various individuals, including members of the clergy, are required to report suspected child abuse under MCL 722.623(1). Under MCL 722.631, any legally recognized privileged communication, except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication, is abrogated and shall not constitute grounds for excusing a report otherwise required to be made. The plain language of the statute indicates that confessions and other communications that are similarly confidential fall under the exception when the communication is made to a member of the clergy in his or her professional character. A similarly confidential communication is one that the church member expects to be kept private or secret. In this case, the district court found that the mother went to defendant for guidance and expected that the conversation would be kept private. The circuit court affirmed, noting that the mother had approached defendant in his role as pastor, seeking pastoral guidance with an expectation of privacy. The factual findings of the lower courts were not clearly erroneous. Thus, while the mother did not make a confession, she had a similar expectation that the communication would not be shared. Therefore, the communica-

tion fell under the exception in MCL 722.631, and defendant was not required to make a report under MCL 722.623(1)(a).

Affirmed.

CRIMINAL LAW — CHILD PROTECTION LAW — CHILD ABUSE REPORTING REQUIREMENTS — MEMBERS OF THE CLERGY — CONFESSIONS AND SIMILARLY CONFIDENTIAL COMMUNICATIONS.

Under MCL 722.631, any legally recognized privileged communication, except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication, is abrogated and shall not constitute grounds for excusing a failure to report suspected child abuse under the Child Protection Law, MCL 722.621 *et seq*.; a "similarly confidential communication" is one that the church member expects to be kept private or secret.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Ronald J. Schafer*, Prosecuting Attorney, and *Kristen Stinedurf*, Assistant Prosecuting Attorney, for the people.

Bruce A. Block for defendant.

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

PER CURIAM. We are asked in this case whether a clergyman is obligated under the Child Protection Law, MCL 722.621 *et seq*., to report child abuse when he is told by a parishioner that the parishioner's husband is abusing her children and she is seeking the pastor's advice and guidance on how to proceed. We hold that, under those circumstances, a clergyman is not obligated to report the suspected child abuse to police.

In 2009, defendant was the pastor at Resurrection Life Church in Ionia and was approached by a parishioner regarding her concerns that her husband was abusing her daughters. The parishioner testified as follows at a hearing to dismiss the charges:

> I didn't know what to do, because I had found out that my husband at the time had my girls touch themselves [in their genital areas], and I went to [defendant], because I didn't know what to do--if I should--I wanted [my husband] to get help and I didn't know if I should get help or what we should do. So I went to him to find out what to do, because I wanted [my husband] to get help and I didn't know what--if--it was something I wasn't sure if it was crossing the line or not crossing the line, because [my husband] admitted to it at the time, and said he didn't watch. The girls said he didn't look at him [sic], so I didn't know what to do.

She further testified that she went to defendant because he was her pastor, she did not know what to do, and she wanted to know what he thought—whether she should make a report when her husband did not actually touch the girls and he had a "weird reason" for doing it.

When asked if she thought defendant would keep the information confidential, she stated, "I expected Pastor John to know what to do with it. If we had to go turn it in, I would--that we would have to go turn it in, but he thought he could help [my husband]." She did not expect defendant to share this information at a worship service or with people in the congregation. She was questioned regarding her expectation of privacy:

> *Q*. You expected him to keep it private?
>
> *A*. Between our family, yes.
>
> *Q*. Confidential?
>
> *A*. Or the authorities--whoever needed to know[.]

She further testified that she went to defendant for family and spiritual guidance and spiritual advice. She also expected guidance on whether this needed to be reported to law enforcement. She told defendant she was willing to report it if necessary. She asked defen-

dant to meet with her husband. She could not remember if she met with defendant at the church, but she thought she had called him. She testified that she talked with him alone and no one else was listening to the conversation.

The mother went to defendant again in 2011 after an additional incident. She explained:

> I woke up to my daughter screaming and I asked her--[my husband] was in her room and I asked her what happened? And she said I hate you, I hate you--she said--I woke up to her screaming I hate you, I hate you, don't ever touch me again. I went in there and she said--I asked her what happened (crying)? And she said that he was touching her.

When she went to defendant in 2011, he told her she needed to report it or else he would. It was during the investigation of this incident that the police learned about the 2009 report by the mother to defendant.

Defendant was charged with failure to report child abuse. MCL 722.633(2). He moved in district court to dismiss the charge based on privilege. The district court determined that the privilege applied and dismissed the charges. The prosecution appealed in circuit court, which affirmed. The prosecution now appeals in this Court by leave granted. We affirm.

Various individuals, including members of the clergy, are required under MCL 722.623(1) to report suspected child abuse. MCL 722.631 abrogates privilege with respect to the reporting statute, except for the attorney-client and the clergy-parishioner privileges:

> Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a

> report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act.

Two other statutes address communications with members of the clergy. MCL 600.2156 specifically prohibits disclosure of confessions:

> No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.

MCL 767.5a(2) provides the evidentiary privilege for communications between members of the clergy and members of a church:

> Any communications between attorneys and their clients, *between members of the clergy and the members of their respective churches*, and between physicians and their patients *are hereby declared to be privileged and confidential when those communications were necessary to enable* the attorneys, *members of the clergy*, or physicians *to serve as such* attorney, *member of the clergy*, or physician.

The issue is whether the mother communicated with defendant "in his . . . . professional character in a confession or similarly confidential communication . . . ." MCL 722.631. There is no dispute that defendant was a member of the clergy or that the mother talked with defendant in his professional character. There appears to be no Michigan case applying MCL 722.631 in a context similar to the instant case.

When interpreting a statute, the primary goal is to "give effect to the intent of the Legislature." *People v Barrera*, 278 Mich App 730, 735; 752 NW2d 485 (2008). "The objective of statutory interpretation is to discern the intent of the Legislature from the plain language of the statute." *Id*. at 735-736. Statutory interpretation

begins "by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Id*. at 736 (quotation marks and citation omitted). When undefined by the statute, a "word or phrase must be accorded its plain and ordinary meaning . . . ." *People v Ryan*, 295 Mich App 388, 400; 819 NW2d 55 (2012) (quotation marks and citation omitted). "If a statute does not expressly define its terms, a court may consult dictionary definitions." *People v Gregg*, 206 Mich App 208, 211-212; 520 NW2d 690 (1994). Additionally, a statute should be considered as a whole "to harmonize its provisions and carry out the purpose of the Legislature." *People v Blunt*, 282 Mich App 81, 83; 761 NW2d 427 (2009) (quotation marks and citation omitted). Further, when interpreting a statute, "every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (quotation marks and citation omitted).

This Court, in *People v Bragg*, 296 Mich App 433, 452-453; 824 NW2d 170 (2012), considered the meaning of "privileged communications" and "confidential communications" in the context of analyzing MCL 767.5a(2):

> In legal parlance, "privileged communications" are "[t]hose statements made by certain persons within a protected relationship such as . . . priest-penitent . . . which the law protects from forced disclosure on the witness stand . . . ." Black's [Law Dictionary] (6th ed), p 1198; see also *Webster's* [*New World Dictionary of the American Language* (2d college ed)], p 1131 (stating that a "privileged communication" is a statement "that one can-

> not legally be compelled to divulge, as that to a lawyer from his client"). "Confidential communication[s]" include "[p]rivileged communications such as those between . . . confessor-penitent" but also include "statement[s] made under circumstances showing that [the] speaker intended [the] statement only for [the] ears of [the] person addressed . . . ." Black's (6th ed), p 298; see also *Webster's*, p 297 (stating that "confidential" means "told in confidence; imparted in secret").

The word "confidential" is defined as "spoken, written, or acted on in strict confidence; secret; private." *Random House Webster's College Dictionary* (1997). Thus, the plain language of the statute, considering the dictionary definition of "confidential" and the definition of "confidential communication" as set forth by this Court in *Bragg*, supports that a "similarly confidential communication" is one that the church member expects to be kept secret or private.

The prosecution appears to argue that "similarly confidential communication" must only refer to confessional communications because the prosecution's position is that conversations are only covered if the church member discusses his or her own actions. Presumably, the prosecution reads "similarly" to relate to the word "confession," and relying on that premise the prosecution concludes that "similarly confidential communication" refers to only communications that are confessional in nature. However, when interpreting a statute, a construction that "render[s] any part of the statute surplusage or nugatory" should be avoided. *Peltola*, 489 Mich at 181. The prosecution's interpretation, that the communication must concern the speaker's own actions, renders the entire phrase "similarly confidential communication" as surplusage because it would have the same meaning as "confession." The word "confession" is first defined as "acknowledgment; avowal;

admission." *Random House Webster's College Dictionary* (1997). The second definition of "confession" is "acknowledgment or disclosure of sin, [especially] to a priest to obtain absolution." *Id*. The word "avowal" is defined as "an open statement of affirmation; frank acknowledgment or admission." *Id*. The prosecution's position ignores the rules of statutory construction.

In the statute at issue, MCL 722.631, "similarly" modifies "confidential communication." When construing a statute, the place and purpose of words in the statutory scheme are considered. *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010). "[S]tatutory language must be read within its grammatical context." *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009). An adjective must modify a noun or pronoun. See *In re Forfeiture of $5,264*, 432 Mich 242, 254 n 10; 439 NW2d 246 (1989). The adjective "confidential" modifies the noun "communication." That adjective is further modified by the placement of the adverb "similarly" before it. An adverb can modify an adjective. See *id*. at 254 n 9; *Random House Webster's College Dictionary* (1997), p 19 (defining "adverb"). Thus, the plain language of the statute clearly reveals that the privilege applies to confessions and other communications that are similarly confidential.

Moreover, MCL 722.631 refers to "a confession *or* similarly confidential communication . . . ." (Emphasis added.) The word "or" "indicates an alternative or choice between two things." *Beauregard-Bezou v Pierce*, 194 Mich App 388, 394; 487 NW2d 792 (1992). Thus, while "confession" refers to an acknowledgment or an admission, "similarly confidential communication" refers to a communication for which the member of the church has an expectation the communication will be

kept secret or private, similar to the expectation they would have for a confession. This interpretation also properly avoids rendering "similarly confidential communication" redundant and surplusage.

Additionally, MCL 767.5a(2), the evidentiary privilege, makes "[a]ny communications . . . privileged and confidential when those communications were necessary to enable the . . . members of the clergy . . . to serve as such . . . member of the clergy . . . ." The *Bragg* decision suggested that this included communications in which the clergy helped the "spiritually sick" or provided "consolation to suppliants who [came] in response to the call of conscience" and could include disclosures made during a "counseling" session in an informal setting. *Bragg*, 296 Mich App at 459-462 (quotation marks and citation omitted). This squarely fits the circumstances in the case at bar, in which the mother approached her pastor for his advice on how to handle this circumstance happening in her family.

The differences between MCL 600.2156 and MCL 767.5a(2) are also instructive. MCL 600.2156 generally prohibits disclosure of confessions and only refers to "any confessions made to [a minister, priest, or Christian Science practitioner] in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." On the other hand, MCL 767.5a(2), as previously noted, refers more broadly to communications that are necessary for the member of the clergy to serve as such. The differing language used in both statutes demonstrates the Legislature's ability to craft statutes that only implicate confessions and to craft statutes implicating additional communications. Turning to MCL 722.631, it refers to both "a confession" and to a "similarly confidential communication." Thus,

MCL 722.631, like MCL 767.5a(2), clearly refers to more than just confessions.

The prosecution briefly raises some additional arguments that we also briefly address. First, the prosecution, relying on an unpublished opinion of this Court, argues that the privilege does not apply when a third party relays information to the clergyman. This would apply to the "confession" aspect of the privilege, but not to the "similarly confidential communication" aspect. Next, the prosecution argues that defendant's own statements reflect that he did not believe that he was prevented from reporting the abuse because of privilege. But we fail to see the relevance of defendant's legal expertise with respect to the reporting statute or the law of privilege. Finally, the prosecution argues that the mother had expressed her willingness to waive any privilege. There is, however, a distinction between being willing to waive a privilege and actually waiving it. We are unaware of any evidence that the mother actually requested that defendant report her husband's behavior; rather, she asked defendant to meet with her husband. Indeed, the entire purpose of her consultation with defendant was to make the decision whether she should report it and, apparently, she made the decision (in 2009) not to report the behavior and, instead, rely on her husband seeking counseling and reforming his behavior.

For these reasons, we hold that under MCL 722.631 a communication is within the meaning of "similarly confidential communication" when the church member does not make an admission, but has a similar expectation that the information will be kept private and secret. In the case at bar, the district court made a finding of fact that the mother went to defendant "for guidance, advice and expected that the conversation be

kept private." The district court determined, "I can't find anything but that this was done within exactly what the privilege was intended to target" and concluded that MCL 722.631 applied. The circuit court affirmed this factual finding and noted that the mother "was approaching [defendant] in his role as a Pastor, that she was seeking his pastoral guidance and that for that reason, there was the expectation of privacy." The circuit court also noted that she "clearly testified as well that she did expect for this to be a confidential communication between her and within her family." We are not persuaded that these factual findings were clearly erroneous. See *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001). Thus, in this case, although the mother did not make a confession, she had a similar expectation the communication would not be shared. Therefore, the communication fell under MCL 722.631, and defendant was not required to make a report pursuant to MCL 722.623(1)(a). The motion to dismiss was properly granted.

Affirmed.

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

PEOPLE v LEWIS

Docket No. 310949. Submitted May 8, 2013, at Lansing. Decided August 27, 2013, at 9:00 a.m. Leave to appeal sought.

Heidi L. Lewis was charged in the Bay Circuit Court with several counts of third-degree criminal sexual conduct. The charges were based on alleged sexual penetration engaged in by Lewis, an alleged substitute teacher or contractual service provider, with several students in the school district. The court, Kenneth W. Schmidt, J., eventually dismissed the charges on the basis that the alleged sexual penetrations occurred during the students' summer break from school. The prosecution appealed.

The Court of Appeals *held*:

The trial court erred by holding that MCL 750.520d(1)(e)(*i*) and (*ii*) preclude the prosecution of a substitute teacher or contractual service provider for alleged sexual penetration that occurs in the summer when the actor is not acting as a complainant's substitute teacher or contractual service provider. The plain language of the statute does not contain any temporal requirement regarding the timing of the sexual penetration. The statute does not state that the sexual penetration must occur while a defendant is acting as a substitute teacher or contractual service provider at a complainant's school. If a prohibited sexual penetration by a substitute teacher or contractual service provider occurs before school, after the school bell rings at the end of the day, on a weekend, or during the summer, prosecution under the statute is not foreclosed. If the actor's occupation as a substitute teacher or contractual service provider at a school of a student of the relevant age group allowed the actor access to the student in order to engage in sexual penetration, the Legislature intended to punish that conduct. The order of the trial court is reversed and the matter is remanded to the trial court for reinstatement of the charges and further proceedings.

Reversed and remanded.

THIRD-DEGREE CRIMINAL SEXUAL CONDUCT — SUBSTITUTE TEACHERS — CONTRACTUAL SERVICE PROVIDERS — STUDENTS.

A defendant is guilty of third-degree criminal sexual conduct if he or she engages in sexual penetration with a public school student or a

> nonpublic school student who is at least 16 years of age and less than 18 years of age and the defendant is a substitute teacher or a contractual service provider at the student's school; there is no temporal requirement regarding the timing of the sexual penetration; if a defendant's occupation as a substitute teacher or contractual service provider allowed access to a student of the relevant age group in order for the defendant to engage in sexual penetration with the student, prosecution is not foreclosed by the fact that the sexual penetration occurred during nonschool hours, on a weekend, or during the summer vacation period (MCL 750.520d[1][e]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kurt C. Asbury*, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for the people.

Mathieu & Lee, PLC (by *Courtney L. Thom*), for defendant.

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

PER CURIAM. The prosecution appeals as of right the trial court's order dismissing the charges of third-degree criminal sexual conduct, MCL 750.520d(1)(e). We reverse and remand for proceedings consistent with this opinion.

In the summer of 2010,[1] the complainants alleged that

[1] An appellate brief must contain a statement of all material facts, both favorable and unfavorable, presented fairly without argument or bias with specific page references to the transcripts. MCR 7.212(C)(6) and (7). A brief that does not conform to the requirements of the court rule may be stricken. MCR 7.212(I). Additionally, the appellant is responsible for securing the complete transcript of all proceedings unless excused by court order or the parties' stipulation. MCR 7.210(B)(1). Although a trial was in progress in this case at the time a second mistrial was declared, the prosecution does not rely on the testimony set forth during trial, but sets forth a statement of facts premised on written police reports. Generally, police reports are inadmissible hearsay. MRE 801(c); MRE 802; *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 254; 805 NW2d 217 (2011). Although transcripts of the trial in progress were submitted, the entire transcript was

they engaged in sexual acts with defendant, an alleged substitute teacher in their school district. A first trial ended in a mistrial purportedly because of juror misconduct.[2] In the course of the second trial, the prosecutor sought to amend the charges to alternatively allege that the sexual acts may have occurred when defendant was a contractual service provider. The judge allowed the prosecutor to amend the charges, but declared a mistrial at the request of the defense and later granted a defense motion for disqualification of the judge. The successor judge requested that the parties address the issue whether the statute applied if the alleged sexual acts between the complainants and defendant occurred during the summer. Ultimately, the trial court dismissed the charges, holding, as a matter of law, that the statute provides that defendant "is a substitute teacher," and it was undisputed that school was out of session because of the summer break at the time of the alleged acts.[3] From that decision, the prosecution appeals as of right.

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not provided, rather only the cross-examination of certain witnesses was transcribed. Because the issue presented involves a question of law and defendant did not object to the deficiencies, we will nonetheless address the merits of the appeal on the available record despite the noncompliance with the court rules.

[2] We do not have a transcript of the first trial, but rely on the register of actions.

[3] This cursory statement of facts primarily devoted to the procedural posture of the case is necessary because the prosecution presented a statement of facts premised on the police reports, concluding that the complainants were preyed upon by defendant. However, although it is difficult to complete the factual picture without the direct examination, the first complainant seemingly admitted that he had initiated the contact with defendant. Moreover, the complainants also appeared to acknowledge that, through texts, they wrote defendant that if she did not cooperate with multiple sexual acts with multiple complainants they would "tell." This information may contradict the statements given by the complainants as presented in the police reports. Because of the prosecution's noncompliance with the requirements of MCR 7.212(C)(6)

The prosecution contends that the trial court erred by holding, as a matter of law, that MCL 750.520d(1)(e)(*i*) and (*ii*) preclude prosecution of a substitute teacher or contractual service provider when the alleged sexual acts occur in the summer. On this limited question, we agree. A trial court's ruling addressing a motion to dismiss is reviewed for an abuse of discretion. *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012); *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012). When a ruling involves an interpretation of the law or the application of law to uncontested facts, appellate review is de novo. *People v Elliott*, 494 Mich 292, 300-301; 833 NW2d 284 (2013). The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *People v Zajaczkowski*, 493 Mich 6, 12; 825 NW2d 554 (2012). "[T]he intent of the Legislature governs the interpretation of legislatively enacted statutes." *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). The intent of the Legislature is expressed in the statute's plain language. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. *Id*. When interpreting a statute, the court must avoid a construction that would render part of the statute surplusage or nugatory. *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011). "Statutes must be construed to prevent

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and (7), we are unable to delineate a factual summary premised on the trial transcripts as a whole and compare the testimony to the police reports.

absurd results." *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) (quotation marks, citation, and footnote omitted). "Criminal statutes are to be strictly construed," and cannot be extended beyond their clear and obvious language. *People v Jahner*, 433 Mich 490, 498; 446 NW2d 151 (1989).

If a statute specifically defines a term, the statutory definition is controlling. *People v Williams*, 298 Mich App 121, 126; 825 NW2d 671 (2012). When "terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used." *Zajaczkowski*, 493 Mich at 13. However, technical words and phrases that have acquired a peculiar and appropriate meaning in law shall be construed and interpreted in accordance with that meaning. See MCL 8.3a; *Bylsma*, 493 Mich at 31. Additionally, when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). A court's reliance on dictionary definitions assists the goal of construing undefined terms in accordance with their ordinary and generally accepted meanings. *People v Morey*, 461 Mich 325, 330-331; 603 NW2d 250 (1999). "However, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself." *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). Despite the Legislature's failure to define a term, the intent may be determined by examining the language of the statutes themselves. *Id*.

Statutes that relate to the same matter are considered to be *in pari materia*. *People v Perryman*, 432 Mich 235, 240; 439 NW2d 243 (1989). "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People*

v Harper, 479 Mich 599, 621; 739 NW2d 523 (2007). The general rule of *in pari materia* requires courts to examine a statute in the context of related statutes. *Id*.

The legislative history of an act may be examined to determine the underlying purpose of the legislation. *In re Certified Question From the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). However, legislative history is afforded little significance when it does not reflect an official view of the legislators and may not be utilized to create an ambiguity where one does not otherwise exist. *Id*.; see also *People v Gardner*, 482 Mich 41, 58; 753 NW2d 78 (2008).

MCL 750.520d provides, in relevant part:

> (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
>
> * * *
>
> (e) That other person is at least 16 years of age but less than 18 years of age and a student at a public school or nonpublic school, and either of the following applies:
>
> (*i*) The actor is a teacher, substitute teacher, or administrator of that public school, nonpublic school, school district, or intermediate school district. This subparagraph does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.
>
> (*ii*) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that

> public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

As applied to the facts of this case, the plain language of MCL 750.520d(1)(e) indicates that a defendant is guilty of third-degree criminal sexual conduct if he or she engages in sexual penetration with a public school student or a nonpublic school student who is at least 16 years of age and less than 18 years of age and the defendant "is" either a "substitute teacher," MCL 750.520d(1)(e)(*i*), or a "contractual service provider," MCL 750.520d(1)(e)(*ii*). Based on the record presented, there *may be* evidence that defendant acted as a substitute teacher[4] in the public school district in which the complainants were students between the ages of 16 and 18 during the previous school year. The testimony reflected that defendant served as a "long term" substitute for the students' British Literature class. However, the trial court further concluded that the elements

[4] We note that a school administrator testified that the school district did not retain defendant as a substitute teacher. Rather, the district contracted with a third-party entity to provide substitute teachers. With regard to defendant's status as a "substitute teacher," the school administrator deferred the issue to the school's human resources department. Consequently, the prosecution sought to amend the complaint to reflect that the alleged offenses were committed by defendant as a substitute teacher or contractual service provider and also sought to add a witness to the witness list to testify regarding defendant's employment status. Because of the incomplete record, we do not address the issue further, but leave the prosecution to its proofs and for resolution by the jury. We also note that defendant objected to the status of the case, by allowing the prosecutor to amend the complaint before the close of proofs, thereby preventing a motion for a directed verdict. This issue was not raised in a motion below, and defendant did not file a cross-appeal addressing this issue. Questions regarding whether the prosecution could meet its proofs, whether any prejudice resulted from the amendment, and whether double jeopardy principles applied were not raised in this appeal, and we do not address them.

of the offenses could not be established because the alleged acts occurred in the summer when defendant was not acting as the complainants' substitute teacher or contractual service provider.

The plain language of MCL 750.520d(1)(e)(*i*) and (*ii*) does not contain any temporal requirement regarding the timing of the sexual penetration. *Bylsma*, 493 Mich at 26; *Cole*, 491 Mich at 330. Rather, the term "is" refers to the relationship of the actor. Specifically, the statute does not state that the sexual penetration must occur while a defendant is acting as a substitute teacher and does not define the term "is." Rather, the statute uses the phrases, "[t]he actor is a teacher, substitute teacher, or administrator of that public school," or "[t]he actor is an employee or contractual service provider of the public school . . . ." We may consult a dictionary definition to determine the meaning of the term "is." *Perkins*, 473 Mich at 639; *Morey*, 461 Mich at 330-331. According to the dictionary, the term "is" means "be." *Random House Webster's College Dictionary* (2001), p 701. The dictionary defines the term "be" to mean "to exist or live," "to take place; occur," "to continue or remain as before," and "to occupy a place or position." *Id*. at 116. Consequently, if we incorporate the dictionary definitions into the statute at issue,[5] third-degree criminal sexual conduct may be committed by an actor who occupies the place or position of a substitute teacher. MCL 750.520d(1)(e)(*i*). This same interpretation applies to the contractual-service-provider language of MCL 750.520d(1)(e)(*ii*). The term "is" does not refer to the timing of the sexual penetration, and the plain language of MCL 750.520d(1)(e)(*i*) contains no reference to when the events between the student in the

[5] That is, we substitute the term "is" with "be" and, in turn, the term "be" with "to occupy a place or position."

relevant age period and the actor must have taken place. Rather, it refers to the occupation of the actor.[6]

Our review of the plain language of MCL 750.520d reveals that the Legislature intended to protect persons in a certain age group or with certain vulnerability who encounter an individual in a position of authority or supervision over those persons. *Bylsma*, 493 Mich at 26; *Cole*, 491 Mich at 330. A review of the statute reveals that it criminalizes sexual penetration under circumstances where an individual of a certain age, infirmity, and/or vulnerability engages in sexual penetration with an individual of a particular circumstance or relationship. An individual is guilty of third-degree criminal sexual conduct if: (1) the victim is at least 13 years of age and under 16 years of age, MCL 750.520d(1)(a); (2) force or coercion is used to commit the sexual penetration, MCL 750.520d(1)(b); (3) the actor is aware of the victim's mental or physical limitations, MCL 750.520d(1)(c); (4) the actor is related to the victim within a specific degree of blood or affinity, MCL 750.520d(1)(d); (5) the victim is a student of at least 16 years of age but less than 18 years of age and the person occupies a relationship of authority over the victim such as a teacher, administrator, or contract worker, MCL 750.520d(1)(e); (6) the victim is at least 16 years old but less than 26 years old and in receipt of special education services and the actor also occupies a position of author-

[6] Because of the limited transcript, we note that it was difficult to discern the qualifications of defendant as a teacher and the requirements for being a substitute teacher in light of the school administrator's reference to the need to consult with the human resources department. In response to a juror question, the school administrator testified that a minimum amount of college credits and a criminal background check was necessary to become a substitute teacher, although a bachelor's degree was preferred. Again, the prosecution is left to its proofs on the issue whether defendant was a substitute teacher or contractual service provider.

ity or supervision over the victim, MCL 750.520d(1)(f); or (7) the actor is an employee or supervisor of a child care organization or foster home in which the at least 16 years old victim resides, MCL 750.520d(1)(g). The plain language stating the various methods of committing third-degree criminal sexual conduct indicates that the statute was designed to prevent harm to individuals of a certain age or a certain vulnerability from actors with knowledge of the vulnerability or actors that occupy positions of authority or supervision over the individuals. Again, there is no temporal requirement in the plain language of the statute regarding the commission of the sexual penetration. Consequently, if a sexual penetration by a substitute teacher occurs before school or after the school bell rings at the end of the day, or on a weekend, or during the summer,[7] prosecution pursuant to MCL 750.520d(1)(e)(*i*) is not foreclosed. Rather, if the actor's occupation as a substitute teacher allowed the actor access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct. MCL 750.520d(1)(e)(*i*); *Bylsma*, 493 Mich at 26.[8] Accordingly, the trial court erred by dismissing the charges[9] against defendant.

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[7] Although we conclude that the plain language of the statute allows the prosecution of a substitute teacher for acts that occur during the summer, we also note that a construction to the contrary, i.e., one that allows for sexual penetration to occur between relevant-age students and substitute teachers after hours, on weekends, or during the summer, leads to absurd results. *Tennyson*, 487 Mich at 741.

[8] Legislative analysis is of limited value because it is not an official view of the legislators. *In re Certified Question*, 468 Mich at 115 n 5; *Gardner*, 482 Mich at 58. However, we note that our holding regarding the Legislature's intent is consistent with the analysis of the need for the legislation protecting students above the age of consent from teachers. See House Legislative Analysis, SB 1127, December 11, 2002.

[9] We note that the trial court, in part to reach its decision, addressed the term "substitute teacher" in the context of workers' compensation

Reversed and remanded for reinstatement of the charges and for proceedings consistent with this opinion. We do not retain jurisdiction.

FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ., concurred.

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law. There is no reference in the criminal statute to other statutes addressing teachers, and therefore, we do not consider them *in pari materia*. *Harper*, 479 Mich at 621.

In re HARPER

Docket No. 309478. Submitted August 14. 2013, at Detroit. Decided August 29, 2013, at 9:00 a.m.

The Genesee Circuit Court, Family Division granted the Department of Human Service's (DHS's) petition to assert jurisdiction over respondent Chelsea Bobbit's minor child in 2010 and respondent's name was placed on petitioner's central registry. The court, John A. Gadola, J., terminated its jurisdiction over the child in 2011 and closed the case. At that same hearing, respondent requested that her name be removed from the DHS central registry because she wanted to pursue a career in nursing; the lawyer-guardian ad litem joined in the request. The court granted the motion and DHS appealed by delayed leave granted.

The Court of Appeals *held*:

1. MCL 722.627(1) requires the department to maintain a statewide, electronic central registry, which contains reports and records related to child protective proceedings. MCL 722.627(5), (6), and (7) create a statutory scheme that allows a person who is the subject of a report or record made under the Child Protection Law, MCL 722.621 *et seq*., to request the department to remove his or her name from the central registry. If the department refuses to remove that individual's name, MCL 722.627(6) requires the department to hold a hearing under the administrative procedures act, MCL 24.201 *et seq*., to determine whether the report or record is not relevant or accurate evidence of neglect. Under MCL 722.627(7), the department must expunge the individual's name from the central registry if no evidence is found to support a finding of abuse or neglect. Because the department has exclusive jurisdiction in maintaining and removing a person's name from the central registry, the trial court erred by granting respondent's motion to expunge her name; the trial court lacked jurisdiction because respondent failed to exhaust her administrative remedies before making the request for expunction in the trial court.

2. MCL 712A.6 grants courts jurisdiction over adults when it is necessary for the physical, mental, or moral well-being of a particular juvenile under its jurisdiction. In this case, the trial court did not have jurisdiction under MCL 712A.6 to order

expunction of respondent's name from the central registry. There was no evidence that respondent's goal of becoming a nurse or removal of her name from the registry was necessary to the child's physical, mental, or moral well-being. In addition, MCL 722.627 specifically addresses expunction from the central registry and that statutory scheme prevails over MCL 712A.6, the more general statute.

3. Respondent was not excused from exhausting her administrative remedies before moving for expunction from the central registry in the trial court. A full, factual record was necessary for proper review of the facts, the department maintains the registry and is most knowledgeable regarding when and if someone's name should be removed, and the agency may have removed her name if an administrative hearing had been conducted.

4. Respondent waived her claim that petitioner's delays in processing her request for expunction violated her due process rights because she did not raise the issue in the trial court or offer any evidence in support.

5. MCL 712A.17d(1)(*l*) allows a lawyer-guardian ad litem to request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment. The lawyer-guardian ad litem could not seek expunction of respondent's name from the central registry under MCL 712A.17d(1)(*i*) because: (1) a lawyer-guardian ad litem's broad power under MCL 712A.17d(1)(*l*) to pursue interests on the child's behalf does not prevail over MCL 722.627, which creates a specific statutory scheme granting the department authority to control expunction from the central registry; and (2) under MCL 722.627(5), respondent, as the person who was the subject of a report or record in the central registry, was the party who could request expunction, not the lawyer-guardian ad litem.

Vacated and remanded for further proceedings.

ADMINISTRATIVE LAW — DEPARTMENT OF HUMAN SERVICES — JURISDICTION — CENTRAL REGISTRY — EXPUNCTION OF NAME.

The Department of Human Services, which is required to maintain a statewide, electronic central registry that contains reports and records related to child protective proceedings, has exclusive jurisdiction in maintaining and removing a person's name from that registry; a person who is the subject of a report or record in the central registry and seeks expunction of his or her name from that registry, must exhaust his or her administrative remedies under MCL 722.627 before seeking review of the department's decision in circuit court.

University of Michigan Law School Child Advocacy Law Clinic (by *Vivek S. Sankaran*), for Chelsea Bobbitt.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kristin M. Heyse* and *Katherine Bennett*, Assistant Attorneys General, for Department of Human Services.

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

RIORDAN, J. Petitioner, Department of Human Services (DHS), appeals by leave granted the trial court order denying its request to set aside the order removing respondent mother's name from petitioner's central registry.[1] We vacate the trial court's order and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

In September 2010, the minor child was admitted to the hospital for failure to thrive because he was underweight. Respondent, who was 17 years old at the time of the incident, was with her 20 year-old boyfriend, who is the father of the baby; she claimed that they had received improper instruction on how to feed the child. Respondent confessed to a Child Protective Services (CPS) worker that when the child was released from the hospital, they would have nowhere to live.

DHS filed a petition, requesting the court to authorize the petition and place the child in DHS custody. The trial court took jurisdiction over the child and, as a result, respondent's name was placed on petitioner's central registry, which contains information related to

[1] The father of the minor is not a party to this appeal.

child protective proceedings. Both respondent and her child were placed in foster care.

Respondent was able to improve her circumstances during the proceedings and obtained housing for herself and the child. At a permanency planning hearing on September 23, 2011, the trial court terminated its jurisdiction and closed the case. Also at this hearing, respondent requested that her name be removed from the central registry because she wanted to pursue a career in nursing, and the lawyer-guardian ad litem joined in that request. The trial court granted the motion, entering an order that petitioner must remove respondent from the central registry because of the "circumstances of this case and [respondent's] chosen field of employment."

Thereafter DHS filed a request to set aside the ruling that respondent's name must be removed from the central registry, contending that MCL 722.627 granted DHS, not the trial court, the authority to add or remove a name from the registry. After a hearing, the trial court entered an order denying the request. DHS now appeals.

II. CENTRAL REGISTRY

A. STANDARD OF REVIEW

"We review de novo jurisdictional questions[.]" *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007). Likewise, "[w]e review de novo questions of statutory interpretation." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008).

B. ANALYSIS

"Circuit courts are courts of general jurisdiction[.]" *Papas v Gaming Control Bd*, 257 Mich App 647, 657;

669 NW2d 326 (2003). However, their jurisdiction is not absolute. "[I]f the Legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive, then the circuit court cannot exercise jurisdiction over those same areas." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). "This Court has not required the phrase 'exclusive jurisdiction' to appear in a statutory provision in order to find that jurisdiction has been vested exclusively in an administrative agency." *Papas*, 257 Mich App at 657. Rather, as long as the statutory language establishes the state agency is endowed with exclusive jurisdiction, "courts must decline to exercise jurisdiction until all administrative proceedings are complete." *Id*.

At issue in this case is MCL 722.627, which, in pertinent part, states:

> (1) The department [DHS] shall maintain a statewide, electronic central registry to carry out the intent of this act.
>
> * * *
>
> (5) A person who is the subject of a report or record made under [the Child Protection Law, MCL 722.621, *et seq*.,] may request the department to amend an inaccurate report or record from the central registry and local office file. A person who is the subject of a report or record made under this act may request the department to expunge from the central registry a report or record in which no relevant and accurate evidence of abuse or neglect is found to exist. A report or record filed in a local office file is not subject to expunction except as the department authorizes, if considered in the best interest of the child.
>
> (6) If the department refuses a request for amendment or expunction under subsection (5), or fails to act within 30 days after receiving the request, the department shall hold a hearing to determine by a preponderance of the evidence

> whether the report or record in whole or in part should be amended or expunged from the central registry on the grounds that the report or record is not relevant or accurate evidence of abuse or neglect. The hearing shall be held before a hearing officer appointed by the department and shall be conducted as prescribed by the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.
>
> (7) If the investigation of a report conducted under this act fails to disclose evidence of abuse or neglect, the information identifying the subject of the report shall be expunged from the central registry. If evidence of abuse or neglect exists, the department shall maintain the information in the central registry until the department receives reliable information that the perpetrator of the abuse or neglect is dead.

The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). A statutory provision must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks and citation omitted). Only when the statutory language is ambiguous may a court consider evidence outside the words of the statute to determine the Legislature's intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). However, "[a]n ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity

can be found only where the language of a statute, as used in its particular context, has more than one common and accepted meaning." *Papas*, 257 Mich App at 658.

The plain language of the statute grants exclusive jurisdiction to DHS to control expunction from the central registry. MCL 722.627(5), (6), and (7) set forth a statutory scheme whereby a respondent may seek removal of his or her name from the central registry from petitioner. MCL 722.627(5) specifically states that a person subject to a report or record may seek removal of his or her name in the central registry from the department. If the department refuses to remove that individual's name, subsection (6) provides that "the department *shall* hold a hearing" pursuant to the administrative procedures act, MCL 24.201 *et seq*., to determine whether "the report or record is not relevant or accurate evidence of abuse or neglect." (Emphasis added); see *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) ("The use of 'shall' in a statute generally indicates a mandatory and imperative directive.") (quotation marks and citation omitted). If no evidence is found to support a finding of abuse or neglect, DHS must expunge the individual's name from the central registry. MCL 722.627(7).

Pursuant to MCL 722.627, the Legislature created a comprehensive statutory scheme for situations, like here, where an individual desires removal from the central registry. As indicated by subsection (1) of the statute, the Legislature mandated that the department "shall" be responsible for the maintenance of the registry, which is language that communicates an intent that the department be the gatekeeper for the registry. See *Papas*, 257 Mich App 647. To read MCL 722.627 as

respondent suggests would undermine this clear mandate. Allowing respondent to evade the department's role in this process would subvert the statutory scheme of MCL 722.627, which in turn would ignore the Legislature's intent. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) (noting that courts should "avoid an interpretation that would render any part of the contract surplusage or nugatory").

Moreover, it is undisputed that respondent initiated the procedure for expunction set forth in MCL 722.627, and had an administrative hearing scheduled. Yet, she cancelled the hearing, thereby failing to see her administrative process through to completion. As this Court has repeatedly recognized, when an administrative scheme of relief exists an individual must exhaust those remedies before a circuit court has jurisdiction. See *L & L Wine & Liquor Corp*, 274 Mich App at 357; *Papas*, 257 Mich App at 665; *Citizens for Common Sense in Gov't*, 243 Mich App at 54. Further, as both parties conceded at oral argument, nothing in the statute precludes respondent from invoking her administrative remedies after remand.

Respondent, however, contends that the trial court had authority to enter its order pursuant to MCL 712A.6, which states:

> The court has jurisdiction over adults . . . and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles.

Respondent relies heavily on the Michigan Supreme Court's decision in *In re Macomber*, 436 Mich 386, 390-391; 461 NW2d 671 (1990), wherein the Court held

that "[a] plainer, more straightforward statement of the authority conferred on the probate court to fashion necessary orders to protect children who come within its jurisdiction would be difficult to imagine."[2] The Court, however, also noted that this statute does not grant the trial court plenary power, but has inherent limits. *Id.* at 398-399. As the Court explained:

> The court is limited in that it can only act after it has jurisdiction over a child, and it may only act to ensure a child's well-being. Any orders aimed at adults must also be incidental to the court's jurisdiction over children. In addition, under § 6, the court may only make orders affecting adults if "necessary" for the child's interest. The word "necessary" is sufficient to convey to probate courts that they should be conservative in the exercise of their power over adults. [*Id.*]

The circuit courts are courts of limited jurisdiction. They possess only that power authorized by the constitution and statute. This power cannot be expanded by judicial decree. Thus, while MCL 712A.6 grants the trial court broad power, there are limits. Respondent posits that because her presence on the central registry would keep her from pursuing her job prospects as a nurse, the trial court was empowered to act under MCL 712A.6. We decline to accept this quite expansive and strained reading of MCL 712A.6.

Regardless of respondent's interaction with other children, there is no evidence that her placement on the central registry actually affects her ability to interact with her own child. There is no evidence that respondent's subjective goal of becoming a nurse, nor the removal of her name from the registry, is *necessary* to the physical, mental, or moral well-being of her child.

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[2] While the Court in *In re Macomber* was interpreting a prior version of MCL 712A.6, the relevant language remains the same.

MCL 712A.6. In fact, removing respondent's name from the central registry without following the procedures and safeguards set forth in MCL 722.627 might actually endanger the child. To accept respondent's argument also would run counter to the Michigan Supreme Court's decision in *In re Macomber*, 436 Mich at 399, which cautioned trial courts to be conservative with orders affecting adults under MCL 712A.6.

Furthermore, it is not evident that respondent's job prospects as a nurse would be affected by her presence in the central registry. Nothing in MCL 722.627j requires a potential employer to seek out such information or to refuse to hire respondent on the basis of that information. Respondent also remains free to seek other employment that would advance her economic status just as effectively. Lastly, even if we were to agree that MCL 712A.6 applies, respondent's argument still fails. Because MCL 722.627 is the more specific statute, explicitly dealing with expunction from the central registry, it prevails over the more general statute, MCL 712A.6. *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 434-435; 648 NW2d 205 (2002) (recognizing that when two statutes apply, the more specific one controls); *Bowden v Hutzel Hosp*, 252 Mich App 566, 578-579; 652 NW2d 529 (2002) mod on other grounds, 468 Mich 851 (2003).

Respondent next argues that she should be excused from exhausting her administrative remedies. "It is well established that where an administrative grievance procedure is provided, exhaustion of that remedy, except where excused, is necessary before review by the courts." *Bonneville v Mich Corrections Org, Serv Employees Int'l Union, Local 526M, AFL-CIO*, 190 Mich App 473, 476; 476 NW2d 411 (1991). As this Court recognized in *Citizens for Common Sense in Govt*, 243 Mich App at 53:

> Exhaustion of administrative remedies serves several policies: (1) an untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agency; (3) resolution of the issues may require the accumulated technical competence of the agency or may have been entrusted by the Legislature to the agency's discretion; and (4) a successful agency settlement of the dispute may render a judicial resolution unnecessary. [Quotation marks and citation omitted.]

Respondent argues that because DHS continuously delayed the process, there was no cohesive administrative scheme, and she should be excused from exhausting her administrative remedies. Even if there was an excessive delay as respondent contends, that is not the only factor to consider.

In regard to the second purpose articulated above, removal of an individual from the central registry involves an intensive factual determination that DHS is in the best position to make. Judicial review would be most efficient after a full factual record has been developed. While respondent contends that the trial court was fully cognizant of the facts of the case, that is not the same as being fully cognizant of the factual issues involved in the management of the central registry or reasons for removal, which is squarely within the department's purview. Contrary to respondent's characterization, in its opinion and order, the trial court displayed limited familiarity with this case. Instead, the trial court perfunctorily granted respondent's request without factual findings and with a notable lack of focus on the minor child.

Furthermore, respondent ignores two relevant concerns, which fully support exhaustion of administrative remedies in this case. DHS, as the agency that manages

and maintains the central registry, is the most knowledgeable party regarding when and if someone should be removed from the central registry. Moreover, had respondent followed through with an administrative hearing as required by MCL 722.627, the result could very well have been an order to expunge her name from the central registry, which would have rendered judicial resolution unnecessary. Therefore, while it may have been more convenient for respondent to bypass the department and go to the trial court, convenience is inconsistent with the applicable statutory scheme.

Respondent also alleges that the department's delays in processing her request violated her due process rights. However, respondent never raised this issue at the trial court level nor offered any evidence supporting this contention.[3] Because there is no evidence properly before us regarding this issue, we decline to consider it. See *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000).

Lastly, the lawyer-guardian ad litem asserts that because she, rather than respondent, moved the trial court to remove respondent's name from the central registry, the trial court's ruling was justified under MCL 712A.17d(1)(*l*), which empowers the lawyer-guardian ad litem "[t]o request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment." The lawyer-guardian ad litem also contends that because she made the motion, MCL 722.627 does not apply.

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[3] While respondent now attempts to expand the record by providing documents detailing the delay, these documents were not in the lower court file. "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

An initial flaw in these assertions is that they are based on a mischaracterization. While the lawyer-guardian ad litem states that she made the motion requesting expunction of respondent's name from the registry, the hearing reflects that the lawyer-guardian ad litem referred the court to respondent's attorney, who made the motion. The lawyer-guardian ad litem then elucidated further and joined in the motion.

Moreover, even assuming that MCL 712A.17d applies, the lawyer-guardian ad litem's arguments still fail. MCL 722.627 specifically grants DHS the authority to control expunction from the central registry, and prevails over the more general statute, MCL 712A.17(d)(1)(*l*), which broadly empowers the lawyer-guardian ad litem to pursue interests on the child's behalf. *Slater*, 250 Mich App at 434-435 ("[W]here two statutes or provisions conflict and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails."). Further, MCL 722.627(5) specifically states that it is the "person who is the subject of a report or record made under this act" who may request removal, which in this case was respondent.

III. CONCLUSION

MCL 722.627 grants DHS exclusive jurisdiction in maintaining and removing a person's name from the central registry. Because respondent failed to exhaust her administrative remedies before seeking judicial intervention, the trial court did not have jurisdiction to enter an order removing her from the central registry. As DHS acknowledged at oral argument, respondent remains free to invoke her administrative remedies upon remand. We vacate the trial court's order and

remand for proceedings consistent with this opinion. We do not retain jurisdiction.

MURPHY, C.J., and MARKEY, J., concurred with RIORDAN, J.

RADU v HERNDON & HERNDON INVESTIGATIONS, INC

Docket No. 304485. Submitted August 6, 2013, at Detroit. Decided August 29, 2013, at 9:05 a.m.

Walter W. and Lindsay K. Radu brought an action in the Oakland Circuit Court against Herndon & Herndon Investigations, Inc., Timothy P. Herndon, and Charles Farley, alleging nine counts arising from a fire in the engine compartment of plaintiffs' vehicle and charges of burning insured property and insurance fraud brought against Walter Radu. Count I alleged a claim of malicious prosecution against all defendants. Count II alleged a claim of injurious falsehood against all defendants. Count III alleged a claim of tortious interference with economic relationships against all defendants. Count IV alleged a claim of intentional infliction of emotional distress against all defendants. Count V alleged claims of negligence against the Herndon defendants and gross negligence against Farley. Count VI alleged an invasion of privacy claim against all defendants. Count VII alleged an abuse of process claim against Farley. Count VIII alleged that Walter Radu was denied due process because defendants conspired to pursue the criminal prosecution against him in violation of 42 USC 1983. Count IX alleged that Walter Radu was denied equal protection of the law because defendants acted in concert and in an arbitrary and capricious manner in violation of 42 USC 1983. The Herndon defendants filed two motions for summary disposition. The first motion was based on their claim that they were entitled to statutory immunity. The second motion concerned a release that was entered in a separate action brought by plaintiffs against the insurer of their burned vehicle. Defendants alleged in that motion that plaintiffs' claims were barred as a consequence of the release plaintiffs entered into with the insurer, which release included the insurer's "representatives," and alleged that the Herndon defendants had been acting as representatives of the insurer and were protected by the release. The court, Rae Lee Chabot, J., granted both motions, concluding that the Herndon defendants were entitled to statutory immunity and that the claims against the Herndon defendants were barred by the release. Farley also sought summary disposition, alleging, in part, that the claims against him were barred by governmental immunity and that Farley's conduct

was not the proximate cause of plaintiffs' claimed injuries. The court granted Farley's motion for summary disposition. Plaintiffs appealed.

The Court of Appeals *held*:

1. The Herndon defendants spoke and acted on behalf of the insurer of the vehicle by delegated authority with regard to the investigation of the fire. The trial court properly held that the Herndon defendants were "representatives" of the insurer within the meaning of the release language.

2. Timothy Herndon was not a signatory to the release. Therefore, the portion of the trial court's order granting summary disposition premised on the Herndon defendants' claim that the case was barred because Herndon had been a signatory to the release was improperly granted and is vacated.

3. The trial court properly granted the Herndon defendants' motion for summary disposition premised on statutory immunity pursuant to MCL 29.4(6) and MCL 500.4509(3). The definition of malice applicable in defamation actions appears appropriate in the context of both statutes. Malice exists for purposes of both statutes when a person supplying information or data to the appropriate authorities set forth in the statutes does so with knowledge of its falsity or with reckless disregard of its truth or falsity. The trial court properly held that plaintiffs failed to present evidence sufficient to allow a rational finder of fact to conclude that Timothy Herndon acted with malice with regard to the information he provided related to the vehicle fire.

4. There is no merit to plaintiffs' claims that Farley did not act in a timely manner when investigating the vehicle fire. Evidence was not presented that would lead a reasonable fact-finder to conclude that Farley's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury would result. The trial court properly dismissed the state law claims against Farley.

5. The trial court properly dismissed the intentional tort claims against Farley. Plaintiffs presented insufficient evidence for a reasonable fact-finder to conclude that Farley did not act in good faith with regard to the investigation of the fire and the prosecution of Walter Radu.

6. To the extent that plaintiffs attempted to state a claim of malicious prosecution under 42 USC 1983, the claim was properly dismissed. There is no evidence to support plaintiffs' claim that Farley knowingly provided false information to the prosecutor's office in an attempt to persuade the prosecutor to file criminal charges against Walter Radu. There is also no evidence that Farley

otherwise participated in the prosecutor's decision to prosecute Walter Radu. Farley's motion for summary disposition was properly granted with regard to plaintiffs' 42 USC 1983 malicious prosecution claim.

Affirmed in part and vacated in part.

1. WORDS AND PHRASES — REPRESENTATIVE — REPRESENT.

A "representative" is a person or thing that represents another or others; to "represent" means to stand or act in place of, as an agent or substitute, and to speak and act for by delegated authority.

2. ARSON — INSURANCE FRAUD — IMMUNITY — MALICE.

The purpose of both MCL 29.4 of the Fire Prevention Code and MCL 500.4509 of the Insurance Code is to foster the communicative and evaluative processes related to fire prevention and insurance-fraud prevention; both statutes grant immunity to persons who have provided information related to investigations of suspected arson and suspected insurance fraud if the persons acted without malice; malice exists for purposes of both statutes when a person supplying information or data to the appropriate authorities does so with knowledge of its falsity or with reckless disregard of its truth or falsity.

3. TORTS — GOVERNMENTAL IMMUNITY — WORDS AND PHRASES — GROSS NEGLIGENCE.

"Gross negligence," for purposes of the statute providing that a governmental employee is immune from tort liability for an injury caused by the employee while in the course of employment if the employee was acting within the scope of his or her authority, the governmental agency was engaged in the exercise of a governmental function, and the employee's conduct did not amount to gross negligence that was the proximate cause of the injury, is conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results (MCL 691.1407[2], and [7][a]).

4. MALICIOUS PROSECUTION — ELEMENTS — FOURTH AMENDMENT — CIVIL RIGHTS.

A claim of malicious prosecution under 42 USC 1983 premised on a violation of the Fourth Amendment consists of four elements: first, the defendant must have influenced or participated in the decision to prosecute the plaintiff, second, the plaintiff must show that there was a lack of probable cause for the criminal prosecution, third, the plaintiff must show that, as a consequence of a legal proceeding, he or she suffered a deprivation of liberty apart from

the initial seizure, and fourth, the criminal proceeding must have been resolved in the plaintiff's favor.

Cummings, McClorey, Davis & Acho, PLC (by *Timothy Young* and *Karen M. Daley*), for Walter and Lindsay Radu.

Hewson & Van Hellemont, PC (by *James F. Hewson* and *Jerald Van Hellemont*), for Herndon & Herndon Investigations, Inc.

Law Offices of Mark A. Hypnar, PC (by *Mark A. Hypnar*), for Timothy Herndon.

Kaufman, Payton & Chapa, PC (by *Ralph C. Chapa, Jr.*), and *James G. Gross, PLC* (by *James G. Gross*), for Herndon & Herndon Investigations, Inc, and Timothy Herndon.

Potter, DeAgostino, O' Dea & Patterson (by *Steven M. Potter* and *Rick J. Patterson*) for Charles Farley.

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM. Plaintiffs, Walter and Lindsay Radu, appeal as of right an order granting two motions for summary disposition in favor of defendants Herndon & Herndon Investigations, Inc (Herndon Investigations), and Timothy Herndon (Herndon), pursuant to MCR 2.116(C)(7), on the basis of release and statutory immunity. We affirm. Plaintiffs also appeal as of right an order granting a motion for summary disposition in favor of defendant Charles Farley (Farley) pursuant to MCR 2.116(C)(7) (governmental immunity) and (C)(10). We affirm in part and vacate in part.

On December 17, 2005, there was a fire in the engine compartment of plaintiffs' 2004 Jeep Grand Cherokee that plaintiff Walter Radu (Walter) had driven to a local

park. Walter, a firefighter for the Dearborn Fire Department, claimed that he parked the vehicle, got out of it and, as he was walking away, heard a noise. When he looked back, he saw smoke coming from the passenger-side front wheel well. He then returned to the vehicle and attempted to start it so that he could drive it to the fire department located close to the park. When smoke started coming through the interior heating vents, he got out of the vehicle and called 911. There were no witnesses in the park at the time who have been identified. A deputy from the Oakland County Sheriff's Office and firefighters from the Commerce Township Fire Department responded to the vehicle fire. After the fire was extinguished, the vehicle was towed to a local facility and was placed in an outdoor storage lot. The fire was not considered suspicious in nature by the firefighter in charge or the deputy.

On the same day, plaintiffs filed an insurance claim with Auto Club Insurance Association (ACIA). On December 30, 2005, ACIA hired defendant Herndon Investigations to investigate the claim. On January 2, 2006, defendant Herndon examined the vehicle to determine the origin and cause of the fire. During his inspection, Herndon noticed that the main fuel line was severed at the rear of the engine compartment on the driver's side, as well as at the fuel rail connection. After Herndon completed his entire investigation, he concluded that the fire was incendiary in nature. The Oakland County Sheriff's Office's fire investigation unit was contacted.

On January 5, 2006, defendant Charles Farley, a certified fire investigator for the Oakland County Sheriff's Office (OCSO), requested that ACIA provide him with insurance information related to plaintiffs' vehicle and ACIA's fire investigation. On January 6, 2006, Farley conducted an examination of the vehicle. He noted that

the fuel line located at the rear of the engine block, on the driver's side, was cut and that the metal joint from the fuel rail to the fuel line was also cut. Farley also noticed that about 18 inches of the fuel line was missing. After Farley completed his initial investigation, he concluded that the fire was incendiary in nature. However, Farley continued to investigate the matter, supplementing his initial report several times through October 2, 2007, but his opinion did not change. Therefore, he submitted to the prosecutor's office a request for a warrant review and attached his reports, witness statements, and other information. The prosecutor's office decided to prosecute, and Walter was charged with burning insured property in violation of former MCL 750.75, see MCL 750.76, effective April 3, 2013, and insurance fraud in violation of MCL 500.4511(1). Although he was bound over as charged after a finding of probable cause, the prosecutor eventually filed a petition for a *nolle prosequi*, which was granted.

Also in 2007, plaintiffs filed a complaint against ACIA, alleging breach of contract with regard to ACIA's denial of their insurance claim. In 2008, that matter was resolved and the parties entered into a release, settlement agreement, and nondisclosure agreement. The settlement agreement released ACIA, as well as its employees and representatives, from any related "claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever . . . ." The nondisclosure agreement was executed by all persons and entities involved in the litigation, including Herndon and all the attorneys involved.

In 2009, plaintiffs filed the complaint at issue in this matter, arising from defendants' investigation of the vehicle fire. In count I, plaintiffs alleged a claim of malicious prosecution against all defendants, asserting that they initiated the criminal prosecution against

Walter after their cursory fire investigation led to their unsupported accusations of arson. In count II, plaintiffs alleged a claim of injurious falsehood against all defendants, asserting that their cursory and incomplete fire investigation resulted in false, published, and injurious accusations that led to significant damages. In count III, plaintiffs alleged a claim of tortious interference with economic relationships against all defendants, asserting that their false, published accusations caused the denial of plaintiffs' insurance claim, the denial of future insurance coverage, and detrimental employment and business repercussions. In count IV, plaintiffs alleged a claim of intentional infliction of emotional distress against all defendants, asserting that defendants' conduct and accusation of arson were so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. In count V, plaintiffs alleged claims of negligence against the Herndon defendants and gross negligence against Farley. In count VI, plaintiffs alleged an invasion of privacy claim against all defendants, asserting that defendants improperly disclosed their investigations to Walter's employer and discussed potential criminal charges, thus intruding on plaintiffs' right to privacy. In count VII, plaintiffs alleged an abuse of process claim against Farley, asserting that he abused the criminal investigation process for his own purpose and inappropriately appeared at Walter's place of business unannounced to discuss potential criminal charges with Walter's supervisor. In count VIII, plaintiffs alleged that Walter was denied due process because defendants conspired to pursue the criminal prosecution against him in violation of 42 USC 1983. In count IX, plaintiffs alleged that Walter was denied equal protection under the law because defendants acted in concert and in an arbitrary and capricious manner in violation of 42 USC 1983.

Eventually, the Herndon defendants filed two motions for summary disposition. In the first motion, brought pursuant to MCR 2.116(C)(7), the Herndon defendants argued that they were entitled to statutory immunity. They argued that plaintiffs' claims arose from the fact that they provided information regarding their fire investigation to Farley and, eventually, criminal charges were brought against Walter. However, they were immune from civil liability pursuant to the Fire Prevention Code, MCL 29.4(6), because the fire investigation report was provided to Farley, without fraud or malice, and upon written request during his investigation of suspected arson. The Herndon defendants also argued that they were entitled to immunity pursuant to the Insurance Code, MCL 500.4509(2) and (3), because their fire investigation information was provided to Farley, without malice and upon written request, during Farley's investigation of suspected insurance fraud. Further, plaintiffs' allegations of malice were without merit as a matter of law because Herndon did not have knowledge that his statements were false and he did not act with reckless disregard with regard to the veracity of his statements.

Plaintiffs responded to the Herndon defendants' motion, arguing that they were not entitled to statutory immunity. Plaintiffs claimed that Herndon acted with malice because he provided false information that he knew to be false or, at least, acted with reckless disregard as to whether his information was false. In particular, plaintiffs argued that Herndon "recklessly disregarded the fact that the fuel line was separated, dislodged or otherwise removed *after* the fire." Moreover, the statutes cited by the Herndon defendants do not grant immunity to the author of the information that was ultimately furnished to the authorities by the insurance company, ACIA. Therefore, plaintiffs argued, the Herndon defendants were not entitled to statutory immunity.

In their second motion for summary disposition, brought pursuant to MCR 2.116(C)(7), the Herndon defendants argued that plaintiffs' claims were barred as a consequence of the release plaintiffs entered into with ACIA. In particular, the Herndon defendants argued that the release included ACIA's "representatives" and, when they conducted the fire investigation at issue in this matter, the Herndon defendants were acting as "representatives" of ACIA. Plaintiffs opposed this motion, arguing that the Herndon defendants were not entitled to benefit from the release because they were not "representatives" of ACIA; rather, they were independent contractors specifically hired only to do an investigation for ACIA. And, plaintiffs argued, Herndon was merely a signatory of the nondisclosure agreement, which was clearly separate and distinct from the release because the Herndon defendants were not parties to that lawsuit.

Following oral arguments on the Herndon defendants' motions for summary disposition, the trial court granted both motions. First, the trial court concluded that there was no evidence from which to infer that Herndon made the statements in his fire investigation report with malice or with actual knowledge of any falsehood. Further, the trial court held that the Herndon defendants were "otherwise cooperating with an investigation" as set forth in MCL 500.4509(3) and they "furnishe[d] information on behalf of an insurance company" as set forth in MCL 29.4(6). Accordingly, the Herndon defendants were entitled to summary disposition on the basis of statutory immunity. Second, the trial court concluded that plaintiffs' claims against the Herndon defendants were barred by the terms of the release; thus, they were also entitled to summary disposition on that ground as well. Plaintiffs' motion for reconsideration was denied.

Defendant Farley also filed a motion for summary disposition. Farley averred that plaintiffs' claims of intentional torts, gross negligence, and constitutional violations arose from Farley's submission of his fire investigation reports to the prosecutor in his request for a warrant review regarding possible criminal charges against Walter. Plaintiffs subsequently hired experts who reached contrary conclusions regarding the cause of the fire; however, such a difference of opinion did not give rise to a cause of action. Further, although plaintiffs challenged the thoroughness of Farley's investigation, the investigation was sufficient to prompt the prosecutor's office to issue a warrant and the court determined that probable cause existed to bind Walter over on the charges. More specifically, Farley argued, plaintiffs' intentional tort claims, including their malicious prosecution, injurious falsehood, tortious interference with economic relationships, intentional infliction of emotional distress, invasion of privacy, abuse of process, and constitutional violation claims, were barred by governmental immunity. Further, plaintiffs' gross negligence claim was the same as their malicious prosecution claim; thus, it was also barred. Moreover, the gross negligence claim must fail because Farley's conduct was not the proximate cause of plaintiffs' claimed injuries; rather, the prosecutor's decision to bring the criminal charges against Walter was the proximate cause of the alleged injuries. Accordingly, Farley argued, he was entitled to summary disposition of plaintiffs' claims.

Plaintiffs opposed Farley's motion for summary disposition, arguing that Farley was not entitled to governmental immunity regarding their intentional tort and gross negligence claims because he acted with malice, without good faith, and in a manner so reckless as to demonstrate a substantial lack of concern for

whether an injury would result with regard to his investigation of this vehicle fire. Further, plaintiffs argued, Farley was not entitled to summary dismissal of their malicious prosecution claim because he influenced or participated in the decision to prosecute Walter and made false statements that established probable cause with regard to the criminal charges against Walter. Moreover, Farley's appalling conduct during the investigation of the vehicle fire met the "shocks-the-conscience" threshold; thus, Farley was not entitled to summary dismissal of plaintiffs' equal protection claim. Accordingly, plaintiffs argued, Farley's motion for summary disposition should be denied in its entirety.

Following oral arguments, the trial court granted Farley's motion for summary disposition. The trial court held that Farley was entitled to governmental immunity. Further, the court concluded that Farley was entitled to dismissal of plaintiffs' gross negligence claim because the evidence did not give rise to a reasonable inference that Farley's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury would result. And the trial court concluded that Farley was entitled to summary dismissal of plaintiffs' constitutional claims because his actions did not shock the conscience and there was no evidence that he was motivated by a discriminatory purpose. This appeal followed.

Plaintiffs first argue that the trial court erred by granting the Herndon defendants' motion for summary disposition on the basis of the release executed in plaintiffs' case against ACIA. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). When the plaintiffs' claims are barred because of a

release, summary disposition is proper under MCR 2.116(C)(7). *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996). The interpretation of a release presents a question of law that this Court reviews de novo. *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000).

Contract law applies to disputes involving the terms of a release. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Id*. (quotation marks and citation omitted). "The scope of a release is governed by the intent of the parties as it is expressed in the release." *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 201; 428 NW2d 26 (1988). If the language is unambiguous, it must be construed, as a whole, according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008); *Cole*, 241 Mich App at 13.

Plaintiffs' previously filed lawsuit against ACIA was dismissed after the parties entered into a "GENERAL RELEASE, SETTLEMENT AGREEMENT, AND NON-DISCLOSURE AGREEMENT." The document provided, in part, that

> the parties to this Agreement and to the above-referred litigation wish to avoid trial and the resulting uncertainty of a verdict, and have agreed that the pending litigation shall be dismissed, with prejudice and without costs to any party, upon such terms as are reflected in this General Release and Settlement Agreement[.]

It further stated that plaintiffs

> do forever release and discharge the Auto Club Insurance Association, its employees and representatives . . . from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever . . . .

The document also provided as follows:

> IN FURTHER CONSIDERATION for the dismissal of this cause of action . . . Plaintiffs Walter Winston Radu and Lindsay K. Radu; Timothy Young, Attorney for Walter and Lindsay Radu in the civil litigation; Defendant Auto Club Insurance Association and its attorneys, including Mary Look; and Kevin S. Carden, Attorney for the Auto Club Insurance Association, and their agents, employees and representatives; and anyone involved in this litigation including Herndon and Associates, Walter Herndon, Timothy Herndon, Daniel Terski, and any and all of its employees and representatives; and Mark Hypnar, attorney for Timothy Herndon; agree that they shall not disclose the terms or conditions of the dismissal of this litigation to anyone other than the attorneys to this litigation, the Court, and the parties to this litigation as necessary, except as required by law or by Court Order.

In their motion for summary disposition, the Herndon defendants argued that they were "representatives" of ACIA within the contemplation of the release. It appears that the trial court agreed with the Herndon defendants' argument, as do we. The release does not define the term "representatives"; thus, "a dictionary may be used to determine the ordinary meaning of a word or a phrase." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 292 n 4; 818 NW2d 460 (2012). According to *Random House Webster's College Dictionary* (2d ed, 1997), a "representative" is "a person or thing that represents another or others." And the word "represent" means "to stand or act in place of, as an agent or substitute" and "to speak and act for by delegated authority." *Id*.

In this case, it is undisputed that the Herndon defendants were hired by ACIA to investigate plaintiffs' insurance claim. That is, with regard to the investigation of the vehicle fire, the Herndon defendants repre-

sented ACIA's interests. In that capacity, Herndon went to the storage lot where plaintiffs' vehicle was located and conducted his investigation on behalf of ACIA. Herndon also contacted the OCSO's fire investigation unit to report the vehicle fire on behalf of ACIA and then consulted with Farley during his investigation of the vehicle fire. Thus, we conclude that the Herndon defendants spoke and acted on behalf of ACIA by delegated authority with regard to the investigation of the vehicle fire. Accordingly, the Herndon defendants were "representatives" of ACIA within the plain meaning of the release language.

The Herndon defendants also briefly argued in the trial court, as they do on appeal, that Herndon was a signatory to the release. We disagree. Neither Herndon defendant was a party to the underlying breach of contract litigation between plaintiffs and ACIA; thus, they had no legal claim to "release" or settle with plaintiffs in that matter. Herndon was a signatory on the nondisclosure agreement only, not the release or settlement agreement, because Herndon Investigations had been hired by ACIA to investigate plaintiffs' insurance claim. Similarly, all the attorneys involved in that lawsuit were signatories to the nondisclosure agreement. Accordingly, the Herndon defendants' motion for summary disposition premised on their claim that plaintiffs' case was barred because Herndon was a signatory to the release entered into between plaintiffs and ACIA was improperly granted by the trial court and that portion of the order is vacated.

Next, plaintiffs argue that the trial court erroneously granted the Herndon defendants' motion for summary disposition premised on statutory immunity pursuant to MCL 29.4(6) and MCL 500.4509(3). We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Spiek*, 456 Mich at 337. A motion for summary disposition is properly granted under MCR 2.116(C)(7) if the action is barred by immunity, including statutory immunity. See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Questions of statutory interpretation are reviewed de novo. *Id*. at 467. Statutes are construed so as to give effect to the intent of the Legislature, as expressed by the language of the statute. *Id*. "While words are construed according to their plain and ordinary meaning, words that have acquired a peculiar and appropriate meaning in the law are construed according to that peculiar and appropriate meaning." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006).

MCL 29.4(6) provides:

> In the absence of fraud or malice, an insurance company or a person who furnishes information on behalf of an insurance company is not liable for damages in a civil action or subject to criminal prosecution for an oral or written statement made or other action taken that is necessary to supply the information required under this section.

MCL 500.4509(3) provides:

> In the absence of malice, an insurer, or any officer, employee, or agent of an insurer, or any person who cooperates with, furnishes evidence, or provides information regarding suspected insurance fraud to an authorized agency . . . is not subject to civil liability for libel, slander, or any other tort, and a civil cause of action of any nature does not exist against the person, for filing a report, providing information, or otherwise cooperating with an investigation or examination of any of these entities, unless that person knows that the evidence, information, testimony, or matter contains false information pertaining to any material fact or thing.

In this case, plaintiffs argue that the Herndon defendants were not entitled to statutory immunity because questions of fact existed regarding (1) whether Herndon acted with malice when he reported that Walter intentionally caused the fire and (2) whether Herndon knowingly provided false information to ACIA regarding plaintiffs' vehicle fire. Accordingly, plaintiffs argue that questions of fact existed with regard to whether the "malice" exception to immunity set forth in both statutes applied under the circumstances in this case.

The statutes at issue in this case do not define the term "malice." However, in *Feyz*, 475 Mich at 683-684, our Supreme Court considered a similar "malice exception" within the medical peer review immunity statute, MCL 331.531. The *Feyz* Court noted that the purpose of the peer review immunity statute is "to foster the free exchange of information in investigations of hospital practices and practitioners, and thereby reduce patient mortality and improve patient care within hospitals." *Feyz*, 475 *Mich* at 666. Consistent with that purpose, the Court also noted that the Legislature clearly intended "to protect peer review participants from liability for participation in this communicative and evaluative process" if they participated without "malice." *Id*. And the Court held that " '[m]alice' is clearly a word that has acquired a peculiar meaning in the law." *Id*. at 683. In consideration of this "communicative context," the *Feyz* Court adopted the defamation definition of the term "actual malice," concluding that "it is the one definition that specifically concerns and promotes honest communication." *Id*. at 685-686; see also *id*. at 684 n 62. Thus, the Court held that "malice can be established when a 'person supplying information or data . . . does so with knowledge of its falsity or with reckless disre-

gard of its truth or falsity.' " *Id*. at 667, quoting *Veldhuis v Allan*, 164 Mich App 131, 136; 416 NW2d 347 (1987).

The purposes of both MCL 29.4 of the Fire Prevention Code and MCL 500.4509 of the Insurance Code similarly foster the communicative and evaluative processes related to fire prevention and insurance-fraud prevention. And, both statutory provisions clearly grant the protection of immunity to persons who have provided information related to investigations of suspected arson and suspected insurance fraud if they acted without malice. In light of the similarity of the statutes at issue in this case and the medical peer review immunity statute, we conclude that the definition of malice applicable in defamation actions appears appropriate in the context of both MCL 29.4(6) and MCL 500.4509(3). Accordingly, with regard to these statutes, malice exists when a person supplying information or data to the appropriate authorities, as set forth in the statutes, does so with knowledge of its falsity or with reckless disregard of its truth or falsity. See *Feyz*, 475 Mich at 690.

Plaintiffs argue that a question of fact existed regarding whether the "malice exception" to immunity set forth in both statutes applied because (1) the purportedly cut end of the fuel line was shiny, was not discolored, and did not have fire debris on the outside surface as it would have had if it had been exposed to fire and (2) there were unburned combustible cotton fibers on the edge of that cut fuel line that would have been burned in the fire. Plaintiffs argue, therefore, that Walter could not have separated the fuel line before the fire and that Herndon ignored this evidence and provided false information or, at least, acted with reckless disregard of it when he communicated his opinion that

Walter intentionally caused this vehicle fire. We cannot agree with plaintiffs that the evidence in this case created a question of fact regarding whether Herndon acted with malice under MCL 29.4(6) and MCL 500.4509(3) when he provided information related to the vehicle fire.

In *Ireland v Edwards*, 230 Mich App 607, 622; 584 NW2d 632 (1998), this Court held:

> Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. "Reckless disregard" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [Quoting *Grebner v Runyon*, 132 Mich App 327, 332-333; 347 NW2d 741 (1984) (quotation marks and citations omitted).]

Further, generally, a failure to investigate is not sufficient to establish reckless disregard, although the "purposeful avoidance of the truth" may be sufficient. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 117; 793 NW2d 533 (2010), quoting *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 692; 109 S Ct 2678; 105 L Ed 2d 562 (1989) (quotation marks omitted).

In this case, Herndon was hired to render an opinion about the origin and cause of the vehicle fire. After his investigation, and in light of his experience with such investigations, he concluded that the fuel line had been intentionally cut before the fire, which caused the fire when Walter attempted to start the vehicle. Plaintiffs disagree with his conclusions and submitted affidavits

from experts who opined that there were other potential explanations for the severed fuel line and other potential, accidental causes of the vehicle fire. However, the fact that a mere difference of opinion exists regarding plausible scenarios does not lead to the conclusion that Herndon knowingly provided false information to ACIA with regard to his opinion. Further, reckless disregard for the truth is not established merely by showing that Herndon may have conducted an insufficient investigation. Nevertheless, a metallurgical engineer also investigated this matter by conducting an analysis of the subject components of the fuel system and determined that "the fuel tube was subjected to repeated bending until breakage occurred." The metallurgical engineer also determined that this "breakage occurred prior to the fire, as the fracture surface and the tube OD [outer diameter] contain the same inorganic debris which was created and deposited during the fire." In his deposition, the metallurgical engineer testified that the combustible cotton fibers found on the edge of the cut fuel line were deposited there after the fire, which was consistent with Herndon's deposition testimony that he wore jersey-style cotton gloves during his inspection of the vehicle. In any case, we agree with the trial court that plaintiffs have failed to present evidence sufficient to allow a rational finder of fact to conclude that Herndon acted with malice with regard to the information he provided related to the vehicle fire. Accordingly, we affirm the trial court's decision to grant the Herndon defendants' motion for summary disposition on the ground that plaintiffs' claims were barred by immunity as set forth in MCL 29.4(6) and MCL 500.4509(3).

Plaintiffs next argue that the trial court erroneously granted Farley's motion for summary disposition after concluding that governmental immunity barred plaintiffs' state law claims because a reasonable juror could

conclude that Farley's actions were grossly negligent. After review de novo of the trial court's decision, we disagree. See *Spiek*, 456 Mich at 337.

If governmental immunity bars a plaintiff's claims, then summary disposition under MCR 2.116(C)(7) is proper. *Odom*, 482 Mich at 466. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Pierce v City of Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005).

MCL 691.1407(2) generally provides that a governmental agency's employee is immune from tort liability for an injury caused by the employee while in the course of employment if (a) the employee was acting within the scope of his or her authority, (b) the governmental agency was engaged in the exercise of a governmental function, and (c) the employee's conduct did not amount to gross negligence that was the proximate cause of the injury. In this case, plaintiffs argue that Farley was not entitled to the protection of immunity because his conduct amounted to gross negligence. Plaintiffs argue as follows:

> Based solely upon information from Timothy Herndon that the fire was suspicious, Farley investigated [plaintiffs'] vehicle fire on January 6, 2006 — 21 days after the fire and 21 days after the vehicle sat in an unsecured lot. After inspecting the vehicle and speaking with Defendant Herndon, Farley concluded that [Walter] deliberately cut the fuel line before the fire. However, as the evidence demonstrates, there is no way the fire could have occurred as concluded by Defendant Farley.

MCL 691.1407(7)(a) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." There-

fore, a plaintiff cannot survive a motion for summary disposition premised on immunity granted by MCL 691.1407(2) merely by presenting evidence that the employee's conduct amounted to ordinary negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Rather, the plaintiff must present evidence that the "contested conduct was substantially more than negligent." *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). And if no reasonable jury could find that the employee's conduct amounted to gross negligence, the plaintiff's claim must be dismissed. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998).

Here, to the extent that plaintiffs are arguing that Farley's investigation of the vehicle fire was not timely, we note that it was not until after Herndon had been hired by ACIA to investigate this vehicle fire that Farley became aware of the suspicious nature of the fire. Herndon did not examine the vehicle until January 2, 2006, at which time he determined that the fuel line was severed and Farley was subsequently notified of the suspicious nature of the vehicle fire. On January 5, 2006, Farley requested that ACIA provide him with information related to the vehicle and the fire. The next day, Farley inspected the vehicle. Thus, under the circumstances, plaintiffs' claims that Farley did not act in a timely manner are without merit. Further, the storage lot to which plaintiffs' vehicle was towed after the fire was a fenced lot and plaintiffs have provided no evidence from which to conclude that the vehicle had been tampered with before Farley conducted his investigation. To the contrary, Farley interviewed employees of the lot and was assured that the vehicle had not been tampered with while in the lot. Additionally, Farley testified that the front end of the vehicle was pushed up against a fence in the storage lot and that the

only means of access to the vehicle was through the rear hatch.

To the extent that plaintiffs challenge Farley's conclusion that Walter intentionally cut the fuel line and caused the fire, there is corroborating evidence that supports Farley's conclusion, as discussed earlier in this opinion. And, Farley testified that he arrived at his conclusion after considering all the circumstances as well as the physical evidence. He testified that his concerns regarding the fire included: "The fact that the fire happened, how it happened, that the vehicle owner was the only person around the vehicle at the time, [and] that the vehicle owner, when the vehicle was supposedly smoking, tried to start the car." That is, "[i]f the vehicle was possibly on fire, the last thing I would do as a rationale individual would [be to] jump into a vehicle that's on fire." It was clear that Walter had driven to the park without incident and, thus, the fuel line and fuel rail could not have been severed until after he arrived at the park. There were no witnesses at the park on this December day who have been identified. Farley also learned that the vehicle was leased and was well over the allotted mileage; thus, plaintiffs faced a "hefty bill" at the end of the lease.

Plaintiffs further argue that Walter did not smell of fuel at the scene of the fire and was not found to have any tools with which to cut the fuel line, which had a "shiny edge," inconsistent with the rest of the fuel line. However, the metallurgical engineer testified that the fuel line was not cut with a tool, but had been subjected to repeated bending until it broke. Although tool marks may have been located on the fuel line, a tool could have been used to facilitate the bending motions that eventually led to breakage. Further, this expert was made aware of the "shiny edge of the fuel line" and testified

that it did not change his conclusion that the stainless steel fuel line was severed before the fire. Farley disagreed that the cut edge of the fuel line was "shiny," and testified that the cut edge could have been a bit different in color compared to the outer surface because it had not been exposed to the elements for as long as the outer surface of the line. Herndon also testified that when he has burned vehicles after cutting a fuel line, he has noticed "a clean edge on the end after a fire, the way the gasoline burns has left clean or shinier ends or different color as to the rest of the fuel line." Moreover, Herndon testified that gasoline would not necessarily have poured out when the fuel line was severed because, when the engine is off, the fuel pump is not running. It is the fuel vapors that ignite when there is an attempt to start a vehicle. Although plaintiffs have presented affidavits from their experts that offer other possible explanations for the cut fuel line and cause of the fire, such evidence could not lead a reasonable fact-finder to conclude that Farley's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." Accordingly, the trial court properly dismissed plaintiffs' state law claims.

Plaintiffs next argue that the trial court erroneously dismissed their intentional tort claims against Farley because the evidence established that Farley did not act in good faith. We disagree.

As discussed by our Supreme Court in *Odom*, a governmental employee is immune from liability for intentional torts if the act was taken during the course of employment, the employee was acting within the scope of his or her authority, the employee was acting in good faith, and the act was discretionary not ministerial in nature. *Odom*, 482 Mich at 473-476. Here, plaintiffs argue that Farley did not act in good faith; thus, he was

not entitled to governmental immunity with regard to plaintiffs' intentional tort claims. The *Odom* Court held that a governmental employee does not act in "good faith" if the employee acts "maliciously or with a wanton or reckless disregard of the rights of another." *Id*. at 474 (citation and emphasis omitted). And " 'willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does.' " *Id*. at 475, quoting *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982).

Plaintiffs argue that "the evidence establishes complete and utter bad faith by Defendant Farley in his continued investigation and prosecution of Mr. Radu. A jury could reasonably conclude that the evidence presented demonstrates that Farley deliberately made false and misleading statements and deliberately omitted key information from his warrant application in order to secure a warrant and manufacture probable cause." More specifically, plaintiffs' arguments focus on Farley's alleged failure to properly preserve the vehicle and ensure its chain of custody, his misstatements or "lies" related to the timing of his investigation, his deficient investigation regarding the vehicle fire, his decision to have a private laboratory conduct tests on the fuel components, and his participation in the prosecution of Walter on criminal charges, including advising the prosecutor that the fuel line was deliberately cut and ignoring the responding fire department's conclusion that the fire was accidental.

We have considered plaintiffs' numerous allegations and conclude that plaintiffs' evidence is insufficient for a reasonable jury to conclude that Farley did not act in good faith. As discussed already in this opinion, Farley timely

commenced his investigation of this vehicle fire after receiving the requested information from ACIA regarding its investigation of plaintiffs' insurance claim. The vehicle had been stored in a fenced lot and there is no evidence that it had been tampered with at the time of his investigation. Farley testified in his deposition that the vehicle had been stored "nose first up against a fence" and "it was not accessible except from the rear hatch." That Farley may have misspoken about the exact date his investigation commenced does not lead to a conclusion of malice. Further, Farley's investigation into this vehicle fire was fairly comprehensive and included interviews as well as further analysis by a metallurgical engineer. Although Walter claimed that there were people in the park on the morning of the fire, those people were never identified. And Farley's conclusion that the fuel line was intentionally severed before the fire was consistent with Herndon's conclusion, as well as the metallurgical engineer's conclusion. Although some of the responding fire department personnel concluded that the fire appeared accidental, they were not certified fire investigators and their opinions were not given following a thorough investigation. In any case, a reasonable jury could not conclude that Farley acted with malice, an intent to harm, or with such indifference to whether harm would result, so as to be the equivalent of a willingness that it does, merely because Farley investigated this matter despite any such opinions by the responding firefighters. Accordingly, plaintiffs' intentional tort claims were properly dismissed by the trial court.

Finally, plaintiffs argue that the trial court erroneously treated their 42 USC 1983 "malicious prosecution claim" as a state law claim and thus erred by dismissing it on the basis of governmental immunity. We conclude that the claim, to the extent that it was pleaded, was properly dismissed.

Count I of plaintiffs' complaint was titled: "MALICIOUS PROSECUTION AGAINST THE HERNDON DEFENDANTS AND DETECTIVE FARLEY." Count VIII of plaintiffs' complaint was titled: "42 U.S.C. 1983 CLAIM AGAINST ALL DEFENDANTS." Thereafter, plaintiffs averred in count VIII, in relevant part, as follows:

> 102. Defendant Farley acted under color of state law and with oppression and malice to Plaintiffs, to the deprivation of their rights, privileges and immunities secured by the constitution and laws, including the right not to be deprived of liberty or property without due process of law as secured by the Fourth and Fourteenth Amendments to the Constitution of the United States of America.
>
> 103. Defendant Farley made stigmatizing statements about Plaintiff Walter Radu that called into question Plaintiff's good name, reputation, honor and integrity.
>
> 104. Defendant Farley's statements impugned Plaintiff Walter Radu's professional reputation, causing a significant road-block in his continued ability to practice his profession. The stigmatizing statements by Defendant Farley to Plaintiff Walter Radu's employer causing them to think Plaintiff had committed arson were false.
>
> 105. Defendant Herndon participated in the constitutional wrong-doing, conspired with Defendant Farley to have the criminal investigation reopened, maliciously prosecuted the claim of arson against Plaintiff Walter Radu, conspired to have the prosecution continued, and all Defendants knew, or should have known that a full disclosure of the evidence would result in a dismissal of the charges against Plaintiff Walter Radu, but all Defendants shared a common goal to maintain a successful prosecution against plaintiff Walter Radu which violated Plaintiffs' federally protected rights.
>
> 106. As a direct and proximate result of the Defendants' conduct, Plaintiffs suffered serious damages and injuries, including, but not limited to, legal and medical expenses, humiliation, outrage and indignity, mental distress, anxi-

> ety, sleeplessness and depression; embarrassment, shock and trauma; other damages currently unascertainable, exemplary damages and punitive damages.

Count IX of plaintiffs' complaint was titled: "VIOLATION OF 42 U.S.C. § 1983" and "VIOLATION OF PLAINTIFFS' EQUAL PROTECTION RIGHTS."

Following oral arguments on Farley's motion for summary disposition, the trial court rendered its decision. After concluding that plaintiffs' state law claims were barred by governmental immunity and that Farley's actions did not rise to the level of gross negligence, those claims were dismissed. The trial court then held: "Likewise, the claims for violation of due process and equal protection are dismissed, as the actions do not shock the conscience, nor is there any evidence that Defendant was motivated by a discriminatory purpose." It appears from the trial court's holding that it construed count VIII of plaintiffs' complaint as a due process claim considering the averments in ¶ 102. Although in ¶ 105 plaintiffs alleged that Farley and Herndon conspired to have the criminal investigation reopened and "maliciously prosecuted the claim of arson" against Walter, it is not clear from their averments that plaintiffs were asserting a "malicious prosecution" claim premised on a violation of the Fourth Amendment. Nevertheless, we conclude that the trial court properly dismissed this claim, albeit for a different reason. See *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009). To the extent that plaintiffs attempted to state a claim of malicious prosecution under § 1983, such claim was properly dismissed.

As plaintiffs set forth in their brief on appeal, a claim of malicious prosecution under § 1983 premised on a violation of the Fourth Amendment consists of four elements. *Sykes v Anderson*, 625 F3d 294 (CA 6, 2010).

First, the defendant must have influenced or participated in the decision to prosecute the plaintiff. *Id*. at 308. Second, because this claim is premised on a violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. *Id*. Third, the plaintiff must show that, "as a consequence of a legal proceeding," he or she suffered a "deprivation of liberty," apart from the initial seizure. *Id*. at 308-309 (quotation marks and citations omitted). Fourth, the criminal proceeding must have been resolved in the plaintiff's favor. *Id*. at 309.

On appeal, plaintiffs argue that Farley influenced or participated in the decision to prosecute Walter and supplied false information to establish probable cause, which resulted in a bindover decision that was eventually dismissed by an order of *nolle prosequi*. However, first, the evidence shows that Farley merely provided the prosecutor's office with a request for a warrant review, which included his investigative reports and all the information he had acquired regarding the vehicle fire. There is no evidence to support plaintiffs' claim that Farley knowingly provided false information to the prosecutor's office in an attempt to persuade the prosecutor to file criminal charges against Walter. There is also no evidence that Farley otherwise participated in the prosecutor's decision to prosecute Walter. Second, in light of the evidence, probable cause supported the issuance of a warrant. Further, Farley did not testify at Walter's preliminary examination, only Herndon testified, and the lower court determined that there was probable cause to bind Walter over on the charges. Third, plaintiffs have failed to address the third element of a malicious prosecution claim by showing that, as a consequence of a legal proceeding, Walter suffered a deprivation of liberty. Plaintiffs did not address this element in their response to Farley's motion for sum-

mary disposition. And plaintiffs have failed to present any evidence showing that, as a consequence of the legal proceeding, Walter suffered a deprivation of liberty. Therefore, we conclude that Farley's motion for summary disposition pursuant to MCR 2.116(C)(10) was properly granted with regard to this claim.

In summary, the Herndon defendants' motions for summary disposition premised on statutory immunity and release were properly granted. The Herndon defendants were "representatives" within the contemplation of the release plaintiffs entered into with ACIA, but Herndon was not a signatory to the release; thus, the trial court's order in that regard is affirmed in part and vacated in part. The Herndon defendants were entitled to statutory immunity pursuant to MCL 29.4(6) and MCL 500.4509(3); thus, the trial court's order in that regard is affirmed. Accordingly, the trial court's order dismissing all of plaintiffs' claims against the Herndon defendants is affirmed. Further, defendant Farley's motion for summary disposition was properly granted; accordingly, the trial court's order dismissing all of plaintiffs' claims against Farley is affirmed.

Affirmed in part and vacated in part.

SERVITTO, P.J., and CAVANAGH and WILDER, JJ., concurred.

DETROIT MEDICAL CENTER v PROGRESSIVE MICHIGAN INSURANCE COMPANY

Docket No. 304622. Submitted February 5, 2013, at Detroit. Decided July 23, 2013. Approved for publication September 3, 2013, at 9:00 a.m. Leave to appeal sought.

Detroit Medical Center brought an action in Wayne Circuit Court against Progressive Michigan Insurance Company and Citizens Insurance Company of America, seeking to recover personal protection insurance benefits under the no-fault act, MCL 500.3101, *et seq*., for its treatment of a motorcyclist, from Progressive, the insurer of the motorcycle owner. The motorcyclist lost control of his motorcycle and crashed when he was speeding and braked quickly after seeing bright headlights from an approaching vehicle; the motorcycle never came into contact with the motor vehicle. Following a bench trial, the court, Susan D. Borman, J., entered judgment in favor of plaintiff, concluding that the motor vehicle was sufficiently involved in the motorcycle accident to trigger entitlement to no-fault benefits. Progressive appealed.

The Court of Appeals *held*:

1. Under MCL 500.3105(1), a provider of personal protection insurance benefits 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. While motorcycles are excluded from the definition of motor vehicles under the no-fault act, a motorcyclist is not necessarily excluded from recovering those benefits when a motor vehicle is involved in the accident. While the motor vehicle need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the motor vehicle. An injury arises out of the use of a motor vehicle as a motor vehicle when the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or "but for." Actual physical contact between a motorcycle and a motor vehicle is not required to establish the requisite involvement of a motor vehicle in an accident as long as the causal connection exists; the motor vehicle must actively contribute to the accident and have more than a random associa-

tion with the accident scene. In this case, the trial court erred by determining that the motorcyclist's injuries arose out of the use of a motor vehicle as a motor vehicle and that the motor vehicle was sufficiently involved in the accident to entitle the motorcyclist to personal protection insurance benefits under MCL 500.3105(1). There was no evidence that the motor vehicle created, through some activity of its own, an actual and objective need for the motorcyclist to take evasive action to avoid the motor vehicle.

Reversed and remanded for entry of judgment in favor of Progressive.

INSURANCE — NO-FAULT INSURANCE — MOTORCYCLES — INVOLVEMENT OF MOTOR VEHICLES IN ACCIDENT.

For purposes of the no-fault act, MCL 500.3101 *et seq*., an injury arises out of the use of the motor vehicle as a motor vehicle when the causal connection between the accident and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or "but for;" actual physical contact between a motorcycle and a motor vehicle is not required to establish the requisite involvement of a motor vehicle in an accident as long as the causal connection exists; for a motorcyclist's injury to arise out of the use of a motor vehicle as a motor vehicle, thereby triggering entitlement to personal protection insurance benefits under MCL 500.3105(1), the motor vehicle must actively create, through some activity of its own, an actual and objective need for the motorcyclist to take evasive action to avoid the motor vehicle.

Miller & Tischler, PC (by *Ronni Tischler*), for Detroit Medical Center.

Garan Lucow Miller, PC (by *Daniel S. Saylor*), for Progressive Michigan Insurance Company.

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

PER CURIAM. Defendant, Progressive Michigan Insurance Company, appeals as of right the trial court's order entering judgment in favor of plaintiff, Detroit Medical Center, for recovery of personal protection insurance benefits under Michigan's no-fault act, MCL 500.3101, *et seq*., in the amount of $111,761.40. We reverse.

This case involves a single-vehicle accident by a motorcyclist. The motorcyclist, who was traveling upward of 100 miles an hour on a dark and deserted side street that intersected with Jefferson Road, saw bright headlights from an approaching motor vehicle. The motorcyclist applied his brakes to avoid colliding with the vehicle, causing the motorcycle to fishtail. The motorcyclist then lost control of the motorcycle and he "drop[ped the] bike on its side," hit the sidewalk, and fell. The motorcycle never came into contact with the vehicle. The motorcyclist sustained serious injuries in the accident, which plaintiff treated. Plaintiff subsequently filed this lawsuit, seeking to recover personal protection insurance benefits for its treatment of the motorcyclist's injuries, from defendant Progressive, the insurer of the motorcycle owner. Following a bench trial, the trial court entered judgment in favor of plaintiff, concluding that the motor vehicle was sufficiently involved in the accident to allow recovery of no-fault benefits.

At issue in this single-vehicle-motorcycle-accident case is whether, as a matter of law, the evidence established that the motor vehicle, which did not make physical contact with the motorcycle, was sufficiently involved in the accident to trigger the motorcyclist's entitlement to no-fault benefits under MCL 500.3105(1). "Liability for no-fault personal protection benefits is governed by MCL 500.3105." *Jones v Tronex Chem Corp*, 129 Mich App 188, 191; 341 NW2d 469 (1983). Under MCL 500.3105(1), "[t]he no-fault act provides coverage for accidental bodily injury 'arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.' " *Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 786; 432 NW2d 439 (1988), quoting MCL 500.3105(1). "Motorcycles are excluded from the definition of motor vehicles

under the no-fault act." *Sanford v Ins Co of North America*, 151 Mich App 747, 749; 391 NW2d 473 (1986); MCL 500.3101(2)(e). However, "a motorcyclist is not among those whom the Legislature has excluded from benefits." *Underhill v Safeco Ins Co*, 407 Mich 175, 185; 284 NW2d 463 (1979) superseded by statute on other grounds as recognized by *Autry v Allstate Ins Co*, 130 Mich App 585, 590 n 1; 344 NW2d 588 (1983). Rather, in *Underhill,* "the Supreme Court held that a motorcyclist involved in an accident which arises out of the ownership, operation, maintenance, or use of a motor vehicle is entitled to no-fault benefits." *Autry*, 130 Mich App at 590; see also *Bromley v Citizens Ins Co of America*, 113 Mich App 131, 134; 317 NW2d 318 (1982).

There is no "iron-clad rule" as to what level of involvement is sufficient under MCL 500.3105. *Dep't of Social Services v Auto Club Ins Ass'n*, 173 Mich App 552, 557; 434 NW2d 419 (1988). However, "while the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for." *Kangas v Aetna Cas & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975). "The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." *Id*. The causal connection between the injuries and the motor vehicle "cannot be extended to something distinctly remote," *Jones*, 129 Mich App at 192 (citation and quotation marks omitted); see also *Keller v Citizens Ins Co of America*, 199 Mich App 714, 715; 502 NW2d 329 (1993). Moreover, the injuries must be more than "tangentially related to the use of an automobile" to trigger the entitlement to no-fault benefits. *Bromley*, 113 Mich App at 135. Actual physical contact between a motorcycle and a motor vehicle is not re-

quired to establish the requisite involvement of a motor vehicle in an accident as long as "the causal nexus between the accident and the car is established." *Id*.; *Greater Flint HMO*, 172 Mich App at 788. For a motor vehicle to be involved in an accident, it "must actively, as opposed to passively, contribute to the accident," and have "more than a random association with the accident scene." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 35, 39; 528 NW2d 681 (1995).[1] "[T]here must be some activity, with respect to the vehicle, which somehow contributes to the happening of the accident." *Brasher v Auto Club Ins Ass'n*, 152 Mich App 544, 546; 393 NW2d 881 (1986).

Defendant claims that the trial court erred as a matter of law by determining that the motor vehicle was sufficiently involved in the motorcycle accident to trigger entitlement to no-fault benefits under the facts of this case. We agree. This question presents an issue of law, which is subject to de novo review on appeal. *Stewart v State of Michigan*, 471 Mich 692, 696; 692 NW2d 376 (2004). "Whether an injury arises out of the use of a motor vehicle must be determined case by

[1] MCL 500.3114(5) provides: "A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the *involvement of a motor vehicle* while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority" and then sets forth the priority of insurers potentially liable (emphasis added). The "involvement of a vehicle" standard, which sets forth the priority of potential insurers' liability for no-fault benefits, "encompasses a broader causal nexus between the use of the vehicle and the damage" than is required under the "arising out of" standard under MCL 500.3105(1). *Turner*, 448 Mich at 35, 39. Accordingly, a vehicle may be involved in the motor vehicle accident even though the injury did not arise out of the use of that vehicle. *Id*. at 35. Therefore, involvement of a motor vehicle when a motorcyclist sustains injuries in an accident is required for a motorcyclist to recover benefits under the no-fault act.

case." *McKenney v Crum & Forster*, 218 Mich App 619, 623; 554 NW2d 600 (1996); *Jones*, 129 Mich App at 192.

We can find no causal connection between the motorcyclist's injuries and the use of a motor vehicle as a motor vehicle sufficient to trigger entitlement to no-fault benefits under MCL 500.3105(1). The motorcyclist applied his brakes when he saw the vehicle's headlights approaching. The motorcyclist's evasive action in braking rapidly was in response to seeing the moving vehicle's headlights and because of the braking he fishtailed and lost control of the motorcycle, ultimately causing him to crash. But this does not mean that the motor vehicle was causally connected to the motorcyclist's injuries, that is, that the injury "originated from," "had its origin in," "grew out of," or "flowed from" the use of the vehicle as a motor vehicle. *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 314; 282 NW2d 301 (1979) (citation and quotation marks omitted).

Rather, the evidence established that the causal connection between the motorcyclist's injuries and the motor vehicle was merely incidental, fortuitous, or "but for." *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986); see also *McPherson v McPherson*, 493 Mich 294, 297; 831 NW2d 219 (2013). We cannot say that the motor vehicle actively contributed to the accident rather than merely being present. See *Turner*, 448 Mich at 39-40; *Brasher*, 152 Mich App at 546. While it is true that "a vehicle which is motionless in a lawful position is less likely to be considered involved," and that "a *moving* vehicle is much more likely to be held to be involved," *Dep't of Social Services*, 173 Mich App at 557, that does not equate to a conclusion that the motor vehicle was involved merely because it was moving. There still needs to be a causal connection between the

injuries and the motor vehicle. For example, in *Bromley*, 113 Mich App at 133-135, this Court determined that the motor vehicle was involved when that vehicle forced the motorcyclist off the road when the vehicle veered over the center line. And in *Greater Flint HMO*, 172 Mich App at 785, 788, the Court arrived at a similar conclusion when a motor vehicle made a sudden and unexpected stop that caused a chain reaction of emergency stops that ultimately resulted in two motorcyclists colliding with each other while attempting to avoid a car in front of them that had stopped.

In this case, there is no evidence that the motorcyclist needed to take evasive action to avoid the motor vehicle. Rather, the evidence only established that the motorcyclist was startled when he saw the approaching headlights and overreacted to the situation. And while fault is not a relevant consideration in determining whether a motor vehicle is involved in an accident for purposes of no-fault benefits, *Turner*, 448 Mich at 39, we believe that principle is limited to not considering fault in the cause of the accident, not whether the motor vehicle was actually involved in the accident. That is, had the motorcycle actually collided with the motor vehicle, we would not consider whether the motorcyclist or the motor vehicle driver was at fault in causing the accident, nor would we consider whether the motorcyclist could have taken evasive action and avoided the accident. But, where there is no actual collision between the motorcycle and the motor vehicle, we cannot say that the motor vehicle was involved in the accident merely because of the motorcyclist's subjective, erroneous perceived need to react to the motor vehicle. Rather, for the motor vehicle to be considered involved in the accident, the operation of the motor vehicle must have created an *actual* need for the motorcyclist to take evasive action. That is, there must be some activity by

the motor vehicle that contributes to the happening of the accident beyond its mere presence. *Brasher*, 152 Mich App at 546.

Because the facts of this case did not support the conclusion that there was an actual, objective need for the motorcyclist to take evasive action, we conclude that the trial court erred by determining that the motorcyclist's injuries arose out of the use of a motor vehicle as a motor vehicle and that the motor vehicle was sufficiently involved in the accident to entitle the motorcyclist to personal protection insurance benefits under the no-fault act. MCL 500.3105(1); MCL 500.3114(5).

Reversed and remanded to the trial court with instructions to enter judgment in favor of defendant, Progressive Michigan Insurance Company. We do not retain jurisdiction. Defendant may tax costs pursuant to MCR 7.219 as the prevailing party.

CAVANAGH, P.J., and SAWYER and SAAD, JJ., concurred.

SPRENGER v BICKLE

Docket No. 310599. Submitted May 16, 2013, at Traverse City. Decided September 10, 2013, at 9:00 a.m. Leave to appeal sought.

John C. Sprenger filed an action in the Benzie Circuit Court against Emily R. Bickle, seeking a determination of his paternity of the minor child under the Paternity Act, MCL 722.711 *et seq*., legal and physical custody, parenting time, and child support. Plaintiff alleged that he had been engaged to defendant for a period of time after her divorce from Adam Bickle in April 2011, that plaintiff and defendant had announced soon after the divorce that defendant was pregnant with plaintiff's child, that the engagement had ended, and that defendant had remarried Adam Bickle in August 2011. Plaintiff claimed that he was the biological father of the minor child born to defendant in November 2011 while she was married to Adam Bickle. The circuit court, Nancy Ann Kida, J., granted defendant's motion to dismiss pursuant to MCR 2.116(C)(5), concluding that plaintiff lacked standing to bring the action. Plaintiff appealed.

The Court of Appeals *held*:

1. Only the mother and the presumed legal father may challenge the presumption of legitimacy of a child born during their marriage. Under the Paternity Act, a third party has standing to rebut the presumption of legitimacy only if there has been a prior judicial determination arising from a proceeding between the husband and wife that declares the child is not the product of the marriage. In this case, because defendant and her husband, Adam Bickle, had not requested a judicial determination that the child was born out of wedlock, the trial court properly determined that plaintiff lacked standing under the Paternity Act to claim paternity of the child.

2. Because plaintiff lacked standing to bring an action under the Paternity Act, he was not entitled to discovery to assist in developing that paternity claim and the trial court properly denied plaintiff's motion for discovery. Whether Adam Bickle had a vasectomy before defendant became pregnant with the minor child was not relevant because Bickle was married to defendant at the

time the child was born and neither Bickle nor defendant had sought a judicial determination challenging the presumption of legitimacy.

3. When both parents in a divorce proceeding identify one child as the issue of their marriage, but acknowledge that another child was not, that divorce judgment is considered to have determined the issue of paternity of both the children. In this case, although defendant was most likely pregnant with the minor child at the time of defendant and Adam Bickle's April 2011 judgment of divorce, the pregnancy was not identified in the judgment. Even though the Bickles' other children were identified by name in the judgment, it was still presumed that Adam Bickle was the minor child's legal father because he was born after the couple had remarried and neither defendant nor Adam Bickle had filed an action to rebut the presumption of the child's legitimacy, or specified that Adam Bickle was not the child's father. As a third party, plaintiff lacked standing to request a modification of defendant and Adam Bickle's divorce judgment regarding paternity of the minor child.

Affirmed.

GLEICHER, J., concurring, agreed with the majority opinion, but wrote separately to state that the dissent misapprehended the law and to reiterate that defendant did not have standing to challenge the validity of the Bickles' divorce.

BOONSTRA, J., dissenting, would have reversed the trial court order and remanded for an evidentiary hearing. He would have held that plaintiff had standing to seek an order of paternity under the Paternity Act because the presumption of Adam Bickle's paternity of the child was sufficiently rebutted in the Bickles' April 2011 divorce judgment; the Bickles' knowledge of Adam Bickle's vasectomy, his likely inability to procreate, and identification of three other children of their marriage in the judgment operated as a stipulation in their divorce judgment that the child was not the issue of the marriage. The trial court's decision in the judgment of divorce that the three specified children were the children of the marriage, necessarily means that any child later born to defendant was a child born out of wedlock. If after discovery the evidence demonstrated that Adam Bickle could not have fathered the child or that defendant was not honest in the divorce proceeding about her pregnancy, Judge BOONSTRA would find that defendant had standing.

Phelps Legal Group, PLC (by *Eric W. Phelps* and *Kathryn M. Traband*), for John C. Sprenger.

Law Offices of Paul T. Jarboe (by *Paul T. Jarboe* and *Lauren K. Pfeil*), for Emily R. Bickle.

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

RONAYNE KRAUSE, P.J. Plaintiff appeals as of right an order entered on May 18, 2012, dismissing for lack of standing his complaint regarding paternity brought under the Paternity Act. MCL 722.711 *et seq*. We affirm.[1]

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff alleges that he is the biological father of a minor child born to defendant in November 2011, while she was lawfully married to someone else. Plaintiff and defendant were briefly engaged after defendant's divorce from Adam Bickle in April 2011. Although the parties dispute whether defendant was pregnant before her divorce, mutual friends of the couple and members of both their families assert that within days of the divorce, defendant and plaintiff were sharing the news that they were expecting a child. The engagement between plaintiff and defendant ended; in August 2011, defendant remarried Adam and they were still married when she gave birth three months later.

In December 2011, plaintiff filed a paternity action under the Paternity Act, alleging himself to be the biological father of the child and requesting the court to determine issues of legal and physical custody, parenting time, and child support. In response, defendant filed a motion to dismiss, asserting lack of standing, MCR 2.116(C)(5), and failure to state a claim on which relief

[1] We publish this case pursuant to MCR 7.215(A). The majority did not request publication.

could be granted, MCR 2.116 (C)(8). In an April 6, 2012 ruling, the circuit court determined that plaintiff did not have standing and granted defendant's motion to dismiss under MCR 2.115(C)(5). This appeal followed.[2]

II. ANALYSIS

Plaintiff argues that the trial court erred by: (1) finding that plaintiff lacked standing to bring a claim under the Paternity Act because defendant had acknowledged to friends and family that plaintiff was the father of the child she was expecting, which rebutted the presumption of the child's legitimacy, and (2) denying him the opportunity to conduct discovery to prove that it would have been impossible for Adam Bickle to be the father. We disagree.

"This Court reviews the grant or denial of a motion for summary disposition de novo." *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000). "In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Id*. "Statutory interpretation is a matter of law subject to review de novo on appeal." *Rose Hill Center*, *Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Id*.

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[2] Shortly after filing his brief with this Court, plaintiff filed a new action in circuit court under the Revocation of Paternity Act, MCL 722.1431 *et seq*., which became effective June 12, 2012. The Revocation of Paternity Act gives putative fathers in certain situations standing to bring paternity actions. In this case, we are reviewing decisions made in the context of the Paternity Act only, and our conclusions have no bearing on the action filed under the Revocation of Paternity Act.

Only the mother and the presumed legal father may challenge the presumption of legitimacy. *People v Zajaczkowski*, 293 Mich App 370, 378; 810 NW2d 627 (2011), vacated 493 Mich 6 (2012) (vacating defendant's conviction of first-degree criminal sexual conduct by relying on the plain language of the criminal statute rather than the civil presumption concerning legitimacy). See also *In re KH*, 469 Mich 621, 635; 677 NW2d 800 (2004) (recognizing that only the mother and the legal father may rebut the presumption of legitimacy that arises when a child is born during a marriage). In order for a third party to have standing to rebut this presumption, there must first have been a "judicial determination arising from a proceeding between the husband and the wife that declares the child is not the product of the marriage." *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 306; 805 NW2d 226 (2011). Letters from friends and family cannot rebut the presumption of legitimacy. In this case, even if blood test results revealed a 99.99% probability that he is the biological father, plaintiff still would not have standing to bring a paternity action absent such a prior judicial determination. *Aichele v Hodge*, 259 Mich App 146, 148, 162; 673 NW2d 452 (2003). Unless and until defendant and her husband ask a court to declare that the child was born out of wedlock, plaintiff lacks standing to claim paternity under the Paternity Act. *Pecoraro*, 291 Mich App at 313.[3] Defendant and her husband have not sought such a judicial declaration; therefore, the trial court was

[3] In *Pecoraro*, the birth mother told the plaintiff that he was the father of a child born during their relationship, while she was married to another man, DNA confirmed his paternity, and a New York court issued an order of filiation declaring him the father of the child that was subsequently enforced by a Wayne Circuit Court. On appeal from the circuit court's decision, this Court found that the plaintiff lacked standing under the Paternity Act because the mother and her husband had not asked a court to declare that the child was born out of wedlock.

correct in determining that plaintiff lacks standing to pursue a remedy under the Paternity Act.

The trial court also correctly denied plaintiff's request for discovery. Because plaintiff does not have standing to *bring* an action under the Paternity Act, he is not entitled to discovery to assist in *developing* a paternity claim.[4] Even if the court had inexplicably allowed discovery, there was no information plaintiff could have discovered through the questions he proposed that would have conferred standing absent a prior judicial determination that the child was not the issue of defendant's marriage.[5]

Plaintiff also argues that the court should vacate or modify defendant's judgment of divorce to address the paternity issue. Plaintiff contends that if defendant knew she was pregnant at the time of her divorce and failed to acknowledge as much to the court, she perpetrated a fraud on the court and the court should vacate the judgment. Alternatively, plaintiff argues that if the court could not address paternity because defendant did not know she was pregnant, the court should address the issue now and modify the judgment accordingly. We disagree.

In support of his argument that the judgment of divorce should be vacated as a fraud on the court, plaintiff relies on *Allen v Allen*, 341 Mich 543; 67 NW2d 805 (1954), and

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[4] It is true, as the dissent notes, that the majority did not provide authority for its conclusion that because plaintiff lacked standing he was not entitled to discovery. It is axiomatic.

[5] The dissent considers the "controlling consideration" to be "whether the legal father was in fact 'incapable of procreation' at the time of the child's conception." As *Aichele* and *Pecoraro* clearly illustrate, however, biological fatherhood is not the dispositive issue. Regardless of whether defendant's husband had a vasectomy after the birth of their third child, under Michigan law he is the legal father of the child at issue in the instant case and, for purposes of the Paternity Act, remains so until he and the mother seek a judicial determination declaring otherwise.

DeHaan v DeHaan, 348 Mich 199; 82 NW2d 432 (1957). In both *Allen* and *DeHaan*, the plaintiff wives became pregnant while separated from their husbands. The courts set aside their judgments of divorce on the basis of fraud. The law under which the Court decided these cases called for the granting of interlocutory decrees of divorce that would become final after a specified period. See *Young v David Young*, 342 Mich 505, 506; 70 NW2d 730 (1955). The marital relationship between the parties did not end until the interlocutory decree became final, and a plaintiff's misconduct during that interlocutory period resulted in his or her loss of the right to an absolute divorce decree. *Linn v Linn*, 341 Mich 668, 673; 69 NW2d 147 (1955); *Curtis v Curtis*, 330 Mich 63, 66; 46 NW2d 460 (1951). Thus at the time *Allen* and *DeHaan* were decided, "a party's marital misconduct was an absolute bar to that party's ability to obtain a divorce. Had the trial court known of plaintiff's misconduct, by law it would have been powerless to grant the divorce." *Rogoski v City of Muskegon*, 107 Mich App 730, 737 n 3; 309 NW2d 718 (1981).

Substantial changes in divorce law since the 1950s render those cases inapplicable to the instant case. But even if *Allen* and *DeHaan* were applicable, plaintiff would not have standing to invoke them because, unlike *Allen* and *DeHaan*, plaintiff was not a party to the instant defendant's divorce.[6] With regard to modifying the judgment of divorce to address the paternity of the child, plaintiff does not have standing to request the court to modify a divorce to which he is not a party. *Berg v Berg*, 336 Mich 284, 288; 57 NW2d 889 (1953) ("[T]he husband and wife are the only parties to be recognized in a divorce case.").

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[6] The petitioners in *Allen* were actually the trustee of the deceased husband's estate and two heirs-at-law whom the court allowed to join.

Finally, plaintiff argues that defendant's judgment of divorce provided for the custody and care of some of her children but not for the child with whom she was then pregnant. Plaintiff argues that this is tantamount to a judicial determination that the child was not issue of the marriage, which suffices to confer standing under the Paternity Act. We disagree.

In support of his argument to vacate defendant's judgment of divorce, plaintiff cites *Afshar v Zamarron*, 209 Mich App 86; 530 NW2d 490 (1995). Afshar claimed to be the biological father of a daughter conceived and born to Zamarron while she was married to another man. The lower court dismissed Afshar's action for lack of standing. This Court confirmed on appeal that a putative father has standing under the Paternity Act only when a child has been born out of wedlock as defined by the act and also stated that "a divorce judgment that is specific with regard to the question of custody and support of one minor child of the marriage and that is silent with regard to another child may, under appropriate circumstances, be deemed to have determined the issue of paternity." *Id*. at 91-92. *Afshar* may be distinguished from the instant case, however, because in *Afshar*, both Zamarron and her husband had acknowledged in their divorce proceedings that Zamarron's daughter was not issue of their marriage. This mutual acknowledgment by mother and presumed father in the context of judicial proceedings was critical to this Court's conclusion that the determination that the child was not issue of the marriage was implicit in the judgment of divorce.[7] In the instant case, as has been

[7] The dissent says "the controlling consideration is not whether the parties to the divorce proceeding expressly made the court aware of the fact that the child was not the issue of the marriage." This is simply untrue. That is precisely the consideration that allowed this Court to conclude in *Afshar* that the determination that the child was not the

repeatedly stated, neither defendant nor the child's legal father has sought to rebut the presumption of the child's legitimacy.

The dissent finds it notable that "[a]t a time when too many fathers are running *from* their parental responsibilities, plaintiff in this case is running *toward* his." This echoes a sentiment expressed nearly a decade ago by this Court in *Spielmaker v Lee*, 205 Mich App, 51; 517 NW2d 558 (1994). In *Spielmaker*, this Court determined that the putative father of a child born two months after the mother's marriage to another man did not have standing under the Paternity Act because the mother was not "not married" during the entire time from conception to birth, and therefore the woman's husband was the child's legal father. *Id*. at 58. The panel observed that "at a time when much criticism is leveled at 'deadbeat dads' who fail to assume responsibility for their children . . . we are faced with a father

issue of the marriage was implicit in the judgment of divorce. The fact that both the mother and the presumed father acknowledged to the court that the child was not issue of the marriage was a necessary prerequisite for the plaintiff to acquire standing under the Paternity Act. *Id*. at 92. The dissent further tries to minimize the crucial significance of the mother and presumed father's admissions by asserting that *Afshar* stands for the proposition that "a biological father could have standing under the Paternity Act where . . . the divorce judgment was specific as to the paternity of one child and silent as to the paternity of another child" and could therefore be a determination that the unmentioned child was not issue of the marriage. What the Court actually held was that this is so "under appropriate circumstances." *Id*. at 91-92. And *Afshar* "presents an example of such circumstances" because both the mother and the presumed father had acknowledged to the court that the child was not issue of the marriage. *Id*. In the instant case, the dissent would construe the court's silence regarding the child at issue as "an affirmative finding" that the child was not issue of the marriage. Presumably, the silence of the parties to the divorce would be construed as a tacit request for the court to declare that the child was born out of wedlock, since such is required before plaintiff could have standing under the Paternity Act. This is illogical.

who wishes to do precisely that yet we are obligated to deny him the opportunity." *Id*. at 59. Rather than contort the law, however, the *Spielmaker* panel did "that which [they were] obligated to do, namely interpret[ed] a statute and appl[ied] the statute as written and in light of the precedent set by the Supreme Court." *Id*. The panel expressed its dislike for the result and urged the Legislature to modify the statute. *Id*. at 60.

The Legislature has in fact provided a measure of relief for putative fathers by allowing them to bring paternity claims in certain situations. As mentioned, the lower court dismissed plaintiff's case for lack of standing just weeks before the Revocation of Paternity Act became effective. Plaintiff filed a separate lawsuit under this new act, and that case is still pending. We have not been called upon to decide whether plaintiff has standing under the Revocation of Paternity Act. Rather, this case concerns whether plaintiff has standing under the Paternity Act. The majority holds the trial court correctly determined that he does not.

Affirmed.

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

GLEICHER, J. (*concurring*). I fully concur with the majority opinion and write separately only to respectfully respond to the dissent.

The dissent laments that "[a]t a time when too many fathers are running *from* their parental responsibilities, plaintiff in this case is running *toward* his." Plaintiff's virtue aside, an insurmountable obstacle blocks his path to paternity: the minor child already *has* a father. That father is Adam Bickle. Adam and Emily Bickle legally married before the child was born. Their marriage created a presumption that Adam fathered the

child. Neither Emily nor Adam ever attempted to rebut this presumption. And no court has determined that Adam is not the child's father. These facts resolve this case, regardless of plaintiff's noble intentions.

Emily and Adam have divorced each other twice and married thrice. They have three children other than the involved minor. Relying on statements attributed to Emily Bickle regarding the date of the involved minor child's conception, the dissent would hold that "the presumption of Adam Bickle's paternity of the child was sufficiently and effectively rebutted in a prior legal proceeding between defendant and Mr. Bickle to require further proceedings in the trial court." That legal proceeding, the dissent asserts, was the Bickle's second divorce. The dissent theorizes that Emily conceived the involved child as early as March 27, 2011, less than two weeks before the *pro confesso* divorce hearing. According to the dissent, Emily may have known that she was pregnant with plaintiff's child when she testified at the hearing, and may have committed a fraud on the court by not revealing her pregnancy.[1] The dissent posits that because Adam had undergone a vasectomy, Emily's failure to disclose the pregnancy at the divorce hearing affords plaintiff with standing to sue under the Paternity Act.

The dissent misapprehends the law. To have standing to file a paternity action, a plaintiff must "allege that a 'court has determined' that the child was not the issue of the marriage." *Girard v Wagenmaker*, 437 Mich 231,

[1] Most home pregnancy tests are not accurate until more than two weeks after ovulation, rendering it highly unlikely that Emily knew she was pregnant by the April 8, 2011 divorce hearing even if she had conceived on the earliest date postulated by the dissent, March 27, 2011. See *Home pregnancy tests: can you trust the results?*, <http://www.mayoclinic.com/health/home-pregnancy-tests/PR00100> (accessed July 9, 2013).

244; 470 NW2d 372 (1991). "To overcome the strong presumption of the legitimacy of a child born or conceived during a marriage, a court determination must settle with finality a controversy regarding the child's legitimacy." *Barnes v Jeudevine*, 475 Mich 696, 704; 718 NW2d 311 (2006). No court has made any such determination. Emily's post-divorce statements concerning the date of conception are not a substitute for a prior legal proceeding. And Adam's vasectomy (even if he actually had one) possesses no relevance whatsoever.[2] Neither Emily nor Adam ever sought to rebut the presumption that Adam is the child's father. Accordingly, plaintiff lacks standing to do so.

Contrary to the dissent, the facts in this case are not "unique" and do not counsel a creative reinterpretation of the Paternity Act. Plaintiff's story merely echoes *Barnes*, *Girard* and countless other cases: the spurned lover of a married woman seeks a declaration that he fathered the child born of the affair. As the Supreme

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[2] The "evidence" of Adam's vasectomy is a statement contained in a letter written by Emily's mother. Needless to say, this "evidence" is pure hearsay. Moreover, even if Adam actually had a vasectomy, he nevertheless could have impregnated Emily. Vasectomy has a failure rate of less than one percent if performed by an experienced doctor, but tests are required afterward to ensure the effectiveness of the procedure. *Vasectomy risks and benefits: what every man should know*, <http://men.webmd.com/features/vasectomy-risks-benefits> (accessed July 9, 2013). In *Foster v Eichler*, 939 SW2d 40 (Mo Ct App, 1997), for example, a father contesting paternity asserted that he had undergone a vasectomy and had three postoperative semen analyses negative for sperm, two before and one after the child's birth. Yet a DNA test identified him as the child's father, which sufficed to support the trial court's paternity ruling.

Moreover, the irrelevance of Adam's alleged vasectomy is not a "sweeping[] assert[ion]" meant to negate the ability of a party with standing to rebut the presumption of legitimacy with evidence of an "incapability of procreation." The dissent misses the point that this ground could have been raised by Adam or Emily, but not by plaintiff.

Court has repeatedly explained, when married parents choose not to explore the paternity of a child born during a marriage, a putative father has no right to meddle with their decision. Children born during a marriage benefit from a "legal regime" that presumes their legitimacy. *In re CAW*, 469 Mich 192, 199; 665 NW2d 475 (2003). "It is likely that these values, rather than failure to consider the plight of putative fathers who wish to invade marriages to assert paternity claims, motivated the drafters of the rules and statutes under consideration." *Id*. at 199-200. Make no mistake, plaintiff seeks to invade a marriage and the dissent would provide him the legal tools to accomplish that invasion.

The dissent asserts that plaintiff's presentation of "clear and convincing evidence" that Adam did not father the child should open the courthouse door to discovery in plaintiff's paternity action. The dissent is incorrect. Plaintiff has no standing to challenge the validity of the Bickles' earlier divorce regardless of any "evidence" that plaintiff may amass. "[T]his Court has been loath to invalidate divorce judgments on the urgings of third parties when neither spouse challenged the validity of the divorce in a direct appeal." *Estes v Titus*, 481 Mich 573, 588; 751 NW2d 493 (2008). Nor is plaintiff empowered to launch an inquisition into whether Emily misrepresented at the *pro confesso* hearing that she was not pregnant: "[T]he Court has refused to invalidate divorces on the basis of third-party allegations of nonjurisdictional irregularities in the divorce proceedings." *Id*. In other words, the validity of the Bickles' divorce is the Bickles' business, not that of plaintiff. And by making a "prior proceeding" a prerequisite to a paternity action, "the Legislature has essentially limited the scope of parties who can rebut the presumption of legitimacy to those capable of address-

ing the issue . . .—the mother and the legal father." *In re KH*, 469 Mich 621, 635; 677 NW2d 800 (2004).

The dissent suggests an exploration of the *pro confesso* divorce proceedings to determine Emily's veracity but provides no details concerning the appropriate scope of such discovery. Should Emily be forced to submit to a polygraph regarding her awareness of the exact date of conception? And why stop there? If plaintiff may explore whether Emily made a misrepresentation, why not evaluate Adam's fertility by ordering him to produce semen for a sperm analysis? Of course, the child would be compelled to undergo a DNA evaluation. Emily's medical records would be fair game for disclosure, as would Adam's. Perhaps expert witnesses could be engaged to opine regarding the date of conception, the accuracy of home pregnancy tests, and the success rate of vasectomies. The specter of an invaded marriage has arrived.

Adam has chosen not to test or renounce his paternity of the involved child. Emily has elected to consider Adam the child's father. This married couple is raising three other children who undoubtedly consider the fourth child their sibling. Adam is the only father the child has ever known. That a court may disrupt this family by issuing discovery orders or ultimately removing the child from his home is nothing short of chilling. It is precisely this scenario that the Legislature intended to avoid by limiting the parties that may challenge a child's paternity to the child's legal parents. Thus, as the majority opinion correctly concluded, plaintiff lacks standing regardless of Emily's statements, the date of her conception, Adam's putative vasectomy, or the fruits of any discovery.

The Legislature and our Supreme Court have placed beyond debate that only a mother or a legal father has

standing to rebut the presumption of paternity. By resting its decision on this tenet, the trial court correctly resolved this case.

BOONSTRA, J. (*dissenting*). At a time when too many fathers are running *from* their parental responsibilities, plaintiff in this case is running *toward* his.[1] He seeks to affirm, under the Paternity Act, MCL 722.711 *et seq*., his parentage of the minor child. Specifically, he requests genetic testing to establish paternity, joint physical custody of the child (including specified parenting time for plaintiff and defendant), and a determination of support in accordance with the Michigan Child Support Formula.

The trial court dismissed plaintiff's complaint for lack of standing, and the majority affirms. I agree with the majority generally as to the standard for seeking relief under the Paternity Act. However, I disagree, on the unique facts of this case and the current record, that plaintiff lacks standing under the Paternity Act to seek to affirm his parentage of the minor child. More specifically, I believe that the presumption of Adam Bickle's paternity of the child was sufficiently and effectively rebutted in a prior legal proceeding between defendant and Mr. Bickle to require further proceedings in the trial court.[2] I would, however, refrain from making a

[1] The majority cites *Spielmaker v Lee*, 205 Mich App 51; 517 NW2d 558 (1994), as echoing a similar sentiment, but as nonetheless interpreting and applying the law as written. Notably, however, *Spielmaker* did not present the issues raised in this appeal, or address the same statutory language or pertinent case law. With due respect to the majority, my analysis and conclusion do not "contort the law," but rather interpret and apply it in a new and unusual factual context.

[2] With due respect to the concurrence, its assertion that this conclusion of the dissent "rel[ies] on statements attributed to Emily Bickle regarding the date of the involved minor child's conception" is

conclusive finding of whether plaintiff rebutted the presumption without the development of a further evidentiary record in the trial court. Accordingly, I dissent from the majority opinion, and would reverse and remand for further proceedings consistent with the reasoning set forth below.

I. BACKGROUND

The facts of this case are unusual and unique.[3] Defendant is now married for the third time to Mr.

simply false. As the discerning reader no doubt will recognize, the concurrence hyperbolically mischaracterizes the dissent's positions in many respects, and then challenges positions that the dissent has not taken, while ignoring those that it has. But this familiar straw-man technique merely serves to substitute misleading rhetorical flair for the intellectually honest debate for which the important issues raised on this appeal cry out, relative to the proper interpretation of the Paternity Act and the case law.

[3] To further its purposes, the concurrence even disputes that the facts of this case are unique, and posits that they "merely echo[]" those of other cases. Really? As the concurrence acknowledges, defendant and Mr. Bickle have "divorced each other twice and married thrice." Between the Bickles' second divorce and third marriage, defendant became engaged to plaintiff. She apparently was carrying plaintiff's child. Mr. Bickle reportedly had a vasectomy years prior to the conception of that child, the fact of which the Bickles were well aware at the time of their second divorce. Before the child's birth, defendant broke off the engagement with plaintiff and instead again remarried Mr. Bickle, just four months after she had divorced Mr. Bickle (for the second time). Defendant's own mother has observed that "[u]nplanned babies seem to encourage unplanned marriages to Adam Bickle which also brings dependency on the welfare system." Defendant denied her own mother (her children's grandmother) further contact with defendant's children. For reasons that are obvious, the concurrence does not explain which of the cited or uncited cases purportedly reflect facts akin to these, or similarly present a situation in which intervening vasectomies, divorces, engagements, and remarriages—in contrast to an out-of-wedlock pregnancy occurring during a single, continuous, procreative marriage—occurred during the course of a pregnancy. The concurrence thus ignores reality to impugn plaintiff as "seek[ing] to invade a marriage" and to falsely

Bickle. Their second divorce was final on April 8, 2011. Prior to the Bickles' second divorce judgment, plaintiff and defendant entered into a relationship that plaintiff maintains resulted in the conception and subsequent birth of the minor child at issue in this case, with whom plaintiff seeks to have a father-son relationship. On April 11, 2011, three days after the final hearing in defendant's second divorce proceeding with Mr. Bickle, defendant told her mother that she was pregnant with plaintiff's child. Defendant also advised others that she was pregnant with plaintiff's child on the basis of the "confirmation" supplied by a pregnancy test taken by plaintiff in the bathroom of a Meijer's store. The date of that pregnancy test is not reflected in the current record, nor is there any evidence in the record as to when defendant began to suspect that she might be pregnant.

Record evidence reflects that Mr. Bickle had a vasectomy after the birth of defendant's third unplanned child in 2009 (prior to his second divorce from defendant), and that he therefore likely could not have conceived the minor child at issue.[4] Plaintiff has sought paternity testing, but it has not been conducted because of the determination below that plaintiff lacked standing under the Paternity Act. Although the evidence suggests that defendant has openly acknowledged plaintiff's paternity of the child, defendant has formally

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characterize this dissent as seeking to "provide him the tools to accomplish that invasion." The law does not require that we wear such blinders.

[4] The concurrence seeks to marginalize the evidence of Mr. Bickle's vasectomy as "pure hearsay," and thus even characterizes the vasectomy as a "putative" one. Of course, no one has disputed the fact of the vasectomy, the concurrence's characterizations notwithstanding. The concurrence then pads its blindfold by inconsistently denying the very discovery that would definitively answer the question that the concurrence clearly wishes to leave unanswered.

neither admitted nor denied plaintiff's claim of paternity in the course of this litigation.[5]

After defendant's second divorce from Mr. Bickle in April 2011, plaintiff and defendant became engaged, and planned to be married. That marriage did not, however, occur. Instead, defendant and Mr. Bickle married, for a third time, in August 2011. The minor child was born on November 16, 2011, while defendant and Mr. Bickle were again married. The child was born five weeks premature.

Plaintiff's complaint initially alleged—on information and belief—that the minor child was conceived after the April 8, 2011 divorce judgment, and while plaintiff and defendant were engaged. Plaintiff now maintains, however, that the conception occurred prior to the April 8, 2011 divorce judgment, as in fact now appears likely.

It appears that defendant may also have shifted her position with regard to the date of conception. The April 8, 2011 Default Judgment of Divorce, which was prepared by defendant's counsel and entered at defendant's request, provides in part that defendant shall have primary physical custody of the parties' three minor children (not including the then-unborn child at issue in this case), and that defendant and Mr. Bickle shall have joint legal custody of those three minor children. The Judgment of Divorce identifies those three other minor children by name and birthdate, and expressly describes them as "*the* minor children of the parties." (Emphasis added.) This language reflects and constitutes a representation and finding that there were *no other* children of the marriage. See *Afshar v Zamarron*, 209 Mich App 86, 92; 530 NW2d 490 (1995). The parties agree that the Judgment of

[5] In lieu of answering plaintiff's complaint in this matter, defendant filed a motion to dismiss pursuant to MCR 2.116(C)(5).

Divorce is silent with respect to any other children, including any conception of, or pregnancy with, the minor child here at issue. The Judgment of Divorce reflects that it was premised in part on defendant's "testimony taken in open Court," which testimony is not before us and appears not to have been before the trial court below. We therefore do not currently have a record of the representations, if any, by defendant at the April 8, 2011 hearing, as to any pregnancy, or lack thereof, as of that date.[6]

Also not before us is evidence of defendant's current position relative to the date of conception. However, plaintiff's counsel has represented, as an officer of this Court, that defendant has submitted evidence in a related proceeding that the conception could only have occurred prior to the April 8, 2011 Judgment of Divorce and, in fact, that the window of conception was from March 27, 2011 to April 3, 2011. Also not in the current record is any evidence of whether defendant knew of, or had reason to suspect, her pregnancy with the child at issue as of the date of the divorce judgment.

II. STANDARD OF REVIEW

Whether a party has legal standing to assert a claim is a question of law which this Court reviews de novo.

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[6] MCL 552.45 provides that every complaint for divorce "shall set forth the names and ages of all children of the marriage." Generally, the proofs taken by the trial court at a divorce hearing should include a determination of whether any of the parties is pregnant at the time of the hearing. See *Tyler v Tyler*, 348 Mich 169, 172; 82 NW2d 448 (1957) (holding that the trial court was empowered to vacate a *pro confesso* divorce decree when it became aware that the complainant was pregnant at the time the default judgment was entered and no provision had been made for the child in the judgment); *Allen v Allen*, 341 Mich 543, 551; 67 NW2d 805 (1954) (holding that the complainant's failure to inform the trial court of her pregnancy by a man other than her husband was "a fraud on the court" that justified setting aside the divorce decree).

Heltzel v Heltzel, 248 Mich App 1, 28; 638 NW2d 123 (2001). This Court also reviews de novo a trial court's ruling on a motion for summary disposition, including one brought pursuant to MCR 2.116(C)(5). *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003). " 'In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties.' " *Id*., quoting *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000). Our de novo review requires drawing all inferences in the light most favorable to the plaintiff, and then determining if the plaintiff established facts that would give him standing to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000).

III. HISTORICAL BACKGROUND

As our United States Supreme Court has recognized, the presumption of legitimacy, as well as its rebuttable nature, have long been recognized:

> The presumption of legitimacy was a fundamental principle of the common law. H. Nicholas, Adulturine Bastardy 1 (1836). *Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period.* (citing Bracton, De Legibus et Consuetudinibus Angliae, bk i, ch 9, p 6; bk ii, ch 29, p 63, ch 32, p 70 (1569)). [*Michael H v Gerald D*, 491 US 110, 124; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (emphasis added).]

Subsequent to Bracton's description (in 1569) of the nature of the proofs required to rebut the presumption of legitimacy, Lord Mansfield's Rule was announced (as dicta in an ejectment action) in *Goodright v Moss*, 2 Cowp 591-594; 98 Eng Rep 1257-1258 (1777). See *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977).

Lord Manfield's Rule[7] was an evidentiary rule prohibiting a husband and wife from testifying about "nonaccess" to prove the husband's lack of paternity of a child born during the marriage. That rule was "judicially incorporated into the law of this state in *Egbert v Greenwalt*, 44 Mich 245, 248; 6 NW 654; 38 Am Rep 260 (1880)." *Serafin*, 401 Mich at 633. Nearly a century later, our Supreme Court abrogated Lord Mansfield's Rule in *Serafin*. *Id*. at 634 ("We agree that the rule has outlived the policy reasons initially advanced to support it and, finding none others persuasive, we hold that a husband and wife may testify concerning nonaccess to each other."). The Court reiterated, however, that the presumption of legitimacy remained "viable and strong," as well as rebuttable, and held that "clear and convincing evidence" was required to rebut the presumption. *Id*. at 636.

I note, parenthetically, that even the restrictions of Lord Manfield's Rule did not address or undermine the alternative basis traditionally recognized for rebutting the presumption of legitimacy, i.e., "proof that a husband was incapable of procreation." *Michael H*, 491 US at 124 (indirectly citing Bracton). Since the Court in *Serafin* reiterated the rebuttable nature of the pre-

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[7] Quoting from Goodright, 2 Cowp at 592-594, the *Serafin* court, 401 Mich at 633, set forth Lord Mansfield's Rule:

> "[T]he law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage.
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> * * *
>
> As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality, and policy that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious."

sumption, that basis for rebutting the presumption not only has always been a viable one, but it remains so. In addition to abrogating Lord Manfield's Rule, however, the Court in *Serafin* established a "clear and convincing" standard of proof for rebutting the presumption; therefore, any such rebuttal of the presumption by way of evidence that a husband was "incapable of procreation" is subject to *Serafin's* "clear and convincing" standard of proof.

While these principles reflect the presumption of legitimacy and its rebuttable nature, they do not establish *who* is entitled to rebut the presumption, i.e., who has "standing" to contest paternity. The answer to that question instead requires our statutory interpretation of the Paternity Act itself. These long-standing principles nonetheless inform my analysis.

IV. STANDING

Our Supreme Court has stated that

> [t]he purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to "ensure sincere and vigorous advocacy." Thus, the standing inquiry focuses on whether a litigant "is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." [*Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (citations omitted).]

A real party in interest is the one who is vested with the right of action on a given claim. *Id*., citing *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 96; 535 NW2d 529 (1995). " 'Standing does not address the ultimate merits of the substantive claims of the parties.' " *Id*. at 357, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995) (opinion by WEAVER, J.).

A plaintiff has standing "whenever there is a legal cause of action." *Lansing Sch Ed Ass'n*, 487 Mich at 372. "Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing." *Id*. Standing may be found if "the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id*.

"A putative father may maintain an action under the Paternity Act only if the child is born out of wedlock." *Afshar*, 209 Mich App at 90. The act defines "child born out of wedlock" as either (1) "a child begotten and born to a woman who was not married from the conception to the date of birth of the child"; or (2) "*a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.*" MCL 722.711(a) (emphasis added). The first prong of this definition is not applicable in this case; rather, plaintiff has standing, if at all, under the second prong.

V. APPLICATION

In applying these principles to the circumstances before us, I conclude that plaintiff likely has standing under the Paternity Act, and would reverse and remand for further proceedings relative to the question of standing. Specifically, I would remand for discovery and an evidentiary *Serafin* hearing to determine: (a) the date of conception of the minor child; (b) whether Mr. Bickle was "incapable of procreation" at that time; (c) defendant's and Mr. Bickle's knowledge of that incapability; (d) the representations to and findings of the trial court in the second divorce proceeding between defendant and Mr. Bickle; and (e) appropriate testing regard-

ing the actual paternity of the child.[8] Further, if those proceedings demonstrate that Mr. Bickle could not have fathered the child in question and/or that defendant was less than fully forthright with the trial court in the divorce proceeding relative to her pregnancy or possible pregnancy, then plaintiff should be found to have standing under the Paternity Act, and his claim should be allowed to proceed.

A. PRIOR JUDICIAL DETERMINATION

Our Supreme Court determined in *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991), that the judicial determination referred to in the statute was a *prior* determination: "For a putative father to be able to file a proper complaint in a circuit court, . . . a circuit court must have made a determination that the child

[8] The majority concludes that because plaintiff does not (in the majority's view) have standing to bring an action under the Paternity Act, he did not have standing to conduct discovery. The majority cites no authority for this conclusion (apart from a bare reference to the discovery subchapter of the Michigan Court Rules), but instead deems it "axiomatic." I would find, to the contrary, that in determining whether plaintiff has standing, plaintiff is first entitled to discovery on the issues that relate to whether he has standing. Generally, a motion for summary disposition is premature when discovery on a disputed issue has not been completed, unless there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Here, I would find that discovery on issues related to standing would have at least a reasonable chance of resulting in factual support for plaintiff, in light of *Afshar* and Justice MARKMAN'S reasoning in *Barnes v Jeudevine*, 475 Mich 696, 714-727; 718 NW2d 311 (2006) (MARKMAN, J., dissenting). As outlined herein, those issues include the date of conception of the minor child, Mr. Bickle's incapability of procreation as of that date, defendant's and Mr. Bickle's knowledge of that incapability, the representations to, and findings of, the trial court in the divorce proceeding between defendant and Mr. Bickle, and appropriate testing to determine the paternity of the child.

was not the issue of the *marriage at the time of filing the complaint*." *Id*. at 242-243. The requirement of a prior judicial determination was recently reaffirmed in *Pecoraro v Rostagno-Wallat*, 291 Mich App 303; 805 NW2d 226 (2011).[9]

I conclude, under the unique circumstances presented, that plaintiff should be afforded the opportunity to demonstrate that defendant's second divorce judgment from Mr. Bickle satisfies this requirement.[10] The record evidence to date reflects that (a) Mr. Bickle had a vasectomy after the birth of defendant's third child in 2009, and he therefore likely was "incapable of procreation" at the time of the conception of the minor child in question;[11] (b) the trial court in the divorce proceed-

[9] The majority relies on *Pecoraro* in maintaining that plaintiff lacks standing "until defendant and her husband ask a court to declare that the child was born out of wedlock." But there are two problems with this expansive reading of *Pecoraro*. First, while *Pecoraro* indeed contains language suggesting that the plaintiff in that case lacked standing because "[the mother] and [her husband] have not asked a court to declare that the child was born out of wedlock," *Pecoraro*, 291 Mich App at 313, the majority's literal reading of that language would require that the mother and her husband have acted *jointly* to request a declaration as to paternity. Second, and more importantly, the point of *Pecoraro* was that the prior proceeding (which there was brought in a New York court for an order of filiation, and to which the legal father was not a party) was not a proceeding *between* the mother and the legal father. It therefore did not satisfy *Girard's* requirement of a prior judicial proceeding between the mother and legal father. Because the proceeding was between defendant and Mr. Bickle, the Bickles' second divorce proceeding does not suffer that deficiency. *Pecoraro* is therefore inapposite.

[10] Notwithstanding the clarity of this language, the concurrence chooses to distort the dissent as if it somehow "misapprehends the law" regarding the prior judicial determination requirement, and is instead seeking a "substitute for a prior legal proceeding." The plain language of the dissent demonstrates otherwise.

[11] The concurrence goes so far as to sweepingly assert that Mr. Bickle's likely incapability of procreation "possesses no relevance whatsoever." This flies in the face of the indisputable fact, as noted, that "incapability

ing made the affirmative determination that three specifically identified children were "the" children of defendant's marriage to Mr. Bickle; (c) this determination was made on the basis of representations by defendant; (d) those representations were not denied by Mr. Bickle; and (e) that determination constitutes a further affirmative determination that there were no other children, born or unborn, of the marriage.[12]

B. AFSHAR v ZAMARRON

Of all of the cases cited by either the majority, the concurrence, or this dissent, only *Afshar* analogously involved the assessment of a putative father's standing under the Paternity Act where a prior judicial proceeding between the mother and the legal father had in fact made a determination of the issue of the marriage. In *Afshar*, this Court recognized that a biological father could have standing under the Paternity Act when, as

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of procreation" is one of the two bases for rebutting the presumption of legitimacy that have been recognized in the law from time immemorial, and the one that retained its viability even while Lord Mansfield's Rule prevailed.

[12] In addition to *Pecoraro*, the majority relies on *People v Zajaczkowski*, 293 Mich App 370, 378; 810 NW2d 627 (2011), vacated 493 Mich 6 (2012), and *Aichele*, 259 Mich App at 148, 162; neither is persuasive of the majority's position. Not only did *Zajaczkowski* involve a criminal proceeding, and not only has it been vacated by our Supreme Court, but the prior judicial proceeding in that case had affirmatively determined that the defendant *was* the issue of the marriage in question. That determination stands in stark contrast to the Bickles' second divorce judgment, which expressly did *not* include the unborn child at issue as among "the" children of the Bickles' marriage. The majority's reliance on *Aichele* is also less than compelling. Not only did *Aichele* assess standing under the Child Custody Act, MCL 722.21 *et seq*, rather than the Paternity Act, but its holding importantly was premised on the absence of *any* prior judicial proceeding whatsoever regarding a determination of paternity. It therefore again stands in stark contrast to this case, where the Bickles' second divorce judgment made an express determination of "the" children of the marriage, and the unborn child was not included in that description.

here, the divorce judgment was specific as to the paternity of one child and silent as to the paternity of another child, and that the divorce judgment may be deemed—in a proceeding brought by the biological father—to be a determination that the unmentioned child was not the issue of the marriage. *Afshar*, 209 Mich App at 92. Similarly, under the unique circumstances of this case, I conclude that the divorce judgment between defendant and Mr. Bickle may properly be deemed a determination that the child in question was not the issue of their marriage.

The majority distinguishes *Afshar* on the ground that the mother and legal father in that case had acknowledged that the unmentioned child was not the issue of the marriage, and that the trial court in the divorce proceedings was expressly aware of the child and of that acknowledgment. See *id*. Indisputably, *Afshar* is not on all fours with this case; however, it is difficult to imagine a case which would be, and I find *Afshar* nonetheless instructive. To me, the controlling consideration is not whether the parties to the divorce proceeding expressly made the court aware of the fact that the child was not the issue of the marriage. To place controlling weight on that factor would, in my mind, potentially reward a lack of candor to the tribunal and exalt form over substance.

Rather, the controlling consideration to me is whether the legal father was in fact "incapable of procreation" at the time of the child's conception, coupled with the parties' knowledge and representations at the time of the prior divorce proceeding. In this case, the evidence reflects that Mr. Bickle had a vasectomy after the 2009 birth of another child and therefore likely was "incapable of procreation" at the time of conception of the minor child in question. Also relevant

to that consideration, as noted, is whether the parties to the divorce proceeding were aware of that incapability at the time of their representations to the court during that proceeding. The evidence here suggests that defendant likely was aware of Mr. Bickle's incapability at the time of her representations to the court in the divorce proceeding, and it was on the basis of those representations that the court affirmatively found that three specifically identified children (not including the child at issue) were "the" issue of the marriage between defendant and Mr. Bickle. Coupled with the fact of the vasectomy itself (of which Mr. Bickle undoubtedly also had knowledge), Mr. Bickle further confirmed that child's status as "non-issue" of the marriage by failing to refute defendant's representations to the court in the divorce proceeding. Accordingly, defendant's and Mr. Bickle's knowledge—at the time of their divorce—of Mr. Bickle's vasectomy and likely incapability of procreation effectively equates to the stipulation in *Afshar* that the child in question was not the issue of the marriage.[13]

C. BARNES v JEUDEVINE

I also agree with the logic of Justice MARKMAN's observation in *Barnes v Jeudevine*, 475 Mich 696, 718; 718 NW2d 311 (2006) (MARKMAN, J., dissenting): "The trial court thus concluded, not unreasonably, that no children were born of the marriage of Charles and [the] defendant. As such, the child later born to defendant must, for purposes of the Paternity Act, MCL 722.711(a), have necessarily been a 'child born out of wedlock.' " Similarly, in this case, the trial court's con-

[13] Amidst all its hyperbole and distortion, the concurrence nowhere addresses the substance of this or any other of the dissent's conclusions; nor does the majority.

clusion in granting defendant her second divorce judgment from Mr. Bickle, that the three children specifically identified in the divorce judgment were "the" children of the marriage, necessarily means that any other child later born to defendant was a "child born out of wedlock" under the second prong of the statutory definition. This is particularly true given Mr. Bickle's likely incapability of procreation, and defendant's and Mr. Bickle's knowledge thereof at the time of their second divorce judgment.

I recognize, of course, that Justice MARKMAN's observation was made in the dissent in *Barnes*. However, I also find *Barnes* to be distinguishable and, therefore, its majority opinion unpersuasive and nonbinding, in at least two important respects. First, the *Barnes* majority stressed the fact that "[t]he circuit court stated in the judgment of divorce merely that it *appeared* no children were born or expected of the marriage," and that under the clear and convincing evidence standard, "the court's statement that it *appeared* that no children were born or expected of the marriage is not a sufficient court determination that there was a child conceived during the marriage that was not an issue of the marriage." *Barnes*, 475 Mich at 706 (emphasis added). The same cannot be said in this case, because the trial court here affirmatively found three specific children to be "the" children of the marriage between defendant and Mr. Bickle, to the exclusion of any others.

Second, a critical factor exists here that did not exist in *Barnes*, i.e., there is evidence in this case that Mr. Bickle was "incapable of procreation" at the time of the conception of the minor child. Although I would remand for the development of further evidence regarding that factor, I find it hard to conceive of evidence that is more "clear and convincing" of whether a minor child could

be the issue of a marriage. In short, while the presumption of legitimacy remains strong, it fails when "common sense and reason are outraged by a holding that it abides." *Serafin*, 401 Mich at 639 (COLEMAN, J., concurring) (quotation marks and citation omitted).

D. KNOWLEDGE OF OR REASON TO SUSPECT PREGNANCY

I note parenthetically that my conclusion does not depend on defendant or Mr. Bickle having made misrepresentations to the trial court in the divorce proceeding.[14] That is, if Mr. Bickle indeed was incapable of procreation at the time of conception, and if defendant and Mr. Bickle had reason to know of his incapability at the time of the divorce, I would find that sufficient to deem the divorce judgment to have affirmatively found that the minor child in question was not the issue of the marriage, and thus to afford plaintiff standing, as noted above.

However, my conclusion would find further support in any evidence that might reflect that defendant knew of, or had reason to suspect at the time of her April 8, 2011 *pro confesso* hearing, that she was pregnant with the minor child in question. A complaint for divorce is required to identify the children of the marriage and to state "whether a party is pregnant." MCL 552.45; MCR 3.206(A)(5). Even if a party is not pregnant at the time she files her complaint for divorce, she is obliged to inform the trial court (in the divorce proceedings) of her pregnancy once she becomes aware of it. See *Allen*, 341 Mich at 551. Further, a trial court, even in the context of a default divorce proceeding, has a duty to make findings of fact, see *Koy v Koy*, 274 Mich App 653, 660; 735 NW2d 665 (2007), as well as provide for the care and

[14] Again, the concurrence premises its critique of the dissent on it supposedly saying the opposite of what it actually says.

support of the children of the marriage, *Remus v Remus*, 325 Mich 641, 643; 39 NW2d 211 (1949). To that end, courts routinely inquire into whether a party to a divorce is pregnant or has reason to believe she may be pregnant at the time of a *pro confesso* hearing, in order to satisfy these duties. See, e.g., *Allen*, 341 Mich at 551; *Tyler*, 348 Mich at 172; *DeHaan v DeHaan*, 348 Mich 199, 200; 82 NW2d 432 (1957); *Dep't of Social Servs v Carter*, 201 Mich App 643, 644; 506 NW2d 603 (1993).

In this case, this Court has the benefit of neither defendant's complaint for divorce nor a record of the proceedings before the trial court in the divorce action. Presumably, given the routine nature of the inquiries at a *pro confesso* hearing, the trial court made these inquiries of defendant, prior to granting the divorce judgment, including by inquiring into whether she was or may have been pregnant as of the April 8, 2011 hearing date. Although the record of that proceeding is not available to this Court, existing evidence does reflect defendant's knowledge of her pregnancy within no more than three days of her divorce judgment, and further suggests the possibility of her knowledge of, or reason to suspect, her pregnancy prior to the divorce judgment.

In my view, discovery as to defendant's knowledge and representations with regard to her pregnancy is potentially relevant to the question of plaintiff's standing. For example, if defendant did in fact allege or represent to the trial court, prior to its grant of divorce, that she was pregnant, then this case is even more definitively analogous to the circumstances of *Afshar* and its finding that "a divorce judgment that is specific with regard to the question of custody and support of one minor child of the marriage and that is silent with regard to another child may . . . be deemed to have determined the issue of paternity." *Afshar*, 209 Mich App at 91-92.

Alternatively, in the event that discovery were to reveal that defendant was not fully forthright in the divorce proceedings with regard to her pregnancy or possible pregnancy, then I believe that she should not be rewarded by a finding that, as a consequence, plaintiff lacks standing under the Paternity Act.[15] This does not require a finding that plaintiff, as a third-party to the divorce proceedings, has standing to challenge or to seek a modification of the divorce decree.[16] Rather, a lack of candor to the tribunal should serve to estop defendant from denying the accuracy of her representations to the trial court in the divorce proceedings. Under those circumstances, if shown, a representation that she was not pregnant thus may also essentially equate to the stipulation in *Afshar*, thereby deeming the divorce judgment to be a finding that the unborn child was not the issue of the marriage, and further supporting a finding that plaintiff has standing under the Paternity Act.

I therefore would further afford plaintiff a right of discovery into those issues relating to the divorce pro-

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[15] Our courts have set aside divorce judgments in the past because of fraud perpetrated on the court. See *Allen*, 341 Mich at 551; *DeHaan*, 348 Mich at 200; *Tyler*, 348 Mich at 172. Others faced with a lack of candor have relied on the doctrines of estoppel and unclean hands. See *Sands v Sands*, 192 Mich App 698, 704; 482 NW2d 203 (1992), aff'd, 442 Mich 30 (1993). Although the majority finds *Allen* and *DeHaan* to be "inapplicable on this issue" because of "substantial changes in divorce law since the 1950s," the majority does not identify those changes, or why those changes render the cases inapplicable. But in any event, plaintiff's standing under the Paternity Act does not require that the Bickles' second divorce judgment be set aside or modified. It need only be interpreted, according to its plain language, as identifying only three particular children (not including the unborn child at issue) as "the" children of the marriage.

[16] Again, the concurrence wrongly attacks the dissent for purportedly affording plaintiff standing to "challenge the validity of the Bickles' earlier divorce." The dissent, of course, does nothing of the kind.

ceeding, as they further may bear on the issue of plaintiff's standing, under the unique circumstances of this case and the Paternity Act. I reiterate, however, that if the evidence demonstrates that Mr. Bickle was incapable of procreation at the time of conception, and that defendant and Mr. Bickle had reason to know of his incapability at the time of the divorce, then I would find that evidence sufficient, without regard to whether defendant knew of or suspected her pregnancy as of the date of the divorce judgment, to deem the divorce judgment to have affirmatively found that the minor child in question was not the issue of the marriage, and thus to afford plaintiff standing.[17]

VI. CONCLUSION

The confluence of the above-discussed factors leads me to conclude that plaintiff likely has standing under the Paternity Act, and that he should be allowed to demonstrate his standing in further trial court proceedings on remand. Specifically, he should be allowed discovery and the opportunity to present proofs at a *Serafin* hearing relative to Mr. Bickle's incapability of procreation at the time of conception, as to defendant's and Mr. Bickle's knowledge of that incapability, and as to the divorce proceedings and the representations of defendant and Mr. Bickle relative to defendant's pregnancy or reason to suspect pregnancy at the time of the divorce. I further would afford to plaintiff, particularly

[17] The concurrence attacks the dissent for providing "no details concerning the appropriate scope of discovery," and rolls out a parade of the horribles that the concurrence postulates will occur if any discovery is allowed. Of course, the concurrence not only ignores the parameters that the dissent in fact has placed on the discovery that it would allow, but it further ignores the existence of an elaborate set of court rules controlling the conduct of discovery, and the trial court's authority to exercise its discretion in applying and enforcing those rules.

in light of Mr. Bickle's likely incapability of procreation, an opportunity for appropriate testing to determine the actual paternity of the child.

If after such discovery the evidence demonstrates that Mr. Bickle could not have fathered the child in question or that defendant was less than fully forthright with the trial court in the divorce proceeding relative to her pregnancy or possible pregnancy, then I would find that plaintiff has standing under the Paternity Act, and that his claim should be allowed to proceed.[18]

I therefore respectfully dissent, and would reverse and remand for further proceedings consistent with the reasoning expressed above.

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[18] The concurrence finds it "chilling" that the dissent would open the door to judicial "disrupt[ion of] this family," including by "ultimately removing the child from his home." To the contrary, the dissent would merely afford plaintiff the opportunity to demonstrate his standing to pursue what his complaint seeks: parenting time and a child support determination.

PEOPLE v JONES

Docket No. 312966. Submitted June 5, 2013, at Detroit. Decided September 10, 2013, at 9:05 a.m. Leave to appeal granted, 495 Mich ___.

Thabo Jones was charged in the 36th District Court with reckless driving causing death in violation of MCL 257.626(4). The court, Cylenthia L. Miller, J., bound defendant over to the Wayne Circuit Court following a preliminary examination. In a prosecution under MCL 257.626(4), MCL 257.626(5) prohibits the court from instructing the jury on the lesser included offense of moving violation causing death, MCL 257.601d. In a pretrial motion, defendant requested that the circuit court instruct the jury on the lesser included offense despite the statutory prohibition. The circuit court, Richard M. Skutt, J., granted the motion, concluding that the statutory prohibition unconstitutionally infringed on the judicial power to determine court practice and procedure. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. Generally, under MCL 768.32(1), upon indictment for an offense consisting of different degrees, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense. The statutory language concerning inferior offenses refers to any offense contained within the charged offense, not just offenses within which the Legislature has formally created degrees. The offense of moving violation causing death is a necessarily included lesser offense of reckless driving causing death. The Legislature may, within constitutional limits, alter the definition of a crime so that it ceases to be a necessarily included lesser offense of another, but the Legislature has not altered the fact that moving violation causing death is a necessarily included lesser offense of reckless driving causing death. Under Const 1963, art 6, § 5, the Supreme Court has exclusive rule-making authority in matters of practice and procedure. Under MCL 768.29 and MCR 2.513(A) and (N), the courts are to instruct the jury on the law. Correctly instructing the jury is a fundamental requirement of the fair and proper admin-

istration of justice. The Legislature's role is only to create the substantive law. If a necessarily included lesser offense exists, it is a violation of the principle of separation of powers for the Legislature to forbid the courts to instruct the jury on that lesser offense. A trial court's duty is to instruct the trier of fact with regard to what the law actually is, and the law is that moving violation causing death is a necessarily included lesser offense of reckless driving causing death. Accordingly, MCL 257.626(5) is an unconstitutional infringement on the exclusive role of the judiciary to establish procedures to vindicate constitutional rights, as well as an infringement on the fundamental right of criminal defendants to a properly instructed jury.

2. MCL 257.626(5) is also infirm because it violates the right to trial by jury in that a criminal defendant charged with reckless driving causing death must give up his or her right to a jury in order for the fact-finder to consider the lesser included offense of moving violation causing death. The plain text of MCL 257.626(5) does not state that a trial court sitting as the finder of fact may not consider the offense of moving violation causing death, nor that it may not convict a defendant of this lesser included offense. Had the Legislature wished to limit the court in this fashion it could readily have included language to that effect. Significantly, under MCL 763.3 and MCR 6.401, a defendant has no right to a bench trial unless the prosecution and the judge agree. Therefore, the statute places defendants in the position of having to trade one right for another without even the ability to make an autonomous choice, and it presents the prosecution with a potentially improper basis for refusing to consent to a requested bench trial. MCL 257.626(5) is unconstitutional as a violation of fundamental due process and the principle of separation of powers.

Affirmed.

K. F. KELLY, P.J., dissenting, would have reversed because the trial court's ruling violated MCL 257.626(5), and the statutory mandate neither deprived defendant of the right to a jury determination of all the elements of the crime charged nor violated the principle of separation of powers. MCL 257.626(5) is within the substantive power of the Legislature because it reflects the Legislature's policy decision that, in certain cases, the jury should not be instructed on certain offenses; it does not concern practice and procedure. Further, the majority's conclusion that the statute allows a judge in a bench trial to find a defendant guilty of a lesser included offense when a jury could not, is contrary to the principle that trial courts are presumed to know the law. Given the clear intent of the Legislature to forbid consideration of the lesser

misdemeanor offense of moving violation causing death when a defendant has been charged with reckless driving causing death, a judge trying a case without a jury would understand that he or she could not convict the defendant of the lesser offense.

CRIMINAL LAW — RECKLESS DRIVING CAUSING DEATH — JURY INSTRUCTIONS — NECESSARILY INCLUDED LESSER OFFENSES — SEPARATION OF POWERS.

In a prosecution for reckless driving causing death, MCL 257.626(5) prohibits the court from instructing the jury on the lesser included offense of moving violation causing death; MCL 257.626(5) is an unconstitutional infringement on the exclusive role of the judiciary to establish procedures to vindicate constitutional rights, as well as an infringement on the fundamental right of criminal defendants to a properly instructed jury; if a necessarily included lesser offense exists, it is a violation of the principle of separation of powers for the Legislature to forbid the courts to instruct the jury on that lesser offense (Const 1963, art 6, § 5; MCL 257.601d; MCL 257.626; MCL 768.32).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

James C. Howarth for defendant.

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

RONAYNE KRAUSE, J. In this prosecution for reckless driving causing death, MCL 257.626(4), the prosecution appeals by leave granted the trial court's order granting defendant's motion to instruct the jury on the lesser included offense of moving violation causing death, MCL 257.601d, contrary to the prohibition against doing so under MCL 257.626(5). The case arises from a three-vehicle collision in which defendant struck another vehicle, causing the second vehicle to strike a third, killing the driver of the second vehicle. MCL 257.626(5) states that "[i]n a prosecution under [MCL 257.622(4) for reck-

less driving causing death], the jury shall not be instructed regarding the crime of moving violation causing death [under MCL 257.601d]." The trial court determined that this statutory prohibition unconstitutionally infringed on the judicial power to determine court practice and procedure. As a constitutional question, we review the matter de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). Because MCL 257.626(5) is unconstitutional, we affirm.

"It is a general rule of criminal law, that a jury may acquit of the principal charge, and find the prisoner guilty of an offense of lesser grade, if contained within it." *People v McDonald*, 9 Mich 150, 153 (1861). Many crimes, today and at common law, consist of several "concentric layers" of crimes, each of which is in fact another crime with an element added or subtracted; the "rejecting of successive aggravations is a function open to juries in all cases where there is presented to them one offense in which another is inclosed" and "[n]o question has ever been made as to this right on the part of the jury . . . ." 1 Wharton, *A Treatise on Criminal Law* (10th ed), § 27, pp 34-35. See also *Hanna v The People*, 19 Mich 316, 318 (1869). Michigan codified this principle by statute as early as 1846 in 1846 RS, ch 161, § 16, which provided that

> [u]pon an indictment for any offence, consisting of different degrees, as prescribed in this title, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence, inferior to that charged in the indictment, or of an attempt to commit such offence.

Our Supreme Court recognized that, at the time, the only crime *formally* divided into degrees was murder, for which no such provision was needed; consequently, the provision must "be construed as extending to all

cases in which the statute has substantially, or in effect, recognized and provided for the punishment of offenses of different grades, or degrees of enormity, wherever the charge for the higher grade includes a charge for the less." *Hanna*, 19 Mich at 321-322. Our Supreme Court eventually concluded that this principle from *Hanna* had become inappropriately extrapolated to include cognate offenses, not only necessarily included offenses. See *People v Nyx*, 479 Mich 112, 118-121; 734 NW2d 548 (2007). However, *Nyx* affirmed the *Hanna* conclusion that the statutory language concerning inferior offenses referred to any offense contained within the charged offense, not just offenses within which the Legislature has formally created degrees. *Nyx*, 479 Mich at 127-129.

Today, MCL 768.32 provides essentially the same rule, with the addition of one enumerated exception, contained in MCL 768.32(2), and an explicit provision for the judge at a bench trial to make the same finding. We find it unambiguous that MCL 768.32(1) embodies a venerable and important rule of common law; consequently, the Legislature is strongly presumed not to have intended any alteration to the common law by enacting it. See *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898), overruled in part on other grounds in *Hosko v Hosko*, 385 Mich 39; 187 NW2d 236 (1971). Of course, the Legislature *can* abrogate the common law, but "[w]hen it does so, it should speak in no uncertain terms." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

In an earlier case, this Court determined that the previously noted exception contained in MCL 768.32(2), pertaining to certain drug offenses, is unconstitutional. *People v Binder (On Remand)*, 215 Mich App 30, 38-42; 544 NW2d 714 (1996). While that conclusion has never

been overturned on any substantive basis, our Supreme Court subsequently vacated that portion of this Court's opinion as having been unnecessary to the resolution of the case. *People v Binder*, 453 Mich 915; 554 NW2d 906 (1996). No binding caselaw presently establishes whether MCL 768.32(2) is or is not constitutional.[1] Furthermore, no binding caselaw addresses whether, or to what extent, the Legislature could abrogate the longstanding rule that the trier of fact may find a defendant not guilty of a charged offense in lieu of finding the defendant guilty of a necessarily included lesser offense.

It is axiomatic that the Legislature may establish the elements of a given crime. *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003). The Legislature may, within constitutional limits, therefore, alter the definition of a crime so that it becomes or ceases to be a necessarily included lesser offense of another. There is no dispute before us that moving violation causing death is, by definition, a necessarily included lesser offense of reckless driving causing death; indeed, the prosecution explicitly so agreed at oral argument. The only distinction between the two crimes is that reckless driving causing death requires the motor vehicle to be operated "in willful or wanton disregard for the safety of persons or property . . . ." MCL 257.626(2). The Legislature could have defined a moving violation causing death in such a way that it included an element not present in reckless driving causing death, with the result that the two would be cognate offenses. However, the Legislature did not do so.

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[1] We respectfully reject the dissent's assertion that we rely on *Binder*. We discuss *Binder* only to explain that it is not binding and therefore has no applicability. Because the parties discussed it, however, we believe we would have been remiss had we failed to address *Binder* at all.

Rather, the Legislature provided that "[i]n a prosecution under [MCL 257.626(4) for reckless driving causing death], the jury shall not be instructed regarding the crime of moving violation causing death [under MCL 257.601d]." MCL 257.626(5). Significantly, this provision (1) does not change the fact that, by definition, moving violation causing death remains a necessarily included lesser offense of reckless driving causing death, (2) does not impose any restrictions on the trial court sitting as the trier of fact at a bench trial, and (3) does not even preclude the jury from *finding* a defendant guilty of the lesser offense.

Pursuant to Const 1963, art 6, § 5, "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." While not present in Michigan's first constitution of 1835, an essentially identical provision is found in all of Michigan's constitutions since 1850. See *McDougall v Schanz*, 461 Mich 15, 26 n 10; 597 NW2d 148 (1999). The courts therefore may "prescribe procedural rules that vindicate constitutional rights," but may not promulgate "procedural rules contrary to legislative enactments that involve nonconstitutional substantive policies." *People v Glass (After Remand)*, 464 Mich 266, 281 n 11; 627 NW2d 261 (2001). Consequently, our Supreme Court has "exclusive rule-making authority in matters of practice and procedure," but may not "enact court rules that establish, abrogate, or modify the substantive law." *McDougall*, 461 Mich at 26-27.

In *People v Cornell*, 466 Mich 335, 353-354; 646 NW2d 127 (2002), our Supreme Court held that only necessarily included lesser offenses could be considered by the fact-finder and observed that this rule extended to misdemeanor offenses. Courts are not free to expand

upon what crimes may be considered by the trier of fact to include what are, essentially, uncharged offenses. *Cornell* therefore stands for the conclusion that the Legislature sets the substantive law. *Id*. at 353. As noted, the Legislature can therefore define what constitutes a given offense. Pursuant to the definitions it crafts, some of those offenses may constitute necessarily included lesser offenses of other offenses. However, the Legislature is not free to dictate that the courts give instructions to the jury that conflict with substantive law. The courts are to instruct the jury on the law; this is established by statute, MCL 768.29, but also by court rule, MCR 2.513(A) and (N), and, importantly, by the simple fact that a jury not properly informed of the law *cannot* fulfill its duty. See, e.g., *People v Potter*, 5 Mich 1, 8-9 (1858); *People v Duncan*, 462 Mich 47, 52-53; 610 NW2d 551 (2000).[2] Correctly instructing the jury, therefore, arguably involves more than mere "substantive law;" it is in fact a fundamental requirement of the fair and proper administration of justice. See *People v Murray*, 72 Mich 10, 16; 40 NW 29 (1888); *People v Townes*, 391 Mich 578, 587; 218 NW2d 136 (1974).

It is the role of the courts to effectuate the right to a properly instructed jury; it is *not* the role of the Legislature to dictate to the courts the details of how to do so. Indeed, in *Cornell* our Supreme Court quoted, seemingly with approval, Justice LINDEMER's dissent in *People v Chamblis*, 395 Mich 408; 236 NW2d 473 (1975),[3] in which he explicitly noted that MCL 768.32 " 'does not speak to instructions on lesser included offenses,' " and that although MCL 768.29 " 'says that

[2] *Binder*, 215 Mich App at 40, and *Duncan*, 462 Mich at 49 n 3, both refer to MCR 6.414(F), the predecessor rule concerning jury instructions, which was repealed and incorporated into MCR 2.513 in 2011.

[3] *Chamblis*, 395 Mich 408, was overruled in *Cornell*, 466 Mich 335.

the court shall instruct the jury as to the law applicable to the case, [it] does not mandate what law is applicable to the case.' " *Cornell*, 466 Mich at 349, quoting *Chamblis*, 395 Mich at 433 (LINDEMER, J., dissenting). Trial judges are, to the contrary, permitted to instruct the jury however they believe best, as long as they accurately convey to the jury the material substance of the law applicable to the case. This supports our view that it is the Supreme Court that determines the practice and procedure to be followed by the courts in effectuating the law. If anything, *Cornell* supports our conclusion that determining what instructions should be given to the jury is exclusively the judiciary's role. See *People v Knoll*, 258 Mich 89, 101; 242 NW 222 (1932). The Legislature's role is only to *create* the law.

Consequently, if a necessarily included lesser offense exists, it is a violation of the principle of separation of powers for the Legislature to forbid the courts to instruct the jury on that lesser offense. A trial court's duty is to instruct the trier of fact regarding what the law actually is, and the law actually is that moving violation causing death is a necessarily included lesser offense of reckless driving causing death.

Even if the statute was not invalid as a violation of the constitutional separation of powers, we would have to strike it down as a violation of the right to trial by jury. As discussed earlier in this opinion, MCL 257.626(5) does not state what is or is not a lesser included offense of reckless driving causing death. It merely states that "[i]n a prosecution under [MCL 257.626(4) for reckless driving causing death], the jury shall not be instructed regarding the crime of moving violation causing death [under MCL 257.601d]." MCL 257.626(5). The plain text of the statute does not state that a trial court sitting as the finder of fact may not

consider the offense of moving violation causing death nor that it may not convict a defendant of this lesser included offense. Had the legislature wished to limit the judge in this fashion it could readily have included explicit language to that effect. Our Legislature is presumed to be aware of the consequences of its use or omission of statutory language as well as its effect on existing laws. *In re MKK*, 286 Mich App 546, 556-557; 781 NW2d 132 (2009). See also, *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448; 656 NW2d 366 (2002) ("When the Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional.").[4]

The limitation in MCL 257.626(5) is not a statement of substantive law. Instead, MCL 257.626(5) is an infringement on the exclusive role of the judiciary to establish procedures to vindicate constitutional rights, as well as an infringement on the fundamental right of criminal defendants to a properly instructed jury. MCL 257.626(5) is also infirm in that, under the statute, a criminal defendant must give up his or her right to a jury in order for the fact-finder to consider the lesser included offense. Significantly, a defendant has no right to a bench trial unless the prosecution and the judge agree. MCL 763.3; MCR 6.401. Therefore, the statute places defendants in the position of having to trade one right for another without even the ability to make an autonomous choice, and it presents the prosecution

[4] The dissent suggests that we should ignore the plain language of the statute. It states that "the clear intent of the Legislature" would bar a judge from considering the lesser included offense of moving violation causing death. The dissent does not explain, however, what wording in the statute sets out this intent. Rather, the dissent seeks to impose what it views as a reasonable reading of the statute onto words that do not actually so read.

with a potentially improper basis for refusing to consent to a requested bench trial.

We conclude that MCL 257.626(5) is unconstitutional as a violation of fundamental due process and as a violation of the principle of separation of powers. Affirmed.

SHAPIRO, J., concurred with RONAYNE KRAUSE, J.

K. F. KELLY (*dissenting*). I respectfully dissent. MCL 257.626(4) provides that "a person who operates a vehicle in violation of subsection (2) [in willful or wanton disregard for the safety of persons or property] and by the operation of that vehicle causes the death of another person is guilty of a felony . . . ." MCL 257.626(5) further provides that "[i]n a prosecution under subsection (4), the jury shall not be instructed regarding the crime of moving violation causing death." Because the trial court clearly violated the statutory mandate of MCL 257.626(5) by granting defendant's motion to instruct the jury on the misdemeanor offense of moving violation causing death, MCL 257.601d(1),[1] and because the statutory mandate neither deprives defendant of the right to a jury determination of all of the elements of the crime charged nor violates the principle of separation of powers, I would reverse.

MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter [MCL 768.1 through MCL 768.37], the jury, or the judge in a trial without a jury,

[1] MCL 257.601d(1) provides that "A person who commits a moving violation that causes the death of another person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both."

> may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

In *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002), our Supreme Court discussed the principles supporting an instruction on lesser included offenses as well as when a necessarily included offense instruction should be given:

> [I]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it . . . (is) entitled to an instruction which would permit a finding of guilt of the lesser offense. But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and the greater offenses. In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for a conviction of the lesser-included offense. [Quoting *Sansone v United States*, 380 US 343, 349-350; 85 S Ct 1004; 13 L Ed 2d 882 (1965) (quotation marks omitted).]

The *Cornell* Court thus held that a court could properly give an instruction on a necessarily included lesser offense "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. To permit otherwise would be inconsistent with the truth-seeking function of a trial . . . ." *Cornell*, 466 Mich at 357.

Defendant argues that MCL 257.626(5) conflicts with the holding in *Cornell* and unconstitutionally infringes

on our Supreme Court's rulemaking authority, violating the separation of powers doctrine. I disagree.

"The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The Legislature has the power over matters of substantive law. See *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007). While the Legislature has the sole power to define crimes and set punishments, *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003), the Supreme Court has the power to establish practice and procedure, *People v Watkins*, 491 Mich 450, 472; 818 NW2d 296 (2012). Therefore, "the Legislature may not enact a rule that is purely procedural, i.e., one that is not backed by any clearly identifiable policy consideration other than the administration of judicial functions." *Pattison*, 276 Mich App at 619. In the course of deciding whether a statutory rule of evidence violated the principle of separation of powers, our Supreme Court held that the Legislature infringes on the Supreme Court's domain

> only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified . . . . Therefore, [i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . [,] the [court] rule should yield. . . .
>
> . . . [P]rocedural rules of evidence involving the orderly dispatch of judicial business are those rules of evidence designed to allow the adjudicatory process to function effectively . . . . Examples are rules of evidence designed to let the jury have evidence free from the risks of irrelevancy, confusion and fraud. [*Watkins*, 491 Mich at 474-475, quot-

> ing *McDougall v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148 (1999) (quotation marks omitted) (first and third alterations in original).]

Contrary to the majority's conclusion, MCL 257.626(5) is obviously not a matter of practice and procedure; rather, § 626(5) is absolutely within the substantive power of the Legislature.

Cornell clearly stated that MCL 768.32 is not confined to practice and procedure, but is a matter of substantive law:

> As this Court has recognized, matters of substantive law are left to the Legislature. *Determining what charges a jury may consider does not concern merely the "judicial dispatch of litigation." Rather, the statute concerns a matter of substantive law*. As this Court has noted,
>
> > [t]he measure of control exercised in connection with the prevention and detection of crime and prosecution and punishment of criminals is set forth in the statutes of the State pertaining thereto, particularly the penal code and the code of criminal procedure. The powers of the courts with reference to such matters are derived from the statutes.
>
> [*Cornell*, 466 Mich at 353 (emphasis added) (citations and quotation marks omitted).]

Our Supreme Court has determined that MCL 768.32, involving the jury's consideration of lesser included offenses, is a matter of substantive law; it follows that MCL 257.626(5) is also a matter of substantive law. MCL 257.626(5) identifies two specific offenses, prohibiting a jury instruction on the less serious offense when the more serious one has been charged. It reflects the Legislature's policy decision that, in certain cases, the jury shall not be instructed on certain offenses. Consequently, § 626(5) is within the Legislature's power over

matters of substantive law and does not violate the separation of powers doctrine.

I find unavailing the majority's reliance on *People v Binder (On Remand)*, 215 Mich App 30; 544 NW2d 714 (1996). In *Binder*, the defendant was charged with delivery of a controlled substance, and MCL 768.32(2) specifically prohibited the trial court from instructing the jury on mere possession. *Id*. at 32-33. The Court of Appeals held that MCL 768.32(2) was contrary to the constitutional doctrine of separation of powers. *Id*. at 41-42. Our Court stated that "once the Supreme Court takes action on a matter relating to practice or procedure, the Legislature is without authority to set other requirements." *Id*. at 40. Our Court concluded that the Supreme Court demonstrated its intent to occupy the domain of jury instructions by court rule and case law and, therefore, MCL 768.32(2) was an impermissible infringement on the Court's rulemaking authority. *Id*. at 40-42. However, our Supreme Court vacated

> the portion of the judgment of the Court of Appeals that held the lesser offense and jury instruction provisions of MCL 768.32(2) unconstitutionally infringe on the Supreme Court's authority over practice and procedure, . . . because it was unnecessary for the Court of Appeals to reach this constitutional question after determining that the defendant's conviction would be affirmed in any event. [*People v Binder*, 453 Mich 915; 554 NW2d 906 (1996) (citation omitted).]

Because that portion of *Binder* was specifically vacated by the Supreme Court, no binding authority supports the majority's conclusion. Statutes are presumed constitutional, and courts must construe statutes as constitutional unless the unconstitutionality of a statute is clearly apparent. *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009). That a statute may appear ill-advised does not make it unconstitutional and em-

power a court to override the Legislature. *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002).

Finally, while the majority expresses concern that MCL 257.626(5) effectively allows a judge, sitting without a jury, to find a defendant guilty of a lesser included offense, I believe that such an assumption is contrary to the longstanding principle that "[i]n a bench trial, the trial court is presumed to know the applicable law." *People v Lanzo Constr Co*, 272 Mich App 470, 484; 726 NW2d 746 (2006); see also *People v Cazal*, 412 Mich 680, 691 n 5; 316 NW2d 705 (1982) (stating that a trial court is not required in a bench trial to give instructions in open court on the law to be applied). Given the clear intent of the Legislature to forbid consideration of the lesser misdemeanor offense of moving violation causing death when a defendant has been charged with reckless driving causing death, a judge trying a case without a jury would surely understand that he or she could not convict the defendant of the lesser offense.

For these reasons, I would reverse.

PEOPLE v JOHNSON

PEOPLE v ANTHONY AGRO

PEOPLE v FLEISSNER

PEOPLE v BARBARA AGRO

PEOPLE v RICHMOND

PEOPLE v CURTIS

PEOPLE v NICHOLAS AGRO

Docket Nos. 308104, 308105, 308106, 308109, 308110, 308111, and 308113. Submitted August 6, 2013, at Detroit. Decided September 10, 2013, at 9:10 a.m.

Barbara M. Johnson, Anthony J. Agro, Ryan M. Fleissner, Barbara J. Agro, Ryan D. Richmond, Matthew Curtis, and Nicholas Agro were charged in the Oakland Circuit Court with various counts of delivering marijuana, delivering delta-9-tetrahydrocannabinol (THC), conspiracy to possess marijuana or THC with intent to deliver them, and conspiracy to deliver marijuana or THC, all arising from the operation of a marijuana dispensary. The court, Daniel Patrick O'Brien, J., granted defendants' joint motion to dismiss all charges in reliance on the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. The prosecution appealed.

The Court of Appeals *held*:

1. It is illegal under the Public Health Code, MCL 333.1101 *et seq*., for a person to possess, use, manufacture, or deliver marijuana. The MMMA, however, provides in MCL 333.26427(a) that the medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the provisions of the act. The MMMA sets forth in MCL 333.26424 and 333.26428 specific and limited protections from arrest, prosecution, or penalty for certain marijuana-related activities. Defendants asserted that their interpretation of the MMMA was reasonable and that, in light of the ambiguous nature of the MMMA, they could not have predicted that their operation of a marijuana dispensary was illegal. Defendants, however, did not specifically argue that they

were entitled to the protections afforded under either MCL 333.26424 or MCL 333.26428 or in what capacity they acquired those rights. Nor did they challenge as ambiguous any specific portion of the MMMA or identify what particular MMMA provisions purportedly led them to believe that they could operate a for-profit marijuana dispensary. A remand for reinstatement of the charges against all seven defendants was necessary.

2. The trial court erroneously held that the rule of lenity applied under the circumstances of this case. The rule of lenity provides that courts should mitigate punishment when the punishment in a criminal statute is unclear. It applies only if the statute is ambiguous or in the absence of any firm indication of legislative intent. The rule of lenity does not apply when construing the Public Health Code because the Legislature mandated in MCL 333.1111(2) that the code's provisions must be liberally construed for the protection of the health, safety, and welfare of the people of Michigan. Nevertheless, defendants argued that the rule of lenity should be applied because they were denied due process and notice that operation of a marijuana dispensary was prohibited. The MMMA, however, does not include any provision that authorizes marijuana dispensaries or from which it could reasonably be inferred that marijuana dispensaries are legal business entities.

3. The trial court also erred by failing to give retroactive effect to *Michigan v McQueen*, 293 Mich App 644 (2011), aff'd on other grounds 493 Mich 135 (2013), which held that the MMMA provides no authority for operating a marijuana dispensary that facilitates patient-to-patient sales of marijuana and was decided after defendants' arrests. The general rule is that judicial decisions are given full retroactive effect and complete prospective application is limited to decisions that overrule clear and uncontradicted caselaw, but the retroactive application of an unforeseeable interpretation of a criminal statute, if detrimental to a defendant, may violate the Due Process Clause. Due process is violated when the retroactive application of a judicial decision operates as an ex post facto law, i.e., criminalizes conduct that was innocent at the time performed. Defendants, however, were not charged with violating any penalty provision of the MMMA; rather, their charges arose from violations of various controlled substance provisions of the Public Health Code. Because defendants alleged that they are entitled to immunity under MCL 333.26424, the retroactive application of *McQueen* did not present a due process concern because *McQueen* did not operate as an ex post facto law, nor did *McQueen* or the Supreme Court's subsequent affirmance of it have the effect

of criminalizing previously innocent conduct. *McQueen* did not overrule clear and uncontradicted caselaw. Moreover, because defendants did not identify any ambiguous provision of the MMMA that could reasonably have led them to believe that operating a marijuana dispensary was permitted under the MMMA, they failed to establish that the interpretation of the MMMA in *McQueen* was unforeseeable. *McQueen* and the Supreme Court's subsequent affirmation of it were entitled to retroactive application.

Reversed and remanded for reinstatement of the charges against defendants.

1. CRIMINAL LAW — RULE OF LENITY — PUBLIC HEALTH CODE VIOLATIONS — CONTROLLED SUBSTANCES.

The rule of lenity provides that courts should mitigate punishment when the punishment in a criminal statute is unclear; the rule applies only if the statute is ambiguous or in the absence of any firm indication of legislative intent; the rule does not apply when construing the criminal provisions of the Public Health Code, MCL 333.1101 *et seq*., because the Legislature mandated in MCL 333.1111(2) that the code's provisions must be liberally construed for the protection of the health, safety, and welfare of the people of Michigan

2. COURTS — APPEALS — OPINIONS — RETROACTIVE EFFECT — MICHIGAN MEDICAL MARIHUANA ACT — DISPENSARIES.

Michigan v McQueen, 293 Mich App 644 (2011), and the Supreme Court opinion that affirmed it on other grounds, *Michigan v McQueen*, 493 Mich 135 (2013), which held that the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., provides no authority for operating a marijuana dispensary that facilitates patient-to-patient sales of marijuana, apply retroactively.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Danielle Walton*, Assistant Prosecuting Attorney, for the people.

Stuart G. Friedman for Barbara M. Johnson, Ryan M. Fleissner, Barbara J. Agro, Ryan D. Richmond, Matthew Curtis, and Nicholas Agro.

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM. These consolidated cases arose from the operation of a marijuana dispensary. Defendants Barbara Johnson and Ryan Fleissner were charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, MCL 333.7401(2)(d)(*iii*) and MCL 750.157a, conspiracy to possess the controlled substance delta-9-tetrahydrocannabinol (THC) with intent to deliver or conspiracy to deliver THC, MCL 333.7401(2)(b)(*ii*) and MCL 750.157a, two counts of delivery of marijuana, MCL 333.7401(2)(d)(*iii*), and delivery of THC, MCL 333.7401(2)(b)(*ii*). Defendant Anthony Agro was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, conspiracy to possess THC with intent to deliver or conspiracy to deliver THC, seven counts of delivery of marijuana, and delivery of THC. Defendant Barbara Agro was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana and delivery of marijuana. Defendants Ryan Richmond and Nicholas Agro were charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana and conspiracy to possess THC with intent to deliver or conspiracy to deliver THC. Defendant Matthew Curtis was charged with conspiracy to possess marijuana with intent to deliver or conspiracy to deliver marijuana, conspiracy to possess THC with intent to deliver or conspiracy to deliver THC, and two counts of delivery of marijuana. The trial court granted defendants' joint motion to dismiss all charges pursuant to the Michigan Medical Marihuana Act (MMMA),[1] MCL 333.26421 *et seq*.

[1] Although the MMMA refers to "marihuana," by convention this Court uses the more common spelling "marijuana" in its opinions. See *People v Nicholson*, 297 Mich App 191, 193 n 1; 822 NW2d 284 (2012).

The prosecution appeals as of right. We reverse and remand for reinstatement of the charges.

In July and August 2010, these seven defendants owned, operated, or were employed by Clinical Relief, a marijuana dispensary in Ferndale, Michigan. Clinical Relief provided marijuana to patients who possessed medical-marijuana cards. On several different days, Narcotic Enforcement Team (NET) undercover officers visited the facility and were sold marijuana and candy containing THC. Subsequently, each defendant was arrested and bound over for trial on the charges. Defendants then filed a joint motion to dismiss in the circuit court. In the motion, they argued that "[a]t the time of their arrest their conduct was reasonable and should not be subject to criminal prosecution." Defendants argued that their "conduct was based on a reasonable understanding of the law and that they are entitled to dismissal as a matter of law . . . ." They pointed out that the first judicial decision interpreting the MMMA was not released until after they were arrested; thus, defendants did not have the benefit of these interpretative decisions to guide their conduct with respect to the MMMA. Defendants also argued that "[t]he notion of due process and advanced notice of the conduct being prohibited is being tossed out of the window." And because the MMMA is ambiguous, defendants could have not been expected to predict that their conduct was illegal. Further, they argued, in light of the ambiguous nature of the MMMA, this Court's holding in *Michigan v McQueen*, 293 Mich App 644; 811 NW2d 513 (2011), aff'd on other grounds 493 Mich 135 (2013), which interpreted it, should be applied prospectively. That is, retroactive application of this decision interpreting the MMMA would violate their due process rights to understand what conduct is prohibited. The prosecutor opposed defendants' motion.

Following oral arguments, the trial court granted defendants' motion. In rendering its decision, the trial court noted that it was not giving retroactive effect to the holding in *McQueen*, 293 Mich App 644. The trial court also noted that it had requested defendants to specify which provisions of the MMMA were being challenged as ambiguous, and those provisions were MCL 333.26424(b), (e), and (i). Section 4(b) of the MMMA provides, in pertinent part, that a "primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty . . . for assisting a qualifying patient to whom he or she is connected through the [Department of Licensing and Regulatory Affairs'] registration process with the medical use of marihuana in accordance with this act." MCL 333.26424(b).[2] The trial court held that this provision "requires a link between the caregiver and the patient." Section 4(e) of the MMMA provides that a "registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marijuana." MCL 333.26424(e). The trial court held that the phrase "receive compensation for costs" was confusing, but rejected defendants' claim that it was ambiguous on the ground that "compensation for costs" does not include profit, i.e., "[c]ost is different and distinct from profit." Section 4(i) of the MMMA provides that a "person shall not be subject to arrest, prosecution, or penalty . . . solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i). The trial court held that "(i)

[2] We quote the version of the statute as amended by 2012 PA 512, effective April 1, 2013. The differences from the original version do not affect our holding.

juxtaposed with either or both (b) or (e) is ambiguous . . . .” In particular, the court held that the phrase “using or administering” was ambiguous. After indicating that due process ramifications exist in criminal cases, the trial court held that the rule of lenity should be applied under the circumstances of this case. Accordingly, it granted defendants’ motion to dismiss. These appeals followed.

The prosecution first argues that the trial court erroneously dismissed the charges against all seven defendants without requiring defendants to first demonstrate that they were entitled to the protections afforded under the MMMA. We agree.

We review for an abuse of discretion a trial court’s ruling on a motion to dismiss. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). However, underlying questions of statutory interpretation are reviewed de novo as questions of law. *Id*.

It is illegal under the Public Health Code, MCL 333.1101 *et seq*., for a person to possess, use, manufacture, or deliver marijuana. The MMMA was proposed by initiative petition, was subsequently approved by the electors, and became effective December 4, 2008. This change in our state law was to have “the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.” MCL 333.26422(b). Accordingly, pursuant to MCL 333.26427(a), the “medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act.” The “medical use” of marijuana is defined by MCL 333.26423(f) as “the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a

registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."[3]

In light of the fact that possession, use, manufacture, and delivery of marijuana remain punishable offenses under the Public Health Code, the MMMA set forth specific and limited protections from arrest, prosecution, or penalty for marijuana-related activities. In particular, at the time of defendants' arrests, MCL 333.26424 as originally enacted provided:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility . . . .[4]
>
> (b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

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[3] Before the amendments set forth in 2012 PA 512, this definition was found in MCL 333.26423(e).

[4] An "enclosed, locked facility" includes a locked room that permits "access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(d), as amended by 2012 PA 512.

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and

(3) any incidental amount of seeds, stalks, and unusable roots.

* * *

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:

(1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

(e) A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substances.

* * *

(i) A person shall not be subject to arrest, prosecution, or penalty in any manner . . . solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

The second protection afforded under the MMMA is set forth in MCL 333.26428, which as originally enacted provided, in relevant part:

> (a) Except as provided in [MCL 333.26427], a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:
>
> (1) A physician has stated that . . . the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana . . . ;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana . . . to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
>
> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

In this case, defendants moved for the dismissal of the charges, asserting that "[a]t the time of their arrest their conduct was reasonable and should not be subject to criminal prosecution." They argued that their interpretation of the MMMA was reasonable and, in light of the ambiguous nature of the MMMA, they could not have predicted that their conduct of operating a marijuana dispensary was illegal. However, defendants did not specifically argue that they were entitled to the protections afforded under either MCL 333.26424 or MCL 333.26428 or in what capacity they acquired such rights. That is, for example, defendants did not argue or

establish that they were qualifying patients who had been issued and possessed registry identification cards, MCL 333.26424(a), or primary caregivers who had been issued and possessed registry identification cards, MCL 333.26424(b). They did not argue or attempt to establish that they were entitled to the protection afforded under MCL 333.26424(i). And none of the defendants argued or attempted to establish that any one of them was entitled to the protection afforded under MCL 333.26428(a) as either "a patient" or "a patient's primary caregiver." In other words, in their joint motion for dismissal defendants did not argue or attempt to establish that they had the legal right to seek the protections from arrest, prosecution, or penalty afforded under the MMMA for their marijuana-related activities. And they did not challenge as ambiguous any specific term as it related to their alleged right to seek the protections afforded under the MMMA. Defendants' brief on appeal likewise fails to assert any such arguments. Again, on appeal defendants merely appear to argue that the entirety of the MMMA is ambiguous. For example, defendants argue: "Because the Defendants operated with a good faith belief that their conduct was protected under the [MMMA], the trial court correctly dismissed the charges." However, defendants have never explained which particular provisions of the MMMA allegedly gave rise to this "good faith belief." That is, what particular provisions of the MMMA purportedly led them to believe that they could operate a for-profit marijuana dispensary?

Nevertheless, the trial court dismissed the charges against all seven defendants without first determining whether any defendant was entitled to the protections afforded under either MCL 333.26424 or MCL 333.26428. The trial court made no specific findings about each of the statutory requirements.

Instead, after inquiring during oral argument which specific provisions were being challenged as ambiguous by defendants—because no specific challenge was set forth in their motion to dismiss—the trial court held that one of the challenged provisions, § 4(i), was ambiguous. As set forth above, that provision provides: "A person shall not be subject to arrest, prosecution, or penalty in any manner . . . solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i). The trial court summarily concluded that the phrase "using or administering marihuana" was ambiguous. Apparently, then, the trial court considered each of the seven defendants "a person" as contemplated under § 4(i) and not a "qualifying patient" or a "primary caregiver." However, even if each defendant was such "a person" contemplated under § 4(i), the trial court failed to determine that each defendant was "assisting a registered qualifying patient" with regard to each charge for which he or she was being prosecuted. And defendants did not challenge as ambiguous the phrase "assisting a registered qualifying patient." In light of all these considerations, we conclude that the trial court abused its discretion when it dismissed the charges against all seven defendants without determining whether any of the defendants were specifically entitled to the protections afforded under either MCL 333.26424 or MCL 333.26428. Accordingly, we remand this matter to the trial court for reinstatement of the charges against all seven defendants.

Next, the prosecution argues that the trial court erroneously held that the rule of lenity applied under the circumstances of this case. We agree.

"The 'rule of lenity' provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). The rule of lenity applies only if the statute is ambiguous or " 'in absence of any firm indication of legislative intent.' " *Id*. at 700 n 12, quoting *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). However, the rule of lenity does not apply when construing the Public Health Code because the Legislature mandated in MCL 333.1111(2) that the code's provisions are to be "liberally construed for the protection of the health, safety, and welfare of the people of this state." *Denio*, 454 Mich at 699. "It is illegal under the Public Health Code, MCL 333.1101 *et seq*., for a person to possess, use, manufacture, create, or deliver marijuana." *People v Nicholson*, 297 Mich App 191, 197; 822 NW2d 284 (2012).

Defendants here argued that the holding in *People v Dempster*, 396 Mich 700; 242 NW2d 381 (1976), supported their argument that the rule of lenity should apply under the circumstances of this case. The statute violated in *Dempster*, however, was not part of the Public Health Code. *Id*. at 703. Nevertheless, defendants argued in the trial court, and argue here on appeal, that the rule of lenity should be applied under the circumstances of this case because they were denied "due process and advanced notice of the conduct being prohibited," i.e., they lacked "fair warning." It appears from defendants' motion to dismiss, as well as their brief on appeal, that they are arguing they did not know and could not know that marijuana dispensaries were not legal under the MMMA. However, even if we were to consider defendants' arguments, defendants have failed to identify any allegedly ambiguous provision of the MMMA that led them to their mistaken belief that marijuana

dispensaries were, in fact, legal. The MMMA did not, and still does not, include any provision that states that marijuana dispensaries are or were legal business entities. Similarly, defendants have failed to identify any allegedly ambiguous provision of the MMMA from which it could reasonably be inferred that marijuana dispensaries were legal business entities. Accordingly, the trial court's decision to apply the rule of lenity in this case is reversed.

In a related argument, the prosecution argues that the trial court erred by failing to give retroactive effect to this Court's decision in *McQueen*, 293 Mich App 644, which addressed the legality of operating a marijuana dispensary that facilitates patient-to-patient sales of marijuana. We agree.

In *McQueen*, the defendants owned and operated a marijuana dispensary that facilitated sales of marijuana between its members who were either registered qualifying patients or their primary caregivers. *McQueen*, 293 Mich App at 647-648. A complaint was filed against the defendants, seeking injunctive relief on the ground that the MMMA did not provide for the operation of marijuana dispensaries and, thus, the dispensary was a public nuisance. *Id*. at 648, 651-652. The trial court denied the plaintiff's request, and this Court reversed the decision, holding that the dispensary was a public nuisance. *Id*. at 648. After holding that "the MMMA does not authorize marijuana dispensaries" and "the MMMA does not expressly state that patients may sell their marijuana to other patients," we considered whether that authority could be inferred from provisions of the MMMA. *Id*. at 663. In particular, we held that although the "medical use" of marijuana is allowed to the extent that it is carried out in accordance with the MMMA, MCL 333.26427(a), the definition of "medi-

cal use" did not include the sale of marijuana.[5] *Id*. at 665, 668-669. Accordingly, the defendants had "no authority under the MMMA to operate a marijuana dispensary that actively engages in and carries out patient-to-patient sales of marijuana."[6] *Id*. at 670. We likewise rejected the defendants' argument that they were entitled to immunity under § 4(i), MCL 333.26424(i), because they were assisting registered qualifying patients with "using or administering" marijuana. *Id*. at 671. We held that a person assists a qualifying patient with "using or administering" marijuana when they aid in preparing it for consumption or by physically aiding the patient in consuming the marijuana.[7] *Id*. at 673.

The general rule is that judicial decisions are given full retroactive effect and complete prospective application is limited to decisions that overrule clear and uncontradicted caselaw. *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998). But "[t]he retroactive application of an unforeseeable interpretation of a criminal statute, if detrimental to a defendant, may violate the Due Process Clause." *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000). In *People v Doyle*, 451 Mich 93, 100; 545 NW2d 627 (1996), our Supreme explained that due process is violated when the retroactive application of a judicial decision acts or operates

[5] Our Supreme Court, however, has since held that the definition of "medical use" includes the sale of marijuana. *Michigan v McQueen*, 493 Mich 135, 152; 828 NW2d 644 (2013).

[6] Our Supreme Court affirmed this holding, albeit on different grounds, holding that the defendants' business, which facilitated patient-to-patient sales, encompassed "marijuana-related conduct that is not for the purpose of alleviating the *transferor's* debilitating medical condition or its symptoms." *Id*. at 157.

[7] Our Supreme Court agreed, holding that "the terms 'using' and 'administering' are limited to conduct involving the actual ingestion of marijuana." *Id*. at 158.

as an ex post facto law, i.e., criminalizes conduct that was innocent at the time performed.

First, we note that defendants were not charged with violating any penalty provision of the MMMA. Defendants' charges arose from their alleged violation of certain controlled substance provisions of the Public Health Code. In defense of these charges, defendants have alleged that they are entitled to immunity as provided under § 4 of the MMMA. Accordingly, the retroactive application of this Court's decision in *McQueen*, although rendered after defendants' arrests, does not present a due process concern because this decision does not operate as an ex post facto law. None of the defendants are deprived of "due process of law in the sense of fair warning that his contemplated conduct constitutes a *crime*." *Bouie v City of Columbia*, 378 US 347, 355; 84 S Ct 1697; 12 L Ed 2d 894 (1964) (emphasis added). Neither our holding in *McQueen*, 293 Mich App 644, nor our Supreme Court's subsequent holding in *McQueen*, 493 Mich 135, had the effect of criminalizing previously innocent conduct. This is not a case in which marijuana dispensaries were authorized by statute and then, by judicial interpretation, deemed illegal.

Second, the retroactive application of this Court's decision in *McQueen* does not have the effect of overruling clear and uncontradicted caselaw. See *Neal*, 459 Mich at 80; *Doyle*, 451 Mich at 104. That is, defendants were never led to believe by a judicial decision of this Court or our Supreme Court that operating a marijuana dispensary was permitted under the MMMA. And third, defendants have not identified any allegedly ambiguous provision of the MMMA that could have reasonably led them to believe that operating a marijuana dispensary was permitted under the MMMA; thus, defendants have failed to establish that this Court's interpretation

of the MMMA in *McQueen* is unforeseeable. Accordingly, this Court's decision in *McQueen* is entitled to retroactive application and the trial court erred by failing to apply the holding to this case. Further, our Supreme Court's subsequent decision in *McQueen*, 493 Mich 135, is also entitled to retroactive application for the same reasons.

Reversed and remanded for reinstatement of the charges against defendants and for further proceedings consistent with this opinion. We do not retain jurisdiction.

SERVITTO, P.J., and CAVANAGH and WILDER, JJ., concurred.

MENARD INC v DEPARTMENT OF TREASURY

SEARS ROEBUCK AND CO v STATE TREASURER

MENARD INC v STATE TREASURER

ART VAN FURNITURE-CONNER INC v STATE TREASURER

ART VAN FURNITURE INC v STATE TREASURER

Docket Nos. 310399, 311053, 311261, 311294, and 312168. Submitted May 7, 2013, at Lansing. Decided September 12, 2013, at 9:00 a.m. Leave to appeal sought.

Menard Inc., Sears Roebuck and Co., Art Van Furniture-Conner Inc., and Art Van Furniture Inc., filed separate actions in the Court of Claims against the Department of Treasury, State Treasurer, and the State of Michigan, seeking a refund under the bad debt deduction contained in MCL 205.54i of the General Sales Tax Act, MCL 205.51 *et seq* (GSTA). Plaintiffs, as retailers, entered into agreements with financing companies to issue private label credit cards. Plaintiffs remitted the sales tax to the treasury department when a customer made a purchase using the respective private label credit card; the financing company would subsequently reimburse the respective retailer for the purchase, as well as the applicable sales tax. The financing companies would write off as bad debt those amounts that customers did not pay on their credit card purchases. Plaintiffs sought a refund from the treasury department of the sales tax paid that was attributable to the bad debt. In Docket No. 310399, the court, Rosemarie E. Aquilina, J., granted summary disposition in favor of Menard. In Docket No. 311053, the court, Clinton Canady III, J., granted summary disposition in favor of Sears. In Docket No. 311261, the court, Joyce Draganchuk, J. granted summary disposition in favor of defendants. In Docket No. 311294, the court, Joyce A. Draganchuk, J., granted summary disposition in favor of defendants. In Docket No.312168, the court, William E. Collette, J., granted summary disposition in favor of Art Van Furniture, Inc. Defendants appealed in Docket Nos. 310399 and 312168, Sears appealed in Docket No. 311053, Menard Inc. appealed in Docket No. 311261, and Art Van Furniture-Conner, Inc. appealed in Docket No. 311294.

The Court of Appeals *held*:

1. The bad debt provision of the GSTA, MCL 205.54i(1)(a), allows a taxpayer to deduct bad debts from the gross proceeds used to calculate tax liability; it allows taxpayers to recover overpayment when expected sales proceeds are not received. To compute the tax owed each month under the GSTA, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. MCL 205.54i(2)

2. A private label credit card means any credit card or charge card that carries, refers to, or is branded with the name or logo of a vendor, that can only be used for purchases from the vendor, MCL 205.54i(1)(d), and the term lender includes the issuer of a private label credit card, MCL 205.54i(1)(b)(*iii*).

3. For purposes of the GSTA, a sales transaction may include a lender when the consumer utilizes a credit card to complete the sale, and the lender may hold the account receivable signifying a bad debt when the consumer fails to pay for the purchase in accordance with the terms of the private label credit card. Under MCL 205.54i(1)(e) and (3), after September 30, 2009, the term taxpayer includes the person who directly remitted the tax to the treasury department or the lender holding the account receivable. A lender and retailer is not a single unit for purposes of determining the taxpayer who is entitled to the bad debt deduction, but pursuant to MCL 205.54i(3), a taxpayer and lender may execute an election regarding which entity may claim the deduction.

4. In this case, plaintiff retailers were not entitled, under the bad debt provision, MCL 205.54i, to a refund for the sales tax paid on retail sales, the payment of which were never collected by the credit card financing companies. The plain language of MCL 205.54i states that when the debt is paid, the taxpayer remains liable for remittance of the tax to the extent of the amount paid. Consumers paid for goods by using private label credit cards and the credit card lenders in turn paid the plaintiff retailers in full for the goods and sales tax in accordance with their reimbursement agreements.

Reversed and remanded for entry of an order granting summary disposition in favor of defendants in Dockets Nos. 310399 and 312168. Affirmed in Docket Nos. 311053, 311261, and 311294.

GENERAL SALES TAX ACT — BAD DEBT PROVISION — DEFINITION OF TAXPAYER.

The bad debt provision, MCL 205.54i(1)(a), of the General Sales Tax Act, MCL 205.51 *et seq*., allows a taxpayer to deduct bad debts from the gross proceeds used to calculate tax liability; for purposes of

> the bad debt provision, after September 30, 2009, the term taxpayer includes the person who directly remitted the tax to the Department of Treasury or, the lender holding the account receivable when a purchase is made with a private label credit card; a lender and retailer is not a single unit for purposes of determining the taxpayer who is entitled to the bad debt deduction, but pursuant to MCL 205.54i(3), a taxpayer and lender may execute an election regarding which entity may claim the deduction.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Scott L. Damich*, Assistant Attorney General, for Department of Treasury, State Treasurer, and State of Michigan.

Bodman PLC (by *Joseph J. Shannon*) and *Akerman Senterfitt* (by *Peter O. Larsen*, *Michael J. Bowen*, and *David E. Otero*), for Menard, Inc.; Sears, Roebuck and Co., Art Van Furniture-Conner, Inc., and Art Van Furniture, Inc.

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

PER CURIAM. In these consolidated appeals, the issue presented is whether plaintiffs, as retailers, are entitled to a refund pursuant to the bad debt provision, MCL 205.54i, of Michigan's General Sales Tax Act (GSTA), MCL 205.51 *et seq*., when the losses were incurred by a third-party financing company. We conclude that plaintiffs are not entitled to the refunds under the bad debt provision, and, in each action, summary disposition in favor of defendants is proper.[1]

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[1] In Docket Nos. 310399 and 312168, summary disposition was granted in favor of plaintiffs, and we reverse and remand for entry of an order granting summary disposition in favor of defendants. In Docket Nos. 311053, 311261, and 311294, summary disposition was granted in favor of defendants, and we affirm those decisions.

I. BASIC FACTS AND PROCEDURAL HISTORY

In these cases, plaintiffs, as retailers, entered into agreements with financing companies to issue private label credit cards (PLCC).[2] When a customer made a purchase with a PLCC, the retailer remitted the sales tax to the treasury department. In accordance with the terms of the agreements between the retailer and the financing companies, the retailer received reimbursement for the purchase[3] and the applicable sales tax. When the customers failed to pay the amounts owed on their PLCC, the financing company wrote off the bad debts. However, plaintiffs, as the retailers, also sought a refund from the treasury department of the sales tax attributable to the bad debt amount. Defendants asserted that plaintiffs were not entitled to a refund of the sales tax because they did not fulfill the requirements of MCL 205.54i(1)(a). Plaintiffs argued that their actions, coupled with the actions of the lender, qualified for the bad debt deduction of MCL 205.54i(1)(a) pursuant to the decision in *DaimlerChrysler Servs North America LLC v Dep't of Treasury*, 271 Mich App 625; 723 NW2d 569 (2006), superseded by statute as recognized in *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 374; 781 NW2d 310 (2009).[4] Pursuant to the plain language of MCL 205.54i, as amended by 2007 PA 105, and the rules governing taxation, we hold that plaintiffs are not entitled to the refund.

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[2] In Docket No. 311053, plaintiff, Sears Roebuck & Co, initially operated a Sears-label credit card program administered by Citibank, but ultimately sold its accounts to Citibank.

[3] The agreements may have provided for discounted amounts and not full reimbursement for the total amount of the sale.

[4] Plaintiffs also rely on *Home Depot USA, Inc v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2012 (Docket No. 301341). However, the *Home Depot* decision is unpublished, not binding precedent, and we decline plaintiffs' invitation to follow it. MCR 7.215(C)(1); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

II. RULES REGARDING STATUTORY CONSTRUCTION

A trial court's ruling regarding a motion for summary disposition presents a question of law subject to review de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. *Id*. Once the intent of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 660 (1989). First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. *Whitman*, 493 Mich at 311. "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman*, 493 Mich at 311. "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). The courts may not read into the statute a requirement that

the Legislature has seen fit to omit. *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951); *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010). "When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Mich Basic Prop Ins Ass'n*, 288 Mich App at 560 (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. *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 212; 828 NW2d 459 (2012). "The word 'or' generally refers to a choice or alternative between two or more things." *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997).

III. RULES REGARDING TAXATION, DEDUCTION, AND EXEMPTION

> State legislatures have great discretionary latitude in formulating taxes. The legislature must determine all question of State necessity, discretion or policy in ordering a tax and in apportioning it. And the judicial tribunals of the State have no concern with the policy of State taxation determined by the legislature. [*In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 308; 806 NW2d 683 (2011) (quotation marks and citations omitted).]

When interpreting a tax statute, the power to tax must be expressly stated, not inferred. *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994); *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). "Tax laws will not be extended in scope by implication or

forced construction." *Ameritech Publishing, Inc*, 281 Mich App at 136. "[A]mbiguities in the language of a tax statute are to be resolved in favor of the taxpayer." *Mich Bell Tel Co*, 445 Mich at 477. The appellate court "may not vary the clear and unequivocal meaning of the words used in the statute and determine tax matters solely on the grounds of unwisdom or of public policy." *Ready-Power Co v City of Dearborn*, 336 Mich 519, 525; 58 NW2d 904 (1953).

A "tax deduction" is a "subtraction from gross income in arriving at taxable income." *In re Request for Advisory Opinion*, 490 Mich at 333 n 40 (quotation marks and citation omitted). A "tax exemption" is characterized as "[i]mmunity from the obligation of paying taxes in whole or in part." *Id*. Although the two principles differ, the net effect is the same because both reduce gross income when computing taxable income. *Id*. (quotation marks and citation omitted). Taxation is the rule, and exemptions are the exception. *Ladies Literary Club v City of Grand Rapids*, 409 Mich 748, 754; 298 NW2d 422 (1980). Consequently, statutory exemptions are strictly construed against the taxpayer. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 201; 699 NW2d 707 (2005). Similarly, a deduction presents a matter of legislative grace, and a clear provision must be identified to allow for a particular deduction. *Id*. A deduction must be clearly expressed because the "propriety of a deduction does not turn upon general equitable considerations, such as a demonstration of effective economic and practical equivalence." *Perry Drug Stores, Inc v Dep't of Treasury*, 229 Mich App 453, 461; 582 NW2d 533 (1998) (citation and quotation marks omitted). The burden of proving a deduction is on the party seeking the deduction. See *Southfield Western, Inc v City of Southfield*, 146 Mich App 585, 590; 382 NW2d 187 (1985).

In practice, the rules of construction governing exemptions may be applied to the rules addressing deductions. See *Detroit Edison Co v Dep't of Revenue*, 320 Mich 506, 514-515; 31 NW2d 809 (1948). In *GMAC LLC*, 286 Mich App at 374-375, this Court set forth the following rules regarding tax exemptions:

> Moreover, "[a]n exemption will not be inferred from language of a statute if the words admit of any other reasonable construction." Tax exemptions are disfavored, and the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption. Tax exemptions are in derogation of the principle that all shall bear a proportionate share of the tax burden, and therefore, a tax exemption shall be strictly construed. [Citations omitted.]

With regard to the clarity of the language required to claim an exemption and the burden of proof, our Supreme Court has held:

> "An intention on the part of the legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it

> depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute, the favor would be extended beyond what was meant." [*City of Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), § 672, p 1403.]

IV. MCL 205.54i AND APPLICATION TO THE FACTS

Before its 2007 amendment, the plain language of the bad debt statute, MCL 205.54i, provided, in relevant part:

> (1) As used in this section, "bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.
>
> (2) In computing the amount of tax levied under this act for any month, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. The amount of gross proceeds deducted must be charged off as uncollectible on the books and records of the taxpayer at the time the debt becomes worthless and deducted on the return for the period during which the bad debt is written off as uncollectible in the

> claimant's books and records and must be eligible to be deducted for federal income tax purposes. For purposes of this section, a claimant who is not required to file a federal income tax return may deduct a bad debt on a return filed for the period in which the bad debt becomes worthless and is written off as uncollectible in the claimant's books and records and would be eligible for a bad debt deduction for federal income tax purposes if the claimant was required to file a federal income tax return. If a consumer or other person pays all or part of a bad debt with respect to which a taxpayer claimed a deduction under this section, the taxpayer is liable for the amount of taxes deducted in connection with that portion of the debt for which payment is received and shall remit these taxes in his or her next payment to the department. Any payments made on a bad debt shall be applied proportionally first to the taxable price of the property and the tax on the property and second to any interest, service, or other charge.
>
> (3) Any claim for a bad debt deduction under this section shall be supported by that evidence required by the department. The department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to this section and shall ensure that the deduction on any bad debt does not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt.

MCL 205.54i, as amended by 2007 PA 105, placed limitations on who qualified as a "taxpayer" for purposes of the bad debt provision. "The amendment to MCL 205.54i was approved and filed on October 1, 2007, given immediate effect, and expressly provided for retroactive application." *GMAC LLC*, 286 Mich App at 369.

MCL 205.54i, as amended by 2007 PA 105, states:

> (1) As used in this section:
>
> (a) "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable

and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.

(b) Except as provided in subdivision (c), "lender" includes any of the following:

(*i*) Any person who holds or has held an account receivable which that person purchased directly from a taxpayer who reported the tax.

(*ii*) Any person who holds or has held an account receivable pursuant to that person's contract directly with the taxpayer who reported the tax.

(*iii*) The issuer of the private label credit card.

(c) "Lender" does not include the issuer of a credit card or instrument that can be used to make purchases from a person other than the vendor whose name or logo appears on the card or instrument or that vendor's affiliates.

(d) "Private label credit card" means any charge card, credit card, or other instrument serving a similar purpose that carries, refers to, or is branded with the name or logo of a vendor and that can only be used for purchases from the vendor.

(e) "Taxpayer" means a person that has remitted sales tax directly to the department on the specific sales at retail transaction for which the bad debt is recognized for federal income tax purposes or, after September 30, 2009, a lender holding the account receivable for which the bad debt is recognized, or would be recognized if the claimant were a corporation, for federal income tax purposes.

(2) In computing the amount of tax levied under this act for any month, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. The amount of gross proceeds deducted must be charged off as uncollectible on the books and records of the taxpayer at the time the debt becomes worthless and deducted on the return for the period during which the bad debt is written off as uncollectible in the claimant's books and records and must be eligible to be deducted for federal income tax purposes. For purposes of this section, a claimant who is not required to file a federal income tax return may deduct a bad debt on a return filed for the period in which the bad debt becomes worthless and is written off as uncollectible in the claimant's books and records and would be eligible for a bad debt deduction for federal income tax purposes if the claimant was required to file a federal income tax return. If a consumer or other person pays all or part of a bad debt with respect to which a taxpayer claimed a deduction under this section, the taxpayer is liable for the amount of taxes deducted in connection with that portion of the debt for which payment is received and shall remit these taxes in his or her next payment to the department. Any payments made on a bad debt shall be applied proportionally first to the taxable price of the property and the tax on the property and second to any interest, service, or other charge.

(3) After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:

(a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.

(b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009.

> (4) Any claim for a bad debt deduction under this section shall be supported by that evidence required by the department. The department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to this section and shall ensure that the deduction on any bad debt does not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt.

Plaintiffs direct this panel to the decisions of *DaimlerChrysler* and *GMAC LLC*, and request that we interpret those decisions to conclude that plaintiff retailers, coupled with the financing companies constituted "taxpayers" for purposes of obtaining the bad debt refund in accordance with MCL 205.54i(1)(a).[5] The appropriate inquiry is not to construe this factual scenario within the confines of those appellate decisions. Rather, our role is to discern the legislative intent from the plain language of the amended statute, *Whitman*, 493 Mich at 311, enforce the statute as written if the language is clear and unambiguous, *id*., or to construe the statute as necessary to give effect to every word in the statute and avoid a construction that would render part of the statute surplusage or nugatory, *Johnson*, 492 Mich at 177. Because a tax exemption or deduction is sought by plaintiffs, they have the burden of proof, *Detroit*, 322 Mich at 148, the statute is strictly construed against them as the taxpayer, *GMAC LLC*, 286 Mich at 375, and the exemption must be expressed in clear and unambiguous terms, *Detroit*, 322 Mich at 149. In light of the rules governing statutory construction, tax exemption

[5] Specifically, plaintiffs contend that *DaimlerChrysler*, which held that groups may act as a unit for purposes of determining the "taxpayer," remains viable. However, the plain language of MCL 205.54i, as amended by 2007 PA 105, indicates that the retailer, as the taxpayer, and the lender, are treated differently. See MCL 205.54i(1)(e) and (3). The statutory amendment superseded the *DaimlerChrysler* decision.

and deduction, and the burden of proof, we conclude that plaintiffs are not entitled to a refund under the bad debt provision.

Pursuant to MCL 205.52(1) of the GSTA, business persons engaged in making sales at retail must pay an annual tax for the privilege of engaging in business in this state. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 407; 590 NW2d 293 (1999). The sales tax is imposed directly on the seller, but the seller may transfer it directly to the consumer at the point of sale. *Id*. at 408. The bad debt provision of the GSTA allows "bad debts to be deducted from the gross proceeds used to calculate tax liability." *Id*. at 406. Specifically, the bad debt provision "allows taxpayers to recover overpayment when expected sales proceeds are not received." *DaimlerChrysler*, 271 Mich App at 626.

A review of the plain language of MCL 205.54i, as amended by 2007 PA 105, and applied retroactively, reveals that the Legislature recognized that sales transactions did not merely involve a consumer and a retailer. Rather, the Legislature acknowledged that sales transactions may include a lender when the consumer utilizes a credit card to complete the sale, and the lender may hold the account receivable signifying a bad debt when the consumer fails to pay for the purchase in accordance with the terms of the private label credit card. MCL 205.54i(1)(b) and (e). Consequently, the availability of the deduction has been limited, and a taxpayer and lender may execute an election regarding the entity that may claim the deduction subject to completion of the necessary conditions. MCL 205.54i(3) ("[A] taxpayer who reported the tax and a lender [may] execute and maintain a written election designating *which party* may claim the deduction[.]"). Furthermore, after September 30, 2009, the term "taxpayer" may

include the person that directly remitted the tax to the treasury department *or* the lender holding the account receivable for which the bad debt is recognized. "The word 'or' generally refers to a choice or alternative between two or more things." *Auto-Owners Ins Co*, 227 Mich App at 50. The use of the alternative term "or" reflects the legislative intent that the "taxpayer" as the remitter of the tax and the "lender" are two different entities for purposes of allowing a taxpayer to obtain the refund. *Id*. Plaintiffs did not meet their burden of proving a clearly stated exemption or deduction.

Irrespective of the Legislature's recognition that the sales transaction may involve third party lenders, both the amended and the prior versions of MCL 205.54i(2) confined the deduction. Specifically, MCL 205.54i(2), and MCL 205.54i(2), as amended by 2007 PA 105, both contain the same language, in relevant part: "If a consumer *or other person pays all or part of a debt with respect to which a taxpayer claimed a deduction* under this section, the taxpayer is liable for the amount of taxes deducted in connection with that portion of the debt for which payment is received and shall remit these taxes in his or her next payment to the department." (emphasis added). In the factual scenario where the taxpayer is the retailer who remits the tax to the treasury department, the retailers are paid by the financing company. Thus, the plain language of the bad debt provision acknowledges that when the debt is paid, the taxpayer remains liable for remittance of the tax to the extent of the amount paid. In the present case, consumers obtained the funds to pay for the goods through credit card lenders, and plaintiff retailers were paid in full in accordance with the reimbursement agreements for the goods, including the tax. Although MCL 205.54i does not define "person," the GSTA, MCL 205.51(1)(a) defines "person" to include "municipal or

private corporation whether organized for profit or not, company . . . .” Therefore, the payment of the bad debt by a third party lender, an organized corporation, does not entitle retailers to a bad debt refund. Accordingly, plaintiffs are not entitled to the requested refunds.

Reversed and remanded for entry of an order granting summary disposition in favor of defendants in Docket Nos. 310399 and 312168, and affirmed in Docket Nos. 311053, 311261, and 311294. We do not retain jurisdiction.

FORT HOOD, P.J., and FITZGERALD and O’CONNELL, JJ., concurred.

LIMA TWP v BATESON

Docket Nos. 306575 and 306583. Submitted February 6, 2013, at Lansing. Decided September 19, 2013, at 9:00 a.m.

Lima Township brought an action in the Washtenaw Circuit Court against Ernest K. Bateson and Pamela E. Gough-Bahash (now Gough-Bateson), seeking to enjoin them from using their property to store commercial vehicles, materials, and equipment in violation of the Lima Township zoning ordinance. Gough-Bahash in turn filed a complaint for declaratory relief against Lima Township, seeking an order permitting her to keep the items on the property pursuant to both the zoning ordinance and the Right to Farm Act (RTFA), MCL 286.471 *et seq*., because she and Bateson were developing a tree farm and their property was zoned for agricultural use. The court, Donald E. Shelton, J., granted Lima Township's motion for injunctive relief and granted summary disposition of both cases. Gough-Bahash and Bateson appealed, and the appeals were consolidated.

The Court of Appeals *held*:

1. The trial court erred by granting summary disposition because there were genuine factual issues regarding whether appellants' activities were protected under the RTFA.

2. A party relying on the RTFA as a defense to a nuisance action has the burden to prove by a preponderance of the evidence that the challenged conduct is protected under the act. To successfully assert the defense, a party must prove that the challenged condition or activity constitutes a farm or farm operation and that the farm or farm operation conforms to the generally accepted agricultural and management practices set forth by the Michigan Commission of Agriculture. The trial court erred by failing to make factual findings with regard to these elements.

3. The trial court abused its discretion by excluding the testimony of Robert Pesko, an engineer who would have testified about the type and amount of materials removed from appellants' property, because it erred as a matter of law by concluding that this would not have constituted rebuttal testimony. On remand, the trial court should consider Pesko's testimony before articulating factual findings under the RTFA.

4. Appellants failed to establish that Lima Township denied them equal protection and due process by treating them differently from other similarly situated individuals.

Reversed and remanded for further proceedings; jurisdiction retained.

1. NUISANCE — DEFENSES — RIGHT TO FARM ACT — BURDEN OF PROOF.

A party relying on the Right to Farm Act, MCL 286.471 *et seq*., as a defense to a nuisance action has the burden to prove by a preponderance of the evidence that the challenged conduct is protected under the act.

2. NUISANCE — DEFENSES — RIGHT TO FARM ACT — ELEMENTS.

To successfully assert the Right to Farm Act as a defense to a nuisance action, a party must prove that the challenged condition or activity constitutes a farm or farm operation and that the farm or farm operation conforms to the generally accepted agricultural and management practices set forth by the Michigan Commission of Agriculture.

3. CONSTITUTIONAL LAW — EQUAL PROTECTION — "CLASSES OF ONE."

A party claiming a violation of the right to equal protection of the law based on being treated as a class of one must establish that he or she was intentionally treated differently from others similarly situated and that there was no rational basis for the difference in treatment; to be considered similarly situated, the party and the comparators must be prima facie identical in all relevant respects or directly comparable in all material respects (US Const, Am XIV; Const 1963, art 1, § 2).

Reading, Etter & Lillich (by *Victor L. Lillich*) for Lima Township.

Baker, Stringer & Garwood, LLP (by *Thomas L. Stringer*) for Ernest K. Bateson and Pamela Gough-Bahash.

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM. In these consolidated appeals, in Docket No. 306575, appellants Ernest Bateson and Pamela Gough-Bahash (Gough) appeal as of right a trial court

order denying appellants' motion for summary disposition and granting appellee Lima Township's motions for summary disposition and injunctive relief. In Docket No. 306583, Gough appeals the same order as of right.[1] For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. FACTS AND PROCEEDINGS

On December 23, 2009, Gough, Bateson's wife, purchased approximately 30 acres of land (the property) zoned AG-1 (agricultural) in Lima Township. Shortly thereafter, appellee Lima Township (Lima) filed a complaint[2] for injunctive relief against appellants, alleging improper use of the property and improper storage of commercial vehicles, materials, and equipment on the property. Lima alleged that Bateson was using the property to conduct commercial business operations and store commercial vehicles and equipment.[3] Lima claimed that these uses were not permitted under the Lima Township Zoning Ordinance (LTZO) and were a nuisance per se.

On the same day Lima filed its complaint, Gough filed a complaint[4] for declaratory relief against Lima, alleging that she and Bateson were developing a tree farm on the property, activity that was permitted in the AG-1 zone. Gough alleged that she had certain materials, sup-

[1] Although Bateson is not a party in Docket No. 306583, for ease of reference, we will refer to him and Gough as "appellants" throughout this opinion, regardless of which underlying case is being discussed.

[2] Lima's complaint commenced lower court Case No. 10-000368-CZ.

[3] Lima alleged that Bateson was storing the following equipment on the property: "dump trucks, semi truck trailers and tractors, Landscape Solutions pick-up truck, front-end loaders, backhoes, dozers, larger crane and drag line, excavators, large oil/chemical/liquid tank container, dozer tracts, miscellaneous equipment and debris, and landscape material."

[4] Gough's complaint commenced lower court Case No. 10-000373-CZ.

plies, equipment, and vehicles delivered to the property for purposes of preparing the property for the tree farm. Gough requested an order declaring that she was permitted to maintain the equipment on the property.

On August 11, 2010, appellants filed two motions for summary disposition. One motion requested summary disposition under MCR 2.116(C)(7) and (10) as to Gough's complaint for declaratory relief. The other requested summary disposition as to Lima's complaint pursuant to MCR 2.116(C)(7), (8), and (10). Appellants' motions were based on assertions that the activities being conducted on the property were a permitted agricultural use. Specifically, appellants asserted that it was their intent to operate a tree farm, which was permitted under the LTZO and protected by Michigan's Right to Farm Act (RTFA), MCL 286.471 *et seq*. Appellants supported their motions with affidavits in which they both averred that they were in the process of preparing the land for tree farming.

Lima opposed appellants' motions, arguing that appellants were not engaged in legitimate farming activities. Additionally, Lima filed a renewed motion for a preliminary injunction and a request for an evidentiary hearing. Lima also requested leave to amend its complaint and add allegations of ongoing excavation without a special use permit.

The trial court granted Lima's request for leave to file an amended complaint. In regard to Lima's motion for a preliminary injunction and evidentiary hearing, the trial court stated: "Motions for Summary disposition will be heard on October 20, 2010 . . . and assuming motions for summary disposition are not granted, an evidentiary hearing on Plaintiff Lima Township's request for Preliminary injunction shall be heard on November 18, 2010."

Lima filed its amended complaint on September 28, 2010. Shortly thereafter, the trial court entered a stipulated order dismissing Gough's complaint for declaratory relief—Case No. 10-000373-CZ—without prejudice.[5]

On January 26, 2011, Lima filed a trial brief and brief in opposition to appellants' motion for summary disposition. Lima argued that appellants were not engaged in a legitimate farming activity protected under the RTFA. Lima supported its brief with affidavits, photographs, and other documentary evidence and requested that the trial court deny appellants' motion for summary disposition and grant summary disposition in its favor pursuant to MCR 2.116(I)(2).

The trial court held a four-day evidentiary hearing on March 24, May 12, July 28, and July 29, 2011. At the hearing, several farmers from the area testified. This testimony showed that appellants kept heavy equipment on the property including trailers, flatbeds, gravel haulers, bulldozers, pay loaders and cranes. One witness testified that a farmer would want a lot of appellants' equipment. In addition, testimony showed that there were piles of dirt, rocks, asphalt millings, and large excavation sites on the property. Several area farmers testified that trucks regularly came and went from the property and two farmers approximated the number of trucks at 500. Several witnesses testified that appellants planted a number of trees near the front of the property, but other testimony showed that there was no harvestable hay on the property and one area resident with a farming background testified that the

[5] The parties stipulated to dismiss Gough's complaint; however, when the trial court entered its final order, it indicated that the order applied to "both cases," and specifically dismissed "Case No. 10-373-CZ." Hence, both cases were presented for appellate review.

property was not desirable for farming. Other evidence showed that appellants were not violating the township's soil erosion ordinance, and the township supervisor testified that there was no claim that appellants were operating a quarry.

Wayne Whitman, the environmental manager for the Right to Farm Program at the Michigan Department of Agriculture and Rural Development (MDOA), also testified at the evidentiary hearing. Whitman inspected the property and reviewed aerial photographs of the property. He testified that some of the photographs depicted ground cover that appeared to be in "some sort of rows" or serving as "some kind of erosion control practice on that ground." However, Whitman could not determine whether any farming was taking place because he did not know what type of vegetation was growing. Whitman testified that vegetation could suggest ongoing farming and that prairie grass and trees could be farm products. Whitman had written a letter after inspecting the property that addressed the RTFA and generally accepted agricultural and management practices (GAAMPs), and he agreed at the hearing that "tree planting and the use of water to irrigate the crops would be included in the definition" of farming activities protected by the RFTA. Whitman agreed that trees were planted on the property and he agreed that a pond used to irrigate crops would be protected under the RTFA. Whitman testified that the trees planted on the property indicated the potential for a farm market because they could be sold on the property.

In regard to the vehicles and equipment stored on the property, Whitman stated that he could not form an opinion as to whether they fell under the RFTA because he did not know what the equipment was used for. However, Whitman testified that if it was

being used for the commercial production of a farm product, then it would be permitted under the RTFA. Whitman further testified that the RTFA refers to the use of equipment and does not limit the amount of equipment that a person can maintain on a farm. Whitman also testified that he was aware of other farms that used heavy equipment for farming purposes, including bulldozers, cranes, and other "rather substantial equipment."

Gough testified that she purchased the property intending to start a tree farm and that appellants had made significant improvements to the property in order to prepare it for farming. Specifically, appellants graded the property, made improvements to the driveway, and extended it to provide access to the rest of the property. Gough stated that Bateson hauled in several truckloads of asphalt millings and had to dig up soil to lay the asphalt. Gough further stated that the previous owners left large piles of dirt along the driveway when they built it so appellants had to remove that dirt. Gough testified that neighbors who saw a large number of trucks coming and going from the property were observing the property at the time appellants were doing asphalt work.

Gough denied that appellants were engaged in commercial activity other than farming. Gough admitted that appellants removed some soil, but stated that it was in relation to the paving and grading projects, and she denied that 500 truckloads of material had been removed. Gough estimated that appellants removed about 30 truckloads, explaining that most of the loads went to Bateson's industrial site for processing and use elsewhere. Gough was also aware of two instances in which material was removed from the property and delivered to some customers.

In regard to the tree farming operation, Gough testified that Bateson used his equipment to move topsoil, prepare the land for planting, and dig holes for planting trees. Gough and family members followed behind and planted about 500 or 600 trees by hand. Gough stated that appellants planned to use two cranes stored on the property to dig an irrigation pond. Gough also stated that she intended to build a barn on the property, obtain livestock, and build a farm market with a parking lot. Gough planned to use hay that Bateson baled for the livestock.

Bateson testified that he was involved in the business of contracting and supplying landscape materials and that he previously owned two commercial locations in Michigan. Bateson testified that he planned to use the property for farming and as a residence, but explained that the property required significant improvements because it was wet and improperly graded. According to Bateson, appellants improved the driveway, installed gravel and asphalt near the rear of the property where they intended to erect a farm market, and performed extensive landscaping. Bateson testified that he laid 10,000 yards of sod, used a lot of equipment to prepare the soil and move the sod, and installed a sprinkler system. Bateson testified that the equipment on the site would be used to dig an irrigation pond and for other farming purposes. Bateson agreed that he removed some material from the property, but claimed he did so within the limits of the LTZO. He denied that 500 truckloads of material were removed and instead estimated that he removed about 30 to 33 truckloads.

In regard to the farming operations, Bateson stated that appellants planted a substantial number of trees. Further, he planned on constructing an irrigation pond

for the trees. Bateson stated that he would be using cranes, loaders, bulldozers, and trucks to build the pond. Bateson also used his equipment to move and store hay bales. Bateson testified that all his activities on the property were related to farming or landscaping and that all the equipment on the property was being used for farm purposes.

Following the hearing, the trial court entered an order denying appellants' motions for summary disposition, granting injunctive relief in favor of Lima Township, and granting Lima's motion for summary disposition pursuant to MCR 2.116(I)(2) "in both cases." The trial court stated that appellants' activities were not permitted under the LTZA and were not protected by the RTFA. The court ordered appellants to stop removing soil and other aggregate materials from the property. Additionally, appellants were ordered to "cease and desist from parking and storing large gravel haulers and other dump trucks on the property, except while in the process of performing specific tasks permitted by this Order . . . ." Appellants were further ordered to remove "earth moving and excavation vehicles and equipment including such equipment as road graders, dozers, front end loaders, cranes, trenchers, backhoes, screeners, and drag lines" and to "cease and desist from the parking and storage of commercial trailers on the property." Finally, appellants were ordered to stop using "the property as a staging area for the coming and going of . . . commercial vehicles and equipment." The trial court denied appellants' motion for reconsideration, these appeals ensued, and this Court consolidated the appeals.[6]

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[6] *Lima Twp v Bateson*, unpublished order of the Court of Appeals, entered November 17, 2011 (Docket Nos. 306575 and 306583).

II. ANALYSIS

A. SUMMARY DISPOSITION

Appellants first argue that the trial court erred by granting summary disposition in favor of Lima and by denying their motions for summary disposition. Appellants contend that summary disposition was inappropriately granted in favor of Lima because the court made credibility determinations and resolved factual disputes. We review de novo a trial court's decision on a motion for summary disposition. *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008).

Having reviewed the record, we conclude that the trial court erred by granting Lima's motion for summary disposition. A court "is not permitted to assess credibility, or to determine facts" on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id*. Here, the trial court held an evidentiary hearing at which both parties presented evidence. The court then proceeded to make findings based on that evidence by concluding that appellant's activities were prohibited under the LTZA and not protected by the RTFA. On the basis of those findings, the court granted summary disposition in favor of Lima. This amounted to error because, as we will discuss in more detail, the trial court erred in applying the RTFA and there were genuine factual issues regarding whether appellants' activities were protected under the RTFA. In short, summary disposition should not have been granted for either party.[7] See *id*. (summary disposition is not

[7] We also note that the trial court erred by entering any order with respect to Case No. 10-000373-CZ—the case that Gough commenced—because the court had previously entered a stipulated order to dismiss that case.

proper if there is a genuine issue of material fact).

B. RIGHT TO FARM ACT

Appellants contend that their activities were protected under the RTFA. In so doing, appellants challenge the trial court's award of injunctive relief in favor of Lima.

This case requires that we construe applicable provisions of the RTFA. "Issues 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). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011).

In this case, Lima alleged that appellants were engaged in activity that is not permitted under the LTZO. Generally, a violation of a zoning ordinance constitutes a nuisance per se, and a court must order it abated. MCL 125.3407; *Travis v Preston (On Rehearing)*, 249 Mich App 338, 351; 643 NW2d 235 (2002). However, "[u]nder the RTFA, a *farm* or *farming operation* cannot be found to be a nuisance if it meets certain criteria . . . ." *Travis*, 249 Mich App at 342-343 (emphasis added). More specifically, the rights afforded a farmer under the RTFA preempt local ordinances such that activities falling within the purview of the act cannot be barred by ordinance. MCL 286.474(6); see also *Travis*, 249 Mich App at 343-346 (noting that 1999 PA 261 amended the RTFA to preempt local ordinances). Therefore, if appellants' activity was protected under the RTFA, then the LTZO could not operate to bar appellants from engaging in the activity and Lima was not entitled to injunctive relief. Accordingly, the central

issue in this case is whether the trial court properly determined that appellants' activity was not protected under the RTFA.

In relevant part, the RTFA affords farmers the following protection:

> A *farm* or *farm operation* shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture. [MCL 286.473(1) (emphasis added).]

Pursuant to this language, it is clear that to determine whether an activity is protected under the RTFA, a two-pronged analysis is required: first, the activity must constitute either a "farm" or a "farm operation," and second, the farm or farm operation must conform to the applicable GAAMPs. However, before proceeding to discuss these elements, we must determine the appropriate burden of proof.

i. BURDEN OF PROOF UNDER THE RTFA

The RTFA is silent with respect to which party bears the burden of proof, and there is no published caselaw addressing the issue. Therefore, we look to the plain language of the act and the intent underlying the legislation in order to resolve this issue. *Klooster*, 488 Mich at 296.

As with most legislative enactments, the purpose and intent of the RTFA are multifaceted, arising from myriad conflicting interests. This Court has previously opined that the Legislature enacted the RTFA in 1981 in recognition of the expansion of development "outward from our state's urban centers and into our agricultural communities . . . ." *Northville Twp v*

Coyne, 170 Mich App 446, 448-449; 429 NW2d 185 (1988). The RTFA was intended to "protect farmers from the threat of extinction caused by nuisance suits arising out of alleged violations of local zoning ordinances and other local land use regulations as well as from the threat of private nuisance suits." *Id*. at 449. As noted, the act provides that a farm or farm operation "shall not be found to be a public or private nuisance" if the farm or farm operation conforms to certain GAAMPs. MCL 286.473(1). In order to prove that challenged conduct constitutes a "farm" or "farm operation," an individual must show that he or she is engaged in the commercial production of a farm product. See MCL 286.473(1); *Shelby Charter Twp v Papesh*, 267 Mich App 92, 101; 704 NW2d 92 (2005).

The statutory language itself, coupled with the intent of the legislation, indicates that the RTFA is defensive in nature. See *Shelby Charter Twp*, 267 Mich App at 110 (noting that a party could establish a "meritorious defense" under the RTFA). Specifically, the language implies that the RTFA is an affirmative defense akin to immunity. See *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001) (noting that an affirmative defense "does not controvert the plaintiff's establishing a prima facie case, but . . . denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings") (quotation marks and citation omitted); *Amburgey v Sauder*, 238 Mich App 228, 233; 605 NW2d 84 (1999), quoting Black's Law Dictionary (6th ed) (defining "immunity" as " '[f]reedom or exemption from penalty, burden, or duty' "); MCR 2.111(F)(3)(a) (immunity is an affirmative defense). Generally, a party raising an affirmative defense has the burden of proof with respect to the defense. See *Palenkas v Beaumont Hosp*, 432 Mich 527, 549; 443 NW2d 354 (1989) (noting that the party raising an affirmative de-

fense generally has the burden of production). Accordingly, we hold that a party relying on the RTFA as a defense to a nuisance action has the burden to prove that the challenged conduct is protected under the RTFA.

With respect to the applicable *standard* of proof, the RTFA is silent and there is no published caselaw addressing the issue. Generally, "in civil cases, the Legislature's failure to spell out a standard of proof . . . usually require[s] application of the preponderance of the evidence standard." *In re Moss*, 301 Mich App 76, 84; 836 NW2d 182 (2013). In keeping with our state's jurisprudence on the applicable standard of proof, we hold that, if a party asserts the RTFA as a defense, that party bears the burden to prove by a preponderance of the evidence that the challenged conduct is protected under the RTFA.

ii. ELEMENTS OF A SUCCESSFUL RTFA DEFENSE

Having concluded that the RTFA is an affirmative defense and that the party relying on the defense has the burden of proof by a preponderance of the evidence, we now turn to the elements of a successful RTFA defense. As noted, in order for a party to successfully assert the RTFA as a defense, that party must prove the following two elements: (1) that the challenged condition or activity constitutes a "farm" or "farm operation" and (2) that the farm or farm operation conforms to the relevant GAAMPs. We proceed by examining the first element.

(1) "FARM" or "FARM OPERATION"

The RTFA defines "farm" and "farm operation" in relevant part as follows:

> (a) "Farm" means the land, plants, animals, buildings, structures, including ponds used for agricultural or aquac-

ultural activities, machinery, equipment, and other appurtenances *used in the commercial production of farm products*.

(b)"Farm operation" means the operation and management of a farm *or a condition or activity* that occurs at any time as necessary on a farm *in connection with the commercial production*, harvesting, and storage *of farm products*, and includes, but is not limited to:

(*i*) Marketing produce at roadside stands or farm markets.

(*ii*) The generation of noise, odors, dust, fumes, and other associated conditions.

(*iii*) The operation of machinery and equipment necessary for a farm including, but not limited to, irrigation and drainage systems and pumps and on-farm grain dryers, and the movement of vehicles, machinery, equipment, and farm products and associated inputs necessary for farm operations on the roadway . . . .

(*iv*) Field preparation and ground and aerial seeding and spraying.

(*v*) The application of chemical fertilizers or organic materials, conditioners, liming materials, or pesticides.

(*vi*) Use of alternative pest management techniques.

(*vii*) The fencing, feeding, watering, sheltering, transportation, treatment, use, handling and care of farm animals.

(*viii*) The management, storage, transport, utilization, and application of farm by-products, including manure or agricultural wastes.

(*ix*) The conversion from a farm operation activity to other farm operation activities.

(*x*) The employment and use of labor. [MCL 286.472 (emphasis added).]

"Both the definitions for 'farm' and 'farm operation' employ the terms 'farm product' and 'commercial production.' " *Shelby Charter Twp*, 267 Mich App at 100.

Thus, under "the plain language of the RTFA, a farm or farming operation cannot be found to be a nuisance if it is commercial in nature and conforms to the GAAMPs." *Id*. at 101.

The act provides that "farm product" means "*those plants and animals useful to human beings produced by agriculture* and includes, but is not limited to . . . trees and tree products . . . ." MCL 286.472(c) (emphasis added). This Court has previously defined "commercial production" as "the act of producing or manufacturing an item intended to be marketed and sold at a profit." *Shelby Charter Twp*, 267 Mich App at 100-101. However, "there is no minimum level of sales that must be reached before the RTFA is applicable." *Id*. at 101 n 4.

Applying these definitions in the present case shows that the trees appellants planted on their property are "farm products." MCL 286.472(c). However, there was a genuine issue of fact with regard to whether appellants proved by a preponderance of the evidence that they intended to produce the trees and sell them for profit and whether the alleged nuisances were necessarily related to the production and sale of the trees. Specifically, evidence showed that appellants kept heavy equipment on the property, removed soil from the property, and had extensive truck traffic at the property. However, other evidence showed that appellants planted a large number of trees on the property, that appellants intended to open a farm market there, and that appellants used the machinery to prepare the land and move farm products. Gough testified that appellants planted 500 to 600 trees, extended the driveway on the property, dug holes for trees, planned to dig an irrigation pond, brought in topsoil, baled hay, and intended to build a barn and a farm market. If so, the machinery falls within a "farm operation" under MCL 286.472(b)(*iii*).

In addition, Bateson testified that the property needed significant improvement because it was wet and improperly graded. He testified that appellants improved the driveway, installed gravel, laid sod, and installed a sprinkler system. Bateson testified that appellants planted a large number of trees and had cranes, bulldozers, and trucks on the property to dig an irrigation pond. Appellants could have engaged in these activities in order to prepare the land for planting, irrigating, maintaining, harvesting, and selling trees at a farmer's market.

Additionally, one witness testified that farmers would like to have a lot of the equipment that appellants had on the property. Moreover, Whitman, the Right to Farm program's environmental manager, did not testify that appellants were engaging in activity that fell outside the scope of the RTFA. Rather, Whitman could not offer an opinion as to whether appellants were engaged in farming because he did not know what type of vegetation was growing, but he testified that vegetation could suggest ongoing farming. With respect to the vehicles and equipment stored on the property, Whitman could not give an opinion as to whether they fell under the RTFA because he did not know what the equipment was used for. Whitman testified that the RTFA does not limit the amount of equipment one can use for the production of farm products and that other farms used heavy equipment similar to the equipment appellants kept at the property. Other evidence showed that appellants had not violated the soil erosion ordinance, which suggested that appellants were not conducting a gravel or soil operation. This evidence was inconclusive, but, when weighed with all the other evidence, it could have supported appellants' contention that they were engaged in the commercial production of a farm product. This conflicting material evidence precluded a grant of summary disposition to either party. The

trial court was required to weigh this evidence together with all the other evidence and articulate findings as to whether the alleged nuisances arose from the commercial production of trees.

We hold that the evidence presented by the parties required the trial court to weigh all the evidence and articulate findings of fact to determine whether appellants proved by a preponderance of the evidence that the alleged nuisance conditions and activities arose from the commercial production of trees, and the trial court erred by failing to do so.[8] Remand for further proceedings is therefore appropriate.

(2) COMPLIANCE WITH GAAMPs

If a party asserting an RTFA defense successfully proves that they maintain a farm or are engaged in a farm operation, then the party must also prove that the farm or farm operation complies with applicable GAAMPs "according to policy determined by the Michigan commission of agriculture." MCL 286.473(1). A party can satisfy this element by introducing credible testimony or other evidence to show that their farm or farm operation complies with applicable GAAMPs as set forth by the Michigan Commission of Agriculture.

In this case, the trial court did not make any findings with respect to the applicable GAAMPs. On remand, if the trial court concludes that appellants' are maintain-

[8] Given our resolution of this issue, we decline to address whether appellants' activities were permissible under the LTZO. If, on remand, the trial court determines that appellants are engaged in the commercial production of a farm product, then the LTZO is inapplicable. See *Travis*, 249 Mich App at 344. However, if the trial court determines that the RTFA does not apply, before awarding injunctive relief, it should articulate findings as to whether appellants are in violation of the LTZO. See *id*. at 351; MCL 125.3407.

ing a farm or farm operation, the trial court must then determine whether the farm or farm operation complies with the applicable GAAMPs. Appellants bear the burden to prove compliance with the GAAMPs by a preponderance of the evidence.

In sum, the trial court abused its discretion by granting Lima injunctive relief in that it erred as a matter of law when it failed to make the requisite findings under the RTFA. *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012) (stating that a court "by definition abuses its discretion when it makes an error of law"). Accordingly, remand for further proceedings is appropriate.

C. EVIDENTIARY ERROR

Appellants next argue that the trial court abused its discretion when it refused to allow the testimony of a rebuttal witness they proffered at the evidentiary hearing. We review a trial court's decision to admit or exclude evidence, including rebuttal testimony, for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

During the evidentiary hearing, appellants attempted to call Robert Pesko. Counsel for appellants did not identify Pesko as a testifying witness during discovery. Counsel represented that Pesko, an engineer, would testify regarding the type of materials removed from the property as well as the amount of material that could have been removed from the property. Counsel stated that Pesko's testimony would rebut witnesses who testified for Lima that approximately 500 truckloads of material had been removed from the property. The trial court excluded the testimony because Pesko was not listed as a witness and because it reasoned that Pesko's testimony was not rebuttal testimony. Later during the hearing, Lima called

Jeffrey Wallace, the manager and zoning administrator for the village of Manchester. Wallace was called to rebut statements Bateson made about an unrelated industrial site that Bateson operated in Manchester. Though Lima had not previously identified Wallace as a witness, the trial court allowed the testimony, indicating that it would gauge from the testimony whether it was rebuttal testimony.

In this case, the trial court abused its discretion by excluding Pesko's testimony because it erred as a matter of law by concluding that Pesko's testimony did not amount to rebuttal. See *In re Waters Drain Drainage Dist*, 296 Mich App at 220. "Rebuttal testimony is used to contradict, explain, or refute evidence presented by the other party in order to weaken it or impeach it." *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994). "The purpose of rebuttal evidence is to undercut an opponent's case, and a party may not introduce evidence competent as part of his case in chief during rebuttal unless permitted to do so by the court." *Id*. at 418-419. In this case, Lima offered testimony that appellants had removed about 500 truckloads of material from the property. Pesko's testimony regarding the amount of material removed from the property could have contradicted Lima's evidence. Therefore, the trial court erred as a matter of law by concluding that the testimony was not rebuttal and excluding it on that ground. The legal error amounted to an abuse of discretion. See *In re Waters Drain Drainage Dist*, 296 Mich App at 220. On remand, the trial court should consider Pesko's testimony before articulating findings under the RTFA.

D. EQUAL PROTECTION

Appellants' final argument is that Lima improperly singled them out as a "class of one" and denied them

equal protection and due process. We review appellants' unpreserved claim of constitutional error for plain error affecting the outcome of the proceeding. *In re Application of Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008). We review de novo constitutional questions such as whether a party was denied due process and equal protection under the law. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010).

"The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law." *Id*. at 318; see also US Const, Am XIV; Const 1963, art 1, § 2. "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law." *Shepherd Montessori Ctr Milan*, 486 Mich at 318. To be considered similarly situated, "the challenger and his comparators must be '*prima facie* identical in all relevant respects or directly comparable . . . in all material respects.' " *United States v Green*, 654 F3d 637, 651 (CA 6, 2011) quoting *United States v Moore*, 543 F3d 891 (CA 7, 2008). A "class of one" may initiate an equal protection claim by alleging that he or she "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000).

Appellants argue that Lima intentionally treated them differently from other similarly situated individuals. Specifically, appellants refer to Howard Sias and Kenneth Prielipp, who both testified at the hearing. Appellants provide no factual analysis of how these individuals are similarly situated, and the record does not support the assertion that they were. There is little

similarity between appellants and Sias and Prielipp. Evidence did not show that Sias and Prielipp maintained the same amount and type of equipment on their property as appellants did, and there was no evidence to show that Sias and Prielipp were engaged in the same type of work on their properties. In sum, appellants were not denied their right to equal protection because they have failed to show that they were treated differently from other similarly situated individuals. See *Shepherd Montessori Ctr Milan*, 486 Mich at 318. Accordingly, appellants' assertion that the alleged equal protection violation amounted to a deprivation of due process also fails.

We reverse and remand for the trial court to conduct, within 91 days after receipt of this opinion, further proceedings consistent with this opinion. We retain jurisdiction. Neither party having prevailed in full, neither may tax costs. MCR 7.219.

JANSEN, P.J., and WHITBECK and BORRELLO, JJ., concurred.

MAPLE BPA, INC v BLOOMFIELD CHARTER TOWNSHIP

Docket No. 302931. Submitted June 11, 2013, at Detroit. Decided August 6, 2013. Approved for publication September 19, 2013, at 9:05 a.m. Leave to appeal sought.

Maple BPA, Inc, brought an action in the Oakland Circuit Court against Bloomfield Charter Township, seeking a declaratory judgment that a township zoning ordinance on which the Michigan Liquor Control Commission based its decision to deny plaintiff's application for a liquor license was unconstitutional. The court, James M. Alexander, J., granted defendant's motions for summary disposition on the bases that the ordinance did not violate plaintiff's rights to due process and equal protection, state law did not preempt the ordinance, and the ordinance did not violate the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. Plaintiff appealed.

The Court of Appeals *held*:

1. The Michigan Liquor Control Commission's decision to recognize local zoning authority indicates that the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales. The Legislature has not expressly provided that its authority to regulate the field of liquor control is exclusive.

2. To the extent that the Legislature has directly spoken on the issue, Bloomfield Township's zoning ordinance is not more restrictive than the state's statutory requirements. The ordinance mirrors the statutory language and does not provide any further constraint, or prohibit what the statute permits. The state statute and the local ordinance do not directly conflict.

3. The Michigan Zoning Enabling Act provides that regulations must be uniform for each class of land or buildings, dwellings, and structures within a district. MCL 125.3201(2). The act authorizes localities to provide for special land uses within a zoning district. MCL 125.3502(1). A locality's identification of uses and activities that are special uses is consistent with the uniformity requirement of the act.

4. The township's zoning ordinance treats automobile service stations as a special class of buildings within the general business zoning district. The ordinance applies to all, not only to some, automobile service stations. The ordinance does not violate the act's uniformity requirement by treating a special class of buildings differently than other classes of buildings.

5. Plaintiff provided no evidence that restricting the sale of alcoholic beverages at automobile service stations fails to advance defendant's stated purposes, including reducing alcohol-related deaths or injuries. The trial court properly granted defendant summary disposition with regard to plaintiff's due process claim on the basis that plaintiff failed to show that there was a question of fact concerning whether the ordinance was arbitrary and capricious.

6. The trial court properly granted defendant summary disposition with regard to plaintiff's equal protection claim on the basis that plaintiff failed to create a question of fact concerning whether defendant's ordinance was arbitrary and unreasonable.

Affirmed.

1. CONSTITUTIONAL LAW — STATUTES — ORDINANCES — PREEMPTION.

A state statute preempts a local regulation if the local regulation directly conflicts with the state statute or the state statute completely occupies the field that the local regulation attempts to regulate; four guidelines are used to determine whether a statute completely occupies a field: first, there is no doubt that municipal regulation is preempted when the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, second, preemption 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 preemption, and 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.

2. CONSTITUTIONAL LAW — STATUTES — ORDINANCES — PREEMPTION.

State law preempts a local regulation when the regulation directly conflicts with a state statute; a direct conflict exists when a local regulation permits what the state statute prohibits or prohibits what the statute permits.

3. ZONING — MICHIGAN ZONING ENABLING ACT — UNIFORMITY OF REGULATIONS.

The Michigan Zoning Enabling Act provides that the zoning regulations of a municipality shall be uniform for each class of land or

buildings, dwellings, and structures within a district; the act authorizes localities to provide for special land uses within a zoning district and the locality's identification of uses and activities that are special uses is consistent with the uniformity requirement of the act (MCL 125.3201[2]; MCL 125.3502[1]).

4. ZONING — CONSTITUTIONAL LAW — PRESUMPTION OF CONSTITUTIONALITY.

Zoning ordinances are presumed to be constitutional exercises of governmental power; a party challenging a zoning ordinance has the burden to prove that the ordinance is an arbitrary and unreasonable restriction on the owner's use of his or her property; to be arbitrary and capricious, it must appear that the clause attacked is an arbitrary fiat, a whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its reasonableness.

Friedlaender Rogowski, PLC (by *Susan K. Friedlaender* and *Joseph M. Rogowski, II*), and *Ronald E. Reynolds* for plaintiff.

Secrest Wardle (by *William P. Hampton* and *Shannon K. Ozga*) and *Johnson, Rosati, LaBarge, Aseltiyne & Field, PC* (by *Carol A. Rosati* and *Timothy S. Wilhelm*), for defendant.

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM. Plaintiff, Maple BPA, Inc, appeals as of right the circuit court's order granting summary disposition in favor of defendant, Bloomfield Charter Township (Bloomfield Township). After the Michigan Liquor Control Commission (the Commission) denied Maple BPA's application for a liquor license on the basis that it did not comply with Bloomfield Township's zoning ordinance (the ordinance), Maple BPA sought a declaratory judgment that the ordinance was unconstitutional. Bloomfield Township ultimately moved for summary disposition, which the trial court granted. The trial court based its ruling on its conclusion that state law

did not preempt the ordinance and that the ordinance did not violate the Michigan Zoning Enabling Act.[1] We affirm.

I. FACTS

A. FACTUAL BACKGROUND

Maple BPA's property contains a mixture of land uses, including gasoline fuel pumps and a convenience food store. Under the ordinance, "retail package outlets" are a permitted use in Maple BPA's zoning district.[2] A retail package outlet is any building in a commercial business district that is allowed to sell packaged alcohol as an ancillary use of the business. Maple BPA desired to sell packaged alcohol on its premises and in March 2007 it applied to the Commission for a specially designated merchant license. A specially designated merchant license allows the holder to engage in the retail sale of beer and wine for off-premises consumption.[3] The Commission may not prohibit an applicant for a specially designated merchant license from owning fuel pumps if, among other conditions, the location where customers purchase alcohol is 50 or more feet from where customers dispense fuel.[4]

Bloomfield Township subsequently passed a resolution that stated that it did not want to allow "gas stations to sell beer and wine" and that Maple BPA's cash registers were too close to where customers dispensed fuel. Bloomfield Township requested that the Bloomfield Township Police Department inspect Maple BPA's premises.

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[1] MCL 125.3101 *et seq*.

[2] Bloomfield Township Ordinance, § 42-3.1.6(B-2)(B)(i) and § 42-3.1.7(B-3)(B)(i).

[3] MCL 436.1111(13).

[4] MCL 436.1541(1)(b).

Bloomfield Township Police Captain Steve Cook determined that Maple BPA's premises did not conform with what was then Bloomfield Township Ordinance § 42-307, which required all retail package outlets to be at least 2,640 feet from each other. Bloomfield Township, in turn, informed the Commission that Maple BPA's request did not comply with its zoning ordinance and that the distance between Maple BPA's fuel pumps and its cash registers was 47 feet.

The Commission denied Maple BPA's application on October 29, 2008, finding that Maple BPA did not comply with Bloomfield Township's zoning ordinance. Maple BPA requested a formal hearing, which the Commission held on March 26, 2009. Subsequently, the Commission affirmed its denial of Maple BPA's application.

Bloomfield Township's planning commission then amended the ordinance. The amendment removed the spacing requirement for retail package outlets and banned the sale of alcoholic beverages at "automobile service stations" entirely. Maple BPA sought leave to appeal the Commission's decision, which the trial court denied on the basis that Maple BPA's claims were more appropriately brought in a declaratory judgment action.

B. PROCEDURAL HISTORY

Maple BPA filed its complaint on February 16, 2010, seeking a declaratory judgment that state law preempts the ordinance, the ordinance violates the Michigan Zoning Enabling Act, and the ordinance violates Maple BPA's rights to due process and equal protection under the act.[5] After the trial court denied Bloomfield Township's initial motion for summary disposition under MCR 2.116(C)(8), Bloomfield Township moved for sum-

[5] *Id.*

mary disposition under MCR 2.116(C)(10). The trial court granted Bloomfield Township's motion regarding Maple BPA's constitutional claims, concluding that Maple BPA failed to show that the ordinance was arbitrary and capricious.

In July 2010, Bloomfield Township again amended the ordinance. As amended, the ordinance provides that automobile service stations may sell alcoholic beverages if they meet certain standards,[6] including that (1) alcohol is not sold less than 50 feet from where vehicles are fueled, (2) no drive-thru operations are conducted in the same building, (3) the store meets minimum floor area and lot size requirements, (4) the store has frontage on a major thoroughfare and is not adjacent to a residentially zoned area, (5) the store does not perform any vehicle service operations that would require customers to wait on the premises, and (6) the store is either located in a shopping center or maintains a minimum amount of inventory.[7] After Bloomfield Township revised the ordinance, it renewed its motion for summary disposition.

The trial court granted Bloomfield Township's renewed motion, concluding that state law did not preempt the ordinance as amended and that it did not violate the Michigan Zoning Enabling Act. It also noted that it had previously dismissed Maple BPA's constitutional claims.

II. PREEMPTION

A. STANDARD OF REVIEW

This Court reviews de novo questions of law, including whether state law preempts an ordinance.[8]

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[6] Bloomfield Township Ordinance, § 42-4.23.

[7] *Id*.

[8] *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 602; 673 NW2d 111 (2003).

B. FIELD PREEMPTION

1. LEGAL STANDARDS

State law preempts a local regulation if (1) the local regulation directly conflicts with a state statute or (2) the statute completely occupies the field that the local regulation attempts to regulate.[9] The Michigan Supreme Court has established four guidelines to determine 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.[10]

2. APPLYING THE STANDARDS

Maple BPA contends that the state has granted the Commission exclusive control over the sale of alcoholic beverages, and therefore state law expressly preempts the ordinance. We disagree.

The Michigan Constitution provides that the Legislature may create a Liquor Control Commission, which

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[9] *McNeil v Charlevoix Co*, 275 Mich App 686, 697; 741 NW2d 27 (2007).

[10] *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977) (citations omitted).

"shall exercise complete control of the alcoholic beverage traffic within this state . . . ."[11] Accordingly, the Legislature created the Commission and gave it "the sole right, power, and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within this state, including the . . . sale thereof."[12]

Maple BPA asserts that this Court's decision in *Sherman Bowling Ctr v Roosevelt Park*[13] is analogous to this case. In that case, an ordinance required a business to obtain a local liquor license—as well as a state liquor license—to sell alcohol at outdoor dancing events.[14] We held that "the city ordinance in this case is preempted" because this Court could "find no provision of the liquor law which would allow cities to regulate the sale of alcoholic beverages by establishments holding outdoor events at which entertainment is provided."[15]

We conclude that *Sherman Bowling Ctr* is distinguishable because it did not involve a *zoning* ordinance and the Court in that case could not locate authority by which the state recognized local control of the area in question. Here, the Michigan Administrative Code explicitly provided that an application for a liquor license "shall be denied if the commission is notified, in writing, that the application does not meet all appropriate . . . local . . . zoning . . . ordinances . . . ."[16] The ordinance in question is a local

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[11] Const 1963, art 4, § 40.

[12] MCL 436.1201(2).

[13] *Sherman Bowling Ctr v Roosevelt Park*, 154 Mich App 576, 584-585; 397 NW2d 839 (1986).

[14] *Id*. at 579-580.

[15] *Id*. at 584-585.

[16] Mich Admin Code, R 436.1003 and former R 436.1005(3) (repealed effective February 29, 2008).

zoning ordinance. But even were *Sherman Bowling Ctr* not distinguishable, it was decided in 1986. This Court must follow published opinions of this Court decided after November 1, 1990.[17]

In contrast, this Court in *Jott, Inc v Clinton Charter Twp* did consider whether the liquor control provisions of the Michigan Administrative Code preempted a local zoning ordinance.[18] In *Jott*, this Court concluded that the Legislature did not intend to preempt the field of liquor control.[19] We reasoned that "it has long been recognized that local communities possess 'extremely broad' powers to regulate alcoholic beverage traffic within their bounds through the exercise of their general police powers, subject to the authority of the [Commission] when a conflict arises."[20] In the context of that zoning regulation, we noted that the Commission explicitly recognized local authority in the area prohibited by the local regulation, which supported our conclusion that the Legislature did not intend preemption in that context.[21]

We conclude that the Commission's decision to recognize local zoning authority indicates that the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales. Thus, we conclude that the state has not expressly provided that its authority to regulate the field of liquor control is exclusive.

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[17] *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 285; 769 NW2d 234 (2009); MCR 7.215(J)(1).

[18] *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 544; 569 NW2d 841 (1997).

[19] *Id.* at 545.

[20] *Id.*; see *Bundo v Walled Lake*, 395 Mich 679, 699-700; 238 NW2d 154 (1976).

[21] *Jott*, 224 Mich App at 544; also see *Van Buren Charter Twp*, 258 Mich App at 608.

C. CONFLICT PREEMPTION

1. LEGAL STANDARDS

State law preempts a local regulation when that regulation directly conflicts with a state statute.[22] "A direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits."[23]

2. APPLYING THE STANDARDS

Maple BPA contends that the state statute and the ordinance directly conflict because the zoning ordinance is more strict than the state's statutory requirements. We disagree.

In *Noey v Saginaw*,[24] the Michigan Supreme Court concluded that a local ordinance that prohibited the sale of alcoholic beverages between certain hours that a state statute allowed such sales was invalid to the extent that it was more strict than the state statute.[25]

We conclude that *Noey* is distinguishable. In *Noey*, the local ordinance prohibited selling alcoholic beverages during a time that the Legislature had expressly permitted alcoholic beverages to be sold. Unlike in *Noey*, here, the Legislature has not expressly spoken concerning the sale of alcohol in buildings with drive-thru windows, the minimum building area of buildings at which alcohol is sold, or the number of parking spaces required for a building from which alcohol is sold. To the extent that the Legislature has expressly spoken on this issue, Bloomfield Township's zoning

[22] *McNeil*, 275 Mich App at 697.

[23] *Id*.

[24] *Noey v Saginaw*, 271 Mich 595; 261 NW 88 (1935).

[25] *Id*. at 597.

ordinance is not more restrictive. The ordinance mirrors the statutory language—it does not provide any further constraint, or prohibit what the statute permits. Therefore, we conclude that in this case, the state statute and the local regulation do not directly conflict.

III. THE MICHIGAN ZONING ENABLING ACT

A. STANDARD OF REVIEW

We review de novo whether an ordinance complies with the Michigan Zoning Enabling Act (the Act),[26] because our analysis involves questions of law.[27]

B. LEGAL STANDARDS

Municipalities have the authority to regulate land use through zoning only because the Legislature has specifically granted them that authority in the Act.[28] Thus, a municipality can exercise zoning authority "only to the limited extent authorized by that legislation."[29] The Act provides that "regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district."[30]

C. APPLYING THE STANDARDS

Maple BPA contends that Bloomfield Township's zoning ordinance violates the uniformity provisions of the Act, because the ordinance's requirements for retail package outlets are not uniform. We disagree.

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[26] MCL 125.3101 *et seq*.

[27] *Whitman v Galien Twp*, 288 Mich App 672, 678; 808 NW2d 9 (2010).

[28] *Id*. at 679.

[29] *Id*.

[30] MCL 125.3201(2).

The Act authorizes localities to provide for special land uses within a zoning district.[31] A locality's identification of uses and activities that are special uses is consistent with the Act's uniformity requirement.[32] Here, Bloomfield Township's zoning regulations treat automobile service stations as a special class of buildings within the general business zoning district.[33] The ordinance does not apply only to some automobile service stations—it applies to *all* automobile service stations. We conclude that the ordinance does not violate the Act's uniformity requirement by treating a special class of buildings differently than other classes of buildings.

Here, Maple BPA has failed to demonstrate that Bloomfield Township's zoning ordinance is not uniform concerning the special use of automobile service stations. Additionally, we note that the uniformity requirement generally prevents a locality from making unreasonable classifications within a zoning district, such as by allowing a certain type of land use in parts of one zoning district, but not in other parts of the same zoning district.[34] The ordinance does not provide that automobile service stations or retail package outlets may be located in one part of Bloomfield Township's general business district, but not in other parts.

Maple BPA appears to argue that the ordinance violates the Act because it is actually an improper local business licensing requirement. We conclude that Maple BPA has not properly presented the argument

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[31] MCL 125.3502(1); *Whitman*, 288 Mich App at 680.

[32] *Whitman*, 288 Mich App at 683.

[33] Bloomfield Township Ordinance, § 42-3.1.7(C)(iv); Bloomfield Township Ordinance, § 42-4.23.

[34] See *Oshtemo Charter Twp v Central Advertising Co*, 125 Mich App 538, 543; 336 NW2d 823 (1983).

for our review. A party abandons an issue when it fails to include the issue in the statement of questions presented in its appellate brief and fails to provide authority to support its assertions.[35] This issue is not contained in Maple BPA's statement of questions presented, and it has provided little authority or analysis to support this assertion. We conclude that Maple BPA has abandoned this argument.

IV. MAPLE BPA'S CONSTITUTIONAL CLAIMS

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination whether a zoning decision is unconstitutional.[36] We also review de novo the trial court's determination on a motion for summary disposition.[37] 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."[38] A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.[39]

B. DUE PROCESS

1. LEGAL STANDARDS

Both the United States and Michigan Constitutions provide that the state shall not deprive any person of

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[35] *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

[36] See *Kropf v Sterling Hts*, 391 Mich 139, 152-153; 215 NW2d 179 (1974).

[37] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[38] MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.

[39] *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

life, liberty, or property without due process of law.[40] The Due Process Clause protects the liberty and property interests of individuals from arbitrary government actions.[41]

We presume that zoning ordinances are constitutional exercises of governmental power.[42] The party challenging the ordinance has the burden to prove that it is " 'an arbitrary and unreasonable restriction upon the owner's use of his property.' "[43] To be arbitrary and capricious, " '[i]t must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness.' "[44]

2. APPLYING THE STANDARDS

Maple BPA contends that Bloomfield Township's ordinance in this case is arbitrary and capricious. Maple BPA concedes that regulating the use of alcohol is rationally related to public health and safety, but contends that Bloomfield Township has not shown that its ordinance advances its stated purposes.

We conclude that the trial court properly granted summary disposition. Maple BPA did not carry its burden of showing that there is a question of fact concerning whether the ordinance is arbitrary and capricious. " 'The burden [is] not on the defendants to establish the relationship, but upon the plaintiff to

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[40] US Const, Am XIV; Const 1963, art 1, § 17; *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

[41] *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 370; 803 NW2d 698 (2010).

[42] *Kropf*, 391 Mich at 162.

[43] *Id.*, quoting *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957).

[44] *Kropf*, 391 Mich at 166, quoting *Brae Burn, Inc*, 350 Mich at 432.

show the lack of it.' "[45] Here, the burden is not on Bloomfield Township to prove the validity of its ordinance with evidence. The burden is on Maple BPA to show that *there is no relationship* between Bloomfield Township's goals and its means of attaining them. Maple BPA provided no evidence that restricting the sale of alcoholic beverages at service stations fails to advance Bloomfield Township's stated purposes of reducing alcohol-related deaths and injuries or fails to advance its other stated reasons. Because Maple BPA failed to raise a question of fact concerning the reasonableness of Bloomfield Township's ordinance, the trial court properly granted summary disposition.

C. EQUAL PROTECTION

Maple BPA asserts that there is no rational reason to treat a business with fuel pumps differently than a business without fuel pumps. We conclude that this equal protection challenge is also without merit.

The Michigan and United States Constitutions provide coextensive provisions on equal protection.[46] Both guarantee equal protection of the law.[47] When a party is not a member of a protected class and does not allege a violation of a fundamental right, "the challenged regulatory scheme will survive equal protection analysis if it is rationally related to a legitimate governmental interest."[48] "[T]he party raising the equal protection challenge has the burden of proving that the challenged law is arbitrary and thus irrational."[49]

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[45] *Kropf*, 391 Mich at 156, quoting *Northwood Props Co v Royal Oak City Inspector*, 325 Mich 419, 422-423; 39 NW2d 25 (1949).

[46] Const 1963, art 1, § 2; US Const, Am XIV; *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 73; 592 NW2d 724 (1998).

[47] *Dowerk*, 233 Mich App at 73.

[48] *Id.*; see *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996).

[49] *Dowerk*, 233 Mich App at 73.

For the reasons stated in our due process analysis, we conclude that the trial court did not err by granting summary disposition on Maple BPA's due process claim. Though Maple BPA asserts that the ordinance's stated reasons for distinguishing automobile service stations from other types of buildings or land uses are merely "irrational prejudices," it provided no evidence from which the trial court could determine that a question of fact existed concerning the arbitrariness of the ordinance. We conclude that the trial court properly granted summary disposition because Maple BPA failed to create a question of fact concerning whether Bloomfield Township's ordinance was arbitrary and unreasonable.

V. CONCLUSION

We conclude that state law does not preempt the field of liquor control regulation and that Maple BPA provided no evidence from which the trial court could conclude that Bloomfield Township's ordinance was arbitrary and capricious. We also conclude that Bloomfield Township's ordinance is uniform under the Michigan Zoning Enabling Act and that it is constitutional.

We affirm.

WHITBECK, P.J., and METER and DONOFRIO, JJ., concurred.

GRIMES v VAN HOOK-WILLIAMS

Docket No. 314723. Submitted June 11, 2013, at Detroit. Decided September 19, 2013, at 9:10 a.m.

Aaron Grimes brought an action in the Macomb Circuit Court against Shawnita Van Hook-Williams, alleging that he was the biological father of a child conceived and born while she was married to Dante Williams and seeking to establish paternity under the Revocation of Paternity Act, MCL 722.1431 *et seq*. Grimes requested (1) a DNA test, (2) an order acknowledging him as the biological father and modifying the child's birth certificate, (3) joint legal and physical custody of the child, and (4) parenting time. Van Hook-Williams contended that Grimes lacked standing to bring an action under the act because he knew that she was married to Williams at the time of the child's conception and that she intended to remain married to Williams. The Friend of the Court referee found that Van Hook-Williams had informed Grimes when their relationship began that she was married. The referee recommended that Grimes's request for DNA testing be denied because under MCL 722.1441(3)(a)(*i*), an alleged father may only file a paternity action if he did not know or have a reason to know that the mother was married at the time of conception. Grimes requested a de novo hearing, arguing that the referee's interpretation of the act violated his constitutional rights. The court, Kathryn A. Viviano, J., granted Van Hook-Williams summary disposition, and Grimes appealed.

The Court of Appeals *held*:

1. The circuit court properly granted summary disposition in favor of Van Hook-Williams because Grimes lacked standing to commence this action under the Revocation of Paternity Act. Under MCL 722.1433(4), Williams was presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth. Under MCL 722.1433(3), Grimes was an "alleged father," that is, someone who by his actions could have fathered the child. MCL 722.1441(3)(a) provides in part that if a child has a presumed father, a court may determine that the child was born out of wedlock for purposes of establishing the child's paternity if the alleged father timely files an action and

(1) the alleged father did not know or have reason to know that the mother was married at the time of conception and (2) the presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child. There was no genuine factual dispute that Grimes knew or had reason to know that Van Hook-Williams was married to Williams at the time of the child's conception.

2. The standing requirements in the Revocation of Paternity Act are constitutional. The liberties protected by substantive due process under the Fourteenth Amendment and Const 1963, art 1, § 17 include the right to have children and the right to direct their education and upbringing. This fundamental liberty interest, however, has not been extended to a putative father who seeks to establish paternity with respect to a child conceived and born during the mother's marriage to another man. In Michigan, a putative father of a child born in wedlock has no constitutional due-process right to claim paternity under the Revocation of Paternity Act or any other statute and request custody or parenting time, regardless of a biological connection to the child and the existence of a parent-child relationship.

3. Grimes's constitutional right to equal protection under the Fourteenth Amendment and Const 1963, art 1, § 2 was not violated. Under MCL 722.1441(1)(a) and (3)(a), if a child was conceived or born during an extant marriage and the child's mother, presumed father, and alleged father mutually and openly acknowledged a biological relationship between the alleged father and the child, the child's mother or the alleged father may commence an action under certain circumstances seeking to revoke the presumption of paternity that attaches to the presumed father. An alleged father, however, may commence an action under the act only if he did not know or have reason to know that the mother was married at the time of conception. Grimes argued that this statutory distinction between the rights of the mother and the alleged father violated his right to equal protection, contending that because a child's mother and alleged father are similarly situated, they must be afforded equal standing to commence an action under the act. Equal-protection principles require a showing that the challenged legislation or governmental action treats similarly situated individuals differently. Gender-based classifications will be upheld when men and women are not actually similarly situated in the area covered by the legislation in question and the statutory classification is realistically based on the differences in their situations. Fathers and mothers are not similarly

situated with regard to the proof of biological parenthood, and the Legislature's decision to prescribe different statutory standing requirements for a child's mother and alleged father in the Revocation of Paternity Act does not offend equal protection.

Affirmed.

CONSTITUTIONAL LAW — PATERNITY — REVOCATION OF PATERNITY ACT — STANDING — PUTATIVE FATHERS — CHILDREN BORN IN WEDLOCK.

The standing requirements in the Revocation of Paternity Act, which include the requirement that the putative father of a child conceived and born during the mother's marriage to another man show that he did not know or have reason to know that the mother was married at the time of conception, do not deny the putative father due process or equal protection under the law (US Const, Am XIV; Const 1963, art 1, §§ 2 and 17; MCL 722.1431 *et seq*.).

Ari Kresch and *Blaney & Condon PLLC* (by *Mary Blaney*) for plaintiff.

Family Legal Centers of Michigan, PLC (by *LaVonne Banister Jackson*), for defendant.

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

JANSEN, P.J. In this paternity action, plaintiff appeals by right the circuit court's order granting summary disposition in favor of defendant and dismissing plaintiff's claims. For the reasons set forth in this opinion, we affirm.

I

At issue in this case is the paternity of defendant's minor child (the child), born November 4, 2011. On September 12, 2012, plaintiff filed a complaint and motion for DNA testing in the circuit court, alleging that he was the biological father of the child. Plaintiff acknowledged that defendant was married to Dante Williams (Williams) "[f]rom the time of conception until the time of the child's birth," but alleged that defendant

and Williams were separated at the time of the child's birth. Plaintiff alleged that he and plaintiff had "held themselves out as a couple" and "discussed plans to marry." In his attached affidavit, plaintiff averred that the child was conceived in April 2011 and that defendant "did not wear a wedding ring or conduct herself as a married woman." Plaintiff sought to establish paternity under the Revocation of Paternity Act, MCL 722.1431 *et seq*. He requested (1) a DNA test to establish paternity,[1] (2) an order acknowledging him as the child's biological father and modifying the child's birth certificate, (3) joint legal and physical custody of the child, and (4) parenting time.

Defendant filed an answer in which she denied that she was ever separated from Williams and denied that she had ever held herself out as plaintiff's girlfriend. She alleged that she and plaintiff merely "had a sporadic, on again, off again relationship" over approximately three years. Defendant contended that plaintiff lacked standing to file an action under the Revocation of Paternity Act because he knew that she was married to Williams at the time of the child's conception and knew that she intended to remain married to Williams.

Plaintiff's motion was referred to a Friend of the Court referee. After reviewing the evidence, the referee found that defendant had informed plaintiff that "she was married at the initiation of their relationship . . . ." Citing MCL 722.1441(3)(a)(*i*), the referee recommended that plaintiff's request for DNA testing be denied because an alleged father may only file an action to establish paternity if he did not know or have a reason to know that the mother was married at the time of

[1] Plaintiff attached the report of a private genetic testing company showing a 99.99 percent probability that he was the biological father of the child.

conception. Plaintiff objected to the referee's recommendations and requested a de novo hearing. Among other things, plaintiff argued that the referee's interpretation of the Revocation of Paternity Act violated his constitutional rights "as it relates to the fundamental right to have a meaningful relationship with one's child."

On December 3, 2012, defendant moved for summary disposition, arguing that plaintiff lacked standing to bring an action under the Revocation of Paternity Act because it was beyond factual dispute that plaintiff was aware of her marriage to Williams at the time the child was conceived. Plaintiff admitted that he knew defendant was married at the time he started dating her, just as he had told the referee. However, plaintiff maintained that he assumed that defendant had subsequently obtained a divorce from Williams. He argued that the Legislature "did not intend for fathers to engage in a fact finding mission to determine if the woman they slept with was married on paper when all other indications of a traditional marriage [were] absent." He also argued that a denial of his request to establish paternity would violate his due-process right to "make decisions regarding the care, custody, and control" of his child, as well as his right to equal protection.

At the hearing on defendant's motion for summary disposition, the circuit court remarked from the bench:

> It is undisputed that [plaintiff] was aware that he was engaged in a relationship with a married woman, and that at the time of the conception and birth of the child [defendant] was married to another man. Under the statute, that denies him standing, and . . . it's unequivocal. It says . . . ["]to know or reason to know that the mother [was] married.["] And so, under that argument, I'm finding in favor of the defendant, and that she is entitled to summary disposition.

> As to the constitutional arguments, . . . men in the same shoes as [plaintiff] lack standing to bring any kind of action whatsoever if the child was born during the time the woman was married to another man, and there's all sorts of public policy debates that happened, but that's what the statute read, and it was found to be constitutional. I don't find that [plaintiff's] constitutional argument under the new statute has merit. For those reasons, I am granting the motion for summary disposition on the basis that the plaintiff lacks standing, and the case is dismissed.

On January 22, 2013, the circuit court entered an order granting summary disposition in favor of defendant and dismissing plaintiff's claims.

II

We review de novo the circuit court's decision to grant a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "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 review de novo whether a party has been afforded due process, *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013), and whether a party has been afforded equal protection under the law, *USA Cash #1, Inc v Saginaw*, 285 Mich App 262, 277; 776 NW2d 346 (2009). "Matters of constitutional and statutory interpretation and questions concerning the

constitutionality of a statutory provision are also reviewed de novo." *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10-11; 743 NW2d 902 (2008). "Statutes are presumed constitutional unless the unconstitutionality is clearly apparent." *Id*. at 11.

III

Plaintiff first argues that the circuit court erred by granting summary disposition in favor of defendant because there was insufficient evidence to establish that he knew or had reason to know that defendant was married to Williams at the time the child was conceived. We disagree.

The Revocation of Paternity Act was added by way of 2012 PA 159, and took effect on June 12, 2012. Among other things, the Revocation of Paternity Act "governs actions to determine that a presumed father is not a child's father . . . ." *In re Daniels Estate*, 301 Mich App 450, 458-459; 837 NW2d 1 (2013). Section 11(3)(a) of the Revocation of Paternity Act, MCL 722.1441(3)(a), provides:

> If a child has a presumed father,[2] a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by an alleged father[3] and any of the following applies:
>
> (a) All of the following apply:
>
> (*i*) The alleged father did not know or have reason to know that the mother was married at the time of conception.

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[2] A "presumed father" is "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." MCL 722.1433(4).

[3] An "alleged father" is "a man who by his actions could have fathered the child." MCL 722.1433(3).

> (*ii*) The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.
>
> (*iii*) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act.
>
> (*iv*) Either the court determines the child's paternity or the child's paternity will be established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock.

The only factual issue that is possibly in dispute in this case is whether plaintiff "did not know or have reason to know that the mother was married at the time of conception." MCL 722.1441(3)(a)(*i*). We conclude that it was beyond genuine factual dispute that plaintiff knew or had reason to know that defendant was married to Williams at the time of the child's conception.

According to plaintiff's own complaint, "[f]rom the time of conception until the time of the child's birth, [defendant] was married to Dante Williams." Plaintiff did allege that defendant and Williams were "separated" and that he believed defendant intended to obtain a divorce from Williams. However, defendant and Williams were never divorced; indeed, defendant apparently remains married to Williams to this day. It is undisputed that defendant never told plaintiff that she had divorced Williams. Nor did plaintiff have any sound reason to believe that defendant had divorced Williams. Even viewing the pleadings, affidavits, and other documentary evidence in the light most favorable to plaintiff, *Kennedy*, 274 Mich App at 712, no reasonable person could have concluded that plaintiff was unaware of defendant's marriage to Williams at the time of the child's conception, see *West*, 469 Mich at 183.

Even assuming arguendo that plaintiff did not actually know that defendant was married to Williams at the time the child was conceived, he had reason to know that defendant remained married to Williams at that time. MCL 722.1441(3)(a)(*i*). Plaintiff fully admits that he was aware of defendant's marriage when he began dating her. In the absence of any proof of an intervening divorce, it was unreasonable for plaintiff to presume that defendant did not remain legally married to Williams. See *Killackey v Killackey*, 156 Mich 127, 133; 120 NW 680 (1909) (noting that, in the absence of evidence to the contrary, the presumption is that married persons have sustained the usual relations of husband and wife from the date of their marriage up to the time that a suit for divorce is filed). Apart from his own subjective, wishful thinking, plaintiff had no reason to believe that defendant had divorced Williams. Thus, even if plaintiff did not actually know that defendant remained married to Williams at the time of the child's conception, he certainly "ha[d] reason to know" that defendant was still married at the time. MCL 722.1441(3)(a)(*i*).

No reasonable person could have concluded that plaintiff "did not know or have reason to know that the mother was married at the time of conception" within the meaning of MCL 722.1441(3)(a)(*i*). Accordingly, plaintiff lacked standing to commence this action under the Revocation of Paternity Act. The circuit court properly granted summary disposition in favor of defendant.

IV

Plaintiff also argues that the statutory standing requirements of the Revocation of Paternity Act are unconstitutional because they violate an alleged

father's due-process and equal-protection rights. For the reasons that follow, we are compelled to conclude that the standing requirements contained in the Revocation of Paternity Act are constitutional.

At common law, a child conceived by or born to a married woman was presumed to be a child of the marriage. *Aichele v Hodge*, 259 Mich App 146, 157; 673 NW2d 452 (2003). Under this presumption, known as Lord Mansfield's Rule, a husband was presumed to be the father of his wife's child, and no declaration of either spouse could be " ' "admitted to bastardize the issue born after marriage." ' " *Id*. at 157-158, quoting *Serafin v Serafin*, 401 Mich 629, 633; 258 NW2d 461 (1977), in turn quoting *Goodright v Moss*, 98 Eng Rep 1257 (1777). Two hundred years later, the Michigan Supreme Court modified Lord Mansfield's Rule, allowing a husband to disclaim paternity while maintaining the "still viable and strong, though rebuttable, presumption of legitimacy." *Serafin*, 401 Mich at 634-636. However, this Court has since observed that the presumption of legitimacy "continues to serve the purpose of promoting order and stability" and "still permeates Michigan law." *Aichele*, 259 Mich App at 158.

A

The United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." US Const, Am XIV, § 1. Similarly, the Michigan Constitution provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The due process guarantee of the Michigan Constitution is coextensive with its federal counterpart. *Cummins v Robinson Twp*, 283 Mich App

677, 700-701; 770 NW2d 421 (2009); *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004).

Due process contains both a procedural and a substantive component. *Collins v Harker Heights*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992); *People v Sierb*, 456 Mich 519, 523 n 8; 581 NW2d 219 (1998). "The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power." *Sierb*, 456 Mich at 523. The substantive component of the due process guarantee "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997). The United States Supreme Court has long recognized that the "liberty" protected by substantive due process includes, among other things, the right to have children and the right to direct the education and upbringing of one's children. *Id*. Indeed, "the interest of parents in the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests" that the United States Supreme Court has recognized. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.); see also *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

However, this fundamental liberty interest has never been extended to a putative father who seeks to establish paternity with respect to a child born during the mother's marriage to another man. "Where . . . the child is born into an extant marital family, the [biological] father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give

categorical preference to the latter." *Michael H v Gerald D*, 491 US 110, 129; 109 S Ct 2333; 105 L Ed 2d 91 (1989). "[T]he current state of the law in Michigan is that a putative father of a child born in wedlock has no constitutional liberty interest relative to commencing a paternity action and requesting custody or parenting time regardless of a biological connection to the child and the presence of a parent-child relationship." *Sinicropi v Mazurek*, 273 Mich App 149, 170; 729 NW2d 256 (2006).

We acknowledge that the Revocation of Paternity Act is relatively new. See 2012 PA 159. Further, we are not insensitive to plaintiff's plight. It is refreshing to see a putative father, such as plaintiff, step forward and express a desire to foster and maintain a parent-child relationship. However, it remains clear, at least at this time, that a putative father in the position of plaintiff who seeks to establish paternity with regard to a child conceived and born during the mother's marriage to another man has no constitutional due-process right to claim paternity, whether under the Revocation of Paternity Act or any other statute. See *Sinicropi*, 273 Mich App at 170.

B

Nor can we conclude that plaintiff's constitutional right to equal protection was violated in this case. The United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV, § 1. Likewise, the Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws . . . ." Const 1963, art 1, § 2. "Michigan's equal protection provision [is] coextensive with the Equal

Protection Clause of the federal constitution." *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000).

"The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Id*. "Conversely, the Equal Protection Clauses do not prohibit disparate treatment with respect to individuals on account of other, presumably more genuinely differentiating, characteristics." *Id*. at 258-259.

If a child was conceived or born during an extant marriage, and if the child's mother, presumed father, and alleged father have "mutually and openly acknowledged a biological relationship between the alleged father and the child," the child's mother or alleged father may commence an action under certain circumstances seeking to revoke the presumption of paternity that attaches to the presumed father. MCL 722.1441(1)(a) and (3)(a). As explained previously, an alleged father may commence such an action under the Revocation of Paternity Act only if he "did not know or have reason to know that the mother was married at the time of conception." MCL 722.1441(3)(a)(*i*). For obvious reasons, the statute imposes no such requirement on the child's mother. See MCL 722.1441(1)(a). After all, the child's mother would certainly be aware of her own marriage to the presumed father.

Plaintiff argues that this statutory distinction—requiring that an alleged father "not know or have reason to know that the mother was married at the time of conception," but imposing no similar knowledge requirement on the child's mother—violates his right to equal protection. He contends that because a child's mother and alleged father are similarly situated, they

must be afforded equal standing to commence an action under the Revocation of Paternity Act.

Although we recognize plaintiff's predicament, we cannot conclude that the particular gender-based distinction challenged by plaintiff is unconstitutional. The Legislature's objective was to permit putative fathers who were genuinely unaware of the mother's marital status at the time of conception to sue to establish paternity in certain instances, but also to protect presumed fathers and extant marital families from competing claims to paternity by knowing adulterers. It bears repeating that, not so long ago, no putative father could assert a claim of paternity with respect to a child born during the mother's marriage to another man. It is true that the Michigan Legislature has altered this common-law rule in certain respects, now permitting certain alleged fathers who were genuinely unaware that the mother was married at the time of conception to commence actions under the Revocation of Paternity Act seeking to revoke the presumption of paternity that attaches to the mother's husband. But it is axiomatic that the Legislature may partially confer such rights on alleged fathers in a gradual or step-by-step fashion and need not immediately give alleged fathers the full panoply of rights and privileges that attach to presumed fathers. See *New Orleans v Dukes*, 427 US 297, 303; 96 S Ct 2513; 49 L Ed 2d 511 (1976).

We fully acknowledge that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v Orr*, 440 US 268, 283; 99 S Ct 1102; 59 L Ed 2d 306 (1979). Accordingly, "[g]ender-based classification schemes are subject to heightened scrutiny review." *Rose v Stokely*, 258 Mich

App 283, 302; 673 NW2d 413 (2003) (opinion by WHITBECK, C.J.). "Under this level of scrutiny, there are two determinations that must be made. The first question is whether the classification serves an *important* governmental interest. The second question is whether the classification is *substantially* related to the achievement of the important governmental objective." *Dep't of Civil Rights ex rel Forton v Waterford Twp Parks & Recreation Dep't*, 425 Mich 173, 191; 387 NW2d 821 (1986); see also *Craig v Boren*, 429 US 190, 197; 97 S Ct 451; 50 L Ed 2d 397 (1976).

But before the applicable level of scrutiny even becomes an issue, it must first be shown that the challenged legislation or governmental action treats similarly situated individuals differently. "When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether [the] plaintiff was treated differently from a similarly situated [individual]." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). "Gender-based classifications will be upheld when men and women are not actually similarly situated in the area covered by the legislation in question and the statutory classification is realistically based on the differences in their situations." *In re RFF*, 242 Mich App 188, 210; 617 NW2d 745 (2000); see also *Parham v Hughes*, 441 US 347, 354; 99 S Ct 1742; 60 L Ed 2d 269 (1979).

The United States Supreme Court has held that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitu-

tional perspective." *Nguyen v INS*, 533 US 53, 63; 121 S Ct 2053; 150 L Ed 2d 115 (2001). "Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity." *Michael M v Superior Court of Sonoma Co*, 450 US 464, 471; 101 S Ct 1200; 67 L Ed 2d 437 (1981) (opinion by Rehnquist, J.). "The mother is *the* only necessary actor at all stages of the process, from conception through pregnancy and delivery, including all the physical and medical implications of each stage. Moreover, the mother is usually the child's primary caregiver during the infant's first weeks of life. These are genuinely differentiating characteristics." *Rose*, 258 Mich App at 297. In addition, the identity of the mother is rarely, if ever, in question, and it is the mother who must ultimately decide whether to give birth to the child or terminate the pregnancy. *In re RFF*, 242 Mich App at 210-211.

In contrast, the identity of the child's biological father may well be uncertain. "[T]he father's physical role is limited to the conception of the child. He has no physical role, after conception, in carrying the child to term or in the delivery of the child." *Rose*, 258 Mich App at 297. It is an "uncontestable fact" that the biological father "need not be present at the birth," and even if he is present, "that circumstance is not incontrovertible proof of fatherhood." *Nguyen*, 533 US at 62.

In short, a married mother and an alleged father are not similarly situated for purposes of the Revocation of Paternity Act. Consequently, the Legislature's decision to prescribe different statutory standing requirements for a child's mother and alleged father in the Revocation of Paternity Act does not offend equal protection. See *id*. at 73 (observing that "[t]he difference between men and women in relation to the birth process is a real

one, and the principle of equal protection does not forbid [the Legislature] to address the problem at hand in a manner specific to each gender"). Because married mothers and alleged fathers are not "actually similarly situated" in the area covered by the Revocation of Paternity Act, plaintiff was not denied equal protection in this case. See *In re RFF*, 242 Mich App at 210.

V

We decline to address plaintiff's unpreserved argument that the circuit court's ruling violated the child's constitutional right to "care and filiation." This argument was not raised in and decided by the circuit court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). At any rate, we note that the United States Supreme Court has never determined "whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." *Michael H*, 491 US at 130. And even if children do have such a constitutional right, it is almost certainly the right to maintain a filial relationship with their *legal parents*. See *id*. at 131. Under the law as it exists in Michigan today, plaintiff is simply not one of the child's legal parents. It is for the Legislature, not this Court, to decide whether the rights of alleged fathers such as plaintiff should be further expanded.

Affirmed. No taxable costs pursuant to MCR 7.219, a public question having been involved.

CAVANAGH and MARKEY, JJ., concurred with JANSEN, P.J.

BOOK-GILBERT v GREENLEAF

Docket No. 308755. Submitted July 10, 2013, at Detroit. Decided September 26, 2013, at 9:00 a.m.

Heather McCallister, the paternal grandmother of Eli Greenleaf, moved in the Genesee Circuit Court for grandparenting time under MCL 722.27b after the child's guardian, Angela Tyndall, refused to let her visit the child. The case began as a support action between the child's mother, Ashlee Book-Gilbert, and the child's father, Jerry R. Greenleaf. Book-Gilbert subsequently died, and Jerry was incarcerated. After Tyndall was appointed as the child's guardian, McCallister moved for grandparenting time in the support action, which had never been closed. The court, Kay F. Behm, J., ruled that Tyndall was entitled to the fit-parent presumption of MCL 722.27b(4)(b), that McCallister had failed to overcome the presumption, and, accordingly, denied McCallister's motion for grandparenting time. The Court of Appeals granted McCallister's delayed application for leave to appeal.

The Court of Appeals *held*:

A child's grandparent may seek a grandparenting time order under certain circumstances. It is presumed in a proceeding for grandparenting time that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption, a grandparent must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent fails to overcome the presumption, the court must deny the grandparent's motion for grandparenting time. Under the plain language of MCL 722.27b(4)(b), only fit parents are entitled to the presumption. There are distinct differences between a parent and a guardian such that it would be inappropriate to read the term "guardian" into the text of the fit-parent presumption in the absence of clear statutory language to that effect. Specifically, parents have a fundamental liberty interest in the care, custody, and control of their children. In contrast, guardianships are statutory in nature. The presumption favoring a fit parent reflects the elevated status of parents and

parental rights. The circuit court erred when it gave the guardian the benefit of the fit-parent presumption.

Reversed and remanded for further proceedings.

CHILD CUSTODY — GRANDPARENTING TIME — FIT-PARENT PRESUMPTION — GUARDIANS.

It is presumed in a proceeding for grandparenting time that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health; only fit parents are entitled to the presumption; a guardian is not entitled to the presumption (MCL 722.27b).

John Ceci PLLC (by *John R. Ceci*) for Heather McCallister.

John A. Streby for Angela Tyndall.

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM. Heather McCallister, the minor child's paternal grandmother, appeals by leave granted the family court order denying her motion for grandparent visitation, MCL 722.27b. We reverse and remand for proceedings consistent with this opinion.

When the minor child was three years old, his mother died. The father of the minor child was homeless and later placed in prison for failing to register as a sex offender. A foster care worker with the Department of Human Services (DHS) interviewed McCallister to determine her eligibility for visitation. McCallister was employed as a licensed adult-foster-care worker. In the course of the interview, McCallister did not disclose that DHS had previously investigated allegations concerning her home. The foster care worker opined that McCallister was not forthright regarding the investigations. The minor child was placed in the care of Angela Tyndall, a relative of the minor child's deceased mother, in March 2009. The minor child was able to visit with

McCallister until August 2009. In August 2009, Tyndall was named guardian of the minor child. After she became the minor child's guardian, DHS gave Tyndall the right to determine whether grandparent visitation would continue. Tyndall refused to allow further visitation.

McCallister subsequently moved for grandparent visitation under MCL 722.27b.[1] At the time of the hearing on the motion, McCallister had not visited or seen the minor child in nine months. The trial court opined that McCallister should have visitation if it was not detrimental to the child. Accordingly, the court appointed a guardian ad litem for the minor child and scheduled the matter for an evidentiary hearing. Two evidentiary hearings were held within a year. At the conclusion of the second evidentiary hearing, the parties agreed to adjourn the matter in order to have a therapist interview McCallister and the minor child and allow a visit if it was deemed appropriate. Although McCallister presented the testimony of an expert, this individual had never interviewed the minor child and testified that he was offering an opinion premised on theory. The trial court noted that without an evaluation of the minor child, all parties were "guessing" what was best for the minor child. However, at the next hearing, it was learned that the evaluation had not occurred, the minor child's therapist had left her employment, and Tyndall's family had moved to a different city because of a job change. It was determined that the evidentiary case would continue, and two additional evidentiary hearings were held. At the conclusion of those addi-

[1] This case began as a child support action. Plaintiff, Ashlee Book-Gilbert, is the minor child's deceased mother, and defendant, Jerry Ryan Greenleaf, is the minor child's biological father. McCallister asserted that the court had jurisdiction over her motion because the support action had never been closed.

tional hearings, the trial court ruled that Tyndall, although only a guardian, was entitled to the fit-parent presumption of MCL 722.27b(4)(b), and that McCallister had failed to overcome the presumption. As a result of this ruling, the court did not address the best-interest factors of MCL 722.27b(6), and denied McCallister's motion. We granted McCallister's delayed application for leave to appeal.[2]

McCallister alleges that the trial court erred by allowing Tyndall, the guardian, to use the fit-parent presumption of MCL 722.27b(4)(b) to deny grandparent visitation. We agree.

The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. *Id*. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. *Id*. "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman*, 493 Mich at 311. "Generally, when language is included in one section of a statute but omitted from

[2] *Book-Gilbert v Greenleaf*, unpublished order of the Court of Appeals, entered October 18, 2012 (Docket No. 308755).

another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). The courts may not read into the statute a requirement that the Legislature has seen fit to omit. *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951); *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010). "When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Mich Basic Prop Ins Ass'n*, 288 Mich App at 560 (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. *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 212; 828 NW2d 459 (2012). The trial court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo. *In re Receivership*, 492 Mich at 218. Application of the law to the facts presents a question of law subject to review de novo. *Miller-Davis Co v Ahrens Constr, Inc*, 285 Mich App 289, 299; 777 NW2d 437 (2009) rev'd on other grounds 489 Mich 355 (2011).

MCL 722.27b governs grandparenting time and provides in relevant part:

> (1) A child's grandparent may seek a grandparenting time order under 1 or more of the following circumstances:
>
> (a) An action for divorce, separate maintenance, or annulment involving the child's parents is pending before the court.
>
> (b) The child's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled.

(c) The child's parent who is a child of the grandparents is deceased.

(d) The child's parents have never been married, they are not residing in the same household, and paternity has been established by the completion of an acknowledgment of parentage under the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013, by an order of filiation entered under the paternity act, 1956 PA 205, MCL 722.711 to 722.730, or by a determination by a court of competent jurisdiction that the individual is the father of the child.

(e) Except as otherwise provided in subsection (13), legal custody of the child has been given to a person other than the child's parent, or the child is placed outside of and does not reside in the home of a parent.

(f) In the year preceding the commencement of an action under subsection (3) for grandparenting time, the grandparent provided an established custodial environment for the child as described in [MCL 722.27], whether or not the grandparent had custody under a court order.

* * *

(3) A grandparent seeking a grandparenting time order shall commence an action for grandparenting time, as follows:

(a) If the circuit court has continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction.

(b) If the circuit court does not have continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a complaint in the circuit court for the county where the child resides.

(4) All of the following apply to an action for grandparenting time under subsection (3):

(a) The complaint or motion for grandparenting time filed under subsection (3) shall be accompanied by an affidavit setting forth facts supporting the requested order. The grandparent shall give notice of the filing to each person who has

legal custody of, or an order for parenting time with, the child. A party having legal custody may file an opposing affidavit. A hearing shall be held by the court on its own motion or if a party requests a hearing. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard.

(b) In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion.

(c) If a court of appellate jurisdiction determines in a final and nonappealable judgment that the burden of proof described in subdivision (b) is unconstitutional, a grandparent filing a complaint or motion under this section must prove by clear and convincing evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health to rebut the presumption created in subdivision (b).

(5) If 2 fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time filed under subsection (3). This subsection does not apply if 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is deceased or whose parental rights have been terminated.

(6) If the court finds that a grandparent has met the standard for rebutting the presumption described in subsection (4), the court shall consider whether it is in the best interests of the child to enter an order for grandparenting

time. If the court finds by a preponderance of the evidence that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. In determining the best interests of the child under this subsection, the court shall consider all of the following:

(a) The love, affection, and other emotional ties existing between the grandparent and the child.

(b) The length and quality of the prior relationship between the child and the grandparent, the role performed by the grandparent, and the existing emotional ties of the child to the grandparent.

(c) The grandparent's moral fitness.

(d) The grandparent's mental and physical health.

(e) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.

(f) The effect on the child of hostility between the grandparent and the parent of the child.

(g) The willingness of the grandparent, except in the case of abuse or neglect, to encourage a close relationship between the child and the parent or parents of the child.

(h) Any history of physical, emotional, or sexual abuse or neglect of any child by the grandparent.

(i) Whether the parent's decision to deny, or lack of an offer of, grandparenting time is related to the child's well-being or is for some other unrelated reason.

(j) Any other factor relevant to the physical and psychological well-being of the child.

(7) If the court has determined that a grandparent has met the standard for rebutting the presumption described in subsection (4), the court may refer that grandparent's complaint or motion for grandparenting time filed under subsection (3) to alternative dispute resolution as provided by supreme court rule. If the complaint or motion is referred to the friend of the court for alternative dispute resolution and no settlement is reached through friend of

> the court alternative dispute resolution within a reasonable time after the date of referral, the complaint or motion shall be heard by the court as provided in this section.
>
> * * *
>
> (12) A court shall make a record of its analysis and findings under subsections (4), (6), (8), and (11), including the reasons for granting or denying a requested grandparenting time order.
>
> (13) Except as otherwise provided in this subsection, adoption of a child or placement of a child for adoption under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, terminates the right of a grandparent to commence an action for grandparenting time with that child. Adoption of a child by a stepparent under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, does not terminate the right of the parent of a deceased parent of the child to commence an action for grandparenting time with that child.

At the conclusion of the testimony,[3] the trial court held that MCL 722.27b(4)(b) provided that deference

[3] In the present case, there were four days of evidentiary hearings. During those hearings, the parties disputed the minor child's growth, development, and whether the minor child was abused before coming into the care of the guardian. McCallister alleged that the minor child was able to communicate, was seen by medical personnel, and was not, to her knowledge, abused. On the contrary, Tyndall testified that the minor child did not speak, ate with his hands and did not know how to use silverware, and expressed abuse at the hands of his biological father. McCallister acknowledged that DHS had previously investigated her home in light of allegations involving the provision of alcohol to minors and peeping by her husband at their daughter in the shower. McCallister further acknowledged that the minor child's father, her son, had been convicted of the sexual abuse of her stepson. However, McCallister noted that the DHS investigations had not resulted in the loss of her adult-foster-care license. A DHS worker, the minor child's guardian ad litem, and Tyndall asserted that the minor child's behavior and condition at the time he came into Tyndall's care coupled with the child's continued behavioral issues warranted termination of visitation with McCallister.

was to be given to the decision of a fit parent to deny grandparenting time, and it was presumed that the denial of grandparenting time "does not create a substantial risk of harm to the child's mental, physical, or emotional health." The trial court acknowledged that Tyndall was not a parent, but a guardian. Nonetheless, the trial court held that Tyndall had the right to make decisions as a fit parent, the right to deny grandparenting time, and that McCallister had failed to overcome the presumption.

The trial court's holding is contrary to the plain language of MCL 722.27b(4)(b). See *Whitman*, 493 Mich at 311. The text of MCL 722.27b contemplates that a minor child will be placed within the custody of an individual other than a parent. MCL 722.27b(1)(e) permits a grandparent to seek visitation when "legal custody of the child has been given to a person other than the child's parent, or the child is placed outside of and does not reside in the home of a parent." Despite the Legislature's acknowledgement that a child might be placed outside of a parental home, the plain language MCL 722.27b(4)(b) grants "fit parents" a presumption with regard to the denial of grandparenting time. The Legislature could have afforded a presumption to "custodians" or "guardians" of a grandchild, but did not include such language. We cannot read into a statute what the Legislature did not include, *In re Hurd-Marvin Drain*, 331 Mich at 509, and permitting guardians or custodians to derive the benefit of the fit-parent presumption would require us to rewrite the statute at issue.

The trial court did not make factual findings or address the credibility of the witnesses. Consequently, we are unable to review any factual findings and are limited to addressing the question of law—whether a guardian is entitled to the fit-parent presumption of MCL 722.27b(4)(b). See *In re Receivership*, 492 Mich at 218.

Tyndall contends that a guardianship encompasses parental responsibilities and, therefore, the trial court appropriately allowed the guardian to "step into the shoes" of the parent for purposes of MCL 722.27b(4)(b). MCL 700.5215 provides that "[a] minor's guardian has the powers and responsibilities of a parent who is not deprived of custody of the parent's minor and unemancipated child, except that a guardian is not legally obligated to provide for the ward from the guardian's own money and is not liable to third persons by reason of the parental relationship for the ward's acts."

Although MCL 700.5215 defines guardian's powers and responsibilities in terms of a parent's powers and responsibilities, that definition may not be incorporated into the provisions of MCL 722.27b(4)(b). The statutes fail to address the same subject matter, and they cannot be read *in pari materia*. See *Maple Grove Twp*, 298 Mich App at 212. More importantly, there are distinct differences between a parent and a guardian such that it would be inappropriate to read the term guardian into the text of the fit-parent presumption of MCL 722.27b(4)(b) in the absence of clear statutory language to that effect. See *Mich Basic Prop Ins Ass'n*, 288 Mich App at 560. Specifically, parents have a fundamental liberty interest in the care, custody, and control of their children. *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010). In contrast to this constitutional right, the purpose and legal effect of a guardianship is determined by statute. *Univ Ctr, Inc v Ann Arbor Pub Sch*, 386 Mich 210, 217; 191 NW2d 302 (1971). "A custody award to a third party . . . represents a lesser intrusion into the family sphere. It does not result in an irrevocable severance of . . . rights . . . ." *Hunter v Hunter*, 484 Mich 247, 269; 771 NW2d 694 (2009). The presumption favoring a fit parent reflects the elevated status of parents and parental rights. See *In re Beck*, 488 Mich at

11. Moreover, a fit parent has a relationship to the grandparents such that an informed decision may be made regarding the propriety of grandparent visitation. On the contrary, a guardian or custodian of a grandchild might or might not have a relationship with the grandparent, and, in the absence of a relationship, could not make an informed decision regarding the risk of harm to a child during visitation. Accordingly, the trial court erred by allowing a guardian to "step into the shoes" of a fit parent for purposes of MCL 722.27b(4)(b). Because the trial court did not make factual findings or credibility determinations in light of the testimony presented, we remand for additional proceedings consistent with this opinion.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ., concurred.

CLOHSET v NO NAME CORPORATION (ON REMAND)

Docket No. 301681. Submitted August 1, 2013, at Lansing. Decided October 1, 2013, at 9:00 a.m.

Clarence and Virginia Clohset and No Name Corporation entered into a lease agreement for commercial premises in 1991. Geraldine and Walter Goodman obligated themselves as guarantors for No Name. No Name failed to make lease payments and the Clohsets filed a demand for possession on No Name in the 48th District Court on October 6, 1998 and filed a complaint against No Name on October 21, 1998 for nonpayment of rent, seeking possession of the premises and costs, but not seeking monetary damages, which the complaint acknowledged would exceed the district court's general statutory jurisdictional limit of $25,000, MCL 600.8301(1). The Clohsets entered into a settlement agreement with No Name, Geraldine Goodman, and Walter Goodman, stating in part that No Name owed the Clohsets $384,822.95, plus 9.5 percent interest. The agreement required the parties to execute consent judgments for entry, potentially, in the circuit court or the district court. The consent judgments were to be held by the Clohsets and one or both were to be filed if No Name or the Goodmans defaulted on the settlement agreement. The Clohsets filed the district court consent judgment, stating that defendants had defaulted on the settlement agreement and owed the Clohsets a net amount of $222,102.09 plus costs and attorney fees. The district court entered the stipulated consent judgment on October 1, 1999. In March 2009, after the Clohsets and Walter Goodman had died, plaintiff Phillip M. Clohset, as personal representative of the estates of Clarence and Virginia Clohset, sent defendant Geraldine Goodman a demand letter for the amount owed in accordance with the consent judgment. Defendants stipulated to the renewal of the consent judgment in September 2009. In October 2009 defendant filed a motion to vacate the original October 1, 1999 consent judgment, arguing that the district court had lacked subject-matter jurisdiction over the case. The district court, Marc Barron, J., denied defendants' motion to vacate the judgment and transferred the case to circuit court pursuant to MCR 2.227(A)(1). Plaintiff moved for entry in the circuit court of the consent judgment that had previously been entered in the district court.

The circuit court, Mark A. Goldsmith, J., denied plaintiff's motion and granted defendants' counter-motion to dismiss, holding that the judgment was void for lack of subject-matter jurisdiction in the district court. Plaintiff filed an amended complaint in the circuit court and moved for summary disposition. The circuit court, Phyllis C. McMillen, J., denied plaintiff's motion and dismissed plaintiff's claims. Plaintiff appealed and the Court of Appeals, BOONSTRA, J., and K. F. KELLY, P.J., and WILDER, J. (concurring), vacated the circuit court order and remanded to the district court for reinstatement and enforcement of the consent judgment. 296 Mich App 525 (2012). The Supreme Court, in lieu of granting leave to appeal, vacated the opinion and remanded the case to the Court of Appeals for reconsideration in light of MCL 600.5739(1) and MCR 4.201(G)(2)(b). 494 Mich 874 (2013).

The Court of Appeals *held*:

1. Michigan district courts have exclusive jurisdiction under MCL 600.8301(1) over civil matters where the amount in controversy does not exceed $25,000 and, pursuant to MCL 600.8302(1) and (3), equitable jurisdiction and authority concurrent with that of the circuit court with respect to equitable claims arising under chapter 57 of the Revised Judicature Act (RJA), MCL 600.5701 *et seq.*, which concerns proceedings to recover possession of premises. Because the grant of jurisdictional authority in MCL 600.8302(1) and (3) is a more specific grant than the general grant of jurisdictional power found in MCL 600.8301(1), when a district court's actions flow from its power arising under chapter 57 of the RJA its actions are within the scope of MCL 600.8302(1) and (3), and MCL 600.8301(1) is inapplicable. Because subject-matter jurisdiction is determined by referring to the pleadings and the Clohsets' complaint invoked the district court's specific jurisdiction under MCL 600.8302(1) and (3) and chapter 57 of the RJA, that specific jurisdictional grant takes precedence over the more general, $25,000 jurisdictional grant found in MCL 600.8301(1). The district court had jurisdiction over this case and erred by transferring it to the circuit court. Having properly acquired jurisdiction, the district court was required to render a final decision on the merits. The district court's specific jurisdiction over this case extended to the entry of the stipulated consent judgment, even though the consent judgment included an agreed-upon monetary component that, if it had been premised on the district court's general jurisdiction, would have exceeded the otherwise applicable statutory jurisdictional limit.

2. Defendants were not entitled to collaterally attack during the 2009 proceedings the October 1, 1999 consent judgment

entered by the district court. Because the district court had subject-matter jurisdiction over this case, its exercise of jurisdiction could only be challenged on direct appeal or by proper motion to alter or amend the judgment. Defendants took no action to challenge the judgment within a reasonable time and plaintiff was entitled to enforce the judgment against defendants. Enforcement of the judgment was not precluded even though the stipulated money damages set forth in the consent judgment exceeded the district court's general jurisdictional amount otherwise applicable in the district court.

3. Even if the consent judgment was premised on an error in the exercise of the district court's jurisdiction, the error was of the parties' own making. Defendants cannot complain about an error created when they stipulated the entry of the consent judgment.

4. Because the district court had jurisdiction over this case and improperly transferred the case to the circuit court, the circuit did not have jurisdiction to rule on plaintiff's motion to enter the consent judgment, on defendants' motion to dismiss, or the parties' cross-motions for summary disposition; the circuit court should have transferred the case back to the district court pursuant to MCR 2.227(A).

5. Under MCR 4.201(G)(2)(b), if a money claim or counterclaim exceeding that district court's jurisdiction is introduced in a possession-of-premises claim, the court, on motion of either party or on its own initiative, shall order removal of that portion of the action to the circuit court, if the money claim or counter claim is sufficiently shown to exceed the court's jurisdictional limit. MCL 600.5739(1) provides that a party to summary proceedings may join claims and counterclaims for money judgment for damages attributable to wrongful entry, detainer, or possession, for breach of the lease or contract under which the premises were held, or for waste or malicious destruction to the premises. The court may order separate summary disposition of the claim for possession, without prejudice to any other claims or counterclaims. A claim or counterclaim for money judgment shall not exceed the amount in controversy that otherwise limits the jurisdiction of the court. MCR 4.201(G)(2)(b) and MCL 600.5739(1) do not apply to this case because the filing of a stipulated consent judgment does not constitute the introduction of a claim or counterclaim for money judgment. A claim is not introduced except as set forth in a pleading and a stipulated consent judgment is not a pleading. Because there was no claim or counterclaim for money judgment introduced in the district court proceedings, MCR 4.201(G)(2)(b)

and MCL 600.5739(1) did not require that this case (or any portion of the case) be transferred to the circuit court.

Vacated and remanded to the district court.

1. COURTS — DISTRICT COURTS — EQUITABLE POWERS — JURISDICTION.

District courts in Michigan have exclusive jurisdiction, under MCL 600.8301(1) over civil matters where the amount in controversy does not exceed $25,000 and, pursuant to MCL 600.8302(1) and (3), equitable jurisdiction and authority concurrent with that of the circuit court with respect to equitable claims arising under chapter 57 of the Revised Judicature Act (RJA), MCL 600.5701 *et seq.*, which concerns proceedings to recover possession of premises; the grant of jurisdictional authority in MCL 600.8302(1) and (3) is a more specific grant than the general grant of jurisdictional power found in MCL 600.8301(1) and takes precedence over the general grant of jurisdictional authority; when a district court's actions flow from its power arising under chapter 57 of the RJA, its actions are within the scope of MCL 600.8302(1) and (3) and MCL 600.8301(1) is inapplicable.

2. COURTS — SUBJECT-MATTER JURISDICTION — JUDGMENTS — APPEAL — COLLATERAL ATTACK.

Once a court's jurisdiction has attached, mere errors or irregularities in the proceedings, no matter how grave, will not render the court's judgment void; until the judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked, whereas the exercise of subject-matter jurisdiction can be challenged only on direct appeal.

3. COURTS — DISTRICT COURTS — JURISDICTION — CONSENT JUDGMENTS.

MCR 4.201(G)(2)(b) provides that if a money claim or counterclaim exceeding the court's jurisdiction is introduced in a summary proceeding to recover the possession of premises, the court shall order removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional amount; under MCL 600.5739(1), a party to summary proceedings to recover possession of premises may join claims and counterclaims for damages attributable to wrongful entry, detainer, or possession, for breach of the lease or contract under which the premises were held, and the court may order separate summary disposition of a claim for possession, but a claim or counterclaim for money judgment may not exceed the amount in controversy that otherwise limits the jurisdiction of the court; when a district

court has subject-matter jurisdiction under MCL 600.8302(1) and (3) over an action for possession of premises, the filing of a stipulated consent judgment that includes an award of monetary damages that was not sought in the complaint but exceeds the district court's general jurisdictional limits, MCL 600.8301(1), does not constitute the introduction of a claim or counterclaim for money judgment and does not require the action to be transferred to the circuit court.

Butzel Long (by *Michael J. Lavoie*, *David J. DeVine* and *Joseph E. Richotte*) for Phillip M. Clohset.

Jaffe Raitt Heuer & Weiss, PC (by *David W. Williams* and *Brian G. Shannon*), for No Name Corporation, Geraldine K. Goodman, and the Estate of Walter A. Goodman.

ON REMAND

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

BOONSTRA, J. Plaintiff, Phillip M. Clohset, appeals as of right the November 30, 2010, circuit court order denying his motion for summary disposition and granting summary disposition in favor of defendants, No Name Corporation (No Name), Geraldine K. Goodman, and the estate of Walter A. Goodman (Walter), deceased. By opinion issued on May 15, 2012, we vacated the judgment of the Oakland Circuit Court and remanded to the 48th District Court for reinstatement and enforcement of the stipulated consent judgment entered on October 1, 1999. *Clohset v No Name Corp*, 296 Mich App 525; 824 NW2d 191 (2012).

On July 3, 2013, our Supreme Court vacated this Court's 2012 opinion and remanded for reconsideration in light of MCL 600.5739(1) and MCR 4.201(G)(2)(b). *Clohset v No Name Corp*, 494 Mich 874; 832 NW2d 387 (2013). We now again vacate the judgment of the circuit

court and remand to the district court for reinstatement and enforcement of the stipulated consent judgment issued on October 1, 1999.

The facts of this case are not in dispute. But the case presents an unusual procedural history that requires us to consider issues of (a) subject-matter jurisdiction and (b) the validity, or degree of validity, of a stipulated consent judgment entered by the district court in an amount in excess of its jurisdictional limit.

Under the unusual circumstances outlined herein, we conclude that the district court had subject-matter jurisdiction over this case and that its entry of a stipulated consent judgment was proper, without regard to the jurisdictional amount-in-controversy limit that applies under the district court's general jurisdictional authority. Moreover, having neither appealed nor properly moved to alter or amend the stipulated consent judgment, defendants could not collaterally attack it, under the circumstances presented, 10 years later. Our conclusion derives in part from the well-established maxim that a party may not properly create error in a lower court and then claim on appeal that the error requires reversal. See, e.g., *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989) ("A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper [in the trial court] since to do so would permit the party to harbor error as an appellate parachute.").

We hold that the district court erred by transferring the case to the circuit court pursuant to MCR 2.227(A)(1). Further, given the jurisdiction of the district court, we hold that the circuit court erred by ruling on the merits of the case, by dismissing plaintiff's claims, and by granting summary disposition to defendants on plaintiff's claims.

I. FACTUAL AND PROCEDURAL HISTORY

This action was originally brought by Clarence and Virginia Clohset (the Clohsets). The Clohsets have since passed away and plaintiff, Phillip Clohset, has taken over as personal representative of their estates. The Clohsets and defendant No Name entered into a lease agreement for commercial premises in 1991, to which defendants Geraldine and Walter obligated themselves as guarantors for No Name. Defendant No Name subsequently failed to make its rental payments. The Clohsets filed a demand for possession on No Name in the district court on October 6, 1998, demanding possession of the premises. On October 21, 1998, they filed a complaint against No Name for nonpayment of rent, seeking possession of the premises and costs, but not seeking money damages, which the complaint acknowledged would exceed the district court's general statutory jurisdictional limit of $25,000. MCL 600.8301(1). The complaint noted that money damages would be sought in a separate action in circuit court.

On November 11, 1998, the Clohsets entered into a settlement agreement with No Name, Geraldine Goodman, and Walter Goodman, stating, in part, that No Name owed the Clohsets $384,822.95, plus 9.5 percent interest. The settlement agreement further required the parties to execute "pocket" consent judgments for entry, potentially, in the district court or the circuit court. The consent judgments were to be held by the Clohsets, and one or both were to be filed in the event that No Name or the Goodmans defaulted on the settlement agreement. When filed, the consent judgments would add Geraldine Goodman and Walter Goodman as named defendants, and would obligate all defendants as set forth therein. Subsequently, the Clohsets filed the district court consent judgment, along

with an affidavit from their attorney at the time, stating that defendants had defaulted and owed the Clohsets a net amount of $222,102.09, plus additional amounts, including costs and attorney fees, as outlined in the settlement agreement. The district court entered the stipulated consent judgment on October 1, 1999.[1]

Over nine years passed, during which time plaintiffs Clarence and Virginia Clohset and defendant Walter Goodman passed away, and then on March 24, 2009, plaintiff sent defendant Geraldine Goodman a demand letter for $222,102.09. Defendants stipulated with regard to a renewal of the consent judgment and the district court entered the stipulated renewal of consent judgment on September 15, 2009. On October 14, 2009, defendants moved to vacate the original, October 1, 1999, consent judgment on the ground that the district court had lacked subject-matter jurisdiction over the case. Plaintiff responded by moving to transfer the proceedings to circuit court. The district court denied defendants' motion to vacate the judgment, granted plaintiff's motion to transfer (while striking proposed language that would have found a lack of subject-matter jurisdiction), and transferred the case to the circuit court pursuant to MCR 2.227(A)(1) (which authorizes a transfer only when the transferring court "determines that it lacks jurisdiction of the subject matter of the action").

Plaintiff then moved for entry of the consent judgment (previously entered in district court) in circuit court. The circuit court denied that motion, finding the

[1] On October 12, 1999, and February 23, 2000, the parties entered into an Amendment and a Second Amendment of the settlement agreement, respectively, and thereby reaffirmed their assent to the terms of the settlement agreement, including, but not limited to, the entry of the consent judgments.

judgment was void for lack of subject-matter jurisdiction in district court, dismissed the case without prejudice, and permitted plaintiff to file an amended complaint. After filing an amended complaint, asserting breach of the parties' various agreements and related equitable claims, plaintiff moved for summary disposition on his breach of contract claims only, and defendants countered with a motion for summary disposition on all plaintiff's claims, both contract-based and equitable. The circuit court granted summary disposition in favor of defendants and dismissed plaintiff's claims.

Plaintiff claims on appeal that the circuit court erred by denying his motion to enter the consent judgment in circuit court, by dismissing his initial claims, and by later denying summary disposition to plaintiff and granting summary disposition to defendants.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision whether to enter a consent judgment for an abuse of discretion. Cf. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 763; 630 NW2d 646 (2001) ("This Court reviews for abuse of discretion a trial court's decision on a motion to set aside a consent judgment."). "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), citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion should be granted only when the plaintiff's claims are " 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Id*. (citation omitted). Likewise, a

motion made under MCR 2.116(C)(9) tests the legal sufficiency of a defense on the pleadings alone. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582; 794 NW2d 76 (2010). The motion should be granted only when "the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002). We review de novo a trial court's grant of summary disposition on the basis of legally insufficient pleadings. *Maiden*, 461 Mich at 118. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). When deciding a motion for summary disposition under this subrule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). We review de novo a trial court's decision on a motion under this subrule. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The underlying question whether a court had subject-matter jurisdiction is a question of law that this Court reviews de novo. See *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013).

III. ANALYSIS

Although plaintiff does not argue that the district court had subject-matter jurisdiction to enter the consent judgment, and does not challenge defendants' right to have collaterally attacked the judgment ten years later or the circuit court's holding that the judgment

was void *ab initio*, a discussion of this issue is necessary before proceeding with the parties' arguments on appeal. This Court does not generally address issues not raised by the parties on appeal. See *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 4 n 3; 704 NW2d 69 (2005). However, "[a]ll courts 'must upon challenge, or even sua sponte, confirm that subject-matter jurisdiction exists . . . .' " *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 479 n 2; 795 NW2d 797 (2010) (YOUNG, J., dissent), quoting *Reed v Yackell*, 473 Mich 520, 540; 703 NW2d 1 (2005) (opinion by TAYLOR, C.J.). Further, this Court is empowered to "enter any judgment or order or grant further or different relief as the case may require." MCR 7.216(A)(7).

A. THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION, AND ERRED BY TRANSFERRING THE CASE TO THE CIRCUIT COURT

District courts in Michigan have exclusive jurisdiction over civil matters where the amount in controversy does not exceed $25,000. MCL 600.8301(1). In addition, district courts have "equitable jurisdiction and authority concurrent with that of the circuit court" with respect to equitable claims arising under chapter 57 of the Revised Judicature Act (RJA), MCL 600.5701 *et seq*., which concerns proceedings to recover possession of premises. See MCL 600.8302(1) and (3).

This Court has previously held that MCL 600.8302(3) is a "more specific" grant of jurisdictional authority than the "general grant of jurisdictional power" found in MCL 600.8301(1). *Bruwer v Oaks* (*On Remand*), 218 Mich App 392, 396; 554 NW2d 345 (1996), citing *Driver v Hanley*, 207 Mich App 13, 17-18; 523 NW2d 815 (1994). "Because [MCL 600.8302(3)] is specific, it takes precedence over [MCL 600.8301(1)]." *Bruwer*, 218 Mich App at 396, citing *Driver*, 207 Mich App at 17-18. When

a "district court's action flowed from its power arising under Chapter 57 of the RJA [MCL 600.5701 *et seq*.], its actions are within the scope of [MCL 600.8302(3)], and [MCL 600.8301(1)] is inapplicable." *Bruwer*, 218 Mich App at 396.

The Court in *Bruwer* faced an apparent "conflict between the two jurisdictional statutes regarding whether district courts have the jurisdiction to issue a judgment in excess of [the then existing statutory limit of] $10,000 when the case arises under Chapter 57 of the RJA." *Id*. Resolving that apparent conflict in favor of the district court's exercise of jurisdiction under the circumstances presented, this Court held in *Bruwer* that a district court "had jurisdiction to issue" a $50,000 judgment on an appeal bond, in an action for "land contract forfeiture under the summary proceedings provisions of Chapter 57 of the [RJA]." *Id*. at 394, 396.

While it is true that a judgment entered by a court that lacks subject-matter jurisdiction is void, *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992), subject-matter jurisdiction is established by the *pleadings* and exists "when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993); see also *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996), citing *Luscombe v Shedd's Food Prod Corp*, 212 Mich App 537, 541; 539 NW2d 210 (1995) ("A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint.").

Because subject-matter jurisdiction is determined by reference to the pleadings, and because the complaint filed by the Clohsets in the district court invoked the

district court's specific jurisdiction under MCL 600.8302(1) and (3) and chapter 57 of the RJA, that specific jurisdictional grant takes precedence over the more general jurisdictional grant found in MCL 600.8301(1), which is inapplicable here. See, *Bruwer*, 218 Mich App at 396. The district court accordingly had jurisdiction over this case.

Having properly acquired jurisdiction, the district court was obliged to render a final decision on the merits. " '[W]hen a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action.' " *Schafer v Knuth*, 309 Mich 133, 137; 14 NW2d 809 (1944), quoting *MacLean v Wayne Circuit Judge*, 52 Mich 257, 259; 18 NW 396 (1884). A matter is finally and completely resolved when a judgment is entered. "A judgment [is] defined as the final consideration and determination of a court of competent jurisdiction on the matters submitted to it." 6A Michigan Pleading & Practice (2d ed, 2010), § 42:1, p 231. In other words, once a court acquires jurisdiction, unless the matter is properly removed or dismissed, that court is charged with the duty to render a final decision on the merits of the case, resolving the dispute, with the entry of an enforceable judgment.

Consistent with *Bruwer*, and with its authority and obligation to render a judgment on a matter properly before it, the district court's specific jurisdiction over this case extended to the entry of a stipulated consent judgment presented by the parties, even though that consent judgment included an agreed-upon monetary component that, if it had been premised on the district court's general jurisdiction, would have exceeded the

otherwise applicable statutory jurisdictional limit.[2] The district court thus erred by granting plaintiff's motion to transfer the case to the circuit court.[3]

B. DEFENDANTS CANNOT COLLATERALLY ATTACK THE AGREED-UPON CONSENT JUDGMENT

When defendants defaulted on the subsequent settlement agreement, the Clohsets entered a consent judgment in district court for the $222,109.09 then owed by defendants. This amount clearly exceeded the district court's general jurisdictional limit, if it applied here (which we find it did not[4]).

Even assuming arguendo that this monetary component of the stipulated consent judgment exceeded the district court's authority, defendants still could not properly collaterally attack the entry of that judgment. As the Michigan Supreme Court explained in *Bowie v Arder*, 441 Mich 23, 49; 490 NW2d 568 (1992), quoting *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 545; 260 NW 908 (1935) (citation omitted):

> "Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once

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[2] The fact that the Clohsets' district court complaint sought only equitable relief did not preclude the inclusion of monetary relief in the consent judgment. As MCR 2.601(A) provides, "every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings."

[3] We also are unaware of any published authority in Michigan that would sanction the "postverdict" transfer of a case to the circuit court merely for *entry* of a judgment, much less (as here) the transfer of a case for further proceedings 10 years *after* the entry of a judgment, and the unpublished authority, to the extent applicable, is unfavorable toward such a transfer.

[4] As noted already in this opinion the district court's general jurisdictional limit is "inapplicable" where, as here, the district court proceeds pursuant to its specific jurisdictional grant under chapter 57 of the RJA.

> 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."

In other words, "lack of subject matter jurisdiction can be collaterally attacked[, whereas] the exercise of that jurisdiction can be challenged only on direct appeal." *In re Hatcher*, 443 Mich at 439.

For the reasons noted, in this case there was no "want of jurisdiction." Rather, and because the district court had jurisdiction, it could at most be argued that the court erred in the "exercise of jurisdiction." Accordingly, as articulated in *Bowie* and *Jackson*, defendants were not entitled to attack this judgment collaterally during the 2009 proceedings; their only option, if any, was to challenge the error on direct appeal[5] or by a proper motion to alter or amend the judgment. Defendants took no such actions within the time allowed.[6] As a result, the original consent judgment, which was filed in the district court on October 1, 1999, was valid, although arguably then voidable (not void) by proper

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[5] We recognize that an appeal as of right may not have been available to the parties with regard to the consent judgment, since they did not reserve the right of appeal in the consent judgment itself. See *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 278 n 4; 597 NW2d 235 (1999), citing *Vanderveen's Importing Co v Keramische Indust M deWit*, 199 Mich App 359; 500 NW2d 779 (1993). This merely highlights the fact that defendants failed to preserve any right of appeal by which to properly challenge the entry of the consent judgment.

[6] Although defendants ultimately moved to vacate the October 1, 1999, consent judgment, they did not do so until October 14, 2009, over 10 years later. MCR 2.612(C)(2) provides that a motion to set aside a judgment as "void" must be made within a reasonable time. See also *Laffin v Laffin*, 280 Mich App 513, 521 n 1; 760 NW2d 738 (2008) (applying the rule to a consent judgment). Defendants' 10-year delay was not reasonable under the circumstances of this case.

and timely appeal or motion, and neither having occurred, the stipulated renewal of the consent judgment, filed in the district court in 2009, preserved the continued validity of the consent judgment. Plaintiff is therefore entitled to enforce the judgment against defendants.

This conclusion is not negated by the fact that the consent judgment provided stipulated relief that was different in kind from that initially requested in the district court complaint, or by the fact that the monetary amount of the stipulated damages exceeded the general jurisdictional limit of the district court. For the reasons noted, the district court had specific subject-matter jurisdiction under chapter 57 of the RJA, and the general jurisdictional limit thus was "inapplicable." See, e.g., *Bruwer*, 218 Mich App at 396.

Moreover,

> A consent judgment is different in nature from a judgment rendered on the merits because it is primarily the act of the parties rather than the considered judgment of the court. *No pleadings are required to support an agreed or negotiated judgment. Consequently, a judgment by consent is distinct from a judgment rendered by the court after trial.* [46 Am Jur 2d, Judgments, § 184, p 528 (2006) (emphasis added).]

Consent decrees differ from typical judgments because the "voluntary nature of a consent decree is its most fundamental characteristic." *Local No 93, Int'l Ass'n of Firefighters, AFL-CIO, CLC v City of Cleveland*, 478 US 501, 521-522; 106 S Ct 3063; 92 L Ed 2d 405 (1986) (recognizing that the agreement of the parties "serves as the source of the court's authority to enter any judgment at all"). See also *Goldberg v Trustees of Elmwood Cemetery*, 281 Mich 647, 649; 275 NW 663 (1937) ("A judgment by consent cannot ordinarily be set

aside or vacated by the court without consent of the parties thereto for the reason it is not the judgment of the court but the judgment of the parties.");[7] *Walker v Walker*, 155 Mich App 405, 406; 399 NW2d 541 (1986) ("When a party approves an order or consents to a judgment by stipulation, the resultant judgment or order is binding upon the parties and the court. Absent fraud, mistake or unconscionable advantage, a consent judgment cannot be set aside or modified without the consent of the parties, nor is it subject to appeal.") (citations omitted).

Accordingly, the fact that the Clohsets' complaint did not seek money damages, and the fact that the stipulated money damages (as set forth in the consent judgment) exceeded the general jurisdictional amount otherwise applicable in the district court, does not preclude enforcement of the consent judgment.

C. HAVING CREATED THE ALLEGED ERROR IN THE ENTRY OF THE CONSENT JUDGMENT, DEFENDANTS MAY NOT HARBOR THAT ALLEGED ERROR AS AN APPELLATE PARACHUTE

As noted at the outset of this opinion, it is fundamental that a party may not create error in a lower court, and then claim on appeal that the error requires reversal. See, e.g., *Dresselhouse*, 177 Mich App at 477 ("A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper [in the trial court] since to do so would permit the party to harbor error as an appellate parachute.").

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[7] The Supreme Court in *Goldberg*, 281 Mich at 649, noted that "a consent decree, in order to be valid, must come within the jurisdiction of the court and cannot confer jurisdiction where the law confers none." Here, however, the parties' consent judgment did not "confer jurisdiction where the law confers none." Rather, as noted, the district court possessed specific subject-matter jurisdiction pursuant to chapter 57 of the RJA.

Here, defendants stipulated to the entry of the consent judgment. The district court relied on that stipulation in entering the consent judgment on October 1, 1999. Even assuming arguendo that the consent judgment was premised on an error in the exercise of the district court's jurisdiction, that error was of the parties' own creation. Having created that error by stipulating to the entry of the consent judgment, defendants cannot now be heard to complain about that alleged error. To sanction such an argument would be to permit defendants to harbor their own error as an "appellate parachute," which we decline to do.

D. PLAINTIFF MAY ENFORCE THE CONSENT JUDGMENT ACCORDING TO ITS TERMS

We are cognizant of the fact that, generally speaking, a district court cannot render a judgment that exceeds its jurisdictional limit. See, e.g., *Zimmer v Schindehette*, 272 Mich 407, 409; 262 NW 379 (1935) (holding void a judgment rendered by a justice of the peace because it was in an amount in excess of the justice's jurisdiction); *Krawczyk v DAIIE*, 117 Mich App 155, 163; 323 NW2d 633 (1982), rev'd in part on other grounds 418 Mich 231 (1983) (holding a judgment awarded in the district court exceeding the then-existing jurisdictional limit of $10,000 not invalid, provided that amounts in excess of the jurisdictional limit can be attributed to costs, attorney fees, and interest, or that the case represents an exception, specified by statute, that would permit the court to render a judgment over the jurisdictional amount).

However, we find the general rule to be inapplicable to the circumstances presented in this case. In the cited cases, the plaintiffs' claims fell within the general jurisdiction of the court, and the judgments in those

cases were thus constrained by the amount-in-controversy limitations of the courts' general jurisdiction. By contrast, the Clohsets' claims fell within the district court's specific jurisdiction under chapter 57 of the RJA, and those general jurisdictional limits were thus "inapplicable." See, e.g., *Bruwer*, 218 Mich App at 396.

Even assuming arguendo that the general jurisdictional limit applied, it might at most be argued that the monetary amount of the consent judgment in excess of the $25,000 general jurisdictional limit (plus interest, costs, and attorney fees) was not recoverable, not that the entirety of the judgment was void. This was the result, for example, in *Brooks v Mammo*, 254 Mich App 486, 496; 657 NW2d 793 (2002), where this Court limited the plaintiff's recovery to the district court's $25,000 general jurisdiction limit.

But the circumstances in *Brooks* were in any event unusual and largely inapplicable here. In *Brooks*, the plaintiff had brought suit in the circuit court for an amount in excess of the then-applicable $10,000 district court general jurisdictional limit. Following a mediation evaluation of $3,500, the circuit court transferred the case to the district court, which then held a jury trial that resulted in a jury verdict in the plaintiff's favor in the amount of $50,000. As of the trial date, former MCL 600.641 (which is not at issue here, but which had permitted the removal of circuit court actions to the district court even where the amount in controversy otherwise would preclude it, and which further made lawful subsequent jury verdicts in excess of the otherwise applicable jurisdictional limit) had been repealed. Before the judgment was entered on the jury verdict in the district court, the jurisdictional limit of the district court also had been increased to $25,000. This Court

therefore was compelled "to determine the combined effect that the repeal of MCL 600.641 and the subsequent amendment of MCL 600.8301 have on the verdict returned by the jury in this case." *Id*. at 493. This Court held that, under the circumstances presented, the plaintiff was entitled to a damages judgment, but neither in the amount of the jury verdict nor the amount of the district court's jurisdictional limit at the time of trial. Rather, the plaintiff was entitled to damages in the amount of the newly increased $25,000 jurisdictional limit.

Even if *Brooks* were applicable here, its application would not void the consent judgment. Rather it, would only limit the recoverability of the judgment to the amount of the district court's general jurisdictional limit of $25,000 (plus interest, costs, and attorney fees).[8] As noted, however, we find that in light of the district court's specific jurisdiction in this case, the general jurisdictional limit was inapplicable.

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[8] Even if the enforceability of the district court consent judgment were so limited (which we expressly do not find), the settlement agreement does not on its face appear to set any time limit for the entry of either version of the consent judgment. Therefore, even under defendants' reading of the settlement agreement (i.e., that the waiver of defenses found in section VI of the settlement agreement related not to a later filing of a suit for breach of the settlement agreement, but rather to the *entry* of judgment), it appears (absent enforcement of the consent judgment in the district court) that defendants have waived any defenses to the entry of the circuit court consent judgment, should plaintiff proceed to file it. This is because the settlement agreement states that the waiver of defenses relates to the "entry of either or both" forms of the consent judgment, i.e., the version prepared for entry in the district court and the version prepared for entry in the circuit court. While only the former has to date been filed, the settlement agreement provides that, in the event of a default: (a) plaintiff may file the district court version of the consent judgment "and/or" the circuit court version; (b) defendants are obliged to "consent to all steps necessary to effectuate the entry of either or both" such versions; and (c) defendants' waiver of defenses relates to the entry of "either or both" versions of the consent judgment.

E. THE CIRCUIT COURT ERRED BY RULING ON THE MERITS

Because the district court had jurisdiction over this case and improperly transferred the case to the circuit court, the circuit court was completely without jurisdiction to rule on plaintiff's motion to enter the consent judgment, on defendant's motion to dismiss or, later, on the parties' cross-motions for summary disposition. Accordingly, the circuit court erred by ruling on those motions, and should instead have transferred the case back to the district court pursuant to MCR 2.227(A).

Having reached the above conclusions, we need not address plaintiff's remaining arguments on appeal.[9]

IV. PROCEEDINGS AFTER REMAND

As directed by our Supreme Court, we have reconsidered our initial opinion, *Clohset*, 296 Mich App 525, in

[9] The Court notes that, while not necessary to its decision in this case, it is unpersuaded in any event that plaintiff lacked proper alternative claims for breach of the settlement agreement, breach of the consent judgment, or otherwise, or that those claims would be barred by the applicable statute(s) of limitations, or otherwise. Therefore, absent enforcement of the consent judgment, plaintiff may still have a valid cause of action, in an appropriate court, for those alternative claims.

In that regard, this Court is compelled to note that it is particularly troubled that, in contesting plaintiff's argument that they waived the statute of limitations defense, and while accusing plaintiff of a "blatant mischaracterization" of the settlement agreement, defendants have used an ellipsis to categorically alter the meaning of the waiver provision of the settlement agreement. Rather than *preserving* "substantive defenses," as defendants suggest, the actual language of the settlement agreement confirms that such defenses are *waived*. This Court makes no judgment at this juncture regarding whether defendants made this representation intentionally or merely in error. The Court additionally notes that the statute of limitations is not, as defendants suggest, a "substantive" defense, but rather is a "procedural one," so that it would have been waived even under defendants' errant reasoning. *Staff v Johnson*, 242 Mich App 521, 531; 619 NW2d 57 (2000).

light of MCL 600.5739(1) and MCR 4.201(G)(2)(b). For the reasons that follow, we conclude that neither the statute nor the court rule alters our analysis or requires a different outcome.

MCL 600.5739(1) provides:

> Except as provided by court rules, a party to summary proceedings may join claims and counterclaims for money judgment for damages attributable to wrongful entry, detainer, or possession, for breach of the lease or contract under which the premises were held, or for waste or malicious destruction to the premises. The court may order separate summary disposition of the claim for possession, without prejudice to any other claims or counterclaims. A claim or counterclaim for money judgment shall not exceed the amount in controversy that otherwise limits the jurisdiction of the court.

MCR 4.201(G) provides the procedure for joinder of claims and counterclaims in summary proceedings to recover possession of premises. MCR 4.201(G)(2)(b) provides:

> If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

We conclude that the filing of a stipulated consent judgment does not constitute the "introduction" of a "claim or counterclaim for money judgment." Claims and counterclaims are stated in pleadings, and a plaintiff's "statement of claim" is set forth in its complaint. MCR 2.111(B). A party generally "must join every claim" it possesses against the opposing party in "a pleading." MCR 2.203(A). Even when the joinder of claims is permissive, the claims must be joined by a

"pleader." MCR 2.203(B). The term "pleading" is specifically and narrowly defined, and does not include a consent judgment. MCR 2.110. "No other form of pleading is allowed." *Id*. A "claim" therefore is not "introduced" except as set forth in a "pleading." Indeed, the proper way to "introduce" a claim that is not stated in a party's initial pleading is by way of an amendment to the pleading. MCR 2.118(A); see also, e.g., *Weymers v Khera*, 454 Mich 639, 663; 563 NW2d 647 (1997). The filing of the stipulated consent judgment in this case thus did not constitute the "introduction" of a "claim," and MCL 600.5730(1) and MCR 4.201(G)(2)(b) are therefore inapplicable.

Also, as noted earlier, consent judgments differ significantly from litigated judgments. It bears repeating that "[a] consent judgment is different in nature from a judgment rendered on the merits because it is primarily the act of the parties rather than the considered judgment of the court. *No pleadings are required to support an agreed or negotiated judgment. Consequently, a judgment by consent is distinct from a judgment rendered by the court after trial*." Am Jur, § 184 (emphasis added). Consent decrees differ from litigated judgments because the "voluntary nature of a consent decree is its most fundamental characteristic." *Local No 93*, 478 US at 521-522 (recognizing that the agreement of the parties "serves as the source of the court's authority to enter any judgment at all").

Certainly, *once entered*, consent judgments are treated the same as litigated judgments in terms of their force and effect. *Trendell v Solomon*, 178 Mich App 365, 368-369; 443 NW2d 509 (1989). However, the fact that a stipulated consent judgment may be *enforced* identically as a litigated judgment does not mean that a district court lacks jurisdiction to enter a consent

judgment merely because it may have lacked jurisdiction to entertain a "claim" set forth in a "pleading" that resulted in a litigated judgment.

The district court indisputably had jurisdiction over plaintiff's claim. We hold that, in the unique circumstances presented, it possessed authority to enter the parties' stipulated consent judgment. In any event, it might at most be argued that the district court erred in the *exercise* of jurisdiction relative to a portion of the agreed-upon relief set forth in the stipulated consent judgment. But, as noted, any such error could have been challenged only on direct appeal, and not collaterally, ten years later, as defendants seek to do in this case. See *Bowie*, 441 Mich at 49; *Jackson*, 271 Mich at 545.

For these reasons, we hold that no "claim or counterclaim for money judgment" was "introduced" in the district court proceedings that would have necessitated the transfer of this case (or any portion thereof) to the circuit court. Therefore, neither MCL 600.5739(1) nor MCR 4.201(G)(2)(b) compels us to alter our original analysis or conclusion, as stated in this opinion.

V. CONCLUSION

We vacate the judgment of the circuit court and remand to the district court for reinstatement and enforcement of the consent judgment. We do not retain jurisdiction.

K. F. KELLY, P.J., and WILDER, J., concurred with BOONSTRA, J.

OSHTEMO CHARTER TOWNSHIP v KALAMAZOO COUNTY ROAD COMMISSION

Docket No. 304986. Submitted May 8, 2013, at Grand Rapids. Decided June 25, 2013, at 9:05 a.m. Opinion vacated on reconsideration and new opinion issued October 1, 2013, at 9:05 a.m. Leave to appeal sought.

Oshtemo Charter Township brought an action in the Kalamazoo Circuit Court against the Kalamazoo County Road Commission, Alamo Township, and Kalamazoo Charter Township, seeking declaratory relief and a preliminary injunction that would stay the decision of the road commission to void certain parts of an Oshtemo Charter Township truck route ordinance under MCL 257.726(3). The trial court, Alexander C. Lipsey, J., granted a preliminary injunction after finding that plaintiff would likely prevail on the merits of the case because, as a result of an apparent typographical error in the last sentence of MCL 257.726(3), the road commission did not have the authority to void the disputed parts of plaintiff's ordinance. The road commission appealed by leave granted. The Court of Appeals, ZAHRA and DONOFRIO, JJ. (METER, P.J., concurring), construing the phrase "MCL 247.671 to 247.675" in MCL 257.726(3) under the scrivener's error doctrine as "MCL 247.651 to 247.675," held that the preliminary injunction had to be vacated. 288 Mich App 296 (2010). On remand, the road commission moved for summary disposition. The trial court granted partial summary disposition in favor of the road commission, determining that MCL 257.726(3), which gives county road commissions the authority to approve or void certain local truck route ordinances, is constitutional and that the road commission's decision was authorized by law. The parties dismissed plaintiff's remaining claim by stipulation, and plaintiff appealed the trial court's order granting summary disposition in favor of defendants. The Court of Appeals reversed and remanded for entry of summary disposition in favor of plaintiff. The road commission moved for reconsideration. The Court of Appeals granted the motion for reconsideration, vacated its previous opinion, and issued a new opinion.

On reconsideration, the Court of Appeals *held*:

Const 1963, art 7, § 29 reserves to counties, townships, cities, and villages the right to reasonable control of roads within their

boundaries. Local governments may protect their specifically reserved constitutional rights on behalf of the public they represent, including the right to reasonable control of roads within their boundaries. Local governments may exercise reasonable control to regulate matters of local concern, but only in a manner and to the degree that the regulation does not conflict with state law. In this case, plaintiff's truck route ordinance did not conflict with state law, either directly or by conflicting with an agency's interpretation of state law. The Legislature exceeds its authority when it attempts to prevent local governments from adopting reasonable traffic regulations that are explicitly authorized by the Michigan Constitution when the regulations do not conflict with state law. In this case, MCL 257.726(3) was unconstitutional as applied because it conflicted with Const 1963, art 7, § 29. The Legislature exceeded its authority when it purported to grant a county road commission the authority to void a township's reasonable traffic control ordinance. At the very least, a road commission must determine that a township's ordinance is unreasonable before it may void the ordinance. The Kalamazoo County Road Commission did not determine that the truck route ordinance was unreasonable before voiding it; thus, MCL 257.726(3) was unconstitutional as applied.

Reversed and remanded for entry of summary disposition in favor of plaintiff.

STATUTES — MICHIGAN VEHICLE CODE — TRUCK ROUTE DESIGNATIONS — CONSTITUTIONAL RESERVATIONS — LOCAL CONTROL OF ROADS — AUTHORITY OF A COUNTY ROAD COMMISSION TO VOID A LOCAL TRUCK ROUTE ORDINANCE.

Const 1963, art 7, § 29 reserves to counties, townships, cities, and villages the right to reasonable control of roads within their boundaries; the Legislature exceeds its authority when it purports to grant a county road commission the authority to void a township's reasonable traffic control ordinance under MCL 257.726(3); at the very least, a county road commission must determine that a township's ordinance is unreasonable before it may void the ordinance.

Fahey Schultz Burzych Rhodes PLC (by *William K. Fahey* and *Stephen J. Rhoades*) and *James W. Porter, P.C.* (by *James W. Porter*), for Oshtemo Charter Township.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg* and *Karl W. Butterer, Jr.*), *Lewis Reed & Allen, P.C.* (by *Stephen Denenfeld*), and *Henn Lesperance PLC*

(by William L. Henn) for the Kalamazoo County Road Commission.

Ford, Kriekard, Soltis & Wise, P.C. (by *Robert A. Soltis*), for Alamo Township.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *Kenneth C. Sparks*), for Kalamazoo Charter Township.

ON RECONSIDERATION

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

PER CURIAM. Plaintiff Oshtemo Charter Township (Oshtemo Township) appeals as of right the circuit court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants Kalamazoo County Road Commission (the Road Commission), Alamo Township (Alamo Township), and Kalamazoo Charter Township (Kalamazoo Township) on Oshtemo Township's claim that the Road Commission's decision to void an Oshtemo Township truck route ordinance under the authority of MCL 257.726(3) was invalid. We reverse and remand.

I. OVERVIEW

Article 7, § 29 of the Michigan Constitution reserves to counties, townships, cities, and villages the right to reasonable control of the traffic within their boundaries. In MCL 257.726(1), the Michigan Legislature has provided that townships may adopt truck route ordinances, and in MCL 257.726(3), the Legislature has purported to grant local road commissions the authority to "approve or void" those ordinances.

We conclude that a township does not have the authority to adopt any ordinance that conflicts with

state law. An ordinance can conflict with state law by conflicting with the rules of an administrative agency. But county road commissions, despite being administrative agencies, do not have the authority to promulgate rules. A truck route ordinance does not conflict with state law either directly or through the operation of an administrative agency under MCL 257.726(3). Because a reasonable truck route ordinance does not conflict with state law, a township has the authority to adopt one.

We also conclude that the Legislature may not override a power provided in the Constitution. Therefore, to the extent MCL 257.726(3) allows a county road commission to void a traffic control ordinance without demonstrating that the ordinance is unreasonable, it conflicts with the Michigan Constitution's grant of the power to townships to adopt reasonable traffic control ordinances, and is unconstitutional as applied.

The Road Commission only has the authority to void an unreasonable traffic control ordinance. Because the Road Commission did not determine that the ordinance was unreasonable, the Road Commission's decision was contrary to the Michigan Constitution, and thus it was not authorized by law. Because the trial court improperly determined that the decision was authorized by law, we reverse and remand.

II. FACTS

A. OSHTEMO TOWNSHIP'S TRUCK ROUTE ORDINANCE

MCL 257.726(1) allows local authorities to pass an ordinance that prohibits trucks on specified routes. In March 2007, Oshtemo Township passed its Truck Route Ordinance, which prohibits heavy trucks from traveling on (1) 10th Street between both G and H

Avenues, (2) 10th Street between West Main Street and G Avenue, (3) 9th Street between West Main Street and H Avenue, and (4) H Avenue between 9th Street and Drake Road (collectively, the prohibited routes).[1] The prohibited routes are all county primary roads.

B. OBJECTIONS TO THE TRUCK ROUTE ORDINANCE

Effective January 13, 2009, the Legislature amended MCL 257.726, adding subdivision (3).[2] MCL 257.726(3) allows a township to object to an adjoining township's truck route ordinance and provides that the county road commission will resolve the objection if the townships fail to resolve it.[3] In February 2009, Kalamazoo Township and Alamo Township challenged Oshtemo Township's truck route ordinance.

On May 21, 2009, after the parties failed to resolve the dispute, the Road Commission determined that the prohibited routes were primary roads and voided the ordinance. On June 4, 2009, Oshtemo Township filed in the Kalamazoo Circuit Court a claim of appeal and a complaint against the Road Commission, Alamo Township, and Kalamazoo Township, seeking a preliminary injunction and declaratory relief. Oshtemo Township asserted in pertinent part that (1) MCL 257.726(3) did not apply to the ordinance, (2) MCL 257.726(3) conflicts with Const 1963, art 7, § 22 and, because Oshtemo Township's ordinance was reasonable, the Road Commission improperly voided it, (3) MCL 257.726(3) unlawfully delegates authority to the Road Commission, and (4) MCL 257.726(3) does not contain adequate governing standards.

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[1] Oshtemo Township Ordinances, §§ 153.005 and 153.006.

[2] 2008 PA 539.

[3] MCL 257.726(3).

In June 2009, the trial court granted Oshtemo Township's request for a preliminary injunction on the basis that MCL 257.726(3) did not apply to the prohibited routes because there were no truck routes designated under the statutes to which MCL 257.726(3) refers. In April 2010, this Court determined that the mistaken reference was a scrivener's error, and remanded the case to the circuit court for further consideration.[4]

C. OSHTEMO TOWNSHIP'S TRAFFIC CONTROL ORDER

On March 9, 2010, while this Court's decision concerning the preliminary injunction was pending, Oshtemo Township appointed James J. Valenta as its traffic engineer pursuant to the Michigan State Police's Uniform Traffic Code for Cities, Townships, and Villages, which Oshtemo Township had adopted in September 2003.[5] Valenta issued a traffic control order on April 13, 2010, under Rule 28.1151 of the Uniform Traffic Code. The traffic control order contained a truck route map, designated specific roadways as truck routes, and prohibited commercial truck traffic from "all other roadways in the township . . . ." On April 13, 2010, Oshtemo Township adopted the traffic control order by resolution.

Kalamazoo Township and Alamo Township challenged the traffic control order on the same grounds that they had challenged the ordinance, and argued that the Road Commission resolution voiding the ordinance also voided the traffic control order.

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[4] *Oshtemo Charter Twp v Kalamazoo Co Rd Comm*, 288 Mich App 296; 792 NW2d 401 (2010) (The statute states that for purposes of MCL 257.726(3), "county primary road" means "a highway or street designated as a county primary road pursuant to 1951 PA 51, MCL 247.671 to 247.675." Under the scrivener's error doctrine, we construed the phrase "MCL 247.671 to 247.675" as "MCL 247.651 to 247.675.").

[5] See MCL 257.951.

D. THE TRIAL COURT'S RULINGS

After this Court's remand, the Road Commission renewed its motion for summary disposition. In March 2011, the trial court heard oral argument concerning the validity of the traffic control order. The trial court determined that the traffic control order fell within the purview of MCL 257.726, and determined that MCL 257.726(3) gave the Road Commission the authority to resolve any conflict concerning the "respective rights and responsibilities of the various townships in relation to one another as to the appropriateness of particular traffic patterns." The trial court determined that the Road Commission's previous determination to void the ordinance also voided the traffic control order. The trial court ultimately concluded that MCL 257.726(3) was constitutional, and granted summary disposition in the Road Commission's favor concerning the traffic control order.

The trial court heard oral argument on April 18, 2011, concerning the Road Commission's decision to void the ordinance. The Road Commission contended that the "shall be final" language of MCL 257.726(3) precluded judicial review of its decision or, in the alternative, that the trial court could only review the decision for an abuse of discretion. Oshtemo Township argued that the trial court must at the least determine whether the Road Commission's decision was reasonable and whether it was authorized by law. Oshtemo Township argued that under these standards, the decision by the Road Commission conflicted with the Michigan Constitution's protection of a township's reasonable control over its roads, and that the burden was on the Road Commission to show that Oshtemo Township's decision was unreasonable.

The trial court found that MCL 257.726(3) was constitutional, and that the Road Commission was authorized to review and void the truck route ordinance. It determined that the statute, "in essence, provide[s] the County Road Commission with the authority to arbitrate . . . the dispute." It opined that it had to review the Road Commission's decision to void Oshtemo Township's ordinance for an abuse of discretion, and found that the Road Commission did not abuse its discretion when it voided Oshtemo Township's ordinance. Accordingly, the trial court granted summary disposition on the majority of Oshtemo Township's claims. On June 22, 2010, the parties dismissed Oshtemo Township's remaining claim by stipulation. Oshtemo Township now appeals.

III. STANDARDS OF REVIEW ON APPEAL

This Court reviews de novo the trial court's decision to grant or deny a motion for summary disposition in an action for a declaratory judgment.[6] 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."[7] This Court reviews de novo issues of constitutional law.[8]

IV. THE TRIAL COURT'S REVIEW

A. OSHTEMO TOWNSHIP'S RIGHT TO JUDICIAL REVIEW

Article 6, Section 28 of the Michigan Constitution provides that

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[6] *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 512-513; 810 NW2d 95 (2011).

[7] See also *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[8] *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

> [a]ll final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law . . . .[9]

Alamo Township contends that Oshtemo Township has no right to claim an appeal under this constitutional provision because Oshtemo Township, as a public entity, has no "private rights or licenses." A private right is " 'a personal right, as opposed to the right of the public or the state.' "[10] Local governments may protect their specifically reserved constitutional rights on behalf of the public they represent.[11] As we will discuss, the Michigan Constitution has reserved to local governments the specific right at issue in this appeal—reasonable control of roads. Accordingly, we reject Alamo Township's argument that Oshtemo Township had no private right that the Road Commission's decision might affect.

B. STANDARDS OF REVIEW IN THE TRIAL COURT

When an agency makes a decision without a contested case hearing, the trial court must review the agency's or officer's decision to determine whether the decision was authorized by law.[12] An agency's decision is not authorized by law if it violates a statute or consti-

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[9] Const 1963, art 6, § 28.

[10] *Midland Cogeneration Venture LP v Naftaly*, 489 Mich 83, 93; 803 NW2d 674 (2011), quoting Black's Law Dictionary (8th ed), p 1348.

[11] See, e.g., *Oakland Co v Michigan*, 456 Mich 144, 167; 566 NW2d 616 (1997) (concerning standing).

[12] Const 1963, art 6, § 28; *Ross v Blue Care Network of Mich*, 480 Mich 153, 164; 747 NW2d 828 (2008).

tution, exceeds the statutory authority or jurisdiction of the agency, is made after unlawful procedures that result in material prejudice, or is arbitrary and capricious.[13] Courts—including trial courts reviewing an agency's decision—review de novo issues of constitutional law and statutory construction.[14]

C. APPLYING THE STANDARDS

To the extent that the trial court determined that it could review the Road Commission's decision to void the ordinance for an abuse of discretion, it may have erred. The Road Commission did not hold a contested case hearing, and MCL 257.726 does not require one. Thus, the trial court should only have determined whether the Road Commission's decision was authorized by law. However, the trial court's possible application of an incorrect standard, when the case hinges on whether the agency's decision was authorized by law, was a harmless error.

In this case, Oshtemo Township filed both a claim of appeal and an action for a declaratory judgment. The trial court found that the Road Commission was not barred from voiding the ordinance by article 7, § 29 of the Michigan Constitution of 1963, that the Road Commission's action was authorized by MCL 257.726(3), that the Road Commission's decision was not arbitrary and capricious, and that the Road Commission did not act with bias. The trial court indicated that it was taking its guidance from other cases. Those cases clearly indicate that the trial court reviews these

[13] *Northwestern Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 488; 586 NW2d 563 (1998).

[14] *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006); *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008).

issues under a de novo standard. Thus, we are not convinced that the trial court applied an improperly deferential standard—much less an abuse of discretion standard—to its determination that the agency's decision was authorized by law. In any event, we conclude that any application of an incorrect standard by the trial court in reviewing the Road Commission decision to void Oshtemo Township's ordinance was harmless.

V. MCL 257.726(3) CONFLICTS WITH ARTICLE 7, § 29 OF MICHIGAN'S CONSTITUTION

A. LEGAL BACKGROUND

Agencies—such as county road commissions—do not have any inherent authority. An agency is limited in power and authority by its statutory enactment.[15] Agencies "are only allowed the powers that the Legislature chooses to delegate to them through statute."[16]

Somewhat similarly, townships possess only those powers that are expressly granted by or fairly implied from the Michigan Constitution or actions of the Legislature.[17] Local control over roads is one of the powers that the Michigan Constitution specifically grants to townships:[18] "Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."[19] Both townships and county road commissions have constitutional authority

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[15] *People v Idziak*, 484 Mich 549, 584; 773 NW2d 616 (2009).

[16] *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582; 810 NW2d 110 (2011).

[17] *Hanselman v Wayne Co Concealed Weapon Licensing Bd*, 419 Mich 168, 187; 351 NW2d 544 (1984); *City of Taylor*, 475 Mich at 115.

[18] *City of Taylor*, 475 Mich at 116.

[19] Const 1963, art 7, § 29.

to exercise reasonable control of highways.[20] Thus, neither has exclusive control.[21] "[F]or some purposes, jurisdiction over its streets and roads remain[s] with the township."[22] For instance, a township does not need to obtain prior consent from a county road commission to enact an ordinance regulating truck traffic in the township.[23]

However, this Court has recognized that "if several townships each designate noncontiguous routes a 'chaotic patchwork' will ensue" that may render certain township ordinances unreasonable.[24] The Legislature has granted county road commissions the following authority in MCL 257.726(3):

> If a township has established any prohibition or limitation under [MCL 257.726(1)] on any county primary road that an adjoining township determines diverts traffic onto a border highway or street shared by the township and the adjoining township, the adjoining township may submit a written objection to the county road commission having jurisdiction over the county primary road, along with a copy to the township that established the prohibition or limitation, on or before the later of March 1, 2009, or 60 days after the township approves the prohibition or limitation. The written objection shall explain how the prohibition or limitation diverts traffic onto the border highway or street shared by the township and the adjoining township. The county road commission shall then investigate the objection. The township and adjoining township shall cooperate with that investigation and negotiate in good faith to resolve the objection. If the objection is not resolved

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[20] Const 1963, art 7, § 29; Const 1963, art 7, § 16. See also *Turner v Washtenaw Co Rd Comm*, 437 Mich 35, 36; 467 NW2d 4 (1991).

[21] See *Robinson Twp v Ottawa Co Bd of Rd Comm'rs*, 114 Mich App 405, 411-412; 319 NW2d 589 (1982).

[22] *Id*. at 412.

[23] *Id*. at 414.

[24] *Id*. at 414-415.

> within 60 days after the township receives the copy of the written objection, the county road commission has the authority to, and shall, either approve or void the prohibition or limitation that is the subject of the objection within 60 days thereafter, which decision shall be final. For purposes of this subsection, "county primary road" means a highway or street designated as a county primary road pursuant to 1951 PA 51, MCL 247.6[5]1 to 247.675.[25]

B. APPLICATION

1. THE PARTIES' CONTENTIONS

Alamo Township contends that the Legislature appears to have designed this statute to address the potential "chaotic patchwork" problem that this Court recognized in *Robinson Twp v Ottawa Co Bd of Rd Comm'rs*.[26] Oshtemo Township contends that the Legislature's attempt to address the problem, as written, conflicts with Const 1963, art 7, § 29, and because the Michigan Legislature cannot override the Michigan Constitution, the Road Commission's decision to void Oshtemo Township's ordinance under that statutory provision was not authorized by law.

Kalamazoo Township contends in its brief on appeal that the Road Commission's decision properly voided Oshtemo Township's ordinance because the ordinance—after the Road Commission's decision—was contrary to state law. However, Kalamazoo Township conceded at oral argument that the ordinance was not, on its face, contrary to state law. Because of the importance of this issue to Oshtemo Township's authority to enact its ordinance, we will briefly explain why Oshtemo Township's ordinance does not conflict with state law.

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[25] See *Oshtemo Charter Twp*, 288 Mich App at 304.

[26] *Robinson Twp*, 114 Mich App at 414.

2. ORDINANCES MUST COMPLY WITH STATE LAW

"Michigan is strongly committed to the concept of home rule, and constitutional and statutory provisions which grant power to municipalities are to be liberally construed."[27] But Const 1963, art 7, § 29—which reserves certain authority to local governments—is explicitly subject to other constitutional provisions, including Const 1963, art 7, § 22.[28] Const 1963, art 7, § 22 "empowers cities and villages 'to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law.*' "[29] The Michigan Supreme Court has interpreted this constitutional grant of authority to mean that a township retains control of its highways and may pass ordinances related to them, as long as those ordinances "do not contravene the State laws."[30] Thus, a local government may "exercise 'reasonable control' to regulate matters of local concern, but only in a manner and to the degree that the regulation does not conflict with state law."[31]

Const 1963, art 7, § 29, reserving to local units of government reasonable control over their highways, only empowers a township to enact an ordinance that does not conflict with state law. Therefore, if Oshtemo Township's ordinance conflicts with state law, then Oshtemo Township simply does not have authority to enact its ordinance.

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[27] *Bivens v Grand Rapids*, 443 Mich 391, 400; 505 NW2d 239 (1993).

[28] *City of Taylor*, 475 Mich at 116.

[29] *Id.*, quoting Const 1963, art 7, § 22 (emphasis altered).

[30] *Fenton Gravel Co, Inc v Village of Fenton*, 371 Mich 358, 362; 123 NW2d 763 (1963), quoting *People v McGraw*, 184 Mich 233, 238; 150 NW 836 (1915) (emphasis omitted).

[31] *City of Taylor*, 475 Mich at 117-118.

3. OSHTEMO TOWNSHIP'S ORDINANCE DOES NOT CONFLICT WITH STATE LAW

An ordinance may conflict with state law in several fashions. Pertinent to this case, Oshtemo Township's ordinance could conflict with state law by conflicting with MCL 257.726(3) directly, or by conflicting with an agency's interpretation of state law. We conclude that Oshtemo Township's ordinance does not conflict with state law in either of these two fashions.

Obviously, an ordinance conflicts with state law when it directly conflicts with a statute.[32] In this case, Oshtemo Township's ordinance does not directly conflict with MCL 257.726, as subdivision (1) directly allows Oshtemo Township to pass an ordinance regulating truck routes. Nor does it conflict on its face with subdivision (3), which provides that the county road commission may approve or void such an ordinance.

An ordinance also conflicts with state law if it conflicts with a validly promulgated rule of an administrative agency.[33] In *City of Taylor v Detroit Edison Co*, for example, the Legislature had granted the Michigan Public Service Commission authority to promulgate rules to enforce, among other things, the placement of utility wires.[34] The commission promulgated rules that possibly conflicted with the City of Taylor's preexisting ordinance.[35] The commission argued that the City of Taylor's ordinance was required to yield to the commission's rules if they indeed conflicted.[36]

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[32] *Fenton Gravel Co*, 371 Mich at 363.

[33] See *City of Taylor*, 475 Mich at 123-124.

[34] *Id*. at 118.

[35] *Id*.

[36] *Id*. at 119.

The Michigan Supreme Court held that, to the extent that the Taylor ordinance conflicted with the commission's rules, the ordinance might not be valid because it conflicted with state law.[37] In reaching its decision, the Court stated that the cases supporting the City of Taylor's position "were decided before the [commission's] promulgation of rules regarding the underground relocation of wires. Thus, there was no state law for the municipal action to conflict with."[38] The Michigan Supreme Court's decision in *City of Taylor* clearly hinged on the commission's authority, delegated to it by the Legislature, to promulgate rules that then became state law.

In this case, the Legislature has *not* conferred the authority to promulgate rules on local road commissions. In arguing that Oshtemo Township has no right to judicial review, Alamo Township asserts in its brief on appeal that the Road Commission "is not a 'state board, commission or agency' authorized under the laws of this State to promulgate rules from which an appeal or other judicial review has not otherwise been provided by law . . . . [The Road Commission] certainly is not . . . authorized to promulgate rules . . . ." And MCL 257.726 does not itself grant county road commissions the authority to promulgate rules to enforce its provisions.

We conclude that Oshtemo Township's ordinance does not conflict with state law, either directly or by conflicting with an agency's interpretation of state law.

4. MCL 257.726(3) IS UNCONSTITUTIONAL AS APPLIED

We conclude that MCL 257.726(3) is unconstitutional as applied to a reasonable township traffic control

[37] *Id*. at 123-124.

[38] *Id*. at 119 (citations omitted).

ordinance because the authority that it purports to grant to county road commissions conflicts with article 7, § 29 of the Michigan Constitution. As this Court has recently recognized, "when a statute contravenes the provisions of the state constitution it is unconstitutional and void."[39] The Legislature's authority does not extend to eradicating constitutional guarantees.[40]

The Michigan Supreme Court has held that the Legislature exceeds its authority when it attempts to prevent municipalities from adopting reasonable traffic regulations, which are explicitly authorized by the Michigan Constitution, when the regulations do not conflict with state law.[41] In *City of Dearborn v Sugden & Sivier, Inc*, the former version of MCL 257.726 was at issue,[42] which provided that local authorities could limit the weight of trucks on highways "except State trunk-line highways . . . ."[43] After the defendant was ticketed for an excessive axle load, it challenged the ordinance, arguing that the city had inappropriately placed a weight limit on a trunk-line highway.[44] Noting that the reasonableness of the ordinance was not at issue and that "[i]t does not assume to authorize conduct by those using its streets and highways of a character forbidden by general State law," the Court held that "the legislature exceeded its authority in undertaking to prevent municipalities from adopting" such an ordinance.[45]

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[39] *AFSCME Council 25 v State Employees Retirement Sys*, 294 Mich App 1, 15; 818 NW2d 337 (2011).

[40] See *Midland Cogeneration Venture*, 489 Mich at 94 ("The legislature may not eradicate a constitutional guarantee . . . .").

[41] See *City of Dearborn v Sugden & Sivier, Inc*, 343 Mich 257; 72 NW2d 185 (1955).

[42] See 1994 PA 300.

[43] *Id*. at 259, quoting former MCL 257.726, as set forth in 1949 PA 300.

[44] *Id*. at 259-260.

[45] *Id*. at 265-267.

We conclude that the Legislature has exceeded its authority to the extent that it has purported to grant a county road commission the authority to void a township's reasonable traffic control ordinance. At the very least, the road commission must determine that the township's ordinance is unreasonable before it may void the ordinance. In this case, despite the parties' proffered evidence concerning the reasonableness of the ordinance before the Road Commission, it did not determine that the ordinance was unreasonable when it resolved to void it. And when before the trial court, the Road Commission, Kalamazoo Township, and Alamo Township did not even attempt to demonstrate that Oshtemo Township's traffic control ordinance was unreasonable. Thus, we conclude that MCL 257.726(3) was unconstitutional as applied.

VI. DELEGATION OF LEGISLATIVE AUTHORITY

Finally, we need not reach the merits of Oshtemo Township's argument concerning the validity of the Legislature's delegation of authority because of our previous conclusion. But we do note that if a road commission's decision to "approve or void" an ordinance were not limited to voiding those ordinances that are unreasonable, the complete lack of standards contained in the statute would very likely render it a constitutionally deficient delegation of authority. The Legislature " 'may delegate to an administrative body the power to make rules and decide particular cases . . . .' "[46] Delegations of legislative authority include delegations of rulemaking authority and "referral statute[s]," which allow an agency to determine whether a fact has

[46] *Herrick Dist Library*, 293 Mich App at 580, quoting *West Virginia ex rel Dyer v Sims*, 341 US 22, 30; 71 S Ct 557; 95 L Ed 713 (1951).

occurred that triggers the statute's operation.[47] But in such delegations, "[a] complete lack of standards is constitutionally impermissible."[48]

In terms of a delegation of legislative authority, MCL 257.726(3) rests on very unsteady ground. In *Blue Cross & Blue Shield of Mich v Governor*, the Michigan Supreme Court held that the Legislature's instruction to the Insurance Commissioner to "either 'approve' or 'disapprove' " risk factors proposed by healthcare corporations, without any guiding standards, was not a constitutionally permissible delegation of legislative authority.[49]

This case is extremely similar to *Blue Cross & Blue Shield of Mich*. Here, MCL 257.726 contains neither factors for the road commission to consider when determining whether to "approve or void" an ordinance nor guiding standards, even in the form of a generalized statement of public policy. Thus, even if MCL 257.726(3) did not conflict with Const 1963, art 7, § 22 as applied to a reasonable traffic control ordinance, we are extremely skeptical that it would pass constitutional muster as, on its face, it would appear to confer unlimited discretion, without guiding standards, on county road commissions.

VII. CONCLUSION

We conclude that MCL 257.726(3) conflicts with Const 1963, art 7, § 22 to the extent that it purports to grant county road commissions the authority to void a

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[47] *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 10; 658 NW2d 127 (2003). See also *In re Complaint of Rovas Against SBC Mich*, 482 Mich at 101.

[48] *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 55; 367 NW2d 1 (1985).

[49] *Id*. at 52.

township's reasonable traffic control ordinance when that ordinance does not conflict with state law. In this case, the Road Commission did not determine that Oshtemo Township's ordinance is unreasonable. Thus, the Road Commission's decision violated the Michigan Constitution, and the trial court erred when it determined that the Road Commission's decision to void Oshtemo Township's traffic control ordinance under MCL 257.726(3) was authorized by law. Given our conclusions, we need not reach Oshtemo Township's remaining issues.

We reverse and remand for entry of summary disposition in favor of Oshtemo Township. Because this appeal does not involve a determination in a contested case, we may not remand to the Road Commission for additional fact-finding because our review is limited to the administrative record.[50] However, we do not preclude Kalamazoo and Alamo Townships from bringing a new challenge to Oshtemo Township's ordinance. The trial court should specify in its order for dismissal that this is not an adjudication on the merits for the purposes of res judicata.[51] We do not retain jurisdiction. Oshtemo Township, having prevailed in full, may tax costs under MCR 7.219(A).

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

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[50] See *Mich Ass'n of Home Builders v Dep't of Labor & Economic Growth Director*, 481 Mich 496; 750 NW2d 593 (2008).

[51] See MCR 2.504(B)(3).

In re TALH

Docket No. 314749. Submitted July 9, 2013, at Lansing. Decided October 10, 2013, at 9:00 a.m. Leave to appeal sought.

AB, the minor child's mother, and FB filed petitions in the Mecosta Circuit Court, Family Division, seeking a stepparent adoption of the minor child and termination of respondent's parental rights. Respondent acknowledged paternity of the minor child in April 2001, was ordered to pay child support, and had accumulated arrearages of over $5,000 by June 2010. Respondent was convicted of unarmed robbery in May 2010, sentenced to 4 to 30 years in prison, and the previous child-support order was modified in June 2010, reducing his child-support payments to $0 a month, including ordinary medical expenses. AB and FB married in April 2010 and filed the instant action in May 2012. During the summary disposition hearing, petitioners acknowledged that respondent had complied with his support order since its 2010 modification. The court, Marco S. Menezes, J., granted respondent's motion for summary disposition and petitioners appealed.

The Court of Appeals *held*:

MCL 710.51(6) provides that if the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father for purposes of MCL 710.39, and the parent who has legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court may issue an order terminating the rights of the other parent if (1) the other parent has failed or neglected to provide regular and substantial support for the child, or if a support order has been entered, has failed to substantially comply with that order for a period of 2 years or more before the filing of the petition, and (2) the other parent has the ability to visit, contact, or communicate with the child but has substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition Under the clear language of MCL 710.51(6), to determine compliance with a child-support order, courts look only at the order in effect during the two-year period immediately preceding the filing of the termination petition, regardless of whether arrearages had previously accrued that were not included

in the most recent order. In this case, the trial court did not err by granting respondent's motion for summary disposition because respondent had undisputedly been in compliance with the most current child-support order since its modification in June 2010; respondent's compliance with the original 2001 child-support order was irrelevant because the order was modified in June 2010 and was the order in effect for the two-year period preceding petitioners' request for stepparent adoption and termination of respondent's parental rights.

Affirmed.

ADOPTION — STEPPARENT ADOPTION — TERMINATION OF PARENTAL RIGHTS — COMPLIANCE WITH CHILD SUPPORT ORDER.

MCL 710.51(6) provides that if the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father for purposes of MCL 710.39, and the parent who has legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court may issue an order terminating the rights of the other parent if (1) the other parent has failed or neglected to provide regular and substantial support for the child, or if a support order has been entered, has failed to substantially comply with that order for a period of 2 years or more before the filing of the petition, and (2) the other parent has the ability to visit, contact, or communicate with the child but has substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition; under the clear language of MCL 710.51(6), to determine compliance with a child-support order, courts look only at the order in effect during the two-year period immediately preceding the filing of the termination petition, regardless of whether arrearages had previously accrued that were not included in the most recent order.

Galloway Legal Services, PLLC (by *Jennifer M. Galloway*), for petitioners.

Lobert & Fransted, PC (by *Emily W. Fransted*), for respondent.

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM. Petitioners, AB and FB, appeal as of right an order granting summary disposition to respondent, RH, under MCR 2.116(C)(10) and dismissing

petitioners' petitions for stepparent adoption and termination of respondent's parental rights. Petitioners argue that the lower court improperly found that respondent had substantially complied with his child-support obligations in accordance with the pertinent time frame set forth in MCL 710.51(6). We affirm, but we urge the Legislature to revisit the statute in question to account for situations such as the present one.

AB and respondent are the biological parents of a minor child. Respondent acknowledged paternity on April 2, 2001, and AB has legal custody of the child. Failing to regularly comply with his child-support order, respondent developed arrearages of over $5,000 by June 2010.

In May 2010, respondent was convicted of unarmed robbery and sentenced to 4 to 30 years' imprisonment. As a result, on June 9, 2010, the lower court modified respondent's previous support order, reducing his child-support payments to $0 a month, including ordinary medical payments.

In April 2010, AB married FB, and on May 4, 2012, they petitioned the lower court for stepparent adoption and for termination of respondent's parental rights under MCL 710.51(6), which states:

> If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a

> support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.[1]

Thereafter, respondent filed a motion for summary disposition under MCR 2.116(C)(10). During a hearing on the motion, petitioners conceded that respondent had complied with his support order since the time it was modified, roughly 23 months before the filing of their petitions. Nonetheless, petitioners argued that respondent was not entitled to summary disposition because he had failed to comply with his support order in the years before its modification. The trial court disagreed and granted respondent's motion.

We review de novo a trial court's grant of summary disposition. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009). We also review de novo issues of statutory interpretation. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006).

We find the resolution of this case straightforward in light of the pertinent statutory language and caselaw. It is simply not in dispute that respondent substantially complied with an entered support order for nearly the entire two years preceding the petitions. See MCL 710.51(6)(a). In *In re Halbert*, 217 Mich App 607, 611-612; 552 NW2d 528 (1996), rev'd in part on other grounds by *In re Caldwell*, 228 Mich App 116; 576 NW2d 724 (1998), this Court clearly ruled—contrary to petitioners' argument in the present case—that in applying MCL 710.51(6), courts are to look at the

[1] MCL 710.51(6)(b) is not at issue in this appeal.

two-year period immediately preceding the filing of the termination petition. The Court stated:

> We conclude that the phrase "for a period of 2 years or more before the filing of the petition" is plain, certain, and unambiguous. A bare reading of the statute reveals that the two-year statutory period must commence on the filing date of the petition and extend backwards from that date for a period of two years or more. Accordingly, we determine that the statute is satisfied and a petition for termination may be granted where the grounds for termination have been shown to exist for *at least two years immediately preceding the filing of the termination petition*. [*Halbert*, 217 Mich App at 612 (emphasis added).][2]

Under the clear and unambiguous statutory language and under the caselaw applying that language, petitioners' claims must fail. Petitioners contend that *In re Hill*, 221 Mich App 683; 562 NW2d 254 (1997), applies and mandates reversal of the trial court's ruling because respondent accrued arrearages with regard to his earlier support order. We do not agree, because *Hill* is distinguishable. In *Hill*, *id*. at 693, the Court, in analyzing whether MCL 710.51(6) authorized termination of the respondent's parental rights, stated, "it is only necessary to determine whether respondent had substantially complied with [a] support order for a period of two years or more before the filing of the petition." The Court then found that the respondent had not done so because he had failed to pay confinement expenses, blood-testing fees, and certain other medical expenses that were required under the support

[2] The Court in *Halbert*, 217 Mich App at 615-616, also ruled that the respondent in that case did not fall within the scope of MCL 710.51(6) because he was incarcerated and did not have the "wherewithal" to provide support, but this ruling was expressly overruled by *Caldwell*. In *Caldwell*, 228 Mich App at 121, the Court concluded that the statute contains "no incarcerated parent exception."

order. *Id*. at 693-694. It did not matter that the support order had been entered many years before the filing of the petitions to terminate parental rights and adopt, see *id*. at 685, 693, because, evidently, the order had not been modified in the interim and *remained in effect*.[3] The present case is different because *the support order in effect* required $0 in monthly payments and petitioners conceded that respondent had complied with the order since the time it was modified.

The trial court did not err by granting summary disposition to respondent. However, we urge the Legislature to revisit MCL 710.51(6) to address a situation such as the present one. It seems ill-advised indeed for a person to fail to provide child support, accrue arrearages, and then fail to fall within the parameters of the statute because of criminal actions leading to his or her incarceration and a resultant modification (to zero) of an earlier child-support order.

Affirmed.

SAWYER, P.J., and METER and DONOFRIO, JJ., concurred.

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[3] Although not stated explicitly, this conclusion can be deduced from the Court's language. See, e.g., *Hill*, 221 Mich App at 693 ("In the present case, a support order was entered on October 7, 1985. Therefore, it is only necessary to determine whether respondent had substantially complied with the support order for a period of two years or more before the filing of the petition [in 1995]."). Clearly the Court was operating under the assumption that the support order remained in effect.

MOUNT PLEASANT PUBLIC SCHOOLS v MICHIGAN AFSCME COUNCIL 25, AFL-CIO, AND ITS AFFILIATED LOCAL 2310

LAKEVIEW COMMUNITY SCHOOLS v LAKEVIEW EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION/MEA/NEA

Docket Nos. 304326, 304342. Submitted October 8, 2013, at Lansing. Decided October 15, 2013, at 9:00 a.m. Leave to appeal sought.

AFSCME Council 25, AFL-CIO, and its affiliated Local 2310, filed an unfair labor practice complaint with the Michigan Employment Relations Commission (MERC) against Mount Pleasant Public Schools, claiming that Mt. Pleasant had violated the public employment relations act, MCL 423.201 *et seq*. (PERA), because it was denied an opportunity to bid on professional cleaning services when Mt. Pleasant issued a request for proposal (RFP) for such services in the school district, including locations already staffed by AFSCME 2310 members. AFSCME demanded to negotiate the bidding procedure, which Mt. Pleasant denied.

Lakeview Educational Support Personnel Association/MEA/NEA (LESPA), filed an unfair labor practice complaint with MERC against Lakeview Community Schools, claiming that it was not given an equal opportunity to bid on an RFP issued by Lakeview to subcontract student transportation services in the district because the RFP limited bidding to independent contractors with at least five years' experience. LESPA submitted a demand to bargain the bidding-process terms, as well as a demand to bargain the decision and effects of subcontracting transportation, all of which Lakeview denied.

The MERC hearing officer consolidated the actions. Charging parties asserted that respondents had breached their duty to bargain under MCL 423.210(1)(e) of PERA when they refused to bargain over procedures for bidding on the subcontracting of noninstructional support services pursuant to MCL 423.215(3)(f).

Following a consolidated hearing, the hearing officer made findings of fact and recommended dismissal of AFSCME's and LESPA's unfair labor practice charges. The MERC accepted the hearing officer's findings and the recommended orders of dismissal in both actions, concluding that, (1) under MCL 423.215(3)(f), as amended by

2009 PA 201, the only issue to be bargained with regard to bidding was whether the bargaining unit was to be given an opportunity to bid on an equal basis as other bidders, (2) the respective RFPs were properly designed for third-party contractors and the bargaining units could be required to meet some of those requirements, and (3) because the charging parties did not submit proper bids, they could not complain that they were not given an equal opportunity to bid. AFSCME and LESPA appealed.

The Court of Appeals *held*:

1. Under MCL 423.215(3)(f), collective bargaining between a public school employer and a bargaining representative of its employees does not include: (1) the decision to contract for noninstructional support services, (2) the procedures for obtaining that contract, (3) the identity of the third party, and (4) the impact of the contract for noninstructional support services on individual employees or the bargaining unit. The statute plainly provides that bargaining may only occur on whether the public school employer will allow the bargaining unit to bid on the contract on an equal basis. MCL 423.215(3)(f) plainly states that once that bargaining unit is provided with an equal opportunity to bid, then the prohibition on bargaining applies; however, if the bargaining unit is not provided with an equal opportunity to bid then the section 15(3)(f) exceptions are subject to bargaining.

2. When the basis of an unfair labor practice charge is that the charging party was denied an equal opportunity to bid on an equal basis, the charging party has the burden of proof to establish that it was not afforded an opportunity to bid on an equal basis as other bidders. In this case, the MERC did not err by requiring AFSCME and LESPA to establish that they were denied an equal bidding opportunity.

3. There was competent, material, and substantial evidence to support the MERC's finding that AFSCME could not complain that it was not provided an opportunity to bid on an equal basis because it did not submit a proper bid. AFSCME should have requested exceptions to the RFP's requirement that it believed it was unable to meet rather than failing to submit a bid. The MERC did not err when it dismissed AFSCME's unfair labor practice charge.

4. There was competent, material, and substantial evidence to support the MERC's finding that LESPA could not complain that it was not provided an opportunity to bid on an equal basis because it did not submit a proper bid. LESPA's bid was a proposal for a collective bargaining agreement that sought to bargain over Mt. Pleasant's decision to subcontract, which is a prohibited subject of

bargaining under MCL 423.215(3)(f) and does not constitute a proper bid. The MERC did not err when it dismissed LESPA's unfair labor practice charge.

5. The MERC did not abuse its discretion by denying AFSCME's motion to reopen the record because AFSCME did not fully address the issue and failed to demonstrate that it could not have discovered the evidence with reasonable diligence and produced it at the original hearing.

Affirmed.

1. LABOR RELATIONS — PUBLIC SCHOOL EMPLOYERS — COLLECTIVE BARGAINING — BARGAINING EXCLUSIONS — NONINSTRUCTIONAL SUPPORT SERVICES.

Under MCL 423.215(3)(f), collective bargaining between a public school employer and a bargaining representative of its employees does not include: (1) the decision to contract for noninstructional support services, (2) the procedures for obtaining that contract, (3) the identity of the third party, and (4) the impact of the contract for noninstructional support services on individual employees or the bargaining unit; bargaining may only occur on whether the public school employer will allow the bargaining unit to bid on the contract on an equal basis; once that bargaining unit is provided with an equal opportunity to bid, then the MCL 423.215(3)(f) prohibition on bargaining applies; if the bargaining unit is not provided with an equal opportunity to bid then the MCL 423.215(3)(f) prohibitions are subject to bargaining.

2. LABOR RELATIONS — UNFAIR LABOR PRACTICES — BURDEN OF PROOF — OPPORTUNITY TO BID ON EQUAL BASIS.

When the basis of an unfair labor practice charge is that the charging party was denied an equal opportunity to bid on an equal basis, the charging party has the burden of proof to establish that it was not afforded an opportunity to bid on an equal basis as other bidders.

Thrun Law Firm, PC (by *Donald J. Bonato*) for Mount Pleasant Public Schools.

Miller Cohen, PLC (by *Robert D. Fetter*), for Michigan AFSCME Council 25, AFL-CIO, and its affiliated Local 2310.

Varnum LLP (by *John Patrick White*) for Lakeview Commmunity Schools.

Kalniz, Iorio & Feldstein Co, LPA, (by *Fillipe S. Ioria*), for Lakeview Educational Support Personnel Association/MEA/NEA.

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM. This matter involves a consolidated appeal from the Michigan Employment Relations Commission (MERC). In Docket No. 304326, the charging party, Michigan AFSCME Council 25, AFL-CIO, and its affiliated Local 2310 (AFSCME), appeals as of right the MERC's order dismissing its unfair labor practice charge against Mount Pleasant Public Schools (Mt. Pleasant). In Docket No. 304342, the charging party, Lakeview Educational Support Personnel Association/MEA/NEA (LESPA), appeals as of right the MERC's order dismissing its unfair labor practice charge against Lakeview Community Schools (Lakeview). The MERC reviewed the cases together and determined that the respondents did not breach their duty to bargain under the public employment relations act (PERA), MCL 423.210(1)(e), when they refused to bargain over procedures for bidding on the subcontracting of noninstructional support services pursuant to section 15(3)(f) of PERA, MCL 423.215(3)(f). We affirm the MERC's order in both appeals.

I. FACTS

A. DOCKET NO. 304326

On March 15, 2010, Mt. Pleasant issued a request for proposal (RFP) for professional cleaning services for many of the locations within the district, including those already staffed by AFSCME 2310 members. AFSCME demanded to negotiate the bidding procedure, but Mt. Pleasant denied its request. AFSCME filed a charge against Mt. Pleasant, alleging that it

had violated sections 10(1)(e), 15(1)(e), and 15(3)(f) of PERA, in that it was denied an equal opportunity to bid on professional cleaning services. AFSCME alleged that Mt. Pleasant had failed to bargain in good faith, even though it was mandatory.

The hearing officer issued an order to show cause why the charge should not be dismissed without a hearing. Specifically, the order noted that section 15(3)(f), of PERA as amended by 1994 PA 112, does not require a school district to bargain with a labor organization over the subcontracting of noninstructional support services. Rather, the order recognized that it only requires that the school district give the bargaining unit "an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders." See section 15(3)(f) of PERA, as amended by 2009 PA 201. The order also made it clear that the current section 15(3)(f) does not make bidding for the subcontracting of noninstructional support services a mandatory subject of bargaining.

AFSCME responded to the order to show cause, arguing that it was denied an opportunity to bid on an equal basis because the RFP required the bidders to be a corporation that has been in business for at least 5 years, and the union could not meet these requirements. Also, AFSCME argued that most of the provisions in the RFP were impossible for the union to comply with. AFSCME argued that the section 15(3)(f) language, as amended by 2009 PA 201, which prohibited from bargaining "the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision," excluded the procedures for providing a bid on an equal basis as one of the prohibited subjects of bargaining. Further,

AFSCME interpreted section 15(3)(f) to state that if the union was not provided with an opportunity to bid on an equal basis, then subcontracting is no longer a prohibited subject of bargaining.

B. DOCKET NO. 304342

On January 22, 2010, Lakeview provided prospective bidders with an RFP to notify them that it was seeking bids for student transportation services. On January 25, 2010, LESPA submitted a demand to bargain the bidding-process terms, which Lakeview declined. LESPA then submitted a "renewed" demand to bargain the bidding-process terms, as well as a demand to bargain the decision and effects of subcontracting transportation, which Lakeview also declined.

On March 8, 2010, LESPA filed a charge against Lakeview, alleging that Lakeview violated sections 10(1)(a), 10(1)(c), and 10(1)(e) of PERA in that it had denied LESPA the opportunity to bid on a transportation contract on an equal basis as other bidders, and had refused to bargain.

The hearing officer also issued an order to show cause that contained identical language to that of the order issued to AFSCME with regard to the interpretation of section 15(3)(f). LESPA responded to the order to show cause, arguing that the recent amendment to section 15(3)(f) restored the rights of the parties to collectively bargain over the subcontracting of noninstructional support services. LESPA argued that bidding is now a mandatory subject of bargaining. Further, LESPA asserted that the collective bargaining prohibition on other aspects of subcontracting, such as the decision and impacts of subcontracting, is not applicable if a bargaining unit is not given an equal opportunity to bid. LESPA argued that it was not given an

equal opportunity to bid because the RFP provided that the bidding was limited to independent contractors with at least five years of experience, and the union could not meet these requirements.

C. THE MERC DECISION

A formal hearing was held by the hearing officer in which the cases were consolidated. The hearing officer determined that the prohibition on bargaining over subcontracting "continues to apply as long as the bargaining unit is given an opportunity to bid on the contract on an equal basis as other bidders." Following the hearing and after considering the parties' exceptions to the hearing officer's findings, the MERC accepted those findings, and issued an order dismissing both of the charging parties' unfair labor practice charges. The MERC stated the following:

> The 2009 amendment to Section 15 expressly prohibits bargaining over the procedures for obtaining a contract for noninstructional support services. The exemption asserted by Charging Parties does not apply to bidding in general. It applies to "the bidding described in this subsection." The bidding described in subsection 15(3)(f) is the "opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders." Giving due consideration to the general purpose of the 1994 and 2009 amendments to Section 15 of PERA, we find that the only issue to be bargained with regard to bidding is whether the bargaining unit is to be given an opportunity to bid on an equal basis as other bidders. If a public school employer fails to give the bargaining unit an opportunity to bid on an equal basis as other bidders, the prohibitions of subsection 15(f) [sic] are removed. If the bargaining unit is given an equal opportunity to bid, bargaining over other procedures for obtaining the contract, including the procedures for bidding, is prohibited.

The MERC further stated that, contrary to the charging parties' argument, it is to be expected that the RFP will be designed for third-party contractors and the bargaining units will be required to meet some of those requirements. The MERC noted that the statute "provides for an equal bidding opportunity, not one that is designed for response by a bargaining unit or a labor organization." Finally, the MERC concluded that because the charging parties did not submit proper bids, they could not complain that they were not given an equal opportunity to bid.

The charging parties filed these appeals, arguing that the MERC (1) misinterpreted section 15(3)(f) of PERA; (2) erroneously shifted the burden of proof to the charging parties to demonstrate that they were not provided with an equal opportunity to bid; and (3) failed to support its findings with competent, material, and substantial evidence. In addition, AFSCME argued that the MERC erroneously denied its motion to reopen the record.

II. INTERPRETATION OF MCL 423.215(3)(F)

First, the charging parties argue that the MERC misinterpreted MCL 423.215(3)(f). We disagree. Questions of statutory interpretation are reviewed de novo. *Macomb Co v AFSCME Council 25 Locals 411 & 893*, 494 Mich 65, 77; 833 NW2d 225 (2013). "As a result, an administrative agency's legal rulings are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law." *Id*. (quotation marks and citation omitted).

In *In re Harper*, 302 Mich App 349, 354-355; 839 NW2d 44 (2013), this Court recently provided the foundation for reviewing questions of statutory interpretation:

> The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239,

> 246-247; 802 NW2d 311 (2011). A statutory provision must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks and citation omitted). Only when the statutory language is ambiguous may a court consider evidence outside the words of the statute to determine the Legislature's intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). However, "[a]n ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute, as used in its particular context, has more than one common and accepted meaning." *Papas*, 257 Mich App at 658.

"If a statute does not expressly define its terms, a court may consult dictionary definitions." *People v Gregg*, 206 Mich App 208, 211-212; 520 NW2d 690 (1994).

Section 15 of PERA provides that a public employer has the duty to bargain in good faith with the bargaining unit over mandatory subjects of bargaining, which include wages, hours, and other terms and conditions of employment. MCL 423.215(1); see also *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 450, n 4; 473 NW2d 249 (1991) (noting that subjects falling within the scope of wages, hours, and other terms and conditions of employment are known as mandatory subjects of bargaining). The statute recognizes that "[a] public school employer has the responsibility, authority, and right to manage and direct on behalf of the public the operations and activities of the public schools under its control." MCL 423.215(2). Accordingly, there are cer-

tain subjects that are prohibited from bargaining, and are provided in section 15(3)(f), which is the statute at issue. MCL 423.215(3)(f) and (4), provide:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> * * *
>
> (f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.[1]
>
> (4) Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

In *Mich AFSCME Council 25 v Woodhaven-Brownstone Sch Dist*, 293 Mich App 143, 156; 809 NW2d 444 (2011), this Court interpreted MCL 423.215(3)(f):

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[1] Prior to its amendment in 2009, section 15(3)(f) provided:

> (f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract; or the identity of the third party; or the impact of the contract on individual employees or the bargaining unit.

Our consideration of the placement of the exception for bidding described in MCL 423.215(3)(f) and the requirement that there be an "opportunity to bid on the contract . . . on an equal basis as other bidders" reveals no ambiguity. The word "bid," in a contractual setting, denotes an offer. It is defined in *Random House Webster's College Dictionary* (1997) as "to offer (a certain sum) as the price one will charge or pay: *They bid $25,000 and got the contract*." The phrase "equal basis as other bidders," examined in context, also is not ambiguous. It does not support plaintiffs' position that they were entitled to input into the terms of any request for proposal before the bidding process, or to have terms drafted in a manner that would permit the bargaining unit an opportunity to submit a bid on terms that differed from those of other potential bidders. This approach would put plaintiffs in a superior position to other bidders.

While opinions of the Attorney General are not binding on the courts, *Danse Corp v City of Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002), we find the Attorney General's interpretation of MCL 423.215(3)(f) in OAG, 2010, No 7249 (June 15, 2010), persuasive with respect to the legislative intent. In particular, we conclude that once the opportunity is afforded to a bargaining unit to bid for a contract on an equal basis with other bidders, the prohibition against collective bargaining concerning all listed subjects in MCL 423.215(3)(f) applies.[2]

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[2] The charging parties argue that this Court's interpretation of section 15(3)(f) in *Woodhaven* is dictum. This Court has defined dictum as " '[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).' " *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001), quoting Black's Law Dictionary (7th ed). This Court's interpretation of section 15(3)(f) was not dictum. In *Woodhaven*, this Court was asked to review the circuit court's grant of a preliminary injunction, which enjoined the defendant "from privatizing custodial, facility maintenance, and transportation work performed by members of the bargaining unit pending resolutions of [the] plaintiffs' unfair labor practice charge before the [MERC]." *Woodhaven*, 293 Mich App at 145. This Court noted that "it is apparent

As this Court correctly determined, the plain language of section 15(3)(f) provides that "once the opportunity is afforded to a bargaining unit to bid for a contract on an equal basis with other bidders, the prohibition against collective bargaining concerning all listed subjects in MCL 423.215(3)(f) applies." *Woodhaven*, 293 Mich App at 156. The last sentence of section 15(3)(f) clearly states that the subdivision only applies "if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders." Therefore, if the bargaining unit is provided an equal opportunity to bid, then the prohibitions on bargaining listed in section 15(3)(f) remain. However, if the bargaining unit is not provided with an equal opportunity to bid, then the four subjects listed in section 15(3)(f) are not prohibited from bargaining. This exception was recognized by section 15(4), which states, "Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining . . . ." Therefore, it is clear that the Legislature intended for the four subjects of bargaining to remain prohibited, unless the bargaining unit was not afforded an equal opportunity to bid.

The charging parties argue that the procedures for *how* to bid on an equal basis are never prohibited. However, this assertion is incorrect. The statute states that the procedures for obtaining the contract, other

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from the record that the issue central to the likelihood of [the] plaintiffs succeeding on the merits of their unfair labor practice charge is whether they were given 'an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.' " *Id*. at 155, quoting MCL 423.215(3)(f). Thus, the interpretation of section 15(3)(f) was necessary to the decision of the case and has precedential value.

than bidding described in this subdivision, are prohibited subjects of bargaining. The only bidding described in MCL 423.215(3)(f) is "an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders." As previously discussed, whether the bargaining unit is afforded an equal opportunity to bid is what determines whether the prohibitions on bargaining listed in section 15(3)(f) apply. Accordingly, pursuant to the plain language of the statute, bargaining would be allowed only on the subject of whether the public school employer will allow the bargaining unit to bid on the contract on an equal basis.

If the bargaining unit is not afforded an opportunity to bid on an equal basis, causing the procedures for obtaining the contract to become a subject of bargaining, respondents argue that it is a permissive subject and not a mandatory subject of bargaining. However, this interpretation is inconsistent with the plain language of the statute. The statute clearly states that "[a] public employer *shall* bargain collectively with the representatives of its employees . . . with respect to wages, hours, and other terms and conditions of employment . . . ." MCL 423.215(1) (emphasis added). The word "shall" generally denotes a "mandatory directive." See *Smitter v Thornapple Twp*, 494 Mich 121, 154; 833 NW2d 875 (2013) (MCCORMACK, J dissenting) (noting that she agreed with the majority's interpretation of the word "shall"). And as discussed earlier, our Supreme Court has indicated that anything falling within the phrase "wages, hours, and other terms and conditions of employment" is a mandatory subject of bargaining. *Amalgamated Transit Union*, 437 Mich at 450, n 4. The statute further provides that collective bargaining "shall not include" procedures for obtaining the contract, which presumably would incorporate bidding procedures. However, this is only true if the

bargaining unit was provided with an opportunity to bid on an equal basis. If the bargaining unit was not provided with an opportunity to bid on an equal basis, then the public school employer's mandatory duty to bargain, as provided in section 15(1), over the bidding procedures is triggered. Contrary to respondents' argument, nothing in the statute states that the public school employer *may* bargain over the procedures for obtaining the contract if it did not provide the bargaining unit with an opportunity to bid on an equal basis.

In sum, the plain language of the statute prohibits collective bargaining over four subjects: (1) the decision to contract for noninstructional support services, (2) the procedures for obtaining that contract, (3) the identity of the third party, and (4) the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, collective bargaining is allowed regarding whether the bargaining unit will be afforded an opportunity to bid on an equal basis. If the bargaining unit is not afforded an opportunity to bid on an equal basis, then the four subjects are no longer prohibited from collective bargaining. If the bargaining unit is afforded an opportunity to bid on an equal basis, then the four subjects remain prohibited from collective bargaining.

III. BURDEN OF PROOF

Next, the charging parties argue that the MERC erroneously shifted the burden of proof to the charging parties to prove that they were not provided with an opportunity to bid on an equal basis as the other bidders. We disagree. "The applicable burden of proof presents a question of law that is reviewed de novo on appeal." *FACE Trading, Inc v Dep't of Consumer & Indus Servs*, 270 Mich App 653, 661; 717 NW2d 377 (2006).

"The charging party, and not MERC, has the burden of establishing the unfair labor practice." *Mich Employment Relations Comm v Reeths-Puffer Sch Dist*, 391 Mich 253, 267 n 20; 215 NW2d 672 (1974), superseded by statute on other grounds as stated in *Employment Relations Comm v Cafana Cleaners, Inc*, 73 Mich App 752, 756; 252 NW2d 536 (1977). "As a general rule, the burden of proof rests upon one who has the affirmative of an issue necessary to his cause of action or defense." *Rasch v City of East Jordan*, 141 Mich App 336, 340; 367 NW2d 856 (1985). In this case, the charging parties' charges were based on the fact that they were denied an opportunity to bid on an equal basis. The hearing officer issued an order to show cause why the charges should not be dismissed for failure to establish that the charging parties were not provided with an opportunity to bid on an equal basis, when there were no factual allegations indicating that the charging parties even bid on the respective contracts. Because the charging parties bear the burden of establishing an unfair labor practice, it is not enough for the charging parties to merely allege that they were not afforded an opportunity to bid on an equal basis—they must provide factual allegations necessary to establish their claim. Therefore, the MERC did not err by requiring the charging parties to establish that they were denied an equal bidding opportunity.

IV. THE MERC'S FACTUAL FINDINGS

Next, the charging parties argue that the MERC's factual findings were contrary to the plain language of the statute and were not supported by competent, material, and substantial evidence. We disagree. The "MERC's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Macomb Co*, 494 Mich at 77 (quotation

marks and citation omitted). "This evidentiary standard is equal to the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *City of Lansing v Carl Schlegel, Inc*, 257 Mich App 627, 630; 669 NW2d 315 (2003) (quotation marks and citations omitted). Further, "[r]eview of factual findings of the commission must be undertaken with sensitivity, and due deference must be accorded to administrative expertise. Reviewing courts should not invade the exclusive fact-finding province of administrative agencies by displacing an agency's choice between two reasonably differing views of the evidence." *Amalgamated Transit Union*, 437 Mich at 450.

First, the charging parties argue that the MERC's finding that the bargaining units have to transform themselves into third-party contractors to bid on the contract eliminates the public school employers' statutory duty[3] to provide the bargaining units with an opportunity to bid on an equal basis. AFSCME also argues that the MERC erred when it determined that the bargaining unit must be the "same as" the other bidders to be on an "equal basis" by transforming itself into a corporation or other third-party entity. AFSCME argues that "equal" means "evenly proportioned or

[3] It should be noted that the statute does not mandate the public school employer to provide the bargaining unit with an opportunity to bid on an equal basis. It is essentially the public school employer's choice whether to provide the bargaining unit with an opportunity to bid on an equal basis. If the public school employer chooses not to, then it is forced to bargain with the bargaining unit over the decision, procedures, and impact of the contract, as well as the identity of the third party. Therefore, although the public school employer is not required to provide the bargaining unit with an opportunity to bargain on an equal basis, it may be in its best interests to do so.

balanced" and requires an "equal contest."[4] Because the RFP only applied to third-party contractors, the charging parties argue that they were not provided with an opportunity to bid on an equal basis.

However, the MERC did not state that the charging parties had to transform themselves into third-party contractors. It merely stated that they must "act in the manner of" third-party contractors to bid on the contract. The statute provides that if the public school employer wishes for the bargaining subjects listed in MCL 423.215(3)(f) to remain prohibited, it must provide the bargaining unit with "an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders." As the MERC correctly stated, the statute does not require the public school employer to provide an RFP "that is designed for response by a bargaining unit or a labor organization." The plain language of MCL 423.215(3)(f) only requires the public school employer to provide the bargaining unit with "an opportunity to bid on an equal basis as other bidders." As this Court has stated, the charging parties are not "entitled to input into the terms of any request for proposal before the bidding process, or to have terms drafted in a manner that would permit the bargaining unit an opportunity to submit a bid on terms that differed from those of other potential bidders," as

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[4] This argument has no merit because "same as" and "evenly proportioned or balanced" are both used to define "equal." *Random House Webster's College Dictionary* (2001) defines "equal" as:

> 1. as great as; the same as (often fol. by *to* or *with*). 2. like or alike in quantity, degree, value, etc. 3. of the same rank, ability, merit, etc.: *two students of equal brilliance*. 4. evenly proportioned or balanced: *an equal contest*. 5. uniform in operation or effect: *equal laws*. 6. adequate or sufficient in quantity or degree. 7. having adequate ability or means; suited: *I felt equal to the task*. 8. level, as a plain. 9. tranquil or undisturbed. 10. impartial or equitable.

this would put the charging parties "in a superior position to other bidders." *Woodhaven*, 293 Mich App at 156. The MERC notes that the RFPs are designed for third-party contractors wishing to submit bids. Thus, it is inherent that the bargaining unit will often have to "act in the manner of" a third-party contractor when bidding pursuant to an RFP seeking bids for noninstructional support services.

Finally, both charging parties argue that the MERC erred by finding that they could not complain that they were not provided with an opportunity to bid on an equal basis because they did not submit proper bids. Given the due deference this Court should afford to administrative-agency decisions, there was competent, material, and substantial evidence to support the MERC's finding.

With regard to AFSCME, it did not submit a bid because it argued that the RFP did not apply to it, and therefore, it could not submit a bid pursuant to it. However, included in the RFP was a provision that provided for exceptions to the RFP's requirements that the bidder was unable to meet. Therefore, as the MERC noted, AFSCME could have submitted a bid and requested an exemption for the requirements it felt that it could not fulfill. If Mt. Pleasant had denied AFSCME's bid or disqualified it from bidding because it could not fulfill certain requirements under the RFP, then AFSCME would have a claim under section 15(3)(f) because it would not have been provided with an opportunity to bid on an equal basis as the other bidders. However, in the absence of a bid, there is no way to determine whether the bargaining unit was denied an opportunity to bid on an equal basis. Thus, the MERC did not err when it determined that AFSCME could not complain that it was not provided with an equal bidding opportunity.

With regard to LESPA, the MERC determined that it only submitted a "proposal" for a collective bargaining agreement that, in effect, asked to bargain over the decision to subcontract noninstructional support services. As discussed, the MERC's findings only need to be supported by "less than a preponderance" of the evidence. Here, LESPA's "bid" was labeled a "proposal" for transportation services that sought to maintain the existing collective bargaining agreement between the parties. The proposal sought to reach a compromise to preserve bargaining unit positions within the school district. This was sufficient to support the MERC's determination that LESPA's "bid" was a proposal for a collective bargaining agreement that sought to bargain over Mt. Pleasant's decision to subcontract. Because this is a prohibited subject of bargaining under section 15(3)(f), the MERC did not err when it determined that LESPA did not submit a proper bid.

V. MOTION TO REOPEN THE RECORD

Finally, AFSCME argues that the MERC erroneously denied its motion to reopen the record. We disagree. The MERC's decision whether to reopen the record is discretionary, and is therefore, reviewed for an abuse of discretion. *St Clair Co Ed Ass'n v St Clair Co Intermediate Sch Dist*, 245 Mich App 498, 519-520; 630 NW2d 909 (2001).

AFSCME filed a motion to reopen the record to introduce the school district's vendor-relations policy that precluded the school district from entering into a contract with a vendor of goods or services in which any employee of the school district has a direct or indirect pecuniary or beneficial interest.

"To merit reopening the record, the union had to demonstrate that it could not with reasonable dili-

gence have discovered and produced the evidence at the original hearing and that the evidence sought to be introduced, and not merely its materiality, is newly discovered." *Id*. at 519 (quotation marks and citation omitted). In this case, AFSCME gave this issue cursory treatment and failed to cite any applicable law, let alone demonstrate that it could not have discovered the evidence with reasonable diligence and produced it at the original hearing. Therefore, the MERC did not abuse its discretion by denying AFSCME's motion.

VI. SUMMARY AND CONCLUSION

The plain language of MCL 423.215(3)(f) prohibits collective bargaining over four subjects: (1) the decision to contract for noninstructional support services, (2) the procedures for obtaining that contract, (3) the identity of the third party, and (4) the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, collective bargaining is allowed regarding whether the bargaining unit will be afforded an opportunity to bid on an equal basis. If the bargaining unit is not afforded an opportunity to bid on an equal basis, then the four subjects are no longer prohibited from collective bargaining. If the bargaining unit is afforded an opportunity to bid on an equal basis, then the four subjects remain prohibited from collective bargaining.

In addition, when the basis of the charging party's unfair labor practice charge is that it was denied an equal opportunity to bid, the burden of proof is on the charging party to prove that it was not afforded an opportunity to bid on an equal basis as the other bidders.

We hold that the MERC did not err when it dismissed LESPA and AFSCME's unfair labor practice charges and when it denied AFSCME's motion to reopen the record.

Affirmed.

SERVITTO, P.J., and WHITBECK and OWENS, JJ., concurred.

NORTHLINE EXCAVATING, INC v LIVINGSTON COUNTY

Docket Nos. 304964, 305689. Submitted October 3, 2013, at Lansing. Decided October 15, 2013, at 9:05 a.m.

The Livingston County Board of Public Works brought an action in the Livingston Circuit Court against Hanover Insurance Company, Northline Excavating, Inc., and others, seeking to recover under a performance bond issued by Hanover on behalf of Northline for Northline's alleged breach of a contract with the board and Livingston County to construct a sanitary sewer pipe and pump station. Northline and Hanover also brought a separate action in the Livingston Circuit Court against Livingston County, the Livingston County Board of Public Works (collectively "the county"), and others, seeking a determination regarding their liability under the performance bond. The court in both actions, Michael P. Hatty, J., held that the liability of Northline and Hanover for combined actual damages, liquidated damages, and attorney fees could not exceed the penal sum of the performance bond, $251,035. The county appealed by leave granted the orders of the court in both actions. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

Michigan's common law has long recognized that a surety's liability is limited to the face amount of the performance bond. The language of the performance bond permitting enforcement of any remedy available to the owner merely confers the right to pursue any cause of action that may prevent or redress a wrong resulting from a breach of the performance bond, but does not implicate what damages may be obtained. The performance bond contains no language specifically expanding the surety's liability beyond the amount of the performance bond.

Affirmed.

BONDS — PERFORMANCE BONDS — SURETY'S LIABILITY — COMMON LAW.

The common law of Michigan recognizes that a surety's liability with regard to a performance bond is limited to the face amount of the bond.

Cummings, McClorey, Davis & Acho, PLC (by *Lindsey A. Kaczmarek* and *T. Joseph Seward*), for Livingston County and the Livingston County Board of Public Works.

Deneweth, Dugan & Parfitt, PC (by *Ronald A. Deneweth*, *Chris Parfitt*, and *Deborah S. Walter*), for Hanover Insurance Company.

Amici Curiae:

The Hubbard Law Firm, PC (by *Michael G. Woodworth*, *Andria M. Ditschman*, and *N. Banu Colak*), for the Michigan Association of County Drain Commissioners, the Michigan Townships Association, and the Michigan Association of Counties.

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson*), for the Surety & Fidelity Association of America.

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

HOEKSTRA, P.J. In these cases involving the interpretation of a contract Livingston County and the Livingston County Board of Public Works (collectively "the County") appeal by leave granted the trial court's orders limiting Hanover Insurance Company's (Hanover) actual and liquidated damages. Because we conclude that the plain language of the suretyship contract limited the liability of Hanover to the amount of the performance bond, we affirm.

These consolidated appeals arise from the failure of Northline Excavating, Inc (Northline), to complete a sanitary sewer extension project in Livingston County and the County's attempt to collect damages for nonperformance of a contract under the terms of a perfor-

mance bond issued by Hanover on behalf of Northline. In 2007, the County entered into a contract with Northline to construct a sanitary sewer pipe and pump station along Grand River Avenue. The contract price was Northline's bid of $251,035. The contract also included a liquidated damages provision of $1,000 a day for each day the contract remained substantially uncompleted beyond the date for completion provided in the contract. In order to comply with MCL 129.201, which requires a contractor to provide a performance bond for public-sector contracts exceeding $50,000, Northline and Hanover executed a performance bond. The amount of the performance bond was $251,035, and the bond identified Northline as the "Contractor" (i.e., the principal contractor), Hanover as the "Surety," the County as the "Owner" (i.e., the obligee), and the contract as the "Construction Contract."

The performance bond contains the following provisions regarding Hanover's obligations as surety under the bond:

> 3. If there is no Owner Default, the Surety's obligation under this Bond shall arise after:
>
> 3.1 The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default; and
>
> 3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the

contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1; and

3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.

4. When the Owner has satisfied the conditions of Paragraph 3, the Surety shall promptly and at the Surety's expense take one of the following actions:

4.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract; or

4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or

4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and the contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Paragraph 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or

4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:

.1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, tender payment therefor to the Owner; or

.2 Deny liability in whole or in part and notify the Owner citing reasons therefor.

5. If the Surety does not proceed as provided in Paragraph 4 with reasonable promptness, the Surety shall be deemed to be in default on this Bond fifteen days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Subparagraph 4.4, and the Owner refuses the payment tendered or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

6. After the Owner has terminated the Contractor's right to complete the Construction Contract, and if the Surety elects to act under Subparagraph 4.1, 4.2, or 4.3 above, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. To the limit of the amount of this bond, but subject to commitment by the Owner of the Balance of the Contract Price to mitigation of costs and damages on the Construction Contract, the Surety is obligated without duplication for:

6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;

6.2 Additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Paragraph 4; and

6.3 Liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.[1]

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[1] We note that the performance bond at issue in these cases is a standard contract of the American Institute of Architects, form A312.

The parties agree that shortly after Northline began excavation and sewer installation it encountered difficulties constructing the sewer extension pursuant to the terms and specifications of the construction contract. There is a factual dispute regarding whether the problematic conditions were disclosed by the County in the plans and specifications of the project. It is not disputed that the parties held a conference as required by the performance bond to discuss methods by which Northline could perform the construction contract. According to the County, the parties failed to reach any agreement at the conference. Northline agreed to submit a "plan of action" detailing how it would complete the project. However, the County ultimately rejected Northline's initial and revised action plans, and notified Northline of its rejection by way of letter. The County similarly notified Northline in a letter that it was declaring a contractor default and terminating Northline's contract. Thereafter, the County notified Hanover of its declaration of a contractor default with regard to Northline for noncompliance with the provisions of the construction contract. Hanover acknowledged receipt of the County's letter and notified the County that it was investigating its claim. Eventually, Hanover denied liability and notified the County of its position by way of letter.

Thereafter, the County commenced suit against Northline and Hanover. The County sought to recover against Northline under a breach of contract theory. It sought to recover under the performance bond against Hanover. Additionally, Northline and Hanover, the latter pursuant to its right of subrogation, commenced suit against the County as well as other parties not relevant to the contract issue on appeal. At a pretrial conference, the trial court adjourned the trial indefinitely to allow the parties to submit briefs addressing

whether Hanover's liability for damages could exceed the penal sum of the performance bond. The parties submitted briefs on the issue, and Hanover filed a motion in limine to limit its potential liability to the penal sum of the performance bond. Following a hearing, the trial court ruled from the bench that Hanover's liability under the terms of the performance bond was limited to the penal sum of the bond.

Immediately after the trial court finished its bench ruling, counsel for the County inquired whether the trial court was limiting Hanover's liability for combined actual damages, liquidated damages, and reasonable attorney fees to the penal sum of the bond. The trial court responded by directing the parties to brief the question whether Hanover could be held liable for liquidated damages in an amount in excess of the penal sum of the bond. Following the parties' submission of briefs, the proceedings were reconvened to consider the County's motion in limine to allow liquidated damages in an amount in excess of the penal sum of the bond. The trial court denied the motion from the bench, finding that the language of the contract limited the recovery of all damages to the amount of the performance bond. Thereafter, these appeals ensued.

The issue on appeal is whether the plain language of the performance bond expressed an intent contrary to the generally understood principle that a surety is liable only for the amount of the bond.

We review de novo questions involving the proper interpretation of a contract. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id*. We must "give effect to every word, phrase, and clause

in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). We cannot read words into the plain language of a contract. *Terrien v Zwit*, 467 Mich 56, 75; 648 NW2d 602 (2002).

The contract at issue is required by statute. MCL 129.201 provides that a performance bond must be provided by a principal contractor before construction can begin on any public building project exceeding $50,000 in value. MCL 129.202, which explains the required performance bond, provides:

> The performance bond shall be in an amount fixed by the governmental unit but not less than 25% of the contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and terms thereof. The bond shall be solely for the protection of the governmental unit awarding the contract.

"A performance bond assures completion of a project in the event of default by the general contractor." *Kammer Asphalt Paving Co, Inc v East China Twp Sch*, 443 Mich 176, 179 n 4; 504 NW2d 635 (1993). The performance bond contract is a suretyship contract, which involves a principal, an obligee, and a surety. *Will H Hall & Son, Inc v Ace Masonry Constr, Inc*, 260 Mich App 222, 228; 677 NW2d 51 (2003). "A surety is one who undertakes to pay money or take any other action if the principal fails therein." *Id*. at 228-229. "The liability of a surety is limited by the scope of the liability of its principal and the precise terms of the surety agreement." *Id*. at 229 (citation and quotation marks omitted). See also *Bandit Indus, Inc v Hobbs Int'l, Inc* (*After Remand*), 463 Mich 504, 511-512; 620 NW2d 531 (2001) ("To the extent and in the manner and under the circumstances pointed out in his obligation, the surety

is bound, and no further. The liability of a surety is not to be extended by implication beyond the terms of his contract.") (citation and quotation marks omitted).

Further, Michigan law has long recognized that a surety is only liable for the amount of the performance bond. See, e.g., *Graff v Epstein*, 238 Mich 227, 232; 213 NW 190 (1927) ("Of course, liability of the sureties cannot exceed the penalty of the bond."); *Fidelity & Deposit Co of Maryland v Cody*, 278 Mich 435, 444; 270 NW 739 (1936) (holding that "the penalty of the respective bonds is the measure of the total liability of the surety company"); *Shambleau v Hoyt*, 265 Mich 560, 573; 251 NW 778 (1933) (holding that "defendants and their surety bound themselves to the extent of the penal sum of the bond."); *Vreeland v Loeckner*, 99 Mich 93, 95; 57 NW 1093 (1894) ("The judgment is valid in its entirety as to the principal defendant, but void as to the surety in the excess over the penal sum of the bond."); *Spencer v Perry*, 18 Mich 394, 399 (1869) (holding that it is generally understood that bonds "fix the limit beyond which the liability of the defendant should not extend," and noting that if the parties intended to provide for indefinite liability, they could have entered into a different type of agreement).

Thus, in light of the fact that performance bonds have traditionally been interpreted to limit a surety's liability to the amount of a performance bond, we will not presume that Hanover's liability is greater than the amount of the bond unless the contract language plainly expresses the parties' intent to expand Hanover's liability contrary to the general interpretation and understanding of performance bonds.

The County maintains that the language of the performance bond does plainly express an intent to expose Hanover to liability exceeding the amount of the

bond. Specifically, the County argues that ¶ 6 does not control damages in this case because Hanover proceeded under subparagraph 4.4, and ¶ 6 only applies if a surety elects to arrange for completion of the construction project as provided under subparagraphs 4.1, 4.2, or 4.3.[2] It argues that because ¶ 6 does not apply when a surety proceeds under subparagraph 4.4, the language of ¶ 5 that permits an owner to enforce "any remedy available" is controlling. The County argues that this language in ¶ 5 removes the limitation on the surety's damages expressed on the face of the bond and in ¶ 6 and allows it to pursue damages beyond the amount of the performance bond.

While we agree with the County that ¶ 6 does not apply when the surety elects to proceed under subparagraph 4.4,[3] we disagree with the County's argument that the language in ¶ 5 permitting the owner to enforce "any remedy available" subjects the surety to liability beyond the amount of the performance bond. We find the County's argument regarding the meaning of ¶ 5 unavailing because it misinterprets the term "remedy" to encompass both causes of action and damages. "Remedy" is defined as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." Black's Law Dictionary (9th ed). In contrast, "damages" is defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Id*. Applying these definitions to the contract in

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[2] The County does not dispute that when ¶ 6 applies, the plain language of the contract limits the surety's liability to the amount of the performance bond.

[3] Paragraph 6 specifically limits its provisions by stating "if the Surety elects to act under Subparagraph 4.1, 4.2, or 4.3 . . . ." Paragraph 6 then lists the damages that the surety is liable for "[t]o the limit of the amount of this bond . . . ." Paragraph 6 is silent in regard to the surety's election to proceed under subparagraph 4.4.

this case, the language permitting enforcement of "any remedy available to the Owner," merely confers the right to pursue any cause of action that may prevent or redress a wrong resulting from a breach of the performance bond, but it does not implicate what damages may be obtained.[4]

Thus, neither ¶ 5 nor ¶ 6 addresses the surety's liability when it proceeds under subparagraph 4.4. However, the contract is not completely silent in regard to the surety's liability when it elects to proceed under subparagraph 4.4 because the face of the bond clearly states that the bond amount is $251,035, and our common law has long recognized that a surety's liability is limited to the face amount of the performance bond. See, e.g., *Graff*, 238 Mich at 232; *Shambleau*, 265 Mich at 573; *Vreeland*, 99 Mich at 95. Moreover, the performance bond contains no language specifically expanding the surety's liability beyond the amount of the performance bond. Accordingly, we conclude that the trial court did not err by holding that Hanover's liability is limited to the amount of the performance bond.

Affirmed.

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

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[4] Consequently, we find the County's reliance on the maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) unavailing because the absence of language limiting the scope of the remedies an owner may pursue has no bearing or relation to the inclusion of language limiting the scope of damages.

In re BOYNTON

Docket No. 310889. Submitted October 2, 2013, at Detroit. Decided October 15, 2013, at 9:10 a.m.

An arrest warrant was issued in Georgia seeking the arrest of Malachi E. Boynton, a minor, on charges of aggravated child molestation and aggravated sodomy arising from Boynton's alleged sexual assault of a child while he was in Georgia. The Governor of Georgia then issued a requisition demand to Michigan's Governor seeking Boynton's extradition to Georgia to face the charges. The Genesee Circuit Court, Family Division, had already asserted jurisdiction over Boynton as a result of an unrelated episode of domestic violence and had placed him on probation. Boynton's probation officer sought to effectuate the extradition request. Boynton filed a petition for a writ of habeas corpus challenging the extradition request. The court, F. Kay Behm, J., denied the petition. The Court of Appeals denied Boynton's application for leave to appeal. *In re Boynton*, unpublished order of the Court of Appeals, entered August 6, 2012 (Docket No. 310889). The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted. *In re Boynton*, 494 Mich 852 (2013). The Supreme Court also granted the Michigan Attorney General's motion to intervene in the case.

The Court of Appeals *held*:

1. The Uniform Criminal Extradition Act (UCEA) under which the extradition request was made has been adopted in both Michigan, MCL 780.1 *et seq*., and Georgia, Ga Code Ann 17-13-20 *et seq*. The UCEA applies to a "person" or "persons" without distinction premised on age. The applicability of the UCEA is not confined to adults. The UCEA applies to juveniles charged with delinquent behavior and permits the extradition of juveniles.

2. A juvenile adjudication clearly constitutes criminal activity because it amounts to a violation of a criminal statute, even though that violation is not resolved in a criminal proceeding.

3. The reason for a person's absence from the demanding state is irrelevant for purposes of extradition. The pertinent inquiry is whether the person whose surrender is demanded is

in fact a fugitive from justice, not whether the person consciously fled from justice in order to avoid prosecution for the crime with which the person is charged by the demanding state. "Fugitivity" is shown when the person is ascertained to be the person wanted in the demanding state and it is shown that the person was present in the demanding state at the time when the alleged offense occurred.

4. A governor's grant of extradition is prima facie evidence that the constitutional and statutorily requirements have been met. Once a governor has granted extradition, a court considering release on a writ of habeas corpus can do no more than decide whether the extradition documents on their face are in order, whether the petitioner has been charged with a crime in the demanding state, whether the petitioner is the person named in the request for extradition, and whether the petitioner is a fugitive. Information regarding an alleged offender's permanent residence is not required to be included in the documents that accompany a demand for extradition. Any alleged inaccuracies in the documents submitted with the demand for Boynton's extradition with regard to identifying Boynton's permanent residence do not render them invalid on their face.

5. Boynton's contention that his extradition to Georgia would constitute cruel and unusual punishment must be addressed by the courts of Georgia, not the courts of Michigan.

6. Boynton, a detainee awaiting extradition, has not incurred a punishment under the Eighth Amendment. Boynton has not incurred a punishment under Const 1963, art 1, § 16. Boynton's claim that the UCEA's application to him and his circumstances would constitute cruel and unusual punishment lacks merit.

Affirmed.

1. CRIMINAL LAW — EXTRADITION — APPEAL.

Challenges to extradition proceedings must be made in the asylum state; the scope of review in passing upon a writ of habeas corpus by the courts of the asylum state is generally limited to questions of identity, fugitivity, and regularity of the extradition procedure.

2. CRIMINAL LAW — EXTRADITION — UNIFORM CRIMINAL EXTRADITION ACT — JUVENILES.

The Uniform Criminal Extradition Act applies to a "person" or to "persons" without distinction premised on age; the applicability of the act is not confined to adults; the act permits the extradition of juveniles (MCL 780.1 *et seq*.).

3. JUVENILE LAW — JUVENILE ADJUDICATIONS — CRIMINAL ACTIVITY.

A juvenile adjudication constitutes criminal activity because it amounts to a violation of a criminal statute, even though the violation is not resolved in a criminal proceeding.

4. CRIMINAL LAW — EXTRADITION — FUGITIVITY.

The voluntary nature of a person's removal from the state demanding the person's extradition is irrelevant to the determination whether the person is a fugitive from justice; "fugitivity" is shown when the person is ascertained to be the person wanted in the demanding state and it is shown that the person was present in the demanding state at the time the alleged offense occurred; the reason for the absence of the person from the demanding state is irrelevant for purposes of extradition.

5. CRIMINAL LAW — EXTRADITION — UNIFORM CRIMINAL EXTRADITION ACT.

Procedural compliance is sufficient to overcome defects or inaccuracies contained within the documentation initiating extradition proceedings under the Uniform Criminal Extradition Act; Section 3 of the act sets forth the required documents, and their necessary content, that must accompany an extradition demand in order for it to be recognized by the Governor of an asylum state (MCL 780.3).

6. CRIMINAL LAW — EXTRADITION — UNIFORM CRIMINAL EXTRADITION ACT.

A governor's grant of extradition under the Uniform Criminal Extradition Act is prima facie evidence that the constitutional and statutory requirements for extradition have been met; once a governor has granted extradition, a court considering a petitioner's release on a writ of habeas corpus can do no more than decide whether the extradition documents on their face are in order, whether the petitioner has been charged with a crime in the demanding state, whether the petitioner is the person named in the request for extradition, and whether the petitioner is a fugitive (MCL 780.1 *et seq*.).

Child Advocacy Team (by *Terina M. Carte*) for Malachi Boynton.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Anica Letica*, Assistant Attorney General, for the Attorney General.

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

PER CURIAM. Petitioner, Malachi Eric Boynton, a juvenile, appeals by leave granted the trial court's May 30, 2012, order denying his petition for a writ of habeas corpus and permitting his extradition to the state of Georgia in accordance with a governor's warrant. An issue of first impression in this case is whether the Uniform Criminal Extradition Act (UCEA), as adopted in Michigan (MCL 780.1 *et seq.*), applies to juveniles charged with delinquent behavior in another state. Because we conclude that it does and that petitioner's other claims of error lack merit, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioner is a Michigan resident. In the summer of 2010, he spent time in Georgia with this godfather. Petitioner was 12 years old at the time. Toward the end of his stay, Georgia authorities began investigating allegations that petitioner sexually assaulted a four-year-old child. Petitioner returned home to Michigan. An arrest warrant was issued in Fulton County, Georgia. Georgia's Governor then issued a requisition demand to Michigan's Governor seeking petitioner's extradition to Georgia to face accusations of aggravated child molestation, Ga Code Ann 16-6-4,[1] associated with his alleged anal penetration of the four-year-old child. Because of petitioner's status as a juvenile, the state of Georgia sought to pursue charges against him in the juvenile court as a delinquent felon.

In November 2010, petitioner was detained in Michigan for delinquent behavior associated with an episode

[1] An amended petition in the Fulton County juvenile court also included the offense of aggravated sodomy, Ga Code Ann 16-6-2.

of domestic violence. Petitioner admitted that he had pushed his mother, and the Genesee Circuit Court, Family Division, asserted jurisdiction over him on February 1, 2011. The court placed petitioner on formal probation with the option of rescinding his plea and being placed on consent calendar probation if he successfully completed the terms of his probation.

In May 2011, after learning of the charges pending in Georgia, petitioner's probation officer sought to effectuate the extradition request. Efforts were made to follow through on this request, but it was not until the following spring, after petitioner violated the terms of his probation by not attending school regularly, that he was served with the extradition paperwork and that the court undertook to execute the extradition request.[2]

Counsel was appointed to represent petitioner in the extradition proceedings. Petitioner's counsel filed a petition for a writ of habeas corpus challenging the extradition request. The trial court denied the petition. This Court denied petitioner's application for leave to appeal.[3] The Michigan Supreme Court, in lieu of granting leave to appeal, remanded the matter to this Court for consideration as on leave granted.[4] The Supreme Court also granted the Michigan Attorney General's motion to intervene in the case.

II. ANALYSIS

Petitioner raises four arguments to challenge the extradition proceedings: (1) the UCEA does not apply to juve-

[2] A new petition was filed with the circuit court in June 2012, arising out of another alleged incident of petitioner engaging in domestic violence.

[3] *In re Boynton*, unpublished order of the Court of Appeals, entered August 6, 2012 (Docket No. 310889).

[4] *In re Boynton*, 494 Mich 852 (2013).

niles charged with delinquent behavior; (2) even if the UCEA does apply to him, he is not a "fugitive from justice" under the act; (3) the documents used to obtain the governor's warrant contain inaccurate and untruthful pertinent information and, thus, are not in order on their face and must not be honored; and (4) enforcing the governor's warrant and extraditing him to Georgia would be cruel and unusual punishment because he is a minor.[5]

"Challenges to extradition proceedings must be made in the asylum state." *People v Duck*, 147 Mich App 534, 540; 383 NW2d 245 (1985). "The scope of review in passing upon a writ of *habeas corpus* by the courts of the custody state is generally limited to questions of identity, fugitivity, and regularity of the extradition procedure." *Williams v North Carolina*, 33 Mich App 119, 123 n 4; 189 NW2d 858 (1971), citing *Drew v Thaw*, 235 US 432; 35 S Ct 137; 59 L Ed 302 (1914). However, the interpretation of a statute presents a question of law that this Court reviews de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004). Furthermore, to the extent petitioner raises questions of constitutional law on appeal, we generally review such issues de novo. *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011).

A. APPLICABILITY OF THE UCEA TO JUVENILES CHARGED WITH DELINQUENT BEHAVIOR

Petitioner raises an issue of first impression in Michigan, contending that the UCEA does not and, as mani-

[5] Petitioner also addresses the Interstate Compact for Juveniles (ICJ), MCL 3.692, solely to argue that it is inapplicable under the circumstances presented and does not serve as an alternative ground upon which to affirm the trial court. Because we conclude that the extradition proceedings are proper under the UCEA, we need not address the applicability of the ICJ.

fested by its chosen language, was not intended to apply to juveniles charged with delinquent behavior. We disagree.

At the outset, it is noted that Michigan, in addition to "[a]lmost all states," has adopted the UCEA. Anno: *Extradition of Juveniles*, 73 ALR3d 700, 706, § 3. In Michigan, the relevant statutory provisions include the following:

> Subject to the provisions of this act, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States *any person* charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state. [MCL 780.2 (emphasis added).]

As noted in MCL 780.28, "The provisions of this act shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it." The state of Georgia has also adopted the UCEA. See Ga Code Ann 17-13-20.

Discussions of the UCEA have recognized as a starting point the Extradition Clause of the United States Constitution, specifically, US Const, art IV, § 2, cl 2, which states:

> *A Person* charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. [Emphasis added.]

Congress implemented this constitutional provision in 18 USC 3182, which states:

> Whenever the executive authority of any State or Territory demands *any person* as a fugitive from justice, of the executive authority of any State, District, or Territory to which *such person* has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging *the person* demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence *the person* so charged has fled, the executive authority of the State, District, or Territory to which *such person* has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged. [Emphasis added.]

The United States Supreme Court in *Michigan v Doran*, 439 US 282, 288-289; 99 S Ct 530; 58 L Ed 2d 521 (1978) (citations omitted), explained the relationship of these various provisions:

> Whatever the scope of discretion vested in the governor of an asylum state, the courts of an asylum state are bound by Art IV, § 2, by § 3182, and, where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met.

Analysis of the relevant constitutional and statutory language is consistent with the rules of statutory interpretation. *In re Request for Investigative Subpoena*, 256 Mich App 39, 45-46; 662 NW2d 69 (2003). "If the language of a statute is clear, no further analysis is necessary or allowed to expand what the Legislature clearly intended to cover." *People v Monaco*, 474 Mich 48, 54; 710 NW2d 46 (2006) (quotation marks and citation omitted).

In this instance, the relevant language indicates the applicability of the statutes to a "person" or "persons" without distinction premised on age. "It is a settled rule of statutory construction that, unless otherwise defined in a statute, statutory words or phrases are given their plain and ordinary meanings." *Id*. at 55 (quotation marks and citation omitted), citing MCL 8.3a. The plain and ordinary meaning of "person" is "a human being; a man, woman, or child." *Random House Webster's College Dictionary* (2005); see also Black's Law Dictionary (9th ed) (defining "person" as "[a] human being"). The act does not define the term "person" and does not contain other provisions limiting its scope to adults. As a consequence, in adherence to the rules of statutory interpretation, we conclude that the Legislature intended to use the broad and encompassing term "person" through its election to not limit the applicability of the provision by using qualifying language such as "adult." Under general principles of statutory interpretation, the applicability of the UCEA is not confined to adults and the UCEA permits the extradition of juveniles.

Although there is limited caselaw regarding the applicability of the UCEA to juveniles, what exists is consistent with the above interpretation premised on the statutory language. As an example, the annotation at 73 ALR3d 700 provides an overview of caselaw pertaining to the extradition of juveniles. In general, it is suggested:

> The constitutional provision and the legislation governing extradition make no special provisions for juveniles, and the cases, at least by implication if not expressly, recognize that juveniles may be extradited the same as adults. Moreover, even though special criminal proceedings may otherwise be required for juveniles, it has been held that such special proceedings are not required when extra-

> diting juveniles. . . . [I]t has been held that the power of a state to try a juvenile is not affected by the manner of his return to another state. . . .
>
> It has been said that where a juvenile is contesting his extradition, the court's inquiry is limited to a determination of the individual's identity, his status as a fugitive from justice, whether a proper demand for his return has been made, and whether he is charged with a crime in the demanding state. However, this applies to extradition under the general extradition acts. . . .
>
> Because the treatment of a juvenile offender as a "juvenile delinquent" is not considered a criminal proceeding, per se, it has been argued that where, under the laws of the demanding state, a juvenile offender may be treated as a juvenile delinquent, the juvenile fugitive is not charged with a crime as required for extradition and therefore is not subject to extradition. However, it has been held that where the demanding state's request cites a criminal charge, the manner in which the demanding state treats its juvenile offenders is not a proper subject for inquiry in the asylum state's extradition proceedings. Moreover, the fact that a juvenile offender can only be tried as a juvenile delinquent in the *asylum* state has also been held to have no effect upon the propriety of extraditing a juvenile.
>
> * * *
>
> In conclusion, the cases reveal very little difference between the treatment of a juvenile in extradition proceedings and that of an adult where the process is being conducted under the general extradition statutes. Occasionally, a noteworthy difference has appeared in a case, but these cases have not developed any following. [73 ALR3d 700, 703-705, § 2[a] (citations omitted).]

A review of the caselaw in other jurisdictions is consistent with this analysis. For example, in *Ex parte Jetter*, 495 SW2d 925 (Tex Crim App, 1973), a Texas appellate court found "no limitation in the Uniform Criminal Extradition Act excluding minors from its

operation." *Id*. Similarly, in *In re O M*, 565 A2d 573, 583 (DC App, 1989), the District of Columbia Court of Appeals opined:

> Although a juvenile petition does not technically charge a crime, the rendition procedures established by the Compact for juveniles charged with delinquency are designed to be essentially the same as those long established for the extradition of adults charged with crimes.

Specifically, the court determined:

> The Constitution does not preclude this congruence of procedures. The Extradition Clause itself makes no distinction between juveniles and adults, providing simply that "[a] Person charged in any State . . . who shall flee from Justice, and be found in another State, shall on Demand . . . be delivered up, to be removed to the State having Jurisdiction of the Crime." We agree with the Supreme Judicial court of Massachusetts that the Constitution "does not contemplate any difference in treatment for criminal offenders based on age." [*Id*. at 583 n 28, quoting US Const, art IV, § 2, cl 2, and citing *A Juvenile*, 396 Mass 116, 118 n 2; 484 NE2d 995 (1985).]

See also *State v J M W*, 936 So 2d 555, 560 (Ala Crim App, 2005). The Supreme Court of Montana has also addressed this issue in *Coble v Magone*, 229 Mont 45, 49-50; 744 P2d 1244 (1987), which stated, in relevant part:

> A review of the Uniform Criminal Extradition Act shows that juveniles are not expressly included in the act, but it also shows that juveniles are not expressly excluded. The legislative history shows that juveniles were not intentionally omitted.
>
> * * *
>
> We hold that the failure of the Legislature to include, or specifically exclude, juveniles is of no aid to [the petitioner] in this case. . . .

> The Attorney General of the State of Montana has also recognized that juveniles are not to be exempted from application of the Uniform Criminal Extradition Act . . . . In evaluation of whether juveniles could be properly extradited, the Attorney General appropriately concluded that the majority of "[j]urisdictions allow extradition of juveniles if they are charged with a crime in the demanding state." [Citation omitted.]

This is not to suggest that all caselaw is consistent. As discussed in 73 ALR3d 700, 705, § 2[b]:

> [W]here the demanding state charged its juvenile offenders with juvenile delinquency only, it has been argued that the juvenile is not charged with a crime and is therefore not subject to extradition. This argument has been successful in one court, and may be successful elsewhere, although the weight of authority is otherwise. [Citations omitted.]

Premised on a review of available decisions and an analysis of those decisions, petitioner's assertion that he is not subject to extradition because the UCEA is inapplicable to juveniles is unavailing. We hold that the phrase "any person" in the UCEA means exactly what it says and does not exclude juveniles.

Petitioner argues that other select words in the UCEA indicate that it was not intended to apply to juvenile delinquency proceedings. Specifically, petitioner argues that the UCEA stands for "Uniform *Criminal* Extradition Act" and expressly provides that it is applicable when a person is charged in another state with "treason, felony, or other crime . . . ." Thus, because a delinquency proceeding is not a "criminal" proceeding, the UCEA cannot apply. Furthermore, because MCL 780.14 addresses committing the accused to the "county jail" to await a requisition and does not have any provision for detention in a juvenile facility, the UCEA applies only to adults.

As discussed in 73 ALR3d 700, 704, § 2[a], petitioner argues: "Because the treatment of a juvenile offender as a 'juvenile delinquent' is not considered a criminal proceeding, per se, it has been argued that where, under the laws of the demanding state, a juvenile offender may be treated as a juvenile delinquent, the juvenile fugitive is not charged with a crime as required for extradition and therefore is not subject to extradition." Yet, contrary to this assertion, and as noted in the ALR section:

> [I]t has been held that where the demanding state's request cites a criminal charge, the manner in which the demanding state treats its juvenile offenders is not a proper subject for inquiry in the asylum state's extradition proceedings. Moreover, the fact that a juvenile offender can only be tried as a juvenile delinquent in the *asylum* state has also been held to have no effect upon the propriety of extraditing a juvenile. [73 ALR3d 700, 704, § 2[a] (citations omitted).]

Once again, decisions from other jurisdictions provide guidance. An Illinois appellate court has determined, in ascertaining a juvenile's right to counsel:

> Although proceedings under the Juvenile Court Act are not criminal, the filing of a delinquency petition is criminal in nature because it requires proof beyond a reasonable doubt. Similarly, the filing of a delinquency petition is analogous to the filing of a criminal complaint . . . . [*People v Fleming*, 134 Ill App 3d 562, 569; 89 Ill Dec 478; 480 NE2d 1221 (1985) (citation omitted).]

Other jurisdictions have permitted extradition, finding that the nature of the charging procedure used by the demanding state is irrelevant to the issue of a juvenile's extradition. See *Ex parte Jetter*, 495 SW2d at 925. In *Jetter*, the court determined it unnecessary to address the issue whether a juvenile was required to be certified as an adult to stand trial in the

demanding state because "once she is extradited [it] is a question for the courts of the [demanding state] to determine and not one for the courts of the [asylum state]." *Id*. Similarly, as discussed in *State v Cook*, 115 Wash App 829, 832; 64 P3d 58 (2003), "Cases under the Uniform Criminal Extradition Act . . . have . . . found the demanding state's determination of juvenile status controlling." In *In re Robert*, 122 RI 356, 357-359; 406 A2d 266 (1979), the Rhode Island Supreme Court held unconstitutional a statute that provided that an individual under the age of 18 could not be extradited to another state unless a family court judge had initially found that the juvenile would be treated as an adult if the out-of-state offense had been committed in the asylum state.

The issue was also discussed in detail in *A Juvenile*, 396 Mass at 119-121 (citations omitted):

> The petitioners next argue that, because they are minors, even if they are subject to rendition to Maryland under the Uniform Act, they are entitled to a probable cause hearing in Massachusetts before they can be returned. This contention requires a review of the nature of the rendition proceeding in an asylum State. A rendition proceeding conducted in the asylum State is limited. Once the Governor of an asylum State has ordered rendition, a judge considering release on a writ of habeas corpus can only decide "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." "If the documents submitted by a demanding State demonstrate that 'a judicial officer or tribunal there had found probable cause, Massachusetts would not need to find probable cause anew, nor would it need to review the adequacy of the [demanding State's] determination.' "

This is consistent with the United States Supreme Court's discussion of the history of interstate extradition. Specifically:

> Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution. The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial.
>
> Near the turn of the century this Court . . . concluded:
>
> > While courts will always endeavor to see that no such attempted wrong is successful, on the other hand, care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt. [*Doran*, 439 US at 288 (citations omitted).]

In Michigan, this Court has determined that a

> juvenile adjudication clearly constitutes criminal activity because it amounts to a violation of a criminal statute, even though that violation is not resolved in a criminal proceeding. As this Court has noted, juvenile proceedings are closely analogous to the adversary criminal process. [*People v Anderson*, 298 Mich App 178, 182; 825 NW2d 678 (2012) (citations and quotation marks omitted).]

Although the law of the asylum state is irrelevant in the determination regarding extradition, it is worth noting that the crime petitioner is charged with in Georgia, if he were convicted, would constitute criminal activity even if adjudicated through juvenile proceedings. Based on this Court's recognition of the criminal nature of the activity regardless of the forum for prosecution, when viewed in conjunction with the determinations of other jurisdictions, petitioner's claim that his being charged

by the demanding state in a juvenile proceeding precludes the propriety of his extradition is unavailing.

Accordingly, we conclude that the UCEA applies to juveniles charged with delinquent behavior.

B. FUGITIVE FROM JUSTICE

Petitioner next contends that the UCEA does not apply to him because the UCEA pertains to "fugitives from justice" and he has not "fled from justice" as set forth in MCL 780.2. Petitioner emphasizes that he left Georgia following a brief vacation to return to his home state of Michigan and that his travel was dictated by his mother.

Black's Law Dictionary (9th ed) defines the term "fugitive" in the following manner:

> 1. A person who flees or escapes; a refugee. 2. A criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony, esp. by fleeing the jurisdiction or by hiding. See 18 USCA § 1073. — Also termed (in sense 2) *fugitive from justice*.

Yet, in terms of extradition, the term "fugitive" has historically been subject to a more restricted application. As discussed by this Court in *In re Simmans*, 54 Mich App 112, 116; 220 NW2d 311 (1974), the voluntary nature of a person's removal from the demanding state is irrelevant. Relying, in part, on *Appleyard v Massachusetts*, 203 US 222, 227; 27 S Ct 122; 51 L Ed 161 (1906), this Court stated:

> The fact that the alleged fugitive from justice left the state with the consent or knowledge of the state authorities or of complainant does not affect his status as a fugitive from justice, where he refuses to return or there is a second indictment or complaint.

* * *

> In conformity with the decisions in other states, we hold that "fugitivity" is shown when, as in the case now before us, defendant is ascertained to be the person wanted in the demanding state and was present in the demanding state at the time the alleged offense occurred.
>
> > So that the simple inquiry must be whether the person whose surrender is demanded is in fact a fugitive from justice, not whether he consciously fled from justice in order to avoid prosecution for the crime with which he is charged by the demanding state. A person charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime leaves the state—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another state must be delivered up by the governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state. [*In re Simmans*, 54 Mich App at 116-117 (citations, emphasis, and quotation marks omitted).]

Although caselaw exists to the contrary, see, e.g., *Kittle v Martin*, 166 Ga 250; 142 SE 888 (1928), Michigan courts and the United States Supreme Court have determined that the reason for the absence of the individual from the demanding state is irrelevant for purposes of extradition. Therefore, petitioner's contention in this appeal that he does not qualify as a fugitive for purposes of extradition is without merit.

C. VALIDITY OF EXTRADITION WARRANT

Petitioner alleges that one of the extradition documents contained an inaccuracy because it indicated that he "resides" in Georgia (and lives somewhere in Michigan under the custody and control of his mother), when, in fact, he resides in Michigan. Petitioner contends that his residency status is important and relevant information because Michigan's governor "obviously thought he was returning a Georgia resident back to his home state." According to petitioner, the extradition warrant should be deemed invalid because false information was relied on to obtain it.

Contrary to petitioner's position, caselaw suggests that procedural compliance is sufficient to overcome defects or inaccuracies contained within the documentation initiating extradition proceedings because of the limited authority and discretion of the asylum state. As discussed by the *Doran* Court:

> Whatever the scope of discretion vested in the governor of an asylum state, the courts of an asylum state are bound by Art IV, § 2, by § 3182, and, where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents *on their face* are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable. [*Doran*, 439 US at 288-289 (citations omitted and emphasis added).]

Use of terms such as "on their face" implicitly suggests that any in-depth inquiry into the factual premises contained within the documents is precluded. As noted

earlier by the Michigan Supreme Court in addressing a habeas corpus proceeding challenging an extradition, "Manifestly the field of inquiry into which the courts may enter is very much circumscribed." *In re Ray*, 215 Mich 156, 162; 183 NW 774 (1921). Citing as authoritative a ruling of the Pennsylvania Supreme Court, our Supreme Court ruled, *id*. at 165-166:

> In *Commonwealth* v. *Supt. Co. Prison*, 220 Pa. 401 [405-406; 69 A 916 (1908)], the court, after a review of the authorities, said:
>
> > If the jurisdictional facts authorizing the extradition of the accused appear from the papers, the court on a hearing in *habeas corpus* proceedings will not go into the merits of the case, or determine the guilt or innocence of the accused. It is the duty of the asylum State to protect the liberty of its citizens and not permit interstate extradition proceedings to be made a pretext for removing them to another jurisdiction for a purpose other than that within the intendment of the Federal Constitution. On the other hand, it is equally the duty of the State to aid in the punishment of crime committed in another State, by the prompt extradition of the guilty person found within its jurisdiction as a fugitive from justice. No State can be the asylum of a fugitive from justice, and hence it should promptly honor the requisition of a sister State for the extradition of a prisoner legally accused of committing an offense against the laws of that State. If the court on *habeas corpus* inquires into the merits of the charge against the prisoner or into the motives which inspired the prosecution in the demanding State, it exceeds its authority under the constitutional and statutory provisions regulating the extradition of criminals. The mandate of the constitution requires 'a person charged in any State with a crime' to be delivered by the asylum State to the State whose laws he has violated. That State alone can determine the guilt or innocence of the offending party. The theory and the intention of the constitutional and statutory provisions are that the

> offender shall be compelled to submit himself for trial to the courts of the State in which the offense was committed, and hence it would be usurpation of authority for the courts of another State to undertake to determine the question of his guilt in a *habeas corpus* proceeding. Assuming that the demanding State has complied with the requirements of the Federal Constitution and the act of congress in making the requisition for the accused, it would be equally an unconstitutional exercise of power for the court of the asylum State to inquire into the motives of prosecution, instituted in conformity with the laws of the demanding State, and release the offender and thereby prevent his extradition for trial in the latter State.
>
> These authorities and many others which might be cited demonstrate that the rendition warrant of the governor cannot be nullified by the courts on *habeas corpus* proceedings by sustaining such claims as are here made. The Federal Constitution as interpreted by the courts precludes such a result. There was much foresight in adopting this clause of the Constitution, and there has been much wisdom in its proper interpretation. If we should accept the theory of plaintiff's counsel this State would soon become the asylum of the murderers and criminal classes of the southern States who could with safety here find immunity from rendition, immunity from prosecution for their crimes. Such a result our forefathers wisely prevented.

MCL 780.3, sets forth the required documents, and their necessary content, that must accompany an extradition demand in order for it to be recognized by the Governor. Such documents include a governor's requisition under the seal of the demanding state, a prosecutor's application for requisition, verification by affidavit of the application, an executive warrant, and the indictment, information, or affidavit. MCL 780.3. Information regarding the offender's permanent residence is not required to be included in those documents. Any alleged inaccuracies within the documents associated

with identifying petitioner's permanent residence does not render them invalid on their face.

D. CRUEL AND UNUSUAL PUNISHMENT

Finally, petitioner, now fifteen years old, seeks to avoid extradition by suggesting that his status as a minor and removal from his family would constitute cruel and unusual punishment.[6] According to petitioner, his extradition at "the tender age of 15" is punishment for his alleged violation of Georgia law.

We conclude that petitioner's contention that his extradition to Georgia would constitute cruel and unusual punishment is a claim that must be addressed by the courts of the state of Georgia, not the courts of Michigan. See *Sweeney v Woodall*, 344 US 86, 89-90; 73 S Ct 139; 97 L Ed 114 (1952) (holding that a fugitive who alleged that future punishment by the state from which he had fled would be cruel and inhuman but who made no showing that relief was unavailable to him in the courts of that state, should exhaust all available remedies in courts of said state and, thus, the district court in the asylum state properly dismissed the petition for a writ of habeas corpus); *New Mexico, ex rel Ortiz v Reed*, 524 US 151, 153; 118 S Ct 1860; 141 L Ed 2d 131 (1998) ("In case after case we have held that claims relating to . . . what may be expected to happen in the demanding State when the fugitive returns, are issues that must be tried in the courts of that State, and not in those of the asylum State."). As discussed in *In re Walton*, 99 Cal App 4th 934, 945-946; 122 Cal Rptr 2d 87 (2002) (citation omitted):

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[6] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII. Our Michigan Constitution prohibits punishment that is "cruel or unusual." Const 1963, art 1, § 16.

> The Supreme Court, with other state and federal courts, has . . . consistently held that even alleged constitutional violations that might result from the extradition of a fugitive may not be raised in the asylum state courts. It is simply not for officials in the asylum state to make determinations, beyond those authorized by the Supreme Court, which affect a demanding state's constitutional right to obtain custody of fugitives from its justice.

To the extent that petitioner argues that his detention in the state of Michigan during "this extradition situation" is punishment for his alleged violation of Georgia law, the Supreme Court of Tennessee has recognized that "virtually all courts . . . hold that a party contesting extradition through habeas corpus may not raise issues that involve possible constitutional violations committed by the asylum state." *State ex rel Sneed v Long*, 871 SW2d 148, 151 (Tenn, 1994); see also *State ex rel DeGidio v Talbot*, 311 Minn 426; 250 NW2d 169 (1977) (asylum state declined to address contentions that delay in commencing extradition proceeding violated prisoner's right of due process and that placing detainer against him resulted in cruel and unusual punishment). Nonetheless, petitioner cannot establish that the circumstances of his detention rise to the level of a constitutional violation.

With respect to a violation of the Eighth Amendment of the United States Constitution, the United States Supreme Court has emphasized that the Eighth Amendment's prohibition only applies to persons who are subjected to "punishment" after the state has secured an adjudication of guilt:

> The Court of Appeals properly relied on the Due Process Clause rather than the Eighth Amendment in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punish-

ment may not be "cruel and unusual" under the Eighth Amendment. The Court recognized this distinction in *Ingraham* v. *Wright*, 430 U.S. 651, 671-672, n. 40 [97 S Ct 1401; 51 L Ed 2d 711 (1977)]:

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. See *United States* v. *Lovett*, 328 U.S. 303, 317-318 [66 S Ct 1073; 90 L Ed 1252 (1946)] . . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment. [*Bell v Wolfish*, 441 US 520, 535 n 16; 99 S Ct 1861; 60 L Ed 2d 447 (1979).]

Petitioner, a detainee awaiting extradition, has not incurred a punishment under the Eighth Amendment. See *id.*; see also *Lynch v Cannatella*, 810 F2d 1363, 1375 (CA 5, 1987) ("[T]he eighth amendment prohibition against cruel or unusual punishment is not applicable to cases in which the plaintiffs were not in custody as a result of having been convicted of a crime."); *Baker v Putnal*, 75 F3d 190, 198 (CA 5, 1996) ("Pre-trial detainees may not bring a cause of action based on the Eighth Amendment. . . . It protects only those who have been convicted."); *Cavalieri v Shepard*, 321 F3d 616, 620 (CA 7, 2003) ("The Eighth Amendment does not apply to pretrial detainees . . . .").

As for a claim of cruel or unusual punishment under the Michigan Constitution, petitioner's claim fails on the same basis. In 1925, our Supreme Court explained that the Michigan Constitution's provision that "cruel or unusual punishment shall not be inflicted," Const 1908, art 2, § 15, had "reference only to punishments

inflicted after convictions of crimes." *Smith v Wayne Probate Judge*, 231 Mich 409, 416; 204 NW 140 (1925). The phraseology from article 2, § 15 of the Michigan Constitution of 1908 is repeated verbatim in article 1, § 16 of the Michigan Constitution of 1963. *People v Lorentzen*, 387 Mich 167, 172 n 3; 194 NW2d 827 (1972). Furthermore, this Court has defined "punishment" for purposes of article 1, § 16 of the Michigan Constitution of 1963 as "the deliberate imposition, by some agency of the state, of some measure intended to chastise, deter or discipline *an offender*." *In re Ayres*, 239 Mich App 8, 14; 608 NW2d 132 (1999) (quotation marks and citation omitted; emphasis added); see also *People v Dipiazza*, 286 Mich App 137, 147; 778 NW2d 264 (2009). A person cannot be considered an offender unless he or she has been adjudicated as such with due process of law. See *People v Rose*, 289 Mich App 499, 517; 808 NW2d 301 (2010) (stating that criminal defendants are presumed innocent). Thus, petitioner has not incurred a punishment under article 1, § 16 of the Michigan Constitution of 1963.

Accordingly, petitioner's claim that the UCEA's application to him and his circumstances would constitute cruel and unusual punishment lacks merit.

Affirmed.

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

NICHOLS v HOWMET CORPORATION

Docket No. 303783. Submitted October 9, 2013, at Lansing. Decided October 15, 2013, at 9:15 a.m. Leave to appeal sought.

Edwin A. Nichols filed an application in the Michigan Compensation Appellate Commission against Howmet Corporation and its worker's compensation insurer, Pacific Employers Insurance Company/CIGNA and Cordant Technologies and its worker's compensation insurer, American Manufacturers Mutual Insurance Company (Michigan Property & Casualty Association was substituted on appeal as a party for American Manufactuers), seeking worker's compensation for injuries suffered as a result of his employment with Howmet and Cordant. Nichols injured his cervical spine in 1989 while working for Howmet. He reinjured his cervical spine at work in 1993 and had additional surgeries in 1993 and 1995, which did not alleviate the symptoms. Nichols filed an application for worker's compensation benefits and in 1998 a magistrate found that a cervical spine condition disabled him but that he could return to light-duty work. Nichols returned to work in November 1998 and injured his low back in December 1998, resulting in surgeries from 1999 to 2007. Nichols filed the instant applications in 2007 and the magistrate found that Nichols had proven by a preponderance of the evidence that he had sustained a low-back injury as a result of the work-related injury that limited his wage-earning capacity. American Manufacturers was ordered to pay Nichols's wage-loss benefits and Pacific was dismissed from the lawsuit. In 2009, the commission found that Cordant and Howmet were a single entity, reversed the magistrate's order dismissing Pacific and remanded to determine which insurance carrier was liable for the benefits. On remand, the magistrate found that Nichols had failed to establish an ongoing cervical spine disability. In 2010, the commission concluded that the magistrate had misallocated the burden of proof and remanded again with the burden on Howmet and Pacific to prove that Nichols's disability had ended. On second remand, the magistrate determined that neither Nichols nor Howmet and Pacific had proved or disproved ongoing cervical disability. The commission accepted the magistrate's determinations and ordered Howmet to pay benefits including wage-loss benefits related to Nichols's cervical spine injury and

ordered Cordant and American Manufacturers to pay benefits related to Nichols's low-back injury. Howmet and Pacific appealed as on leave granted and Nichols cross-appealed. 493 Mich 890 (2012).

The Court of Appeals *held*:

1. On appeal, the Court of Appeals reviews the decision of the commission, not the magistrate. The commission did not err by finding that Howmet and Cordant are the same employer and that the case involves a dispute between insurance carriers. The commission's final order was consistent with its previous finding that Cordant and Howmet are a single entity.

2. Under the version of MCL 418.301(5) in effect when the commission issued its March 2011 opinion and order, an employee is entitled to wage-loss benefits if he or she establishes a disability which is a limitation of the employee's wage-earning capacity in work suitable to his or her qualification and training resulting from a personal injury or work related disease. The employee is not entitled to wage-loss benefits if he or she receives an offer of reasonable employment and refuses it without good cause. The worker loses his entitlement to wage-loss benefits during the period of refusal only; there is no permanent forfeiture of wage-loss benefits. A worker who returns to work is entitled to have his or her wage-loss benefits reinstated from the date that the worker returned. If the worker is no longer disabled, he or she is not entitled to benefits.

3. For purposes of workers' compensation, res judicata precludes a redetermination of an employee's disability absent a showing of a change in the claimant's physical condition. When an employee is being compensated under an existing wage-loss benefits order or award, compensation may not be discontinued or reduced without a further order or award. However, res judicata does not preclude reevaluation of an employee's entitlement to wage-loss benefits when his or her condition has changed. An employee is only entitled to wage-loss benefits if the employee can establish a causal link between a work-related injury and a reduction in his or her wage-earning capacity. An employer may file a petition to stop an employee's compensation on the grounds that the employee is still injured, but his or her injury is no longer related to the injury. The burden of proof is on the petitioner when an employer files a petition to stop compensation on this basis. The commission properly concluded that Howmet and Pacific had the burden to prove that Nichols was no longer disabled because of his cervical spine injury. Howmet and Pacific are in effect contending that Nichols is not entitled to wage-loss benefits from his cervical

spine injury because, even though the injury still exists, his wage loss is no longer related to it because it is related to his low-back injury. An employer has the burden of proof when it petitions to stop an employee's compensation on the grounds that the injury is no longer related to the injury that resulted in an award of wage-loss benefits. Similarly, an employer that contends that an employee is no longer disabled and thus no longer entitled to continued wage-loss benefits after ending a refusal to work has the burden of proving that the disabled employee's condition has changed.

4. The successive injury rule places full liability for an employee's disability on the carrier covering the risk at the time of the most recent injury that caused the disability, even if a previous injury contributed to the more recent injury. The successive injury rule only applies when the first injury contributes to or causes the second injury, as opposed to when an independent, intervening force causes the second injury. The commission did not err when it determined that the successive injury rule did not apply to the facts of this case because there was no evidence that Nichols was no longer disabled from the cervical spine injury when the second disabling injury to his lower back occurred.

5. Howmet and Pacific's argument that if Pacific is liable for wage-loss benefits it is only obligated to the difference in benefits above what American must pay for Nichols's low-back injury was not raised before the commission and was not preserved for review.

6. The commission did not err by reversing the magistrate's award of wage-loss benefits against Cordant and American Manufacturers. Under former MCL 418.301(5)(e), liability for Nichols's wage-loss benefits was properly assigned to Howmet and Pacific because, as the original employer, Howmet was liable for wage-loss benefits when Nichols lost his job after performing work for Cordant for less than 100 weeks.

Affirmed.

WORKER'S COMPENSATION — REEVALUATION OF ENTITLEMENT TO BENEFITS AFTER ENDING REFUSAL TO WORK — BURDEN OF PROOF.

An employer that contends that an employee is no longer disabled and thus no longer entitled to continued wage-loss benefits after ending a refusal to work has the burden of proving that the disabled employee's condition has changed.

McCroskey Law (by *Michael J. Flynn*) and *John A. Braden*, for Edwin A. Nichols.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg, Calvin J. Sterk*, and *Thomas R. Tasker*), for Howmet Corporation and Pacific Employers Insurance Corporation.

Conklin Benham, PC (by *Martin L. Critchell*), for Cordant Technologies and Michigan Property & Casualty Association.

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM. This case involves a dispute between two insurers of a single employer concerning who must pay wage-loss benefits to an employee who suffered two separate, distinct injuries. Defendant Howmet Corporation (Howmet) and its workers' compensation insurer, Pacific Employers Insurance Company/Cigna (Pacific), appeal as on leave granted[1] an order of the Workers' Compensation Appellate Commission (the commission), now named Michigan Compensation Appellate Commission,[2] ordering Howmet to pay benefits including wage-loss benefits related to the cervical spine injury of plaintiff, Edwin A. Nichols, and ordering defendants, Cordant Technologies (Cordant) and American Manufacturers Mutual Insurance (American), to pay benefits related to Nichols's low-back injury. Nichols cross-appeals the same order. On appeal, the Michigan Property & Casualty Association has been substituted as a party for the American Manufacturers Mutual Insurance Company.

We conclude that the commission properly determined that (1) Howmet and Cordant were a single employer, (2) the burden to prove that Nichols was no

[1] *Nichols v Howmet Corp*, 493 Mich 890 (2012).

[2] Executive Order 2011-6, effective August 1, 2011.

longer disabled from his first injury was on Howmet and Pacific, and (3) the successive injury rule does not apply to the facts in this case. We conclude that we cannot determine whether Howmet and Pacific are only liable for a portion of Nichols's wage-loss benefits because they did not raise the issue before the commission. Therefore, we affirm.

I. FACTS AND PROCEDURAL HISTORY

A. NICHOLS'S CERVICAL SPINE INJURY

Nichols began working for Howmet in 1979. In June 1989, while attempting to catch a heavy barrel, Nichols injured his cervical spine. The injury required surgery. At that time, Pacific was the insurer on the risk for his injury. Nichols recovered from surgery and returned to work for Howmet in December 1989 without restrictions.

Nichols injured his cervical spine again in January 1993, and he began to experience neck pain, numbness, and headaches. Nichols required another surgery and stopped working in March 1993. He testified that the 1993 surgery did not relieve his symptoms, and the doctor who performed the surgery testified that "[t]he fusion did not take[.]"

In March 1995, Nichols underwent a third surgery on his cervical spine. In Magistrate Grit's opinion, in 1998 Nichols continued to suffer from headaches, neck aches, arm aches, and trouble using his right hand. In 1996, Howmet offered Nichols light-duty work. Nichols did not return to work, and Howmet terminated his employment in November 1996.

In March 1997, Nichols returned to full-time, light-duty work at Howmet. The company physician restricted Nichols to "light duty sedentary work" with

restrictions. On the basis of Nichols's complaints of continued pain, his family physician restricted him to working four hours a day and, in September 1997, restricted him from working completely.

In October 1997, Nichols declined Howmet's offer to return to work. He petitioned for workers' compensation benefits. In April 1998, Nichols underwent an independent medical evaluation with Dr. Dennis Szymanski. Szymanski opined that Nichols could return to full-time work as long as he avoided repetitive overhead activities.

After a trial in June 1998, Magistrate Grit found that Nichols could return to light-duty work, with restrictions. Magistrate Grit found that Nichols's cervical condition disabled him, but she limited his benefits to the period from March 1997 to May 1997. Magistrate Grit determined that Nichols "forfeit[ed] his wage loss benefits as of the date of his refusal to participate in the favored work program."

B. NICHOLS'S LOW-BACK INJURY

In November 1998, Nichols returned to light-duty work. On December 7, 1998, Nichols injured his low back while bending to pick up a folder of papers. The injury resulted in a series of surgeries from 1999 to 2007. At that time, American was the insurer on the risk.

Nichols did not return to work. In April 2005, Nichols filed an application for a hearing, naming Howmet as his employer and providing the dates of employment from January 1979 to February 1999. Both Pacific and American filed carrier responses, identifying Howmet as the employer. Nichols eventually withdrew his petition when the benefits were voluntarily paid.

In April 2007, Nichols filed two applications for workers' compensation benefits, one against Howmet and Pacific, and a second against Cordant and American.

Dr. Yousif Hamati testified that he "would never return [Nichols] to duty because of his multiple surgeries to the neck and low back[.]" Dr. Henry Ottens testified that Nichols's neck surgeries produced scar tissue and made his neck vulnerable to wear and tear, but that Nichols's low back was "more problematic" and would "severely restrict his activities."

Dr. Grant J. Hyatt testified that Nichols should only work part-time, with restrictions. But Dr. Hyatt testified that he was asked only to evaluate the extent of Nichols's low back injury. Szymanski testified that he would not restrict Nichols on the basis of his cervical spine injury, but would restrict Nichols from a variety of activities on the basis of his low back injury.

Magistrate McAree found that Hyatt's opinions were the most credible. Magistrate McAree also found that Nichols had proved by a preponderance of the evidence that he sustained a low-back injury and his wage-earning capacity was limited "as a result of the personal injury of December 7, 1998."

Magistrate McAree found that light-duty work was no longer available for Nichols within his restrictions. He ordered American to pay Nichols's wage-loss benefits. After the parties appealed the order, Magistrate McAree dismissed Pacific from the suit.

C. THE COMMISSION'S 2009 DECISION

Nichols and American appealed Magistrate McAree's decision. Nichols asserted that both Howmet and American were liable for full, "stacked" wage-loss ben-

efits. American contended that the insurer liable for Nichols's benefits was Pacific because, under MCL 418.301(5)(e), Nichols worked less than 100 weeks after his January 1993 injury. Pacific responded that Magistrate McAree properly determined that American was liable because of the successive injury rule.

The commission reversed Magistrate McAree's order dismissing Pacific and remanded for further proceedings. The commission opined that the appeal "center[ed] around the single issue of which carrier is liable for paying benefits to [Nichols]" and found that "Cordant [T]echnologies and Howmet Corporation are the same entity." Because Magistrate McAree had not addressed Nichols's cervical spine injury, the commission remanded.

D. PROCEEDINGS AFTER FIRST REMAND

On remand, Magistrate McAree opined that res judicata did not bar litigation concerning whether Nichols suffered from an ongoing disability, and found that the injury to Nichols's low back was "a new condition distinct from [Nichols's] prior cervical injuries." Magistrate McAree found Hamati and Hyatt the most credible, but neither of these doctors addressed whether Nichols had an ongoing cervical spine disability. He found that the other doctors disagreed regarding whether Nichols continued to suffer restrictions because of his cervical spine injury. He noted that Ottens's physical examination of Nichols's neck revealed that it was "nearly normal" and there was no documented treatment of Nichols's cervical spine after July 1998.

Magistrate McAree determined that Nichols's medical proofs established a clear history of prior cervical injuries, but that he "fail[ed] to establish that the historical facts of those prior surgeries and continued

physical complaints are sufficient to establish ongoing cervical disability." The Magistrate noted that he was not finding that the cervical condition was completely healed or irrelevant, but that it no longer remained a factor in his overall condition, even though Nichols was working a lighter job when he injured his low back. Magistrate McAree ultimately concluded that Nichols "simply failed to establish ongoing cervical disability."

E. THE COMMISSION'S 2010 DECISION

The commission concluded that Magistrate McAree had "misallocated the burden of proof." It reasoned that MCL 418.301(5)(a) provides that if a magistrate finds that a claimant is disabled, but suspends benefits because the employee refused to return to work, the employee may request a determination that his or her refusal to return to work has ended. The commission further reasoned that if the employee proves that he or she has returned to work—and would thus be entitled to have his or her wage-loss benefits resume—the employer has the opportunity to prove that the employee is no longer disabled, and that he or she is therefore *not* entitled to have wage-loss benefits resume. According to the commission, "[t]he employee carries the burden of proof concerning the end of the refusal, but the employer carries the burden of proof that the disability ended." Accordingly, the commission determined that Magistrate McAree erred by concluding that Nichols had not proved continuing disability. The commission opined that Howmet and Pacific needed to prove that Nichols's disability had ended. It remanded for Magistrate McAree to determine whether each side had satisfied its burden of proof.

A dissenting commissioner would have held that Howmet and Pacific had forfeited the issue of whether

Nichols had a continuing cervical disability because they had not filed a petition to stop Nichols's benefits and Magistrate McAree had not addressed whether Nichols's cervical condition had changed.

F. PROCEEDINGS AFTER SECOND REMAND

On second remand, Magistrate McAree determined that Nichols proved that he returned to work. He noted that Howmet and Pacific had not filed a motion to stop Nichols's benefits, and framed the second issue as follows:

> II. Did Defendant Howmet meet its burden of proving that Plaintiff's cervical disability had ended?
>
> Answer: No.

Magistrate McAree explained that "none of the testimony relative to the cervical condition . . . [was] persuasive on the issue of ongoing cervical disability." He stated that he did not "accept any claim that the cervical condition has somehow, subsequently changed from occupational to nonoccupational." He explained why he did not find any of the doctors' opinions persuasive on the issue of ongoing cervical disability, and noted that he did not find "sufficient evidence that physical limitations have ended[.]" In summary, Magistrate McAree concluded that "the evidence produced neither proved nor disproved ongoing cervical disability. Whoever had the burden of proof failed."

G. THE COMMISSION'S 2011 DECISION

The commission accepted Magistrate McAree's determinations and modified his order "to reflect the appropriate liabilities." The commission rejected Howmet and Pacific's argument that it was not the proper party to pay benefits, because "Howmet must prove the

disability ended before any order relieves the obligation to pay." It also rejected Howmet and Pacific's argument concerning the successive injury rule on the basis that Nichols's injuries were to different body parts. The commission ordered that "Defendant Cordant must pay benefits related to plaintiff's low back injury. Defendant Howmet must pay benefits related to plaintiff's cervical injury including wage loss benefits." A dissenting commissioner would have held that, for cases in which two distinct injuries are present, "an employer paying a lower wage loss benefit . . . reduces whatever obligation the earlier injury with an employer paying a higher wage loss benefit . . . has[.]" The commission disagreed, noting that "the Supreme Court [in *Arnold v Gen Motors Corp*[3]] specifically declined to decide this very issue because the parties did not raise the issue."

II. NUMBER OF EMPLOYERS

A. STANDARD OF REVIEW

This Court's review of a decision of the Michigan Compensation Appellate Commission is limited. Absent fraud, the commission's findings of fact are conclusive on appeal if there is any competent evidence in the record to support them.[4] This Court reviews de novo questions of law involving any final order of the commission.[5]

B. ANALYSIS

Nichols contends that the commission found that Howmet and Cordant are separate employers. We dis-

[3] *Arnold v Gen Motors Corp*, 456 Mich 682; 575 NW2d 540 (1998).

[4] *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000).

[5] *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000).

agree. If viewed in isolation, the commission's final paragraph of its final order potentially confuses the issue, as it states:

> Defendant Cordant must pay benefits related to [Nichols's] low back injury. Defendant Howmet must pay benefits related to [Nichols's] cervical injury including wage loss benefits.

However, we cannot take this paragraph out of context. The commission found that the conflict in this case centered on "the single issue of which carrier is liable for paying benefits to [Nichols]" and stated that "Cordant [T]echnologies and Howmet Corporation are the same entity." The record evidence supported the commission's finding that Nichols had only one employer. This includes Nichols's testimony that he worked for Howmet and his April 2005 application, which named Howmet as his employer from January 1979 to February 1999. Further, we note that it was the convention of the magistrate and commission in this case to refer to Cordant/American as simply Cordant, and Howmet/Pacific as Howmet, and frequently refer to them collectively in the singular term "defendant."

Finally, while the dissenting commissioner clearly referred to Howmet and Cordant as separate employers, and the magistrates' various opinions are ambivalent on the issue, the same is not true of the commission's opinion. We review the decision of the commission, not the decision of the magistrate.[6] In its original opinion, the commission found that Cordant and Howmet were the same employer, and it did not subsequently change its original finding.

We therefore conclude that the commission's order does not indicate that Cordant and Howmet are sepa-

[6] *Mudel*, 462 Mich at 709.

rate employers. The commission's final order is consistent with the commission's previous finding that Cordant and Howmet are the same employer and that this case involves a dispute between insurance carriers.

III. LIABILITY FOR WAGE LOSS

A. STANDARD OF REVIEW

As noted, the commission's findings of fact are conclusive on appeal if there is any competent evidence in the record to support them, and we review de novo questions of law.[7] We review de novo which party bears the burden of proof because it is a question of law.[8]

B. EXTENT OF HOWMET'S LIABILITY FOR WAGE LOSS

1. LEGAL STANDARDS

As an initial matter, we note that the Legislature amended the provisions of the Workers' Compensation Act after the commission issued its order in this case.[9] This opinion concerns the provisions of MCL 418.301 as they were in effect when the commission decided this case.

At that time, MCL 418.301(5) governed wage-loss benefits. To be entitled to wage-loss benefits, an employee must establish that he or she has a disability, which is "a limitation of the employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work re-

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[7] *Id*. at 709-710; *DiBenedetto*, 461 Mich at 401.

[8] *Pickering v Pickering*, 253 Mich App 694, 697; 659 NW2d 649 (2002).

[9] MCL 418.301, as amended by 2011 PA 266, effective December 19, 2011. Unless otherwise noted, all references in this opinion are to the former version of MCL 418.301.

lated disease."[10] But if a disabled employee receives an offer of reasonable employment and refuses it without good cause, the employee is not entitled to wage-loss benefits.[11]

A worker only loses his or her entitlement to wage-loss benefits during the period of refusal.[12] He or she does not permanently forfeit wage-loss benefits.[13] A worker who returns to work is entitled to have his or her wage-loss benefits reinstated from the date that the worker returned.[14] But if the worker is no longer disabled, he or she is not entitled to benefits.[15]

2. APPLYING THE STANDARDS

It is undisputed that Nichols ended his period of refusal by returning to work in 1998. The question here is: when an employer contends that the employee was no longer disabled when he or she has returned to work and is seeking benefits, does the employer have the burden to prove that the employee was no longer disabled, or does the employee have the burden to prove that he or she continues to be disabled? Howmet and Pacific contend that the burden is on the employee to show that he or she has a continuing disability. Nichols contends that res judicata either prohibits a redetermination of disability or, in the alternative, places the burden of proof on the employer to establish that the disability has ended. We conclude that, consistently

[10] MCL 418.301(4) and (5).

[11] MCL 418.301(5)(a).

[12] *Perez v Keeler Brass Co*, 461 Mich 602, 611; 608 NW2d 45 (2000); *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000).

[13] *Perez*, 461 Mich at 611; *McJunkin*, 461 Mich at 598.

[14] *McJunkin*, 461 Mich at 599.

[15] *Perez*, 461 Mich at 615.

with principles of res judicata as applied to workers' compensation law, the burden of proof is on the employer to show that the employee's disability has ended.

Res judicata precludes a redetermination of an employee's disability "absent a showing of a change in the claimant's physical condition."[16] Thus, when an employee is being compensated under an existing order or award, "compensation shall not be discontinued or reduced without a further order or award[.]"[17]

But res judicata does not preclude reevaluation of an employee's entitlement to wage-loss benefits when his or her condition has changed.[18] If an employee's condition has changed, the employer may petition to stop or reduce his or her workers' compensation payments.[19] An employee is only entitled to wage-loss benefits if the employee can establish a causal link between a work-related injury and a reduction in his or her wage-earning capacity.[20] Thus, an employer may file a petition to stop an employee's compensation on the grounds that the employee is still injured, but his or her wage loss is no longer related to the injury.[21] "On a petition to stop compensation, . . . the burden of proof is upon the petitioner."[22]

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[16] *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 380; 521 NW2d 531 (1994).

[17] Mich Admin Code, R 408.40(1).

[18] *Kosiel*, 446 Mich at 380. See *Reiss v Pepsi Cola Metro Bottling Co, Inc*, 249 Mich App 631, 640; 643 NW2d 271 (2002).

[19] *Pike v City of Wyoming*, 431 Mich 589, 600-601; 433 NW2d 768 (1988); R 408.40(1).

[20] *Sington v Chrysler Corp*, 467 Mich 144, 155, 158; 648 NW2d 624 (2002); *Sweatt v Dep't of Corrections*, 468 Mich 172, 186; 661 NW2d 201 (2003).

[21] See *Reiss*, 249 Mich App at 634-635, 639.

[22] *Johnson v Pearson*, 264 Mich 319, 320; 249 NW 865 (1933).

It is logical to apply the law regarding an employer's petition to stop compensation to the context of an employer contending that an employee is no longer disabled and thus is not entitled to continued wage-loss benefits after ending a refusal to work. Howmet and Pacific are in effect contending that Nichols is no longer entitled to wage-loss benefits from his cervical spine injury because the injury still exists, but his wage loss is no longer related to it. In other words, Howmet and Pacific contend that the sole cause of Nichols's reduced wage-earning capacity is his low-back injury. This circumstance is similar to an employer petitioning to stop an employee's compensation on the grounds that the employee's wage loss is no longer related to his or her injury. It would be illogical and contrary to the precepts of res judicata to require Nichols to show that his condition has not changed when, under similar circumstances, the burden of proof would be on Howmet and Pacific to show that Nichols's condition *has* changed.

Therefore, we conclude that the commission appropriately determined that Howmet and Pacific had the burden to prove that Nichols was no longer disabled because of his cervical spine injury.

C. SUCCESSIVE INJURY RULE

1. LEGAL STANDARDS

The successive injury rule places full liability for an employee's disability on the carrier covering the risk at the time of the most recent injury that caused the disability, even if a previous injury contributed to the more recent injury.[23] The successive injury rule applies only when the first injury contributes to or causes the

[23] *Mudel*, 462 Mich at 724; *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243, 253-254; 262 NW2d 629 (1978).

second injury, as opposed to when an independent, intervening force causes the second injury.[24]

2. APPLYING THE STANDARDS

Howmet and Pacific contend that the commission erred by failing to apply the successive injury rule to hold American, who was the insurer on the risk at the time of Nichols's second injury, liable for his disability. We disagree.

First, the commission did not find that Nichols's cervical spine injury caused or contributed to his low back injury. It instead adopted the magistrate's finding that "subsequent injury is to [Nichols's] lumbar spine, which is in fact . . . found to be a new condition distinct from [Nichols's] prior cervical injuries." Absent a finding that Nichols's cervical spine injury caused or contributed to his low back injury, the successive injury rule does not apply because the injuries are independent. Therefore, we conclude that the commission did not err when it concluded that the successive injury rule did not apply to the facts in this case.

Further, Magistrate Grit found that Nichols's cervical spine injury disabled him and entitled him to wage-loss benefits. The successive injury rule applies when either (1) the first injury, by itself, did not disable the employee, or (2) the first injury was disabling, but the employee had recovered from it and was no longer disabled when the second disabling injury occurred.[25] Here, there was no evidence that when Nichols suffered his low-back injury in 1998, he was no longer disabled. Thus, the commission

[24] *Dressler*, 402 Mich at 253; *Brinkert v Kalamazoo Vegetable Parchment Co*, 297 Mich 611, 614-615; 298 NW 301 (1941).

[25] *Arnold*, 456 Mich at 689; *Dressler*, 402 Mich 251-253; *Mudel*, 462 Mich at 724-726.

correctly determined that the successive injury rule did not apply to the facts in this case.

D. ALLOCATION OF LIABILITY

Howmet and Pacific contend that, if Pacific is liable for wage-loss benefits, it is only obligated to pay the difference in benefits above what American must pay for Nichols's low-back injury. We conclude that we may not reach this issue.

MCL 418.861 provides that this Court has the power to review "questions of law involved in any final order of the board[.]" We may not reach legal arguments that were not raised before or addressed by the commission.[26] A careful review of Howmet and Pacific's briefs below reveals that Howmet and Pacific did not raise this issue before the commission and, similarly, that the commission did not address it. Howmet and Pacific contended below only that the successive injury rule placed full liability for Nichols's disability on Cordant and American. Therefore, we cannot reach the merits of this issue.

We recognize that MCL 418.301(5)(e) provides that the original employer must pay wage-loss benefits, but it does not allocate liability among insurance carriers concerning whether one insurer may seek reimbursement from another.[27] But, as the dissenting commissioner here aptly noted, "while one would suspect that the amount of Howmet's liability ought to be reduced by the amount of Cordant's liability, this argument has not been made." Regardless of whatever merit this legal argument may have, we cannot reach it.

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[26] MCL 418.861; *Calovecchi v Michigan*, 461 Mich 616, 626; 611 NW2d 300 (2000).

[27] See *Arnold*, 456 Mich at 691, 692 n 9.

On cross-appeal, Nichols contends that the commission erred by reversing the magistrate's award of wage-loss benefits against Cordant and American. We disagree. MCL 418.301(5)(e) provides that the original employer is liable for wage-loss benefits when a disabled employee loses his or her job after performing favored work for less than 100 weeks.[28] In this case, Nichols lost his employment after working for less than 100 weeks. Therefore, the commission properly assigned liability for his wage-loss benefits to Howmet and Pacific.

E. "STACKING" OF BENEFITS

On cross-appeal, Nichols contends that he is entitled to "stack" full wage-loss benefits from each employment because separate injuries from separate employers do not coordinate. As explained, the commission found that Cordant and Howmet were the same employer and that this case involved a dispute between which insurance carrier was liable to pay for Nichols's benefits. Because Nichols bases his argument on the faulty premise that he was employed by two different employers, we reject it.

IV. CONCLUSION

We conclude that the commission did not err by requiring Pacific to prove that Nichols was no longer disabled. We also conclude that (1) the commission properly determined that the successive injury rule does not apply in this case, and (2) we cannot reach the merits of Pacific's argument that it is only liable for the difference in benefits because it did not raise this legal argument before the commission.

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[28] MCL 418.301(5)(e); *Arnold*, 456 Mich at 690-691.

We affirm.

SERVITTO, P.J., and WHITBECK and OWENS, JJ., concurred.

DETROIT LIONS, INC v CITY OF DEARBORN

Docket Nos. 299414, 300830. Submitted May 8, 2013, at Detroit. Decided October 22, 2013, at 9:00 a.m. Leave to appeal sought.

Detroit Lions, Inc. and WCF Land, LLC filed petitions in the Michigan Tax Tribunal (MTT), challenging the ad valorem taxation of certain real property commonly known as the Detroit Lions headquarters and practice facility, as well as the associated tangible personal property, by the city of Allen Park and the city of Dearborn for the tax years 2004 through 2009. A portion of the real property and personal property is located in and taxed by Dearborn and the other portion of the real and personal property is located in and taxed by Allen Park. Ford Motor Land Development Corporation, the original developer and owner of the practice facility, entered into a 30-year lease with the Detroit Lions and the lease granted the Detroit Lions an option to purchase the practice facility. The option to purchase was assigned to William Clay Ford, Sr., who formed WCF Land, a single-member limited liability company, which in turn exercised the option and purchased the practice facility from Ford Land on March 25, 2004. The MTT concluded that Allen Park could not uncap the taxable value of the real property following the March 25, 2005, sale and transfer of the facility because under MCL 211.27a(7)(*l*), it constituted a transfer or ownership between related companies. The MTT also determined the true cash value of the real and personal property for the tax years in question. In Docket No. 299414, Allen Park appealed the MTT's uncapping decision and petitioners cross-appealed the MTT's determination of the true cash value of the real property. In Docket No. 300830, petitioners appealed the MTT's method of determining the true cash value of the personal property.

The Court of Appeals *held*:

1. Under Mich Admin Code, R 792.10247(12)(b), the tribunal may enter an order consolidating matters over which it has acquired jurisdiction. The MTT properly consolidated MTT Docket Nos. 00-314349 and 00-307900 and entered a single, final decision pertaining to both cases. Allen Park, which was an aggrieved party in MTT Docket No. 00-314349, became an aggrieved party with respect to the consolidated, unified proceeding

because the tribunal properly consolidated those claims and the claims had effectively merged and become one unified proceeding by the time the claim of appeal was filed in the Court of Appeals in Docket No. 299414. Accordingly, in Docket No. 299414 Allen Park was entitled to claim an appeal from both MTT Docket Nos.

2. MCL 211.27a(3) provides that under certain circumstances, when a transfer of ownership occurs, the taxable value of property may be reassessed, or uncapped, according to the following year's state equalized value, when property is sold or transferred. A transfer of ownership is 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. However, under MCL 211.27a(7)(*l*), a transfer of real property or other ownership interests among entities that are commonly controlled does not give rise to uncapping. Only the actual entities involved in a transfer of real property or other ownership interests are relevant when determining whether the parties are commonly controlled for purposes of MCL 211.27a(7)(*l*); the existence of a lease of the real property being transferred, without more, is not relevant for purposes of a common-control analysis. In Docket No. 299414, the MTT erred when it determined that WCF Land's purchase of the practice facility from Ford Land was a transfer of ownership between related companies so that the taxable value of the property could not be uncapped. Ford Land and WCF Land are not commonly controlled entities within the meaning of MCL 211.27a(7)(*l*); while the Detroit Lions and WCF Land are commonly controlled, WCF Land is entirely owned by William Clay Ford, Sr. and Ford Land is a corporate entity that is not controlled by Mr. Ford. The purchase transaction involved only Ford Land and WCF Land; it was irrelevant that the Detroit Lions had possession of the practice facility under the terms of the lease because it was not a party to the transfer of the property.

3. In general, property must be assessed at 50 percent of its true cash value, which is the most probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation. A property's highest and best use is the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market or demand for such use. The use must be legally permissible, financially feasible, maximally productive, and physically possible. A property's existing use may be indicative of the use to which a potential buyer would put the property and is relevant to the fair market value of the property.

Even if a property has a special purpose and limited market, its existing use may still constitute its highest and best use. The MTT did not err by concluding that the highest and best use of the property as improved was its existing use as an integrated professional football team headquarters and practice facility. The MTT's rejection of the alternative highest and best use asserted by petitioners was supported by competent, material, and substantial evidence because local zoning laws did not allow such use. In addition, the alternative highest and best use would have substantially decreased the property's value, which would violate the principle of highest and best use.

4. The MTT has discretion to select the valuation approach that provides the most accurate valuation under the individual circumstances of every case. The cost-less-depreciation method is appropriate for valuing special-purpose properties with a limited or inadequate market. In Docket No. 299414, the MTT did not legally err by determining that a modified cost-less-depreciation approach, based on the original build-to-suit cost, provided the most accurate value of the special-purpose practice facility and the MTT's true cash value determinations were supported by competent, material, and substantial evidence on the whole record.

5. Tangible personal property must be taxed on the basis of its true cash value. The petitioner has the burden of proof in establishing the true cash value of property and the MTT must apply its expertise to the facts of the case and make an independent determination of true cash value. In Docket No. 300830, the MTT properly determined that petitioners' personal property appraiser was not credible and that petitioners did not meet their burden of proof in establishing true cash value. However, the MTT committed an error of law when it simply accepted respondents' personal property valuation rather than conducting an independent determination of true cash value. The MTT failed to consider the other traditional methods of determining true cash value and failed to determine the approach that most accurately reflected the value of the property. Because the MTT did not consider the other approaches and reconcile the values derived thereunder, the Court could not determine whether the valuation method utilized by respondents' appraiser and relied on by the MTT provided an accurate true cash value of the personal property in this case.

In Docket No. 299414, the MTT's conclusion that the sale and transfer of the practice facility from Ford Land to WCF Land did not give rise to uncapping of the property's value is reversed and its determination of true cash value for years 1994 through 1999 is

affirmed. In Docket No. 300830, reversed and remanded to the MTT for an independent determination of the true cash value of the personal property.

TAXATION — PROPERTY TAX — TAXABLE VALUE — TRANSFER OF PROPERTY — UNCAPPING — COMMONLY CONTROLLED ENTITIES.

MCL 211.27a(3) provides that under certain circumstances, when a transfer of ownership occurs, the taxable value of property may be reassessed, or uncapped, according to the following year's state equalized value, when property is sold or transferred; a transfer of ownership is 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; under MCL 211.27a(7)(*l*), a transfer of real property or other ownership interests among entities that are commonly controlled does not give rise to uncapping; only the actual entities involved in a transfer of real property or other ownership interests are relevant when determining whether the parties are commonly controlled for purposes of MCL 211.27a(7)(*l*); the existence of a lease of the real property being transferred, without more, is not relevant for purposes of a common-control analysis.

Hoffert & Associates, PC (by *Myles B. Hoffert* and *David B. Marmon*), for Detroit Lions, Inc. and WCF Land, LLC.

Secrest Wardle (by *Stephanie Simon Morita*) for the city of Dearborn.

Dykema Gossett PLLC (by *Carl Rashid, Jr.* and *Paul M. Mersino*), for city of Allen Park.

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

JANSEN, J. The instant consolidated appeals involve the ad valorem taxation of certain real property, commonly known as the Detroit Lions headquarters and practice facility ("practice facility" or "the real property"), as well as the associated tangible personal property ("the personal property"), by the city of Dearborn

("Dearborn") and the city of Allen Park ("Allen Park") (collectively "respondents"). In Docket No. 299414, Allen Park appeals by right the final decision of the Michigan Tax Tribunal ("MTT" or "tribunal") prohibiting it from uncapping the taxable value of the practice facility following a sale and transfer of the real property on March 25, 2004. Petitioners Detroit Lions, Inc. ("Detroit Lions") and WCF Land, LLC ("WCF Land") (collectively "petitioners") cross-appeal a different provision of that MTT decision determining the true cash value of the real property. In Docket No. 300830, petitioners appeal by right a second MTT decision, specifically challenging the MTT's method of determining the true cash value of the personal property. In Docket No. 299414, we affirm in part and reverse in part. In Docket No. 300830, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND AND PROCEDURAL HISTORY

The factual background of these appeals, while complex and protracted, is not in serious dispute. The practice facility consists of approximately 232.25 acres of land, a two-story office building, a practice building with an indoor football field, an outdoor football field, a par-three golf hole, and certain other outbuildings. The practice facility is situated partly in Dearborn and partly in Allen Park. The personal property located at the practice facility includes, but is not limited to, furniture, athletic training equipment, computer equipment, office machines, video and broadcast equipment, telephones, kitchen equipment, file cabinets, a chiropractic table, turf care equipment, and certain collectibles and antiques. Eighty-two percent of the real property is taxed by Dearborn and 18 percent of the real

property is taxed by Allen Park. This 82/18 split generally governs the taxation of the personal property as well.

The practice facility was originally constructed by Ford Motor Land Development Corporation ("Ford Land") and was completed in 2000 or 2001. In 2001, Ford Land and the Detroit Lions entered into a renewable, 30-year lease by which the Detroit Lions agreed to lease the practice facility with an option to purchase. According to Detroit Lions Senior Vice President and Chief Financial Officer J. Thomas Lesnau, the Detroit Lions never exercised this option to purchase the practice facility because "[t]he Lions did not have the money to do that." Instead, the option to buy was assigned to William Clay Ford, Sr. Mr. Ford formed a single-member limited liability company, WCF Land, which exercised the option and purchased the practice facility from Ford Land on March 25, 2004. WCF Land paid $44,015,000 for the practice facility, of which $2,386,731 represented the value of the personal property, and $41,628,269 represented the value of the real property. As part of the sale, WCF Land acquired all of Ford Land's interest in the long-term lease with the Detroit Lions, and the Detroit Lions continued as lessee under the original lease agreement.

On June 14, 2004, the Detroit Lions commenced MTT Docket No. 00-307900 by filing a petition requesting a review of Dearborn's assessment of the practice facility for tax year 2004. On May 3, 2005, WCF Land commenced MTT Docket No. 00-314349 by filing a petition requesting a review of Allen Park's assessment of the practice facility for tax year 2005. Over the course of the next several years, the Detroit Lions and WCF Land filed numerous motions seeking to amend their petitions to add subsequent tax years.

These motions were granted, and petitioners ultimately challenged both respondents' assessments of the practice facility for tax years 2004 through 2009. MTT Docket Nos. 00-307900 and 00-314349 were eventually consolidated.

On May 3, 2005, WCF Land commenced MTT Docket No. 00-314348 by filing a petition requesting review of the assessment of a certain portion of the personal property for tax year 2005. The Detroit Lions thereafter commenced MTT Docket No. 00-315349 by filing a petition requesting a review of the assessment of a different portion of the personal property for tax year 2005. The following year, the Detroit Lions commenced MTT Docket No. 00-327111 by filing a separate petition challenging the assessment of certain items of personal property for tax year 2006. WCF Land commenced MTT Docket No. 00-327112 by filing a separate petition challenging the assessment of certain other items of personal property for tax year 2006. On June 28, 2008, the Detroit Lions commenced MTT Docket No. 00-352900 by filing a petition claiming that Dearborn had improperly taxed certain items of personal property. MTT Docket Nos. 00-314348, 00-315349, 00-327111, 00-327112, and 00-352900 were ultimately consolidated. The Detroit Lions and WCF Land filed numerous motions seeking to amend their petitions to add subsequent tax years. In the end, these motions were granted and petitioners challenged respondents' assessments of the personal property for tax years 2005 through 2009.

A hearing was conducted before the MTT during December 2009 and April 2010. The MTT considered Allen Park's contention that it was entitled to uncap the taxable value of the practice facility following its sale and transfer on March 25, 2004. Specifically, the MTT took evidence concerning whether WCF Land's pur-

chase of the practice facility from Ford Land on March 25, 2004, was a transfer between entities under common control.

With regard to the personal property, petitioners introduced valuation evidence through the testimony of J. Michael Clarkson, a personal property appraiser from Austin, Texas. Clarkson testified that he had visited the practice facility once in 2003, and again in 2005, to inspect and inventory the personal property. Clarkson determined the value for each item of personal property according to its highest and best use, i.e., the purpose for which the item was originally designed or manufactured. Clarkson's appraisal encompassed approximately 1,000 items of personal property. Some items were owned by the Detroit Lions and some were owned by WCF Land. Clarkson testified that he did not know which items were owned by the Detroit Lions and which were owned by WCF Land.

Clarkson predominantly used the market-comparison method rather than the income method or cost-less-depreciation method to value the items of personalty. Clarkson opined that the market-comparison method best reflects the usual selling price, and therefore the true cash value, of an asset. Clarkson used market comparables from Internet e-commerce sites. Clarkson explained that many appraisers now use market comparable data from e-commerce sites instead of data from trade catalogues, as was used in times past. In appraising the personal property, Clarkson relied on current retail prices of comparable items, such as eBay "buy-it-now" prices. Clarkson did use the cost-less-depreciation method to appraise certain items of personal property that were unique and did not have an active secondary market.

After making his appraisal, Clarkson submitted a written report, which was admitted into evidence by the MTT over the objection of Dearborn's attorney. Clarkson concluded that the aggregate true cash value of the personal property was $1,620,000 for tax year 2005, $1,450,000 for tax year 2006, $1,280,000 for tax year 2007, $1,330,000 for tax year 2008, and $1,200,000 for tax year 2009.[1]

The parties disagreed as to whether Clarkson had seen and taken into account every item of personal property at the practice facility. Counsel for Dearborn suggested that Clarkson had missed several items during his appraisal and repeatedly attacked Clarkson's market-comparables technique as unreliable. Clarkson admitted that he could not remember which depreciation tables he had used with respect to certain items and that he had missed a few items of personal property during his appraisal, such as a washer and dryer. Nonetheless, he maintained that his appraisal was accurate. Dearborn's attorney asserted that Clarkson was "being purposely evasive" or "incompetent."

Lesnau testified that some of the personal property had been brought to the practice facility from the Detroit Lions' former headquarters in Pontiac, and some of the personal property had been acquired by the Detroit Lions after moving to the practice facility. Moreover, some of the personal property had been acquired directly from Ford Land. Lesnau testified that the NFL considered the practice facility to be "state of

[1] A separate document listed 10 additional items of property that were fixed to the buildings, such as wiring, doors, built-in lockers, auditorium seating, and kitchen hoods. The value of these items was not included in Clarkson's report because it was not clear whether these items should be assessed as personalty or realty. The total value of these 10 items was approximately $100,000. The parties agreed that it was for the MTT to determine whether these 10 items were personalty or realty.

the art" when it was built, but that much of the equipment had become obsolete in the intervening years.

Lesnau testified that he provided Clarkson a list of new assets that were acquired and old assets that were discarded or eliminated for each tax year through 2008. Clarkson used this information in his report. However, counsel for Dearborn questioned whether Clarkson had actually received a list of new acquisitions for 2008.

Lesnau testified that he walked through the practice facility in 2003 with Mr. Lott, inspected the personal property, and identified which items of personalty belonged to Ford Land and which items belonged to the Detroit Lions. Lesnau testified that Clarkson was not present during this inspection and walk-through, but that Clarkson had visited the premises previously and had walked through the practice facility at that time. Lesnau testified that it took one day to conduct the walk-through and two days to compile a list of the items of personal property that were inspected.

Counsel for Dearborn attacked Clarkson's methods and credibility. Counsel took issue with Clarkson's values for a number of items of personal property. Counsel also asserted that Clarkson had lied when he stated that he had made a "three-day inspection" of the practice facility because, as Lesnau had testified, Clarkson did not actually conduct the inspection and inventory in person but instead sent Lott. Counsel questioned Clarkson's representation that he was never informed which assets belonged to WCF Land and which assets belonged to the Detroit Lions. She pointed out that Lesnau had testified that he gave Clarkson this information prior to the generation of his report. Lastly,

counsel for Dearborn noted that Clarkson had failed to determine any value for several items of personal property.

Alphonso Consiglio, a certified personal property examiner, testified for respondents. Consiglio attempted to audit the personal property statements by reconciling the actual personal property disclosures by petitioners with the items listed in Clarkson's report. Consiglio then performed a valuation of all the personal property by applying State Tax Commission ("STC") multiplier tables to the original costs of the various assets. Consiglio identified several discrepancies between Clarkson's report and the list of assets that were known to be present at the practice facility. Many newly acquired assets were not accounted for in Clarkson's report. Similarly, Clarkson's report failed to account for the disposal or elimination of other obsolete assets over time. Consiglio testified that numerous items of the personal property were altogether missing from Clarkson's report. For instance, Consiglio believed that there was approximately $1,273,078 in true cash value missing from Clarkson's report with respect to the personal property for tax year 2005, $1,121,863 missing for tax year 2006, $989,021 missing for tax year 2007, $891,789 missing for tax year 2008, and $799,594 missing for tax year 2009. After applying the STC multiplier tables, Consiglio concluded that the total true cash value of the personal property owned by the Detroit Lions was: $1,958,153 for tax year 2005, $1,446,817 for tax year 2006, $1,315,731 for tax year 2007, $1,294,634 for tax year 2008, and $1,201,829 for tax year 2009. Consiglio concluded that the total true cash value of the personal property owned by WCF Land was: $1,783,292 for tax year 2005, $1,573,048 for tax year 2006, $1,381,341 for tax year 2007, $1,239,878 for tax year 2008, and $1,110,853 for tax year 2009.

With respect to the real property, the MTT heard extensive testimony concerning the market price per square foot for office building space, open fields, and other commercial real property within the cities of Dearborn and Allen Park. The MTT took considerable testimony concerning the nature and type of buildings at the practice facility, the size and layout of the buildings, the fixtures and amenities in the buildings, the plumbing and wiring, the floor plans, and other similar details. There was also extensive testimony concerning the landscaping, the grounds, and the par-three golf hole located on the property. The MTT heard testimony regarding various methods of appraising other sports facilities located around the country. Real estate appraiser David Bur testified that, assuming the practice facility was not for sale together with the entirety of Detroit Lions operation, the highest and best use of the real property was as an office complex or "office industrial facility."

The MTT issued its decisions on July 12, 2010. The tribunal first addressed the issue of uncapping the taxable value of the real property following the sale and transfer of March 25, 2004. The MTT found that although the transfer by deed on March 25, 2004, would have otherwise constituted a "transfer of ownership" under MCL 211.27a(6)(a), it did not in this particular case because "the subject property is owned by corporations under common control." The MTT ultimately concluded that, pursuant to MCL 211.27a(7)(*l*), WCF Land's purchase of the practice facility from Ford Land on March 25, 2004, was a "transfer of ownership[] between related companies and, therefore, the taxable value of the property is not uncapped."

The tribunal next addressed the real property valuation for tax years 2004 through 2009. The MTT found

it "difficult . . . to understand" how the practice facility, for which WCF Land had paid $41,628,269 in 2004, could have lost more than half its value in only two years as petitioners asserted. After considering the totality of the testimony and exhibits, the MTT concluded that the best evidence of the true cash value of the real property was the initial cost to acquire and build the practice facility. The MTT determined that the build-to-suit cost of $33,000,000 was the best evidence of the true cash value of the practice facility's buildings in 2004. Regarding the value of the land, itself, the MTT found that the $5,470,000 figure proposed by petitioners "appears reasonable for the area and [will be] used to determine the value of the subject property." Adding these sums together, the MTT determined that the total true cash value of the real property was $38,470,000 for tax year 2004. Given the evidence concerning the fluctuation in land values between 2005 and 2009, as well as the evidence concerning depreciation of the buildings, the MTT set the following true cash values for the real property for the remaining years: $39,734,700 for tax year 2005, $39,772,200 for tax year 2006, $36,650,500 for tax year 2007, $34,020,000 for tax year 2008, and $31,510,000 for tax year 2009. Applying the abovementioned 82/18 split, the MTT then calculated the true cash value taxable by Dearborn and the true cash value taxable by Allen Park for tax years 2004 through 2009.

In its second decision, the tribunal addressed the true cash value of the personal property for tax years 2005 through 2009. The MTT considered the valuation testimony presented by the parties. The MTT determined that the cost-less-depreciation values provided by Consiglio were more accurate than the Internet-based values provided by Clarkson. The tribunal noted that the Internet-based approach em-

ployed by Clarkson "*can* be a reliable method." However, the tribunal concluded that the valuation evidence presented by Clarkson lacked credibility because of significant contradictions and discrepancies in Clarkson's testimony and the fact that Clarkson had missed many items of personal property during his appraisal. For instance, the MTT discredited Clarkson's testimony that the age of a piece of equipment does not affect its value. The MTT also noted that Clarkson had misrepresented the nature and extent of his appraisal. In addition, even though Lesnau had provided Clarkson a list of assets belonging to the Detroit Lions and a comparable list of assets belonging to WCF Land, and even though Clarkson claimed to have personally inventoried the assets on site at the practice facility, Clarkson was unable to distinguish between his asset valuations for the two entities. Lastly, during the five years that the matter was pending, Clarkson had failed to identify true comparables for certain assets and had made no adjustments for depreciation over time with respect to several of his original valuations. The MTT concluded that Clarkson's testimony was "inconsisten[t]" and "damaged," and agreed with respondents that "Clarkson's whole methodology" was "slipshod in nature." The MTT also concluded that Clarkson's insistence on the use of resale prices rather than original acquisition prices was "illogical" and that Clarkson had provided "insufficient documentation for adjustments" over time. The tribunal noted that Clarkson did "not apply time-relevant sales or adjustments" or "contemporary sales of similar property," but instead made adjustments based entirely on his own unsupported opinions which he could not effectively defend when questioned.

In addition to its conclusions concerning Clarkson's credibility, the MTT found that petitioners' appraisal data were vague, inconsistent, and "fraught with errors." The tribunal noted that many of petitioners' data were based on sales and listings of dissimilar items, and that Clarkson had failed to place a value of any kind on approximately $2,100,000 worth of assets owned by WCF Land. Indeed, the MTT explained that Clarkson had entirely omitted numerous assets from his valuation reports. When questioned, Clarkson was unable to explain why this had happened.

In contrast, the MTT generally accepted the valuation evidence presented by respondents, including their audit report.[2] The MTT observed that Consiglio had reviewed petitioners' personal property statements and had then applied the STC multiplier tables to the original costs of the assets. Although respondents' proposed values were based on petitioners' personal property statements rather than an independent, on-site inventory, the tribunal found that respondents' valuations were more accurate because Consiglio had taken into account all items of personalty in his report, including those items that had been omitted by Clarkson.

With respect to that portion of the personal property owned by the Detroit Lions, the tribunal set the following true cash values: $1,958,153 for tax year 2005, $1,446,817 for tax year 2006, $1,315,731 for tax year 2007, $1,294,634 for tax year 2008, and $1,201,829 for tax year 2009. With respect to that portion of the personal property owned by WCF Land, the tribunal set

[2] However, the MTT did agree with petitioners' contention that certain items of personalty had already been included in the valuation of the real property, and therefore excluded those items from its determination of the personal property's true cash value.

the following true cash values: $1,347,168 for tax year 2005, $1,193,565 for tax year 2006, $1,051,465 for tax year 2007, $951,011 for tax year 2008, and $855,621 for tax year 2009.

Petitioners filed a motion for reconsideration of the MTT's decision concerning the valuation of the personal property. On October 8, 2010, the tribunal denied their motion for reconsideration.

In Docket No. 299414, Allen Park filed its claim of appeal with this Court on July 30, 2010. Petitioners filed their claim of cross-appeal on August 18, 2010. In Docket No. 300830, petitioners filed their claim of appeal with this Court on October 28, 2010. We consolidated the appeals on March 30, 2011. *Detroit Lions, Inc v Dearborn*, unpublished order of the Court of Appeals, entered March 30, 2011 (Docket Nos. 299414, 300830).

II. STANDARDS OF REVIEW

Our review of a final decision of the MTT is limited. *Malpass v Dep't of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013). Because fraud is not alleged in this case, we review the tribunal's decision for misapplication of the law or adoption of a wrong principle. Const 1963, art 6, § 28; *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). The MTT's factual findings are conclusive if they are supported by competent, substantial, and material evidence on the whole record. Const 1963, art 6, § 28; see also *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). "Substantial evidence is any evidence that reasonable minds would accept as sufficient to support the decision[.]" *In re Grant*, 250 Mich App 13, 18-19; 645 NW2d 79 (2002). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the

evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

When statutory interpretation is involved, we review de novo the MTT's decision. *Briggs Tax Serv*, 485 Mich at 75. Clear and unambiguous statutory language must be applied as written. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Whether this Court has jurisdiction is a question of law that we consider de novo. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

III. DEARBORN'S JURISDICTIONAL CHALLENGE

In Docket No. 299414, Dearborn argues that Allen Park was not entitled to claim an appeal with regard to both MTT Docket No. 00-314349 and MTT Docket No. 00-307900 because it was an aggrieved party in MTT Docket No. 00-314349 only. This argument is without merit. As explained, MTT Docket Nos. 00-314349 and 00-307900 were consolidated, and the tribunal entered a single, final decision pertaining to both cases.

The MTT may enter an order consolidating matters over which it has acquired jurisdiction. Mich Admin Code, R 792.10247(12)(b); see also MCL 205.732(c) and (d). A "final order or decision" of the MTT is appealable to this Court as a matter of right. MCL 205.753(1) and (2). Because the tribunal properly consolidated MTT Docket Nos. 00-314349 and 00-307900, and entered a single, final decision with regard to both cases, the cases had effectively merged and become one unified proceeding by the time the claim of appeal was filed in this Court. The claims and parties in MTT Docket Nos. 00-314349 and 00-307900 could have been joined in a single proceeding from the inception. Cf. *Chen*, 284 Mich App at 197.

Moreover, the present situation did not mandate the entry of a separate decision in each original case. Cf. *People ex rel MacMullan v Babcock*, 38 Mich App 336, 343; 196 NW2d 489 (1972). We conclude that Allen Park was an aggrieved party with respect to the entire merged, unified proceeding; its claim of appeal was therefore proper. See MCR 7.203(A)(2).

IV. DOCKET NO. 299414

Allen Park argues on appeal that it should have been permitted to uncap the taxable value of the practice facility following the transfer of that property from Ford Land to WCF Land on March 25, 2004, because Ford Land and WCF Land are not "commonly controlled" within the meaning of MCL 211.27a(7)(*l*). Petitioners argue on cross-appeal that the MTT committed an error of law and adopted a wrong principle when it determined the true cash value of the practice facility without regard for the property's highest and best use and usual selling price. Petitioners also argue that there was not competent, material, and substantial record evidence to support the MTT's valuation of the practice facility. We address these arguments in turn.

A. UNCAPPING THE TAXABLE VALUE

The MTT committed an error of law by concluding that the sale and transfer of the practice facility from Ford Land to WCF Land on March 25, 2004, did not give rise to uncapping the property's taxable value.

Under certain circumstances, the taxable value of property may be reassessed according to the following year's state equalized value upon the sale or transfer of the property. MCL 211.27a(3); *Schwass v Riverton Twp*, 290 Mich App 220, 222; 800 NW2d 758 (2010). "This is

known as 'uncapping' the taxable value." *Schwass*, 290 Mich App at 222. "Uncapping occurs whenever a 'transfer of ownership' occurs." *Id*., quoting MCL 211.27a(3). "Transfer of ownership" is defined as "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." MCL 211.27a(6). "The statute lists several types of conveyances that qualify as a 'transfer of ownership,' including '[a] conveyance by deed.' " *Schwass*, 290 Mich App at 222, quoting MCL 211.27a(6)(a). However, MCL 211.27a(7) enumerates "certain types of conveyances that are excepted from this definition and do not give rise to uncapping." *Schwass*, 290 Mich App at 222. Among other things, "[a] transfer of real property or other ownership interests among . . . entities . . . [that] are commonly controlled" does not give rise to uncapping. MCL 211.27a(7)(*l*).

Ford Land and WCF Land are not "commonly controlled" within the meaning of MCL 211.27a(7)(*l*). We acknowledge that the Detroit Lions and WCF Land are commonly controlled entities. The evidence established that WCF Land is entirely owned by William Clay Ford, Sr., and that the Detroit Lions is controlled by Mr. Ford, his wife, and his children. However, it is undisputed that Ford Land, a corporate entity that is entirely separate from the Detroit Lions, is not under the control of Mr. Ford.

The sale and transfer of the practice facility on March 25, 2004, took place exclusively between Ford Land and WCF Land. The Detroit Lions was not involved in the sale and transfer. It is irrelevant for purposes of MCL 211.27a(7)(*l*) that the Detroit Lions had possession of the practice facility, both before and after the sale, under the terms of the long-term lease.

The fact remains that the Detroit Lions was not a party to the transfer of the property.

Because Ford Land and WCF Land are not under common control, the sale and transfer of March 25, 2004, was not "[a] transfer of real property or other ownership interests among . . . entities [that] are commonly controlled." MCL 211.27a(7)(*l*). Accordingly, the sale and transfer of the practice facility by deed on March 25, 2004, was a "transfer of ownership," MCL 211.27a(6)(a), and necessarily gave rise to uncapping the practice facility's taxable value, MCL 211.27a(3). Furthermore, it does not matter that the practice facility's taxable value had already been uncapped when the Detroit Lions initially entered into the long-term lease with Ford Land in 2001. See MCL 211.27a(6)(g). The statute does not limit the number of times that a parcel's taxable value may be uncapped. The MTT committed an error of law when it determined that WCF Land's purchase of the practice facility from Ford Land on March 25, 2004, was a "transfer of ownership between related companies and, therefore, the taxable value of the property is not uncapped." We conclude that Allen Park was entitled to uncap the taxable value of the practice facility at the time the property was transferred from Ford Land to WCF Land on March 25, 2004. See MCL 211.27a(6)(a).[3] We therefore reverse the decision of the tribunal on this issue.

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[3] We fully acknowledge that, under the terms of the long-term lease, the Detroit Lions had possession of the practice facility. However, the fact remains that the practice facility was *owned* by Ford Land until the sale of March 25, 2004. We therefore reject any attempt by petitioners to characterize the sale of March 25, 2004, as an "equitable" or "constructive" transfer of the property from the Detroit Lions to WCF Land. The Detroit Lions merely held a leasehold interest in the property; a leasehold interest is different from an ownership interest. See *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 25 n 5; 614

B. TRUE CASH VALUE OF PRACTICE FACILITY

"[T]rue cash value" is the starting point for determining the taxable value of real and tangible personal property in Michigan. Const 1963, art 9, § 3; *Wayne Co v State Tax Comm*, 261 Mich App 174, 178; 682 NW2d 100 (2004); see also *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 483; 473 NW2d 636 (1991). In general, property must be assessed at 50 percent of its true cash value. Const 1963, art 9, § 3; MCL 211.27a(1); see also *WPW Acquisition Co v Troy*, 250 Mich App 287, 298; 646 NW2d 487 (2002). "[T]rue cash value" is defined in relevant part as "the usual selling price . . . that could be obtained for the property at private sale, and not at auction sale . . . ." MCL 211.27(1). "True cash value is synonymous with fair market value," *WPW Acquisition*, 250 Mich App at 298; see also *Jones & Laughlin*, 193 Mich App at 353, and refers to "the probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation," *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 28; 737 NW2d 187 (2007). The Legislature has provided the following nonexhaustive list of factors that should be considered in determining a property's true cash value:

> [T]he 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; minerals, quarries, or other valuable deposits not otherwise exempt under this act known to be available in the land and their value. [MCL 211.27(1).]

NW2d 634 (2000). The sale and transfer of March 25, 2004, took place exclusively between Ford Land and WCF Land. The Detroit Lions was not a party to the transfer.

Petitioners assert that the tribunal committed legal error by concluding that the highest and best use of the property as improved was its existing use as a practice facility. Petitioners also contend that the tribunal improperly rejected their proposed alternative highest and best uses for the property as improved. We disagree. The concept of "highest and best use" is fundamental to the determination of true cash value. See *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 633; 705 NW2d 549 (2005). " 'Highest and best use' means 'the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.' " *Id*. at 633 (citation omitted). A highest and best use determination "requires simply that the use be legally permissible, financially feasible, maximally productive, and physically possible." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 285; 730 NW2d 523 (2006). "[I]t is the duty of the tribunal to hypothesize the highest probable price at which a sale would take place." *Safran Printing Co v Detroit*, 88 Mich App 376, 382; 276 NW2d 602 (1979). "[E]xisting use may be indicative of the use to which a potential buyer would put the property and is, therefore, relevant to the fair market value of the property." *Id*.

The MTT specifically considered and rejected the alternative highest and best uses proposed by petitioners. The tribunal found that the local zoning laws would not permit using the property as an industrial facility. See *Detroit Plaza*, 273 Mich App at 285. The tribunal further determined that using the property as an office complex or technology park would substantially decrease the property's value, and that such alternative uses therefore "violate[d] the princip[les] of highest and best use." These findings were supported by competent,

material, and substantial evidence. The MTT did not misapply the law or adopt a wrong principle when it determined that the practice facility's highest and best use was its existing use. See *Briggs Tax Serv*, 485 Mich at 75. The evidence established that petitioners' use of the property as an integrated professional football team headquarters and practice facility was the most profitable use to which the property could feasibly be put. See *Stadium Auth*, 267 Mich App at 633.

We recognize that the MTT may not determine a property's true cash value solely on the basis of its current use "where such use bears no relationship to what a likely buyer would pay for the property[.]" *Safran*, 88 Mich App at 382. However, the *Safran* Court did not hold that a property's existing use could never be used to determine its usual selling price. *Clark Equip Co v Leoni Twp*, 113 Mich App 778, 783; 318 NW2d 586 (1982). In *Safran*, 88 Mich App at 382, the property was being used as a printing plant, even though this use was obsolete and it was undisputed that no buyer would purchase the property for this purpose. Accordingly, the property's existing use was not its highest and best use. *Id*. In the present case, conversely, the MTT's valuations were based on record evidence tending to show what a likely buyer would pay for the property. There was competent, material, and substantial evidence on the whole record to support the tribunal's determination that the practice facility's existing use was its highest and best use. See *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 408; 576 NW2d 667 (1998).[4] Consequently, the tribunal properly

[4] We note that in a previous appeal involving tax year 2002, this Court affirmed the MTT's determination that the practice facility's existing use was its highest and best use. *Detroit Lions, Inc v Dearborn*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2007 (Docket No. 266260), slip op at 3.

considered the practice facility's existing use in determining its usual selling price. See *id*.

Petitioners also assert that the practice facility is a "special purpose" property for which no active market exists, and that different standards should therefore govern its valuation. It is unclear whether the MTT found the overall practice facility to be unique in this case. Indeed, the tribunal explained that it "did not find any components that are unique to the owner other than the indoor practice field." We acknowledge that "[m]erely because property is put to an unusual use does not render it unique for purposes of property taxes." *Safran*, 88 Mich App at 383. At the same time, however, this Court has previously affirmed the MTT's determination that the practice facility is a "special-purpose" property. *Detroit Lions, Inc v Dearborn*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2007 (Docket No. 266260), slip op at 3. But irrespective of the tribunal's exact finding on this matter, we note that even if a parcel has a special purpose and limited market, its existing use may still constitute its highest and best use and provide the best evidence of its usual selling price. See *Great Lakes*, 227 Mich App at 408; *Clark Equip*, 113 Mich App at 785. We perceive no error with respect to this issue.

Nor do we agree with petitioners' contention that the MTT erred by relying on the practice facility's original build-to-suit cost, less depreciation, to determine the property's true cash value for tax years 2004 through 2009.

Petitioners argue that the practice facility's original cost, less depreciation, should not have been used to value the real property. However, experts on both sides agreed that some version of the cost approach should be used to determine the value of the buildings and im-

provements. The cost-less-depreciation approach is one of the traditional methods of calculating true cash value. *Meadowlanes*, 437 Mich at 484-485. "It is the duty of the Tax Tribunal to select the approach which provides the most accurate valuation under the circumstances of the individual case." *Antisdale v Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984). It is well settled that the cost-less-depreciation method is particularly appropriate for valuing special-purpose properties with a limited or inadequate market. *Presque Isle Harbor Water Co v Presque Isle Twp*, 130 Mich App 182, 193 n 14; 344 NW2d 285 (1983); *Tatham v Birmingham*, 119 Mich App 583, 591; 326 NW2d 568 (1982); see also *Twenty-two Charlotte, Inc, v Detroit*, 294 Mich 275, 284-285; 293 NW 647 (1940).

Of course, under the traditional cost-less-depreciation method, the land is valued in its unimproved state and depreciation (including depreciation due to obsolescence) is then deducted from the *replacement or reproduction* cost of the buildings and improvements. See *Meadowlanes*, 437 Mich at 484 n 18. Here, in contrast, the MTT deducted depreciation from the *original* build-to-suit cost rather than the replacement or reproduction cost. "However, in and of itself, this does not render the [MTT's] cost approach invalid because 'variations of the [traditional] approaches and entirely new methods may be useful if found to be accurate and reasonably related to the fair market value of the subject property.' " *Wayne Co*, 261 Mich App at 209, quoting *Meadowlanes*, 437 Mich at 485. Indeed, this modified original-cost-less-depreciation approach has been used to value special-purpose properties. See *Wayne Co*, 261 Mich App at 210.

"[T]he determination of true cash value is not an exact science and . . . often involves a reconciliation of

various approaches." *Great Lakes*, 227 Mich App at 398. Moreover, it frequently "involves a considerable amount of judgment and reasonable approximation," and "there is no rule of law that requires the Tax Tribunal to quantify every possible factor affecting value." *Id*. at 398-399. It is within the expertise of the MTT to determine which method provides the most accurate valuation under the particular circumstances of the case. *Meadowlanes*, 437 Mich at 485. In the case at bar, the tribunal determined that a modified cost-less-depreciation approach, based on the original build-to-suit cost, provided the most accurate value of the practice facility. This determination did not constitute an error of law, and it was supported by substantial evidence. Const 1963, art 6, § 28.

As explained earlier, the MTT determined that the original build-to-suit cost of $33,000,000 was the best evidence of the true cash value of the buildings and improvements in 2004. With respect to the value of the land, the tribunal found that the $5,470,000 figure advanced by petitioners was "reasonable for the area and [will be] used to determine the value of the subject property." Adding these sums together, the tribunal determined that the total true cash value of the real property was $38,470,000 for tax year 2004. Taking into account the fluctuation in land values between 2005 and 2009, as well as the evidence concerning depreciation and obsolescence, the MTT set the following true cash values for the practice facility for the remaining years: $39,734,700 for tax year 2005, $39,772,200 for tax year 2006, $36,650,500 for tax year 2007, $34,020,000 for tax year 2008, and $31,510,000 for tax year 2009.[5] This Court may not

[5] Applying the aforementioned 82/18 split, the MTT then calculated the amount taxable by Dearborn and the amount taxable by Allen Park for tax years 2004 through 2009.

substitute its judgment for that of the MTT, even if we would have reached a different result than the tribunal. *Black v Dep't of Social Servs*, 195 Mich App 27, 30; 489 NW2d 493 (1992). The MTT's calculation of the practice facility's true cash value for tax years 2004 through 2009 was principled and reasoned. We affirm the tribunal's determinations concerning the true cash value of the real property, which were supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28.

V. DOCKET NO. 300830

Petitioners assert that the MTT erred by adopting respondents' proposed values, which were based on the STC multiplier tables. Petitioners also contend that the tribunal adopted a wrong principle and committed an error of law by valuing the personal property in gross by category rather than taking into account the market value of each individual asset. For the reasons that follow, we conclude that the tribunal committed an error of law with regard to the valuation of the personal property because it relied exclusively on respondents' proposed values and did not conduct an independent analysis of its own.

Like real property, tangible personal property must be taxed on the basis of its true cash value. Const 1963, art 9, § 3; see also *Wayne Co*, 261 Mich App at 178. "The petitioner has the burden of proof in establishing the true cash value of the property." MCL 205.737(3). The MTT must apply its expertise to the facts of the case and make an independent determination of true cash value. *Jones & Laughlin*, 193 Mich App at 353.

Petitioners' expert, J. Michael Clarkson, purported to determine the market value for each asset using Internet e-commence data. However, as explained previously,

the MTT concluded that the valuation evidence presented by Clarkson lacked credibility for numerous reasons. The tribunal also found that Clarkson's appraisal data were vague, inconsistent, and "fraught with errors." The tribunal noted that the data were based on sales and listings of dissimilar items, and found that Clarkson had wholly omitted approximately $1,200,000 in assets owned by WCF Land from his appraisal. In contrast, the MTT generally accepted the valuation evidence presented by Alphonso Consiglio. Consiglio had reconciled petitioners' personal property statements and had applied the STC multiplier tables to the original asset values. The tribunal noted that Consiglio had taken into account all items of personalty in his report, including those items that had been omitted by Clarkson.

We do not disturb the MTT's findings regarding the credibility of the witnesses. It is exclusively for the tribunal to assess the credibility of the witnesses who appeared before it. *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 436; 830 NW2d 785 (2013); *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 636; 806 NW2d 342 (2011). We must defer to the tribunal's determinations of witness credibility. See *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011).

Nevertheless, we are compelled to reverse in this case because the MTT committed an error of law by failing to undertake an independent determination of true cash value. Upon finding that "[p]etitioners have not carried their burden of proving that the assessment is excessive," the tribunal simply adopted the personal property values advanced by respondents, at least with respect to those assets owned by the Detroit Lions. And with respect to those assets owned by WCF Land, it

appears that the tribunal merely adopted respondents' proposed values after making certain downward adjustments for items that had already been accounted for as part of the realty.

It is undisputed that the personal property values advanced by respondents were based on the STC multiplier tables. The STC multiplier tables are used by taking the property's historical or original cost by year of acquisition and applying a multiplier to convert the cost to current true cash value. *Wayne Co*, 261 Mich App at 181. But the STC multiplier tables are merely guides, and do not have the force of law. *Danse Corp v Madison Heights*, 466 Mich 175, 182; 644 NW2d 721 (2002); *Wayne Co*, 261 Mich App at 245. Respondents' proposed personal property values were incomplete because they were not developed after research and a review of the other traditional methods for determining true cash value. *Meadowlanes*, 437 Mich at 485-486.

The tribunal, itself, similarly failed to consider other traditional methods of valuation. Upon finding that petitioners had not carried their burden of proof, the MTT simply adopted the values proposed by respondents (with certain downward adjustments for the assets owned by WCF Land) without making its own, independent determination of true cash value. This constituted error. *Jones & Laughlin*, 193 Mich App at 355. The tribunal must at least consider the other traditional methods of determining true cash value, *Wayne Co*, 261 Mich App at 206, and "has the duty to determine the property's true cash value using the approach that most accurately reflects the value of the property," *Pontiac Country Club*, 299 Mich App at 435. Specifically, the tribunal must "consider multiple approaches to determine . . . true cash value, correlating, reconciling, and weighing the values derived under the

various approaches to reach a final estimate of the property's value." *Id*. There is simply no record evidence that the MTT ever considered any of the other approaches before setting the true cash value of the personal property. Because the tribunal did not consider the other approaches and reconcile the values derived thereunder, it is impossible to discern whether the STC multipliers provided an accurate calculation of the true cash value of the personal property in this case. Cf. *Lionel Trains, Inc v Chesterfield Twp*, 224 Mich App 350, 352; 568 NW2d 685 (1997).

We conclude that the tribunal "shirk[ed] its duties" by failing to make an independent determination of the true cash value of the personal property. *Pontiac Country Club*, 299 Mich App at 436. The tribunal was not entitled to merely adopt the values advanced by respondents, which were derived from the STC multiplier tables, without conducting its own analysis. We accordingly reverse the MTT's decision concerning the true cash value of the personal property and remand to the tribunal. On remand, the MTT shall make an independent determination of the true cash value of the personal property. *Jones & Laughlin*, 193 Mich App at 355-356.

In Docket No. 299414, we affirm in part and reverse in part. In Docket No. 300830, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, no party having prevailed in full.

BECKERING, P.J., and M. J. KELLY, J., concurred with JANSEN, J.

STURGIS v STURGIS

Docket No. 313672. Submitted August 7, 2013, at Lansing. Decided September 17, 2013. Approved for publication October 22, 2013, at 9:05 a.m.

Kimberly Sturgis (plaintiff) and Urian Sturgis, Sr. (defendant), were divorced in 2000. Following that time, defendant's parenting time with the children was suspended and reinstated several times and changed more than once from supervised to unsupervised and back again. In 2012, defendant moved in the Wayne Circuit Court, Family Division, for a change of custody. The court, Maria L. Oxholm, J., denied the motion but reinstated defendant's parenting time. Plaintiff appealed, additionally asserting that the court had erred by failing to hold a de novo hearing on her motion for termination of defendant's parental rights.

The Court of Appeals *held*:

1. MCL 552.507(4) provides that upon the written request of either party or motion of the court, the trial court must hold a de novo hearing on any matter that has been the subject of a referee hearing. The referee, however, did not deny plaintiff's motion to terminate defendant's parental rights, but instead stated that the trial court could address it at a later hearing. Because the referee did not rule on the issue of termination, the statute did not require the trial court to hold a de novo hearing. The trial court, which was in the domestic-relations section of the family division of the Wayne Circuit Court, had jurisdiction to hear and decide the termination issue but decided that the juvenile section of the family division was more capable of deciding the matter because the judge had never handled a termination case and the ongoing divorce case was a separate matter. In light of the Wayne Circuit Court's division of labor in its family division, the trial court chose to conserve the resources of the court, as it was authorized to do under MCR 3.215(F)(2), and its decision to not handle the matter was not legally erroneous.

2. The trial court's findings with regard to a reasonable likelihood of abuse or neglect during defendant's parenting time were against the great weight of the evidence, and the court committed a palpable abuse of discretion. Plaintiff argued that the

trial court incorrectly determined that it was in the children's best interests to reinstate defendant's parenting time. Under MCL 722.27(1)(c), a trial court may modify or amend its previous judgments or orders for proper cause shown or because of a change of circumstances. If the proposed change does not change the custodial environment, the burden is on the parent proposing the change to establish by a preponderance of the evidence that the change is in the child's best interests. A trial court may use both the statutory best-interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting-time statute, MCL 722.27a(6), when deciding whether to award parenting time. MCL 722.27a(6)(c) provides that a court may consider whether there is a reasonable likelihood of abuse or neglect of the child during parenting time. The Court of Appeals took judicial notice of two prior cases in which defendant's parental rights to other children were terminated. The trial court in this case knew about defendant's entire history, yet concluded that he nonetheless should have parenting time with the two children, who clearly exhibited behavioral and emotional problems based on defendant's conduct. Defendant's criminal sexual conduct convictions; his history of violence; his son's plea that he not be in defendant's care; his abhorrent, abusive behavior towards the children in the other cases, including repugnant disciplinary tactics; and his outright denial of culpability suggested a strong likelihood of future abuse or neglect of the children during parenting time.

Affirmed in part and reversed in part.

Kimberly Sturgis *in propria persona*.

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

PER CURIAM. Plaintiff appeals the trial court's ruling on defendant's motion for a change in custody. Plaintiff specifically challenges the trial court's failure to hold a de novo hearing on her motion for termination of defendant's parental rights and the trial court's order reinstating defendant's parenting time. For the reasons set forth, we affirm in part and reverse in part.

Plaintiff argues that the trial court erred by denying her a de novo hearing on the subject of her termination motion. "Whether there is a statutory requirement for a hearing de novo . . . is a question of law calling for

review de novo on appeal." *Cochrane v Brown*, 234 Mich App 129, 131; 592 NW2d 123 (1999). MCL 552.507(4) provides:

> The court shall hold a de novo hearing on any matter that *has been the subject of a referee hearing*, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party. [Emphasis added.]

MCR 3.215(F)(2) provides, in relevant part:

> The court may [during a de novo hearing], in its discretion:
>
> * * *
>
> (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

MCL 712A.19b(1) provides that a "child, guardian, custodian, concerned person, agency, or children's ombudsman" may file a petition to terminate a person's parental rights.

MCL 552.507(4) does not require the trial court to hold a de novo hearing because the termination issue was not the subject of the referee hearing. The referee did not deny plaintiff's motion to terminate defendant's parental rights, but instead stated that the trial court could address it at a later hearing. The purpose of a de novo hearing is for the trial court to "render[] its own decision based on the evidence, independent of any prior . . . ruling." *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 219; 707 NW2d 353 (2005). Because the referee did not make a ruling on the issue of termination, there was no basis for a de novo hearing.

The trial court had jurisdiction to hear and decide the termination issue, but the trial court decided that the juvenile section of the family division of the circuit court was more capable of deciding the matter.

> The Wayne Circuit Court developed a family court plan that divided its family division into a juvenile section and a domestic relations section, each of which is assigned particular causes of action in part because the geographical distance between the Lincoln Hall of Justice (where child protective proceedings are heard) and the Coleman A. Young Municipal Building (where domestic relations matters are heard.) Wayne Circuit Court Administrative Order No. 1997–04; Wayne Circuit Court Administrative Order No. 1997–05. For example, the juvenile section is assigned delinquency and abuse and neglect cases, whereas the domestic relations section is assigned cases pertaining to divorce, paternity, support, custody, and emancipation of minors. Each section, however, has the same authority and jurisdiction as the other section over matters enumerated in MCL 600.1021. [*In re AP*, 283 Mich App 574, 595-596; 770 NW2d 403 (2009).]

The trial court determined that plaintiff should file a petition in the juvenile section of the family division of the circuit court because the judge had never handled a termination case and the ongoing divorce case was a separate matter. In light of the Wayne Circuit Court's division of labor, the trial court chose "to conserve the resources of . . . the court." MCR 3.215(F)(2)(d). Thus, while the court clearly could have handled the matter, its decision not to do so was not legally erroneous.

Plaintiff argues the trial court incorrectly determined that it was in the children's best interests to reinstate defendant's parenting time. An appellate court must affirm a trial court's parenting-time orders " 'unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear

legal error on a major issue.' " *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010) (citation omitted). "Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Id*. at 21. "In child custody cases, '[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.' " *Id*. (citation omitted) (alteration in original). "Clear legal error occurs 'when the trial court errs in its choice, interpretation, or application of the existing law.' " *Id*. (Citation omitted.)

"Under MCL 722.27(1)(c), a trial court may '[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . .' " *Id*. at 22 (alterations in original). The definition of "proper cause" or "change of circumstances" is "more expansive . . . when a modification in parenting time does not alter the established custodial environment." *Id*. at 28.

"If the proposed change does not change the custodial environment, . . . the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child[ren's] best interests." *Id*. at 23. A trial court may use "[b]oth the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6)" when deciding whether to award parenting time. *Id*. at 31. When a trial court makes a parenting-time decision, it may limit its findings to the contested issues. *Id*. at 31-32.

MCL 722.23 lists the following relevant best-interest factors:

> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> * * *
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> * * *
>
> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

MCL 722.27a(6)(c) provides that a court may consider whether there is a "reasonable likelihood of abuse or neglect of the child during parenting time."

With all due respect to the trial court, we strongly disagree with its implicit finding that there was not a "reasonable likelihood of abuse or neglect of the child during parenting time." MCL 722.27a(6)(c). Since the divorce judgment in 2000, the trial court repeatedly changed defendant's parenting time from supervised to unsupervised and back again, his parenting time was suspended and reinstated numerous times, and defendant only sporadically attended supervised parenting visits. At age 10, defendant's daughter was drawing sexually explicit pictures at school, and his son, age 12, was writing letters stating that he was sexually active and that he likes to watch pornographic films. Plaintiff also reported to the police that defendant's other daughter, age 11, asked his son to touch her breast. The trial court stated that there was no violation of any law and that it did not believe that defendant was intentionally showing the children pornography. However, the court acknowledged defendant's use of inappropriate language in disciplining his son, but suggested that discipline "was not the worst thing in the world" for the

child. The court disregarded the son's statement that he did not wish to be with his father at all.

The record reveals that defendant has at least two prior criminal sexual conduct convictions and that he failed to register as a sex offender as required by state law. While the record reflects that the trial court was aware of the entirety of defendant's history, we specifically take judicial notice of *In re Stephens*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2007 (Docket Nos. 271015 and 271016), and *In re Sturgis*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2008 (Docket Nos. 280118 and 280119).

In *Stephens*, unpub op at 2, this Court affirmed the trial court's decision to terminate defendant's parental rights to one minor child. Evidence showed that defendant had severely abused another child in the household, beating and whipping the child with a belt and causing burns, bruises, and marks on the child's body. *Id*. at 4. Defendant also admitted that he punished the child "by forcing him to stand in a closet and to stand with his arms outstretched for long periods of time." *Id*. In the same case, this Court observed that defendant had caused severe injuries to yet another child in the household when he bathed the child "in scalding hot water, either negligently or as a punishment for failures in toilet training." *Id*. at 5. Defendant had previously caused bruises, marks, and burns on the same child. *Id*. The police were unable to prosecute defendant for the abuse because the mother, Jennifer Stephens, refused to cooperate with the police. *Id*. In the case, "[t]he majority of caseworkers and other professional opined that . . . abuse by [defendant] would likely recur." *Id*. at 6.

In *Sturgis*, unpub op at 2, defendant's parental rights were terminated for another child, Y., who was born during the proceedings in *Stephens*. This Court observed that termination of defendant's parental rights to the baby was proper under MCL 712A.19b(3)(b)(*i*), which states that the court may terminate parental rights if

> [t]he child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (*i*) The parent'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 in the foreseeable future if placed in the parent's home.

Defendant did not challenge that ground for termination, but this Court observed that it had

> determined in *In re Stephens, supra*, slip op at 5–6, that [defendant] caused physical injury or physical abuse of [Y.'s] siblings, [Z.] and [S.]. Further, there is a reasonable likelihood that [Y.] would suffer physical injury or abuse in the foreseeable future if placed in [defendant's] home. [Defendant] continued to blame his inappropriate behavior on his upbringing and attempted to minimize what happened previously. He also denied using some of the forms of punishment described by [Z.] and claimed that [Z.] slept in the basement because he wanted to. [Defendant] admitted that [S.] was seriously burned while in his care, but gave several explanations for how it happened, denied the severity of the burns, and continued to maintain that it was an accident. He never addressed the older injuries that were detected on [S.]. He also never addressed the inappropriateness of potty training a child in a basement laundry tub. Additionally, his testimony denying criminal responsibility associated with his prior convictions for criminal sexual conduct, his lawsuits associated with these proceedings, and his accusations of corruption and racism

> demonstrate a pattern of blaming others rather than accepting responsibility for his actions. The trial [court] did not clearly err in finding that there was a reasonable likelihood that [Y.] would be injured or abused in the foreseeable future if placed in [defendant's] home. [*Id*. at 2-3.]

The Court also noted other grounds for terminating defendant's parental rights to the child:

> The evidence showed that [Y.] spent her first three weeks in the care of her paternal grandmother, whom [defendant] admitted was an alcoholic. Further, [defendant] continued to fail to accept responsibility for his prior abusive behavior and Stephens continued to minimize his culpability and make excuses for his behavior. Thus, there was a reasonable likelihood that [Y.] would be injured or abused if placed in the care of either respondent.
>
> With regard to [MCL 712A.19b(3)(k)(*iii*)], this Court determined in *In re Stephens, supra*, slip op at 5–6, that [defendant's] abuse of [Y.'s] siblings included battering, torture, and other severe physical abuse. The trial court did not clearly err in finding that termination of [defendant's] parental rights was appropriate under [MCL 712A.19b(3)(k)(*iii*)]. [*Id*. at 3.]

Again, the record indicates that the trial court knew about defendant's entire history, yet concluded that defendant should have parenting time with the two children now at issue, who clearly exhibited behavioral and emotional problems resulting from defendant's conduct.

While we generally affirm parenting-time orders, the record in this case simply demands a different result, and we specifically hold that the trial court's findings with regard to the lack of a reasonable likelihood of abuse or neglect were against the great weight of the evidence and that the court committed a palpable abuse of discretion. *Shade*, 291 Mich App at 20-21. The record,

including defendant's criminal sexual conduct convictions, his son's plea that he not be in defendant's care, and defendant's abhorrent, abusive behavior towards the other children in cases before this Court strongly suggest a "reasonable likelihood of abuse or neglect of the child during parenting time." MCL 722.27a(6)(c). Indeed, defendant's history of violence, repugnant disciplinary tactics, and outright denial of culpability indicate a strong likelihood of continued abuse, just as the Court found in defendant's prior termination cases.

Affirmed in part and reversed in part.

SAAD, P.J., and K. F. KELLY and GLEICHER, JJ., concurred.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered August 22, 2013:

DANIEL ADAIR v STATE OF MICHIGAN, Docket No. 302142. Pursuant to the opinion issued concurrently with this order, the motion to expedite consideration of objections to special master's report pursuant to MCR 7.206(E)(2) is denied as moot. Additionally, this case is referred to Special Master Michael Warren for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on referral in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority until they are concluded. As stated in the accompanying opinion,* the Special Master shall take proofs and make factual findings regarding plaintiff's claim that the existing appropriations do not fully fund the necessary costs of the CEPI mandates. The proceedings before the Special Master are limited to this issue only. The parties shall file with this Court a copy of all pleadings and documents filed with the Special Master. The Special Masters's findings of fact and other determinations shall be made in a written report to be filed with this Court. Transcripts of the proceedings before the Special Master shall be transmitted to this Court within 21 days after the issuance of the Special Master's report. The parties shall have 21 days from the filing of the transcripts in which to file objections to the Special Master's report. The objections shall be accompanied by a supporting brief and exhibits. Answers to the objections made by opposing parties shall be filed within 14 days of the filing of the objections.

Order Entered October 1, 2013:

OSHTEMO CHARTER TOWNSHIP v KALAMAZOO COUNTY ROAD COMMISSION, Docket No. 304986. The Court orders that the motion for reconsideration is granted, and this court's opinion issued June 25, 2013, is hereby vacated. A new opinion** is attached to this order. The parties are advised that only the last paragraph of the opinion has been altered.

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* Reported at 302 Mich App 305—REPORTER.

** Reported at 302 Mich App 574—REPORTER.