MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

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[1] From October 14, 2013.

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COURT OF APPEALS CASES

SANDERS v PERFECTING CHURCH

Docket No. 308416. Submitted July 9, 2013, at Detroit. Decided July 16, 2013. Approved for publication October 24, 2013, at 9:00 a.m.

Brenda Sanders brought an action against Perfecting Church in the Wayne Circuit Court after she slipped and fell on motor oil in defendant's parking lot. Defendant moved for summary disposition. The court, Gershwin A. Drain, J., held that plaintiff was a licensee at the time that she was injured, but denied the motion for summary disposition, concluding that there was a question of fact regarding whether the oil was an open and obvious condition. Plaintiff moved for reconsideration of the court's determination that she was a licensee. The court denied plaintiff's motion with regard to whether she was a licensee, but further announced that it had reconsidered its earlier decision denying defendant's motion for summary disposition. On reconsideration, the court granted summary disposition in favor of defendant. Plaintiff appealed.

The Court of Appeals *held*:

In a premises liability action, a plaintiff must prove (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. The duty owed to a visitor by a landowner depends on whether the visitor is a trespasser, licensee, or invitee at the time of injury. A plaintiff is entitled to invitee status only if the purpose for which he or she was invited onto the owner's property was directly tied to the owner's commercial business interests. Absent a showing that a church's invitation to attend its services was for an essential commercial purpose, a plaintiff should be considered a licensee and not an invitee. In this case, the trial court did not err by holding that there was no genuine issue of material fact that plaintiff was a licensee. The predominant or essential purpose for which defendant invited people to its premises was to hold religious services. Although meals could be purchased at the church after the service, members of the congregation were not required to purchase a meal and income generated from the sale of postservice meals was minimal. Because plaintiff was a licensee, defendant's duty was only to warn her of hidden, unreasonably dangerous conditions.

There was no record evidence that defendant knew or had reason to know of such a condition. The trial court properly granted summary disposition in favor of defendant.

Affirmed.

NEGLIGENCE — PREMISES LIABILITY — ATTENDANCE AT RELIGIOUS SERVICES — LICENSEE.

The duty owed to a visitor by a landowner depends on whether the visitor is a trespasser, licensee, or invitee at the time of injury; a plaintiff is entitled to invitee status only if the purpose for which he or she was invited onto the owner's property was directly tied to the owner's commercial business interests; absent a showing that a church's invitation to attend its services was for an essential commercial purpose, a plaintiff should be considered a licensee and not an invitee.

Brenda Sanders, *in propria persona*.

Johnston, Sztykiel, Hunt, Goldstein & Fitzgibbons, PC (by *Eric S. Goldstein*) for Perfecting Church.

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

WILDER, J. In this slip and fall case, plaintiff, Brenda Sanders, appeals as of right the trial court's order granting summary disposition in favor of defendant and denying her motion for reconsideration. Plaintiff also challenges the trial court's order denying her motion to amend her complaint and the order denying her motion to compel discovery.[1] We affirm.

I. BACKGROUND

On July 8, 2007, plaintiff slipped and fell on motor oil that was located in defendant church's parking lot. Plaintiff filed the instant action, alleging that she was an

[1] We note defendant's jurisdictional challenge with respect to the trial court's order denying plaintiff's motion to amend the complaint and the order denying plaintiff's motion to compel discovery. We find that it has no merit.

invitee at the time of the injury and that she was injured as a result of defendant's failure to inspect for and protect her from dangerous conditions on its property. Before the close of discovery, defendant moved for summary disposition. Defendant alleged that plaintiff was a licensee at the time she was injured and that, even if she was an invitee, it did not owe her a duty pursuant to the open and obvious danger doctrine. After the hearing, the trial court found that there was a question of fact regarding whether the oil was an open and obvious condition and denied defendant's motion for summary disposition. The trial court further found, as a matter of law, that plaintiff was a licensee at the time that she was injured. Plaintiff moved the trial court to reconsider its decision and requested that she be able to submit the question of her status as an invitee or licensee to the jury. After a hearing, the trial court denied plaintiff's motion and announced sua sponte that it had reconsidered its prior denial of summary disposition and granted dismissal in favor of defendant because it concluded that plaintiff was a licensee.

II. ANALYSIS

A. SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred by granting summary disposition in favor of defendant because there was a material question of fact with regard to her status as an invitee at the time that she was injured. We disagree.

A trial court's determination regarding a motion for summary disposition is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Although the trial court did not identify the subrule under which it granted summary disposition, it is apparent that the motion was granted under MCR 2.116(C)(10) because

the trial court considered documentary evidence beyond the parties' pleadings. *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304 n 3; 788 NW2d 679 (2010). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in a light most favorable to the party opposing the motion." *Smith*, 460 Mich at 454 (quotation marks and citations omitted). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. *Id*.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty owed to a visitor by a landowner depends on whether the visitor was a trespasser, licensee, or invitee at the time of the injury. *Hoffner v Lanctoe*, 492 Mich 450, 460 n 8; 821 NW2d 88 (2012).

> A "trespasser" is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him by "willful and wanton" misconduct.
>
> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A

> landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. . . .
>
> The final category is invitees. An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000) (citations omitted) (alterations in original).]

In the present case, there is no dispute that plaintiff was not a trespasser; thus, the question is whether she was a licensee or an invitee. In *Stitt*, our Supreme Court held that a plaintiff will be granted invitee status only if the purpose for which she was invited onto the owner's property was "directly tied to the owner's commercial business interests." *Id*. at 603-604. "Absent a showing that the church's invitation to attend its services was for an *essential* commercial purpose, [a plaintiff] should be considered a licensee and not an invitee. A person who attends church as a guest enjoys the 'unrecompensed hospitality' provided by the church in the same way that a person entering the home of a friend would." *Id*. at 606 (emphasis added).

While it is undisputed that plaintiff intended to attend Sunday church service on defendant's property

on the day that she was injured, she later asserted in an affidavit that she also was going to purchase a meal at defendant's café after the service. Related to the café, defendant's business manager, Cynthia Williams, stated in an affidavit that the meals are available for purchase "by those who attended services at a minimal cost." She further averred that "there are no and/or minimal proceeds from the sale of these meals over and above the cost of their preparation" and that if there are any proceeds, they are placed into the church's general fund "as an additional form of minimal contribution."

After reviewing the evidence in the light most favorable to plaintiff, we agree with the trial court that a reasonable juror could not have concluded that defendant invited people, including plaintiff, to its premises on July 8, 2007, for an "essential commercial purpose." The predominant or essential purpose for which defendant invited people to its premises was to hold religious services; the congregation was not required to stay and purchase any meals after the religious service, and any income generated from the sale of the postservice meals was "minimal." The trial court did not err by holding that there was no genuine issue of material fact that plaintiff was a licensee. Because defendant's primary purpose in having people attend its premises was for religious services, any "commercial" aspect was purely ancillary to the main religious purpose and minimal in scope.

Plaintiff's contention, that because she had spent money at the church on previous occasions she was an invitee on the day of the accident, was an argument specifically rejected by the *Stitt* Court when it held that a plaintiff's prior financial dealings with a church have "no bearing" on her status at the time of the accident. *Id*. at 605-606. Again, the primary consideration in determining a visitor's status at the time of the accident

is "the owner's reason for inviting persons onto the premises." *Id*. at 604.

We further note that this case is distinguishable from other cases the *Stitt* Court analyzed, which all held that the respective church visitors were invitees. These other cases have held that invitee status was warranted when the visitor was on the church premises for a commercial business purpose. *Id*. at 601. In *Bruce v Central Methodist Episcopal Church*, 147 Mich 230; 110 NW 951 (1907), the defendant church was held liable after the plaintiff was injured while painting the church building. "The plaintiff was working for a contractor, painting the ceiling of the church when the scaffolding [or stage] on which he was standing broke."[2] *Stitt*, 462 Mich at 601. In another case, the defendant church was held liable after the plaintiff was injured when she was leaving a bingo game that was held on the defendant's property. *Manning v Bishop of Marquette*, 345 Mich 130, 138-139; 76 NW2d 75 (1956). Notably, the bingo game was held on a Tuesday night, when no other religious services were taking place. *Id*. at 132. Lastly, in *Kendozorek v Guardian Angel Catholic Parish*, 178 Mich App 562, 564, 568; 444 NW2d 213 (1989), rev'd on other grounds *Orel v Uni-Rak Sales Co*, 454 Mich 564 (1997), a plaintiff who was injured at a carnival held on the church grounds was afforded invitee status because this Court found that the "purpose of the carnival rides was to attract people to come and spend money for the benefit of [the] defendant church."[3] In sum, all these cases are distinguishable because none involves the plaintiff's participation in the religious services of the

[2] The *Bruce* Court explained that it was a "scaffolding or stage" that the defendant had erected "for the use of employés of defendant and others engaged in the work of erecting the church" that the plaintiff was using when it failed. *Bruce*, 147 Mich at 233.

[3] To be clear, the carnival was part of the defendant's "Applefest" fundraising venture it held every year. *Kendzorek*, 178 Mich App at 564.

church. In the present case, defendant's primary purpose in inviting people to its premises was for conducting religious services.

Therefore, because plaintiff was a licensee, defendant had no duty to warn plaintiff unless it knew of a hidden, unreasonably dangerous condition. *Stitt*, 462 Mich at 596. In this case, there is no evidence on the record that defendant knew or had reason to know of any such condition. Further, a landowner has no duty to inspect the premises to make it safe for a licensee's visit. *Id*. Accordingly, the trial court properly granted summary disposition in favor of defendant.

B. MOTION FOR RECONSIDERATION

Plaintiff next argues that the trial court improperly determined as a matter of law that she was a licensee at the time of her injury and therefore erred by denying her motion seeking reconsideration of her status. We review a trial court's decision regarding a motion for reconsideration for an abuse of discretion. *Woods v SLB Prop Mgt*, 277 Mich App 622, 629-630; 750 NW2d 228 (2008). Generally, in a premises liability action, if there is evidence from which a plaintiff's invitee status might be inferred, then the question of duty is one for the jury. *Stitt*, 462 Mich at 595. However, because we have already determined that a reasonable juror could not have concluded that defendant invited people onto its premises on July 8, 2007, for an "essential commercial purpose," we conclude that the trial court did not abuse its discretion by denying plaintiff's motion.

C. MOTION TO AMEND COMPLAINT

Next, plaintiff argues that the trial court improperly denied her motion to amend the complaint. We review a

trial court's decision regarding a plaintiff's motion to amend the pleadings for an abuse of discretion. *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009).

After plaintiff fell in defendant's parking lot, she was brought to defendant's security office to see its on-site nurse, Carol Russell. Russell examined plaintiff and instructed her to put ice on her wrist and arm. Russell also created an incident report to document that plaintiff was injured on defendant's property. Plaintiff discovered two days later that her arm and wrist were fractured as a result of her fall. After Russell's deposition, plaintiff sought to amend her complaint to include additional claims of practicing medicine without authorization or a medical license, medical malpractice, and violation of the Health Insurance Portability and Accountability Act (HIPAA), PL 104-191; 110 Stat 1936 *et seq*. See 42 USC 1320d *et seq*. The trial court denied her motion.

A trial court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2). Ordinarily, a motion to amend a complaint should be granted unless the amendment would be futile. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). The filing of the original complaint will toll the running of the period of limitations pertaining to the claims reflected in the amended complaint, *Doyle v Hutzel Hosp*, 241 Mich App 206, 219-220; 615 NW2d 759 (2000), if it is found that the amended pleading relates back to the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D).

The period of limitations for a medical malpractice action is ordinarily two years, MCL 600.5805(6), from "the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the

plaintiff discovers or otherwise has knowledge of the claim," MCL 600.5838a(1). In this case, the alleged malpractice occurred on July 8, 2007. Plaintiff filed her original complaint on July 7, 2010, which was one year after the two-year period of limitations had run. MCL 600.5805(6); MCL 600.5838a(1). Accordingly, the trial court did not abuse its discretion by denying plaintiff's motion because permitting plaintiff to amend the complaint to include the expired medical malpractice claim would have been futile. See *Lane*, 231 Mich App at 697. Because plaintiff's malpractice claim was clearly barred by the statute of limitations at the time the initial complaint was filed, we need not consider whether the medical malpractice claim related back to the original pleading.

Plaintiff also asserts that the trial court abused its discretion by denying her motion to amend the complaint to include claims of unauthorized practice of medicine and violation of HIPAA. However, plaintiff has not explained or rationalized these arguments. Nor has she cited any authority to support the assertion that she had a viable cause of action under either of these claims. "An appellant may not merely announce [her] position and leave it to this Court to discover and rationalize the basis for [her] claims, nor may [she] give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). Therefore, these arguments are abandoned, *id*. at 339-340, and we affirm the trial court's denial of plaintiff's motion to amend the complaint.

D. MOTION TO COMPEL DISCOVERY

Finally, plaintiff argues that the trial court improperly denied her motion to compel discovery. In light of our determination that plaintiff was a licensee as a

matter of law, plaintiff's motion to compel discovery was moot. As such, we decline to address it. See *Attorney General v Pub Serv Comm'n*, 269 Mich App 473, 485; 713 NW2d 290 (2006).

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

STEPHENS, P.J., and OWENS, J., concurred with WILDER, J.

SCHOLMA v OTTAWA COUNTY ROAD COMMISSION

Docket No. 308486. Submitted October 3, 2013, at Lansing. Decided October 24, 2013, at 9:05 a.m. Leave to appeal sought.

Lee Scholma, as trustee of the Sena Scholma Trust, and David Morren brought an action in the Ottawa Circuit Court against the Ottawa County Road Commission after the road commission denied a permit application for a field driveway from Horizon Lane to property owned by the trust that is leased by Morren for farming purposes. The court, Jon Hulsing, J., entered an order requiring the road commission to allow access to the property from Horizon Lane. The road commission appealed.

The Court of Appeals *held*:

1. The trial court failed to utilize the appropriate standard of review, which provides that a road commission's exercise of its authority over the public roads may be subject to judicial review when its decision is so unreasonable as to be unsupported by substantial evidence. This standard of review is highly deferential and precludes judicial intervention unless the disputed decision of a road commission lacked any reasonable basis or evidentiary support. The road commission's denial of the permit application had a sufficiently reasoned basis and evidentiary support under the circumstances presented in this case. The decision of the road commission was not a totally unreasonable exercise of power. Therefore, plaintiffs are not entitled to relief under the provisions of the driveways, banners, events, and parades act, MCL 247.321 *et seq*.

2. MCL 247.324 requires that permits be granted "in conformity with rules promulgated by the highway authority" and that such rules must both "be consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest." The statute mandates only that, in exercising its discretion, the road commission do so in conformity with applicable rules, it does not mandate that permits be issued whenever a rule is not violated. The road commission's rules and Mich Admin Code, R 247.231(1) indicate discretion on the part of the highway authority in granting driveway permits based on the circumstances surrounding each individual request. Therefore, even if the permit application

complied with the road commission's rules, the road commission still had the discretion to deny or grant the permit application upon consideration of additional factors.

3. The trial court's conclusion that any action taken by a local unit of government that impairs a farm or farm operation is improper under the Michigan Right to Farm Act (RFTA), MCL 286.471 *et seq*., was an overly broad and incorrect statement of the reach of the RTFA. Pursuant to the RTFA, only those ordinances, regulations, and resolutions by local units of government that either purport to extend or revise or that conflict with the RTFA or the generally accepted agricultural and management practices (GAAMPs) determined by the Michigan Commission of Agriculture and Rural Development are improper. Therefore, the proper inquiry is not whether the road commission's denial of the permit application impaired Morren's ability to farm the property, but whether such denial constituted an ordinance, regulation, or resolution that purported to extend or revise or that conflicted with the RTFA or the GAAMPs. In this case, there is no ordinance, regulation, or resolution that conflicts with or that purports to extend or revise the GAAMPs.

4. Plaintiffs are not using the RTFA for its intended purpose, as a shield to protect farmers from nuisance lawsuits, but are attempting to use the RTFA as a sword to force the road commission to grant their request. No provision of the RTFA requires a local unit of government to take affirmative action to allow or enable a farmer to more effectively comply with the GAAMPs.

5. Nothing in the RTFA or the GAAMPs addresses the permitting or location of field driveways. Therefore, no conflict exists between the road commission's denial of the permit application and the RTFA and the GAAMPs. The RTFA does not preempt the road commission's denial and plaintiffs are not entitled to relief under the RTFA. The order of the trial court is reversed and the matter is remanded to the trial court for entry of a judgment in favor of the road commission.

Reversed and remanded.

1. REAL PROPERTY — HIGHWAYS — RIGHT TO ACCESS TO PROPERTY.

A property owner has the right to convenient and reasonable access to his or her property from public highways but is not entitled to access at all points.

2. HIGHWAYS — ROAD COMMISSIONS — JUDICIAL REVIEW.

A road commission's exercise of its authority over the public roads may be subject to judicial review when its decision is so unreason-

able as to be unsupported by substantial evidence; this highly deferential standard of review precludes judicial intervention unless the disputed decision lacked any reasonable basis or evidentiary support.

3. HIGHWAYS — DRIVEWAYS — PERMITS.

Permits for driveways are to be granted in conformity with rules promulgated by the highway authority that are both consistent with the public safety and based on traffic volumes, drainage requirements, and the character of the use of the land adjoining the highway and other requirements in the public interest; although a highway authority has discretion in granting permits based on the circumstances surrounding each individual request and must exercise its discretion in conformity with applicable rules, a highway authority is not required to issue a permit whenever a written rule is not violated.

4. CONSTITUTIONAL LAW — RIGHT TO FARM ACT — CONFLICT OF LAWS — PREEMPTION.

The Michigan Right to Farm Act preempts any local ordinance, regulation, or resolution that purports to extend or revise or that conflict with in any manner, the provisions of the act or the generally accepted agricultural and management practices determined by the Michigan Commission of Agriculture and Rural Development (MCL 286.474[6]).

5. RIGHT TO FARM ACT — GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES.

No provision of the Michigan Right to Farm Act requires a local unit of government to take affirmative action, and to thereby change the status quo, to allow or enable a farmer to more effectively comply with the generally accepted agricultural and management practices determined by the Michigan Commission of Agriculture and Rural Development (MCL 286.471 *et seq*.).

Varnum LLP (by *Aaron M. Phelps* and *Ben A. Anderson*) for plaintiffs.

Henn Lesperance PLC (by *William L. Henn*) for defendant.

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

BOONSTRA, J. Following a bench trial, the trial court entered an order requiring defendant, Ottawa County Road Commission ("defendant" or "OCRC"), to allow plaintiffs, Lee Scholma, as trustee of the Sena Scholma Trust (the Trust), and David Morren (Morren), reasonable access to a 30-acre parcel of undeveloped land (the property) from Horizon Lane for farm operations. The OCRC appeals as of right. We reverse and remand for entry of judgment in favor of defendant.

I. BASIC FACTS AND PROCEDURAL HISTORY

The Trust owns the property, and Morren leases it from the Trust and farms it. The property, which is in Ottawa County, is bordered on the east by 56th Avenue and on the west by Woodcrest Estates, a residential subdivision comprised of single-family homes. Horizon Lane, a "stub street" in the subdivision, ends in a temporary cul-de-sac just west of the property. The traditional point of access to the property is from a driveway off of 56th Avenue just south of the property. However, because the center of the property has the lowest elevation, Morren is unable to access the west side of the property from 56th Avenue during times of high precipitation, especially in early spring. The Trust, at Morren's request, submitted a permit application to the OCRC for a field driveway to the property from Horizon Lane. After the OCRC denied the permit application, plaintiffs filed their complaint. They requested declaratory relief for violations of the driveways, banners, events, and parades act (the Driveway Act), MCL 247.321 *et seq*., and the Michigan Right to Farm Act (RTFA), MCL 286.471 *et seq*.[1] Following a

[1] Plaintiffs also claimed that the denial of the permit application was a violation of their substantive due process rights. However, the trial court granted summary disposition to the OCRC on this claim, and plaintiffs have not filed a cross-appeal.

bench trial, the trial court held that, in deciding whether to grant or deny the permit application under the Driveway Act, the OCRC was required to consider the RTFA and the agricultural aspects of some of the property, because the Driveway Act and the RTFA "work hand in hand." The trial court further held that access to the property from Horizon Lane was "necessary . . . to engage in farm operations" on the property, and that, under the RTFA, "[a]ny action taken by a local unit of government which impairs a farm or farm operation is improper." Therefore, the trial court held that the OCRC was required to grant plaintiffs access to the property from Horizon Lane.

II. STANDARD OF REVIEW

On appeal, the OCRC argues that the trial court erred when it failed to limit its review of the OCRC's denial of the permit application to whether the decision was "totally unreasonable." Also, the OCRC claims that the trial court interpreted the RTFA much too broadly and that, under a correct interpretation of the RTFA, there is no conflict between the denial of the permit application and the RTFA. Following a bench trial, we review a trial court's factual findings for clear error and its conclusions of law de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). We review de novo issues of statutory interpretation. *Ward v Michigan State Univ (On Remand)*, 287 Mich App 76, 79; 782 NW2d 514 (2010).

III. PLAINTIFFS' CLAIM UNDER THE DRIVEWAY ACT

Local units of government, including counties, have been granted "reasonable control" of their highways and streets. Const 1963, art 7, § 29. Although a property owner has the right to access his or her property from

public highways, *State Hwy Comm v Sandberg*, 383 Mich 144, 149; 174 NW2d 761 (1970), a property owner is not entitled to access at all points, *Grand Rapids Gravel Co v William J Breen Gravel Co*, 262 Mich 365, 370; 247 NW 902 (1933). An owner is only entitled to convenient and reasonable access. *Id*.

The purpose of the Driveway Act is to regulate driveways, banners, events, and parades on highways, to provide for the promulgation of rules, to prescribe requirements for the issuance of permits, and to provide for the issuance of those permits. Title, 1969 PA 200, as amended by 1981 PA 177; *Loyer Ed Trust v Wayne Co Rd Comm*, 168 Mich App 587, 591; 425 NW2d 189 (1988). The Department of Transportation shall make rules necessary for the administration of the Driveway Act, and "[t]he boards of county road commissioners may adopt by reference the rules, in whole or in part, of the [Department of Transportation] or may adopt its own rules . . . ." MCL 247.325. No driveway is lawful except pursuant to a permit issued in accordance with the Driveway Act unless otherwise provided. MCL 247.322.

In *Turner v Washtenaw Co Rd Comm*, 437 Mich 35, 37; 467 NW2d 4 (1991), our Supreme Court stated that a road "commission's exercise of its authority over the public roads may be subject to judicial review where its decision is so unreasonable as to be unsupported by substantial evidence." This standard of review is "highly deferential" and precludes judicial intervention unless the disputed decision lacked any "reasoned basis or evidentiary support." *Id*. The trial court failed to utilize this deferential standard of review.

Here, the traditional access point to the property was from 56th Avenue. An OCRC employee testified that, on the basis of the information he had at trial,

he was willing to grant a permit for a field driveway off of 56th Avenue if Scholma were to apply for one. The land along 56th Avenue is predominantly farmland and sparsely populated, whereas the land along Horizon Lane (as well as the two additional subdivision streets that must be traversed to gain access to Horizon Lane) is populated with residential houses. Although 56th Avenue only has a paved road width of 22 feet, there is an eight-foot shoulder on each side and the shoulders were designed to be driven on by vehicles. In contrast, Horizon Lane and the other subdivision streets only have a road width of 26 feet. Although there is an additional two feet on each side for the curb and gutter, curbs and gutters are not typically driven on by vehicles. In addition, cars are often parked on the subdivision streets and this reduces the amount of area available for travel. Much of Morren's farm equipment exceeds 13 feet in width. The OCRC did not believe that it was convenient for drivers to be hindered by traffic in the opposing lane and it wanted to limit "the potential for any conflicts." Further, the OCRC has a policy of discouraging the placement of a driveway at the end of a stub street when other access is available because driveways at the end of stub streets have the potential to inhibit future development. Under these circumstances, the OCRC's denial of the permit application had a sufficiently reasoned basis and evidentiary support. *Id*. The decision was not a totally unreasonable exercise of power by the OCRC. Accordingly, plaintiffs are not entitled to any relief under the Driveway Act.

In reaching this conclusion, we reject plaintiffs' argument that, pursuant to MCL 247.324, the OCRC had no discretion to deny the permit application because the

application met the OCRC's written standards. MCL 247.324 provides:

> Permits for driveways shall be granted in conformity with rules promulgated by the highway authority which shall be consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest. Rules shall prescribe reasonable standards for the design and the location of driveways and may require that driveways shall be hard-surfaced. The provisions of this section shall not be deemed to deny reasonable access to a nonlimited access highway.

The goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). The first criterion in determining legislative intent is the language of the statute. *Id*. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed and this Court must enforce the statute as written. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). Any interpretation that would render any part of a statute surplusage or nugatory must be avoided. *Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 27; 811 NW2d 98 (2011). Statutory language must be read within its grammatical context unless a contrary intent is clearly expressed. *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009). "The 'last antecedent' rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Id*.

While MCL 247.324 requires that permits be granted "in conformity with rules promulgated by the highway authority," the statute also requires that such rules "be consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest." We conclude that the modifying clause, "which shall be consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest," means that rules so promulgated by the highway authority must both be consistent with public safety *and* based upon the other listed items. Consistent with this mandate, the OCRC has adopted a rule regarding driveway location that provides that "[d]riveways shall be located to maintain the free movement of road traffic and to provide the required site distance and the most favorable driveway grade." Ottawa County Road Commission, Rules Governing the Granting of Permits for Driveways, Banners & Parades, § III.A.2. This rule is similar to Mich Admin Code, R 247.231(1), which provides that

> [a] driveway shall be so located that no undue interference with the free movement of highway traffic will result. A driveway shall be so located also to provide the most favorable vision and grade conditions possible for motorists using the highway and the driveway consistent with development of the site considering proper traffic operations and safety.

The OCRC rule, like the Michigan Administrative Code rule, indicates discretion on the part of the highway authority in granting driveway permits based on the circumstances surrounding each individual request. Moreover, we do not in any event read the language of MCL 247.324 as divesting the OCRC of its constitutionally

granted discretion. MCL 247.324 mandates only that, in exercising its discretion, the OCRC do so "in conformity" with applicable rules; it does not mandate that permits be issued whenever a written rule is not violated. Thus, the mere fact that plaintiffs allege that the proposed field driveway does not violate any specific OCRC rule does not relieve the OCRC of any discretion in granting or denying the permit. To the contrary, even if the permit application complied with the OCRC's rules, the OCRC still had discretion to grant or deny the permit application upon consideration of additional factors.[2]

The trial court expressly recognized the OCRC's "broad discretion" under the Driveway Act. It nonetheless rejected the OCRC's exercise of its discretion, basing that finding on its conclusion that the RTFA precluded "[a]ny action taken by a local unit of government which impairs a farm or farm operation . . . ." It therefore premised its analysis under the Driveway Act on an alleged RTFA violation. As discussed later in this opinion, however, the RTFA is not implicated here. Therefore, the trial court's rationale fails.

IV. PLAINTIFFS' CLAIM UNDER THE RTFA

The trial court held that "[f]ailure to grant access to the field when it is necessary for farm operations

[2] The OCRC employee in charge of granting driveway permits stated that, on the basis of the information he had received at trial, he would grant the Trust a permit for a field driveway off of 56th Avenue. This is consistent with Ottawa County Road Commission, Rules Governing the Granting of Permits for Driveways, Banners & Parades, § III.D.2, which entitles a landowner to one field driveway for "each five hundred (500) feet of frontage or portion thereof." The property has more than 1,000 feet of road frontage; therefore, it would appear that the Trust is entitled to at least one field driveway. However, there is nothing in the OCRC rules that requires that a field driveway be allowed on the 66 feet of the property that fronts Horizon Lane.

unreasonably denies Plaintiffs access to their land" in violation of the RTFA. We conclude, however, that the RTFA was not implicated by defendant's actions.[3]

The RTFA was enacted to protect farmers from nuisance lawsuits. *Travis v Preston (On Rehearing)*, 249 Mich App 338, 342; 643 NW2d 235 (2002).

> The Legislature undoubtedly realized that, as residential and commercial development expands outward from our state's urban centers and into our agricultural communities, farming operations are often threatened by local zoning ordinances and irate neighbors. It, therefore, enacted the Right to Farm Act 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. [*Northville Twp v Coyne*, 170 Mich App 446, 448-449; 429 NW2d 185 (1988).]

In particular, MCL 286.473(1) provides:

> 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 [GAAMPs] according to policy determined by the Michigan commission of agriculture. Generally accepted agricultural and management practices may be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.

Before § 4(6) was added to the RTFA, 1999 PA 261, MCL 286.474(6), effective March 10, 2000, the RTFA

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[3] Even if the RTFA applied here, we would question the trial court's conclusion that access to the property from Horizon Lane was "necessary" for farm operations. It is undisputed that the property has indeed been farmed for many years without access from Horizon Lane. That portions of the property might be more *effectively* farmed if access were permitted from Horizon Lane does not mean that such access was "necessary" for farm operations under the RTFA. The trial court recognized that absent such access being "necessary," the RTFA would not apply and the OCRC could exercise its discretion. We agree.

did not exempt farms and farm operations from local laws, including local zoning ordinances. *Travis*, 249 Mich App at 343. MCL 286.474(6), the preemption provision of the RTFA, provides:

> Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

The trial court concluded that, pursuant to the RTFA, "[a]ny action taken by a local unit of government which impairs a farm or farm operation is improper." This conclusion was an overly broad and incorrect statement of the reach of the RTFA. The RTFA preempts any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of the RTFA or the GAAMPs. MCL 286.474(6); see also *Lima Twp v Bateson*, 302 Mich App 483, 493-494; 838 NW2d 898 (2013). Section 4(6) also states that local units of government shall not enact an ordinance, regulation, or resolution that conflicts in any manner with the RTFA or the GAAMPs. Thus, pursuant to the plain language of the RTFA, only those ordinances, regulations, and resolutions by local units of government that either purport to extend or revise or that conflict with the RTFA or the GAAMPs are improper. An action by a local unit of government that impairs a farm or farm operation is not preempted by the RTFA if it is not an ordinance, regulation, or resolution that purports to extend or revise or that

conflicts with the RTFA or the GAAMPs. Accordingly, the trial court failed to engage in the proper inquiry. The proper inquiry is not whether the OCRC's denial of the permit application impaired Morren's ability to farm the property, but whether such denial constituted an ordinance, regulation, or resolution that purported to extend or revise or that conflicted with the RTFA or the GAAMPs, under the facts of this case.

Plaintiffs argue that the OCRC's denial of the permit application conflicted with the GAAMPs for manure management and utilization and for nutrient utilization, both of which include requirements for the timing of "certain applications." According to plaintiffs, the denial of the permit application conflicts with these two GAAMPs because the denial, which results in Morren having little or no access to the west side of the property during the early spring, requires him to farm in a manner other than that required by the GAAMPs.[4]

Plaintiffs rely on *Shelby Charter Twp v Papesh*, 267 Mich App 92; 704 NW2d 92 (2005), a case that we find distinguishable. In *Papesh*, the defendants conducted a poultry operation on 1.074 acres of property. A local zoning ordinance required that all farms have a minimum lot size of three acres. The township sued the defendants, and the trial court held that the defendants' poultry operation constituted a nuisance per se

[4] Plaintiffs specifically point to the requirement in the Generally Accepted Agricultural and Management Practices for Nutrient Utilization by the Michigan Commission of Agriculture & Rural Development, § III, Nitrogen Management Practices: Time and Placement of Nitrogen Fertilizer, p 9, that "[t]he remainder of the N requirement for these crops [winter small grains, such as winter wheat or rye] should be applied just prior to green-up in the spring." In discovery, plaintiffs maintained that the OCRC was violating the GAAMPs because, in denying the requested access via Horizon Lane, the OCRC was preventing plaintiffs from "effectively farming" the property.

under the zoning ordinance. In reversing the trial court's grant of summary disposition in favor of the plaintiff township and remanding for further proceedings, this Court held that material factual questions existed regarding whether the defendants' farm was commercial in nature and in compliance with the GAAMPs. The Court went further, however, and stated that if the defendants' poultry operation was commercial in nature and conformed to the GAAMPs, it was a farm operation protected by the RTFA. *Id*. at 106. Because no GAAMP limited the minimum size of poultry operations, the Court concluded that the RTFA preempted the zoning ordinance because the ordinance precluded a protected farm operation. *Id*.

Here, however, there is no "ordinance, regulation, or resolution" that conflicts with, or that purported to extend or revise, the GAAMPs. At most, there is a denial of a driveway permit application pursuant to defendant's constitutionally granted discretionary authority. Moreover, even if that denial constituted an "ordinance, regulation, or resolution" under MCL 286.474(6), it is not the denial itself that may preclude Morren from complying with any timing requirements reflected in the two GAAMPs. To the contrary, it is the wet conditions of the property—if and when they exist—that make it more difficult to meet those timing requirements. If the conditions of the property allow Morren to access the west side of the property from 56th Avenue, then Morren can comply with the GAAMPs. Access via Horizon Lane may make it easier to farm the west side of the property in the early spring, depending on weather and drainage conditions, but the denial of that access point simply does not equate to an "ordinance, regulation, or resolution" that conflicts with, or that purports to extend or revise, the GAAMPs.

Further, the Legislature intended the RTFA to be used as a shield by farmers. It enacted the RTFA to protect farmers from nuisance lawsuits. *Travis*, 249 Mich App at 342-343; *Northville Twp*, 170 Mich App at 448-449; *Papesh*, 267 Mich App at 99. The RTFA provides a defense to farmers in order to protect their farms or farm operations when the farms or operations are claimed to be a nuisance, including for the reasons stated in MCL 286.473. *Papesh*, 267 Mich App at 99. However, plaintiffs are not using the RTFA as a shield, and no one has claimed the farming operation to be a nuisance. Plaintiffs thus are not using the RTFA for its intended purpose of protecting a farming operation from an action by the OCRC (or anyone else). Rather, plaintiffs are using the RTFA as a sword, seeking to force the OCRC to grant them access to the property from Horizon Lane, because the conditions of the property, especially in early spring, make it difficult, less effective, or perhaps even sometimes impossible, to access the west side of the property from 56th Avenue. However, no provision of the RTFA requires a local unit of government to take affirmative action, and to thereby change the status quo, to allow or enable a farmer to more effectively comply with the GAAMPs.

The present case is similar to *Papadelis v City of Troy*, 478 Mich 934 (2007). In *Papadelis*, the Supreme Court held that the RTFA did not exempt the plaintiffs from a zoning ordinance governing the permitting, size, height, bulk, floor area, construction, and location of buildings used for their greenhouse operations because no provisions in the RTFA or the GAAMPs addressed the permitting, size, height, bulk, floor area, construction, and location of buildings used for greenhouse or related agricultural purposes. Similarly here, nothing in the RTFA or the GAAMPs addresses the permitting or location of field driveways. Accordingly, no conflict

exists between the OCRC's denial of the permit application and the RTFA and the GAAMPs. Therefore, the RTFA does not preempt the OCRC's denial of the permit application and plaintiffs are not entitled to any relief under the RTFA.

Because we conclude that plaintiffs are not entitled to any relief under the Driveway Act or the RTFA, we need not address the OCRC's remaining arguments on appeal.

Reversed and remanded for entry of judgment in favor of defendant. As the prevailing party, defendant may tax costs. MCR 7.219. We do not retain jurisdiction.

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

CHARLES A MURRAY TRUST v FUTRELL

W H BEARCE TRUST v FUTRELL

Docket Nos. 304093 and 311134. Submitted September 10, 2013, at Lansing. Decided October 24, 2013, at 9:10 a.m.

In 1934, the Waubun Beach Association and others brought an action in the Cheboygan Circuit Court against Robert Wilson and others, seeking to establish an easement over property in the Waubun Beach Subdivision for purposes of ingress and egress to and from the public highways. The plaintiffs and the defendants were the owners of lots in the subdivision, including lots 1 through 34. The court entered an order granting a right of way by necessity over lots 1 through 34. The order also stated that the right of way was appurtenant to the lots and reciprocal between the parties. Defendants Theodore R. MacClure and his wife, the owners of lots 4, 5, 7, 8, 35 through 38, and 42 through 51, appealed. The Supreme Court, after explaining that a way of necessity ceases to exist when the necessity to use it ceases, reversed the order of the trial court on the basis that all the parties had a way to reach their premises without passing over the property of the MacClures. *Waubun Beach Ass'n v Wilson*, 274 Mich 598 (1936). In 2007, Edward and Rosemary Futrell, the owners of lots 20 and 21, except the southeastern 30 feet of lot 21, planted trees on their property that blocked access through the easement. The Charles A. Murray Trust, Charles and Frances Gano, and others (the Murray plaintiffs), who owned lots 4 through 19, brought an action in the Cheboygan Circuit Court against the Futrells (case number 07-007789-CH), seeking a declaration that they had an easement by prescription, acquiescence, or necessity over the Futrells' property during the winter and to enjoin the Futrells from interfering with the Murray plaintiffs' access to their property over the easement. The W. H. Bearce Trust and others (the Bearce plaintiffs), who own the southern half of lot 23 through lot 34, with the exception of lot 32 and the northern half of lot 33, also brought an action in the Cheboygan Circuit Court against the Futrells and others (case number 08-007889-CH), seeking a confirmation by the trial court that reciprocal, appurtenant

easements existed over lots 9 through 34. The trial court, Scott L. Pavlich, J., consolidated the cases. The trial court granted plaintiffs' request for summary disposition concerning the validity of the 1934 decree with respected to lots 9 through 34, opining that the owners of lots 9 through 34 in the present case had been awarded an easement and that the Supreme Court's decision had not affected those rights. The trial court stated that the Supreme Court's decision had only reversed the 1934 decree relative to lots 4 through 8, which were owned by the MacClures, and had not affected the decree with respect to lots 9 through 34. The trial court ordered that plaintiffs had the burden of proof to show that an easement by necessity existed with regard to lots 4 through 8 and defendants had the burden of proof to show that lots 9 through 34 were no longer entitled to an easement by necessity over defendants' property. The trial court issued separate opinions and judgments in each case. In case number 07-007789-CH, the court held that the Murray trust and the Ganos, the owners of lots 4 through 8, had failed to establish an easement by necessity over the Futrells' property and dismissed their claims with prejudice. The trial court modified the easement by necessity for lots 9 through 19, as decreed in 1934, to provide an "easement for necessity" only with regard to "emergency, police, medical and fire vehicles" that could travel over the Futrells' property during the winter months only when an accumulation of snow and ice existed and in order to respond to emergencies located on lots 9 through 19. The remaining claims of the Murray plaintiffs were dismissed with prejudice. In case number 08-007889-CH, the trial court held that the reciprocal easement rights created by necessity over the parties' lots were extinguished because there was no longer a necessity for the parties to cross each other's lots. The trial court noted that the Bearce plaintiffs had access to a public road without crossing the Futrells' property and that the Futrells, even in the winter, could access their property using their private drive without traversing others' lots. The trial court's order stated that the easement by necessity awarded in 1934 was extinguished to the extent that the owners of lot 20 and the north half of lot 21 shall not traverse the south half of lot 23 and lots 24 through 29 and 32 through 34 and the owners of the south half of lot 23 and lots 24 through 29 and 32 through 34 shall not traverse lot 20 and the north half of lot 21. After the trial, both Edward and Rosemary Futrell passed away, and the trial court substituted Kelly Futrell, executor of Rosemary's estate, as a defendant in both cases. The Murray plaintiffs appealed and Kelly Futrell cross-appealed with regard to case number 07-007789-CH. (Docket No. 304093.) The W.H. Bearce

Trust and some of the other Bearce plaintiffs appealed with regard to case number 08-007889-CH. (Docket No. 311134.) The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The 1934 decree awarded an easement by necessity.

2. Strict necessity is required to establish an easement by necessity. The Court in *Chapdelaine v Sochocki*, 247 Mich App 167 (2001), erroneously applied a reasonable-necessity standard for easements by necessity. The strict-necessity standard articulated by the Supreme Court in *Waubun Beach*, 274 Mich 598 (1936), has not been altered by the Supreme Court and binds the Court of Appeals to apply the strict-necessity standard. *Chapdelaine* did not establish a new rule of law that reasonable necessity is required to establish an easement by necessity.

3. There is no strict necessity in this case. Neither the Bearce appellants nor the Murray plaintiffs are entitled to an easement by necessity. The trial court erred to the extent that it ruled otherwise.

4. The 1934 decree did not establish a "social easement" to allow the neighboring parties to socialize.

5. The trial court did not err in case number 08-007889-CH by extinguishing the easement by necessity over the Futrell property.

6. The Court's holding in *Waubun Beach* with regard to the Murray plaintiffs' entitlement to an easement was limited to the existence of a right of way over the MacClures' lots 4, 5, 7, and 8. The Court did not extinguish the rights of the owners of lots 1, 2, 3, 6, and 9 through 34 to traverse each other's lots for ingress and egress to and from public highways. The Court did not extinguish the MacClures' right to traverse lots 1, 2, 3, 6, and 9 through 34 for ingress and egress to and from public highways. However, the Court extinguished the easement by necessity that permitted the owners of lots 1, 2, 3, 6, and 9 through 34 to traverse MacClure lots 4, 5, 7, and 8.

7. In light of *Waubun Beach* and assuming that a strict necessity for an easement still existed, all the Murray plaintiffs had an easement by necessity to traverse defendant's property. The *Waubun Beach* Court did not extinguish the easement rights of the owners of lots 4 through 19 to traverse the lots now owned by defendant, lot 20 and the portion of lot 21 excluding the southern 30 feet. It only extinguished the rights to traverse the lots owned by the MacClures (the lots now owned by the Murray trust and the Ganos). Therefore, the trial court erred by placing the burden on the Murray trust and the Ganos, the owners of lots

4 through 9, to show the existence of an easement by necessity. Defendant bore the burden of establishing that the necessity for the Murray plaintiffs' easement had ceased to exist.

8. The trial court did not err by finding that the parties had access to their lakefront lots back to the county road and had driveways installed from the road to gain access to the lots and, therefore, there was not a strict necessity in this case. The Murray plaintiffs were not landlocked. Use of defendant's property was not strictly necessary for purposes of ingress and egress to and from a public highway, even in the winter. The trial court erred in case number 07-007789-CH by awarding an easement by necessity when no strict necessity existed.

9. An easement by necessity no longer exists because there is no longer a strict necessity for its existence. In case number 07-007789-CH, the trial court erred by awarding an easement by necessity. The judgment in that case is affirmed in part and reversed in part. The trial court properly extinguished the easement by necessity in case number 08-007889-CH and the judgment in that case is affirmed.

Judgment in Docket No. 304093 affirmed in part and reversed in part. Judgment in Docket No. 311134 affirmed.

1. EASEMENTS — IMPLIED EASEMENTS — EASEMENTS BY NECESSITY — EASEMENTS IMPLIED FROM QUASI-EASEMENTS.

An implied easement may arise in essentially two ways: an easement by necessity or an easement implied from a quasi-easement; an easement by necessity may be implied by law when an owner of land splits the property so that one of the resulting parcels is landlocked except for access across the other parcel; an easement by necessity may arise either by grant or by reservation and is not dependent on the existence of any established route or quasi-easement before the severance of the estate by the common grantor; an easement by necessity is first established after the severance.

2. EASEMENTS — EASEMENTS BY NECESSITY — STRICT NECESSITY.

A right of way of necessity is not a perpetual right; it ceases to exist when the necessity for its continuance ceases; strict necessity is required to establish an easement by necessity.

3. EASEMENTS — IMPLIED EASEMENTS — EASEMENTS IMPLIED FROM QUASI-EASEMENTS — CONTINUOUS EASEMENTS — NONCONTINUOUS EASEMENTS.

Three things must be shown to establish an easement implied from a quasi-easement: (1) that an apparently permanent and obvious

> servitude was imposed on one part of an estate in favor of another during the unity of title, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits; a continuous easement is one that may be enjoyed without any act on the part of the party claiming it; a noncontinuous easement is one to the enjoyment of which the act of the party is essential; an easement implied from a quasi-easement is an easement appurtenant that runs with the land.

Plunkett Cooney (by *Ernest R. Bazzana*) for the Charles A. Murray Trust and others.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), for the W. H. Bearce Trust and others.

Brown Powers, PLLC (by *Bridget Brown Powers*), for Kelly Futrell, executor of the estate of Rosemary Futrell, deceased.

Before: WILDER, P.J., and DONOFRIO and BECKERING, JJ.

BECKERING, J. In 1934, the Cheboygan Circuit Court granted lot owners of the plat of Waubun Beach a reciprocal easement by necessity to traverse each other's lots for purposes of ingress and egress to and from public highways. Over 70 years later, one of the subsequent owners of these lots refused to allow access through their property to the other lot owners. The consolidated appeals before us present the following question: does the reciprocal easement by necessity still exist in light of both an appeal of the 1934 decree in the Michigan Supreme Court in *Waubun Beach Ass'n v Wilson*[1] and the necessity for its existence, if any, given the factual circumstances existing at the time these consolidated cases were filed?

The trial court concluded that it does, but only for emergency-vehicle access to a limited number of the lots

[1] *Waubun Beach Ass'n v Wilson*, 274 Mich 598; 265 NW 474 (1936).

in the winter when snow and ice has accumulated. In Docket Number 304093, the Murray plaintiffs[2] appeal as of right the trial court's judgment in circuit court case number 07-007789-CH, which dismissed with prejudice claims of an easement for the benefit of lots 4 through 8 (the Murray trust and Gano lots) and granted the winter emergency-vehicle easement for the benefit of lots 9 through 19 (the remaining Murray plaintiffs' lots). Defendant[3], Kelly Futrell, executor of the estate of Rosemary Futrell, deceased (hereafter "defendant"), cross-appeals and argues that no easement by necessity remains. In Docket Number 311134, the Bearce appellants[4] appeal as of right the trial court's judgment in circuit court case number 08-007889-CH, which extinguished the easement of the Bearce plaintiffs. We hold that an easement by necessity no longer exists because there is no longer a strict necessity for its existence. Therefore, although the trial court properly extinguished the easement by necessity in case number 08-007889-CH, it erred in case number 07-007789-CH by awarding an easement by necessity when no strict necessity existed. Accordingly, we affirm in part and

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[2] The Murray plaintiffs are the Charles A. Murray Trust (the Murray trust); Charles and Frances Gano; Priscilla S. Krippendorf; Paul E. Blome; Nancy J. Love; Edward and Robetta Bicsok; Robert and Isabell Novak; and Frederick M., Charlotte, and Norman P. Otto.

[3] Defendant's parents, Edward and Rosemary Futrell, were the original defendants in these consolidated cases. They passed away after the trial, and the trial court substituted defendant as a party defendant in their place.

[4] The Bearce appellants are the following Bearce plaintiffs: Gretchen H. Bearce and David H. Bearce, as cotrustees of the W. H. Bearce Trust; Gretchen H. Bearce, as trustee of the Gretchen H. Bearce Revocable Trust; Franklin E. Hill Jr.; and Rebecca Hill. The following are the Bearce plaintiffs who are not appellants before this Court: Suzanne Gabriel, as trustee of the Suzanne Gabriel Revocable Living Trust; Michael and Kimberly Thoresen; Dorothy S. Demrick; Daryl Davis; and Elizabeth Bevis, as trustee of the Elizabeth B. Bevis Trust.

reverse in part the trial court's judgment in case number 07-007789-CH and affirm the trial court's judgment in case number 08-007889-CH.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case involves a dispute over the existence of an easement in the Waubun Beach Subdivision in Tuscarora Township. The land at issue in Waubun Beach Subdivision was owned by E. R. Smith and was platted in 1914. The 34 lots at issue are aligned north-to-south along Burt Lake, with the west side of each lot abutting Burt Lake. For a short distance, the land extending east from the shore of Burt Lake is comparatively flat and contains the parties' cottages or homes. North Wahbee Avenue (the location of the alleged easement) runs parallel to Burt Lake through the parties' lots and ultimately connects to Frontenac Road to the south of the parties' lots. To the east, the parties' lots then rise abruptly in a bluff to higher land. To the east of the parties' lots is Chippewa Beach Road.

Pertinent to this case are an August 15, 1934 decree of the Cheboygan Circuit Court and the appeal of the decree in the Michigan Supreme Court in *Waubun Beach Ass'n v Wilson*, 274 Mich 598; 265 NW 474 (1936).

A. THE 1934 CIRCUIT COURT DECREE

The plaintiffs and defendants in the 1934 case were owners of lots 1 through 34 of the plat of Waubun Beach. According to the circuit court's decree, the plat was "bounded on the west by Burt Lake and on the other sides by wild cut-over lands not owned by any of the parties," except for a small parcel owned by one of the defendants. The plat had no public streets or alleys.

However, for more than 15 years, the plaintiffs, the defendants, and their grantors "used and maintained a way" over lots 1 through 34, which became a trail used at the time of the decree with all parties having the same right of passage over the lots of the other parties. The circuit court found that there was no other practical means for the lots to be connected with public highways or for the lots' occupants to communicate amongst themselves or use the water works system and community buildings built and owned by them in common.

The circuit court ordered that all the parties to the case had, "for the purposes of ingress and egress to and from the public highways" in Tuscarora Township, "a right of way by necessity over, upon, and across each and every of the premises of the other parties hereto from lot one (1) to and including lot thirty-four (34) of said plat of Waubun Beach, and immediately adjoining said plat on the north to the township highway at the foot of the bluff . . . ." The court specified that the "right of way is the roadway now used by the owners of said lots one (1) to thirty-four (34) in said Plat, running northerly and southerly along and adjoining the bluff upon said lots and extending to said township road as aforesaid, and is and shall be only of sufficient width to permit the use thereof by vehicles in common use . . . ." The court ordered that the right of way would extend to the lot owners and "their successors and assigns, and to the families of said lot owners, their servants, agents, employees, friends and invitees, or others having business or proper occasion to reach the premises of the said several owners of said lots, and shall be appurtenant to the said several lots." Finally, the court ordered that the right of way was reciprocal between the parties.

B. APPEAL OF THE 1934 DECREE TO THE MICHIGAN SUPREME COURT

The only parties to appeal in the Michigan Supreme Court were the owners of lots 4, 5, 7, 8, 35 through 38, and 42 through 51: the MacClures. *Waubun Beach*, 274 Mich at 601-602. After explaining that a way of necessity ceases to exist when the necessity to use it ceases, the Supreme Court held as follows:

> If plaintiffs ever had a way of necessity upon or over the lands of appellants, such necessity ceased to exist before the filing of the bill October 5, 1932. At that time appellants had not only constructed roads from their lots to the public highway along the section line between sections 1 and 2, but had opened a way across their own premises from lot 35 to the highway, running south of the plat, which was open and used; so that at the time of the filing of the bill of complaint plaintiffs had a right of way to this section line road, as had the owner of lot 6. The owners of lots 1, 2 and 3 had a way to their premises over the lands lying north thereof, and persons owning lands south of those owned by appellants had a way to lot 35, which was established by the trial court, and were given an extension of the right of way for temporary use at least for a period of three years from there to the highway south of the premises by appellants, so that, at the time of the filing of the bill of complaint, all of the parties owning property in the plat had a way to reach their premises without passing over the lands of appellants. Having such way, no right of way of necessity existed over the lands and premises of appellants.
>
> The decree of the trial court is reversed as to appellants . . . . [*Id*. at 615.]

C. THE PRESENT CASE

The Murray plaintiffs, the Bearce plaintiffs, and defendant are lot owners in the Waubun Beach Subdivision. The Murray plaintiffs' properties consist of lots

4 through 19.[5] Defendant owns lots 20 and 21, except for the southeastern 30 feet of lot 21. The Murray plaintiffs' lots and defendant's lots have access to Chippewa Beach Road through private driveways that go up the bluff.[6] The owners of the remaining part of lot 21, lot 22, and the northern half of lot 23, are not parties in this case. The Bearce plaintiffs' properties consist of the southern half of lot 23 through lot 34, with the exception of lot 32 and the northern half of lot 33, which belong to Joseph C. Rode, who is not a party in this case.[7]

In the early fall of 2007, the Futrells planted trees on their property that blocked access through North Wahbee Avenue. The Futrells informed the Murray plaintiffs of their intention to maintain the "landscaping." The Murray plaintiffs and the Bearce plaintiffs filed separate complaints against the Futrells in case numbers 07-007789-CH and 08-007889-CH, respectively. The Murray plaintiffs requested that the trial court declare that they had an easement by prescription, acquiescence, or necessity over the Futrells' property during the winter and enjoin the Futrells from interfering with the Murray plaintiffs' access to their prop-

[5] The Murray trust's property consists of lots 4 through 6, the Ganos own lots 7 through the northern half of lot 9, Krippendorf owns the southern half of lot 9 through lot 13, the Blome property is lot 14, the Bicsoks own lots 15 and 16, the Novaks own lot 17 and the northern half of lot 18, and the Ottos own the southern half of lot 18 and lot 19.

[6] As the trial court noted, since the 1934 decree, all the landowners acquired additional property to the east of the original lots that runs out to the county road and they had driveways installed from that county road to access their lakefront parcels.

[7] The Bearces own the southern half of lot 23 through part of lot 25; the Gabriels own the remaining part of lot 25; the Thoresens own lot 26; Demrick owns lot 27; the Hills own lots 28 and 29; the Bevises own lots 30 and 31; lot 32 and the northern half of lot 33 belong to Joseph C. Rode; and Davis owns the southern half of lot 33 and lot 34.

erties over the easement. In contrast, the Bearce plaintiffs requested that the trial court confirm its 1934 decree that reciprocal, appurtenant easements for North Wahbee Avenue existed over lots 9 through 34.

The trial court consolidated the cases and considered various motions for summary disposition brought by plaintiffs. The trial court granted plaintiffs' "request for summary disposition concerning the validity of the 1934 decree as it effects [sic] Lots 9 through 34," opining in pertinent part:

> It appears from a review of the *Waubun* decision that owners of Lots 9 through 34 in the present case were awarded and [sic] easement over the property on the lakeside of the bluff and the Supreme Court did not issue a decision that affected those rights. The 1934 decision was appealed by the MacClures who owned Lots 4 through 8. The other defendants to the original action did not appeal the 1934 decision. The other lot owners were not a party to the appeal. . . .
>
> The Supreme Court decision specifically only reversed the decree relative to the lots owned by the MacClures being Lots 4 through 8. The decree with respect to Lots 9 through 34 was unaffected by the Supreme Court decision.

Addressing the burden of proof at trial in light of the Supreme Court's decision in *Waubun Beach*, the trial court thereafter ordered that "Plaintiffs shall have the burden of proof to show that as to Lots 4 through 8 there exists an easement by necessity." "Defendants shall have the burden of proof at trial that Lots 9 through 34 no longer are entitled to an easement over Defendants property by reasonable necessity[.]" The trial court conducted a bench trial[8] and issued separate opinions and judgments for each case.

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[8] The Bearce plaintiffs did not participate at trial, which the trial court explained as follows:

In its opinion in case number 07-007789-CH, the court found that "all of the lot owners" had property running east to the county road; thus, all of the parties had access from their lakefront lots back to the county road. Furthermore, the parties had driveways installed from that county road to access their lakefront parcels, most of which were unpaved and quite steep in their incline. The court opined that although it may be somewhat difficult, the parties could access their lakefront properties through the use of their own driveways during the winter with regular plowing and the use of a vehicle with a relatively high ground clearance. The court found that emergency vehicles such as ambulances and fire trucks could not access the lots during the winter when significant amounts of snow and ice were present. The court concluded that the owners of lots 4 through 8, the Murray trust and the Ganos, had failed to meet their burden of proof to establish necessity because the issue whether road access to the north was available had not been resolved at trial. The court concluded that the Futrells had failed to meet their burden of proof for the same reason and, therefore, the remaining Murray plaintiffs had an easement by necessity previously granted by the 1934 decree. However, the court decided that the easement by necessity granted by the 1934 decree should be "significantly reduced" because "there no longer exists any necessity except for the necessity of emergency vehicle access during the winter months." Thus, the court reduced the easement to "an easement by necessity for emergency

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At the commencement of trial, the attorney for the Bearce Plaintiffs indicated his clients had nothing left to litigate as they merely wanted an affirmation that the 1934 decree remained effective as to them as a matter of law. Consequently counsel for the Bearces excused himself from the trial proceedings and the Bearce Plaintiffs presented no proofs nor participated in the trial.

vehicles . . . for Lots 9 through 19 during the winter months when there is an accumulation of snow and ice."

The trial court's judgment in case number 07-007789-CH provided that the Murray trust and the Ganos, the owners of lots 4 through 8, failed to establish an easement by necessity over the Futrells' property and that their claims were dismissed with prejudice. It further provided that the easement by necessity for lots 9 through 19 as decreed by the court in 1934 was modified so that "the easement for necessity exists only as to emergency, police, medical and fire vehicles which may travel over and across [the Futrells' property] during the winter months only when there exists an accumulation of snow and ice, to respond to emergencies located upon Lots 9 through 19, or any of them." The remaining claims in the Murray plaintiffs' complaint were dismissed with prejudice.

In case number 08-007889-CH, the court's opinion provided that the reciprocal easement rights created by necessity over the parties' lots were extinguished because there was no longer a necessity for the parties to traverse each other's lots. The court explained that the proofs submitted at trial illustrated that the Bearce plaintiffs' lots had access to a public road without crossing the Futrells' property. The court also explained that the proofs established that the Futrells, even in the winter, could access their property using their private drive without traversing lots to the north or south. The trial court entered a judgment ordering as follows:

> [T]he rights and interests of the parties hereto to the easement by necessity awarded by this Court in Decree entered August 15, 1934, are hereby extinguished to the extent that the party/owners, invitees, and assigns of Lot 20 and the north one-half of Lot 21 shall not traverse or go upon the south one-half of Lot 23 and Lots [24-29 and

> 32-34], and the party/owners, invitees, and assigns of the south one-half of Lot 23 and Lots [24-29 and 32-34] shall not traverse or go upon Lot 20 and the north one-half of Lot 21 . . . .

II. THE NATURE OF THE EASEMENT AWARDED IN THE 1934 DECREE

The parties dispute the nature of the easement awarded by the circuit court in 1934. The Bearce appellants and the Murray plaintiffs insist that the circuit court awarded three easements implied from quasi-easements, specifically (1) an easement to access landlocked lots, (2) a social easement for neighbors to communicate with each other, and (3) an easement for the neighborhood's waterworks system. In contrast, defendant argues that the 1934 decree awarded a single easement by necessity for the benefit of lots 1 through 34 for the specific, sole purpose of ingress and egress to and from a public road.

We review this question of law de novo. See *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013).

"An implied easement may arise in essentially two ways": (1) an easement by necessity and (2) an easement implied from a quasi-easement. *Schmidt v Eger*, 94 Mich App 728, 732-733; 289 NW2d 851 (1980); see also *Forge v Smith*, 458 Mich 198, 211 n 38; 580 NW2d 876 (1998). An easement by necessity "may be implied by law where an owner of land splits his property so that one of the resulting parcels is landlocked except for access across the other parcel." *Chapdelaine v Sochocki*, 247 Mich App 167, 172; 635 NW2d 339 (2001), citing *Schmidt*, 94 Mich App at 732. "An easement by necessity may arise either by grant, where the grantor created a landlocked parcel in his grantee, or it may arise by reservation, where the grantor splits his prop-

erty and leaves himself landlocked." *Chapdelaine*, 247 Mich App 172-173. "This sort of implied easement is not dependent on the existence of any established route or quasi-easement prior to the severance of the estate by the common grantor; it is first established after the severance." *Schmidt*, 94 Mich App at 733. "A right of way of necessity is not a perpetual right. It ceases to exist when the necessity for its continuance ceases." *Waubun Beach*, 274 Mich at 609.

In contrast, an easement implied from a quasi-easement "requires that at the severance of an estate an obvious and apparently permanent servitude already exists over one part of the estate and in favor of the other. It also requires a showing of [reasonable] necessity . . . ." *Schmidt*, 94 Mich App at 733-735. Thus, "three things must be shown: (1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits." *Id*. at 731. Our Supreme Court has explained that "[a] continuous easement is one which may be enjoyed without any act upon the part of the party claiming it . . . . A noncontinuous easement is one to the enjoyment of which the act of the party is essential, and of this class a way is the most usual." *Waubun Beach*, 274 Mich at 606. An easement implied from a quasi-easement is an easement appurtenant. See *Bean v Bean*, 163 Mich 379, 397; 128 NW 413 (1910); see also *Ketchel v Ketchel*, 367 Mich 53, 58; 116 NW2d 219 (1962). An easement appurtenant runs with the land. See *Myers v Spencer*, 318 Mich 155, 163-167; 27 NW2d 672 (1947).

We conclude that the 1934 decree awarded an easement by necessity and not three easements implied

from a quasi-easement. The 1934 decree provides that aside from the trail used and established across lots 1 through 34, "there is no other practical means by which said lots can be connected with public highways . . . ." Thus, the court essentially found that the lots were landlocked. Significantly, the 1934 decree expressly uses the words "a right of way by necessity," ordering that all of the owners of lots 1 through 34

> have, respectively, *for the purposes of ingress and egress to and from the public highways* in said Township of Tuscarora*, a right of way by necessity* over, upon, and across each and every of the premises of the other parties hereto from lot one (1) to and including lot thirty-four (34) of said plat of Waubun Beach . . . . [Emphasis added.]

Although the decree does refer to the fact that the parties and their grantors had used and maintained the trail for more than 15 years, this finding by the court does not establish that the decree awards easements implied from a quasi-easement.[9] Significantly, the language of the decree does not include a finding that the trail was an apparently permanent and obvious servitude imposed on one part of an estate in favor of another during unity of title. See *Schmidt*, 94 Mich App at 731-735. Moreover, the 1934 decree does not include any facts that would support such a finding, the trial court here did not find any facts to support this finding, and the evidence at trial did not support such a finding. In addition, at the time the trial court issued its decree

[9] It is noteworthy that the circuit court in 1934 considered and rejected the argument that an easement existed by "adverse user or by prescription," which may explain why the circuit court's decree includes a reference to over 15 years of usage. *Waubun Beach*, 274 Mich at 601; see also, generally, *Engel v Gildner*, 248 Mich 95, 99; 226 NW 849 (1929) (15-year period required for easement by prescription); *Hopkins v Parker*, 296 Mich 375, 376; 296 NW 294 (1941) ("It is settled in this jurisdiction that such an easement may be acquired by adverse user for 15 years.").

in 1934, the law in Michigan was that a right of way is not a continuous easement for purposes of establishing an easement implied from a quasi-easement. See *Zemon v Netzorg*, 247 Mich 563, 565-566; 226 NW 242 (1929). Thus, assuming the trial court knew the law, see *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999) (stating that a trial court is presumed to know the law), such an easement implied from a quasi-easement could not have been established.

Finally, the Supreme Court in *Waubun Beach* recognized that the easement awarded by the 1934 decree was an easement by necessity. *Waubun Beach*, 274 Mich at 601. We presume that the *Waubun Beach* Court knew the law. Cf. *Alexander*, 234 Mich App at 675 (stating that a trial court is presumed to know the law). The *Waubun Beach* Court's analysis of the issues before it further supports a finding of an easement by necessity. The Court's opinion reveals that the Court first considered the elements of an easement implied from a quasi-easement, determining that the easement was not continuous because it was a right of way; the Court explained that noncontinuous easements do not pass on the severance of two tenements as appurtenances, unless the grantor uses language in a conveyance sufficient to create an easement de novo (which was not present in *Waubun Beach*). See *Waubun Beach*, 274 Mich at 605-607. The Court then discussed easements by necessity, explaining that a showing of strict necessity is required and that such an easement ceases to exist when the necessity no longer exists. *Id*. at 608-614. The Court ultimately concluded that a right of way by necessity did not exist over the MacClures' property because at the time the complaint was filed, all the parties in the plat had a way to reach their property without passing over the MacClures' land. *Id*. at 615.

Accordingly, we hold that the 1934 decree awarded an easement by necessity.

III. THE DEGREE OF NECESSITY REQUIRED FOR AN EASEMENT BY NECESSITY

The parties also dispute the degree of necessity required to establish an easement in this case: strict necessity or reasonable necessity. We hold that strict necessity is required to establish an easement by necessity.

Whether an easement by necessity requires a showing of strict or reasonable necessity is a question of law that this Court reviews de novo. See *Thomas M Cooley Law Sch*, 300 Mich App at 254.

In *Waubun Beach*, our Supreme Court articulated the standard for the establishment of an easement by necessity as one of "strict necessity." *Waubun Beach*, 274 Mich at 609. Indeed, the Court explained that "the fact that a former way of necessity continues to be the most convenient way will not prevent its extinguishment when it ceases to be *absolutely* necessary." *Id*. at 611 (quotation marks and citation omitted; emphasis added). The requirement of strict necessity for an easement by necessity was the law in Michigan before *Waubun Beach*. See, e.g., *Goodman v Brenner*, 219 Mich 55, 59; 188 NW 377 (1922) ("A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over other land of the grantor, or as an alternative by passing upon the land of a stranger.") (quotation marks and citation omitted); *Moore v White*, 159 Mich 460, 463-464; 124 NW 62 (1909) (explaining that a way of necessity is one of strict necessity).

Since our Supreme Court's decision in *Waubun Beach*, our Supreme Court has continued to apply the

principles of strict necessity in the context of easements by necessity. See, e.g., *Forge*, 458 Mich at 211 n 38 ("A claim of easement by necessity would fail because there is no true necessity, as plaintiff is not landlocked. See *Goodman v Brenner*, 219 Mich 55, 59; 188 NW 377 (1922)."). This Court has both recognized and applied the principles of strict necessity articulated in *Waubun Beach*. See, e.g., *Birch Forest Club v Rose*, 23 Mich App 492, 496-497; 179 NW2d 39 (1970); *Schmidt*, 94 Mich App at 732-733; *Schadewald v Brulé*, 225 Mich App 26, 41 n 4; 570 NW2d 788 (1997). However, it has not done so consistently. Compare *Schmidt*, 94 Mich App at 732-733 (stating that the standard is one of strict necessity), and *Schadewald*, 225 Mich App at 41 n 4 (applying principles articulated in *Waubun Beach*), with *Chapdelaine*, 247 Mich App at 173 (applying reasonable-necessity standard), *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 130-131; 737 NW2d 782 (2007) (stating that reasonable necessity is the appropriate standard), and *Tomecek v Bavas*, 276 Mich App 252, 275 n 9; 740 NW2d 323 (2007) (stating that the necessary showing for an easement by necessity is one of reasonable necessity, not strict necessity), vacated in pertinent part *Tomecek v Bavas*, 482 Mich 484 (2008).

The origin of this inconsistency appears to be this Court's decision in *Chapdelaine*, 247 Mich App at 172-173, where this Court opined as follows before applying a reasonable-necessity standard to a question regarding an easement by necessity:

> An easement by necessity may arise either by grant, where the grantor created a landlocked parcel in his grantee, or it may arise by reservation, where the grantor splits his property and leaves himself landlocked. *Goodman v Brenner*, 219 Mich 55, 59; 188 NW 377 (1922); *Moore v White*, 159 Mich 460, 463-464; 124 NW 62 (1909). *Regardless of whether the easement at issue is implied by law or by reservation, the party asserting the right to the easement*

> *need only show that the easement is reasonably necessary, not strictly necessary, to the enjoyment of the benefited property. Schmidt*, *supra* at 735. See also 1 Restatement Property, Servitudes, 3d, § 2.15. [Emphasis added.]

Our Court has relied on this quotation, or cases citing it, for the proposition that the reasonable-necessity standard applies to an easement by necessity. See, e.g., *Schumacher*, 275 Mich App at 130-131; *Tomecek*, 276 Mich App at 275 n 9.

The *Chapdelaine* Court's citation of *Schmidt*, 94 Mich App at 735, does not support the proposition that the reasonable-necessity standard applies to an easement by necessity. Indeed, the *Schmidt* Court expressly stated, "Easements implied from necessity have been recognized in Michigan as requiring a showing of strict necessity." *Id*. at 732-733. The *Schmidt* Court's discussion of reasonable necessity was confined to easements implied from quasi-easements. See *id*. at 732-735. In *Schmidt*, this Court was tasked with resolving whether there was a difference between a grant and a reservation for purposes of applying the reasonable-necessity standard to easements implied from quasi-easements. *Id*. at 734-735.

The *Chapdelaine* Court's citation of 1 Restatement Property, 3d, Servitudes, § 2.15, p 202 does, however, support the proposition that the reasonable-necessity standard applies to an easement by necessity. The Restatement reads as follows:

> A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

Comment *d* to § 2.15 addresses the degree of necessity required:

> "Necessary" rights are not limited to those essential to enjoyment of the property, but include those which are reasonably required to make effective use of the property. If the property cannot otherwise be used without disproportionate effort or expense, the rights are necessary within the meaning of this section. [*Id*. at 207.]

Notwithstanding this authority from the Restatement, citation of authority from our Supreme Court for the use of the reasonable-necessity standard is markedly absent from *Chapdelaine*. We have not located any authority from our Supreme Court adopting this section of the Restatement or applying the reasonable-necessity standard to easements by necessity. Therefore, the *Chapdelaine* Court erroneously applied the reasonable-necessity standard for easements by necessity. The strict-necessity standard was the law in Michigan when *Chapdelaine* was decided and it remains the law in Michigan today absent contrary authority from our Supreme Court.

Accordingly, we conclude that strict necessity is required to establish an easement by necessity.

We note that it is unnecessary for this Court to convene a conflict panel under MCR 7.215(J) to resolve the inconsistency in this Court's easement-by-necessity decisions for two reasons. First, it is well established that this Court is bound by stare decisis to follow the decisions of the Supreme Court. See, e.g., *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007); *Meier v Awaad*, 299 Mich App 655, 670; 832 NW2d 251 (2013). Only the Supreme Court has the authority to overrule one of its prior decisions; until the Court does so, all lower courts must follow the prior deci-

sion. *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). The strict-necessity standard articulated by our Supreme Court has been the rule of law since before the Court's decision in *Waubun Beach*, and there is no case from our Supreme Court changing this rule of law to the reasonable-necessity standard. Thus, we are bound by stare decisis to apply the strict-necessity standard as articulated by the Supreme Court. See *Meier*, 299 Mich App at 670. If we were to follow *Chapdelaine*, we would be violating the rule of stare decisis. Second, MCR 7.215(J)(1) does not require this Court to follow *Chapdelaine*. MCR 7.215(J)(1) provides that "[a] panel of the Court of Appeals must follow *the rule of law established by* a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." (Emphasis added.) But *Chapdelaine* did not establish a rule of law that reasonable necessity is required to establish an easement by necessity. It is axiomatic that this Court does not have the authority to recant the Supreme Court's positions. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 371; 817 NW2d 504 (2012). Again, only the Supreme Court has the authority to overrule one of its prior decisions. *Paige*, 476 Mich at 524. Because a legal rule requiring reasonable necessity would be inconsistent with the Supreme Court's rule of law requiring strict necessity, *Chapdelaine* could not and did not recant the Supreme Court's rule of law requiring strict necessity. See *id.*; *DeFrain*, 491 Mich at 371. Consequently, *Chapdelaine* did not establish a rule of law. As such, MCR 7.215(J)(1) is not triggered in this case and MCR 7.215(J) does not require this Court to convene a conflict panel.

IV. ENTITLEMENT TO AN EASEMENT BY NECESSITY

Having determined that strict necessity is required to establish an easement by necessity, we now turn to whether the trial court erred by (1) extinguishing the Bearce appellants' easement rights and (2) limiting the Murray plaintiffs' easement rights to an easement by necessity for winter emergency-vehicle access for the benefit of only lots 9 through 19. We hold that there is no strict necessity in this case and, therefore, that neither the Bearce appellants nor the Murray plaintiffs are entitled to an easement by necessity. The trial court erred to the extent that it concluded otherwise.

A. STANDARD OF REVIEW

We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id*. at 251. "The trial court's findings are given great deference because it is in a better position to examine the facts." *Id*. Furthermore, we review questions of law de novo. *Thomas M Cooley Law Sch*, 300 Mich App at 254.

B. THE BEARCE APPELLANTS' ENTITLEMENT TO AN EASEMENT

The Bearce appellants argue that the trial court erred by extinguishing their easement rights on the basis of cessation of necessity. They contend that their easements are easements implied from a quasi-easement and, thus, are appurtenant and run with the land so that analyzing the degree of necessity is unnecessary. However, the easements in this case are ease-

ments by necessity for the reasons previously discussed. Therefore, the Bearce appellants' argument on this basis fails. The Bearce appellants alternatively argue that if the easements are easements by necessity, the trial court erred by extinguishing their "social easement." According to the Bearce appellants, the 1934 decree "expressly implied" a social easement between the lots by acknowledging the need for interaction among neighbors. We disagree.

The Bearce appellants do not provide this Court with any legal authority regarding a "social easement," let alone legal authority standing for the proposition that an easement merely for interaction with neighbors can constitute an easement by necessity. Appellants may not merely announce their position with no citation of supporting authority and, thus, leave it to this Court to discover and rationalize the basis for their claims. See *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). Regardless, the 1934 decree does not support the Bearce appellants' claim that the court ordered a "social easement," i.e., an easement to allow the neighbors to socialize. The court's order was limited to a right of way "for the purposes of ingress and egress to and from the public highways in said Township of Tuscarora . . . ." Although the decree refers to the existing trail when stating that "there is no other practical means by which . . . the occupants [of lots 1 through 34] can communicate among themselves," the only purpose of the right of way by necessity ordered by the court was for ingress and egress to and from the public highways; the court's order did not include socializing with neighbors as a purpose.

As previously discussed, an easement by necessity "ceases to exist when the necessity for its continuance ceases." *Waubun Beach*, 274 Mich at 609. Here, the trial

court found that the Bearce appellants' necessity for ingress and egress over defendant's property to go to and from public highways ceased to exist because the lots south of defendant's property had access to a public road and, furthermore, had a relatively level road available to them to access their lots without crossing defendant's property. The court also found that the Futrells, even in the winter, could access their property using their private drive without traversing lots to the north or south. The Bearce appellants do not challenge these findings. On the basis of these findings, the trial court's judgment extinguished the easement rights awarded in the 1934 decree to the extent that "the party/owners, invitees, and assigns of Lot 20 and the north one-half of Lot 21 shall not traverse or go upon the south one-half of Lot 23 and Lots [24-29 and 32-34], and the party/owners, invitees, and assigns of the south one-half of Lot 23 and Lots [24-29 and 32-34] shall not traverse or go upon Lot 20 and the north one-half of Lot 21 . . . ." The Bearce appellants have not established that the trial court erred by entering this judgment.

Accordingly, the trial court did not err in case number 08-007889-CH by extinguishing the easement by necessity over defendant's property.

C. THE MURRAY PLAINTIFFS' ENTITLEMENT TO AN EASEMENT

The Murray plaintiffs contend that they are entitled to an easement by necessity over defendant's lots in the winter for purposes of general vehicular traffic, or at the very least, emergency-vehicle access. Thus, the Murray plaintiffs argue that the trial court erred by concluding that they are not entitled to an easement by necessity for general vehicular traffic over defendant's lots, erred by concluding that lots 4 through 8 do not have an easement by necessity over defendant's prop-

erty for wintertime emergency-vehicle access, and correctly awarded the easement by necessity over defendant's lots for winter emergency-vehicle access for the benefit of lots 9 through 19. We disagree.

An analysis of this issue first requires this Court to determine the easement rights of the owners of lots 4 through 19 following the Supreme Court's decision in *Waubun Beach*. In *Waubun Beach*, 274 Mich at 601, the Supreme Court stated that the 1934 decree awarded a way of necessity for the owners of lots 1 through 34 across each others' lots for purposes of ingress and egress to and from public highways. The only party to appeal to the Supreme Court was the MacClures, who owned lots 4, 5, 7, 8, 35 through 38, and 42 through 51. *Id*. at 601-602. The *Waubun Beach* Court explained that at the time the bill of complaint was filed,

> appellants had not only constructed roads from their lots to the public highway along the section line between sections 1 and 2, but had opened a way across their own premises from lot 35 to the highway, running south of the plat, which was open and used; so that at the time of the filing of the bill of complaint plaintiffs had a right of way to this section line road, as had the owner of lot 6. The owners of lots 1, 2 and 3 had a way to their premises over the lands lying north thereof, and persons owning lands south of those owned by appellants had a way to lot 35 . . . and were given an extension of the right of way for temporary use at least for a period of three years from there to the highway south of the premises by appellants . . . . [*Id*. at 615.]

The Court therefore held:

> [A]t the time of the filing of the bill of complaint, all of the parties owning property in the plat had a way to reach their premises without passing over the lands of appellants. Having such way, no right of way of necessity existed over the lands and premises of appellants.

> The decree of the trial court is reversed as to appellants . . . . [*Id.*]

Although the Court discussed how all the parties had access to their property, including the MacClures' installation of roads from their lots to a public highway, the Court's holding was limited to the existence of a right of way over the MacClures' lands. It is clear that the Court extinguished the easement by necessity that permitted the owners of lots 1, 2, 3, 6, and 9 through 34 to traverse MacClure lots 4, 5, 7, and 8. See *id.* ("[N]o right of way of necessity existed over the lands and premises of appellants."). However, by limiting its holding to the existence of a right of way over the MacClures' lands, the Court did not extinguish the rights of the owners of lots 1, 2, 3, 6, and 9 through 34 to traverse each others' lots for ingress and egress to and from public highways. Moreover, although the Court reversed the 1934 decree "as to appellants," the Court did not extinguish the MacClures' right, i.e., the right of the owners of lots 4, 5, 7, and 8, to traverse lots 1, 2, 3, 6, and 9 through 34 for ingress and egress to and from public highways. The owners of lots 1, 2, 3, 6, and 9 through 34 were not appellants in *Waubun Beach* and, thus, were not afforded relief. See *Nelson & Witt v Texas Co*, 256 Mich 65, 69; 239 NW 289 (1931) ("From the judgment against it the United Company has not appealed, so that feature of the case calls for no discussion, this appellate court not being concerned with errors which may have been committed against a nonappealing party."); *Johnston Realty & Investment Co v Grosvenor*, 241 Mich 321, 324; 217 NW 20 (1928) (explaining that relief will not be granted by an appellate court on behalf of a party who has not appealed).

Thus, in light of *Waubun Beach* and assuming that a strict necessity for an easement still existed, all the

Murray plaintiffs had an easement by necessity to traverse defendant's property for purposes of ingress and egress to and from the public highways. The *Waubun Beach* Court did not extinguish the easement rights of the owners of lots 4 through 19 to traverse the lots now owned by defendant (lot 20 and the portion of lot 21 excluding the southeasterly 30 feet); it only extinguished the rights to traverse the lots owned by the MacClures, here, the lots owned by the Charles A. Murray Trust and the Ganos. Therefore, the trial court erred by placing the burden on the trust and the Ganos, the owners of lots 4 through 9, to show the existence of an easement by necessity. Defendant bore the burden of establishing that the necessity for the Murray plaintiffs' easement had ceased to exist.

As previously discussed, the requirement for an easement by necessity is that of strict or absolute necessity, and an easement by necessity ceases to exist when the necessity ceases. *Waubun Beach*, 274 Mich at 608-609, 611; see also *Schmidt*, 94 Mich App at 732-733. The *Waubun Beach* Court explained that an easement by necessity is not a right of way of mere convenience. *Waubun Beach*, 274 Mich at 609, 611-612. The necessity ceases when another way has been acquired. *Id*. at 610. Indeed, the Court expressly stated that Michigan "has never recognized the doctrine that the mere fact that one has to go upgrade in getting to or from his land or that he would have to make or improve a way therefrom, gave him a right to a way of necessity." *Id*. at 611; see also *Schadewald*, 225 Mich App at 41 n 4 ("The lack of any access except over a steep grade is insufficient to establish an easement by necessity."). In 1998, our Supreme Court opined that a claim for an easement by necessity fails if the property at issue is not landlocked; in such a situation, there is "no true necessity." *Forge*, 458 Mich at 211 n 38, citing *Goodman*, 219 Mich at 59.

Here, the trial court found that the parties had access from their lakefront lots back to the country road and that the parties had driveways installed from the county road to access their lakefront lots. We are not definitely and firmly convinced that the trial court mistakenly found these facts. See *Chelsea Investment Group LLC*, 288 Mich App at 251. In light of these facts, there was not a strict necessity in this case. The Murray plaintiffs were not landlocked. See *Forge*, 458 Mich at 211 n 38. Each of the Murray plaintiffs had a driveway to Chippewa Beach Road. Thus, each of the Murray plaintiffs and any emergency responders had public-highway access to and from the Murray plaintiffs' property without traversing defendant's property. Indeed, the Murray plaintiffs and any emergency responders had access to the Murray plaintiffs' properties from a public highway simply because the Murray plaintiffs' driveways are on the Murray plaintiffs' properties.[10] Use of defendant's property was not strictly necessary for purposes of ingress and egress to and from a public highway. This was true even in the winter when there was snow and ice accumulation. The snow and ice accumulation only impacts the ability to traverse the Murray plaintiffs' properties via driveways when vehicles *have already accessed* the respective property. Simply put, this is not a case about inability to access the Murray plaintiffs' properties; this is a case about access to a *particular part* of the properties—the part of the properties where homes and cottages are located—and the most convenient way of doing so. Even if it was more convenient for the Murray plaintiffs and emer-

[10] Thus, the trial court clearly erred by finding that emergency vehicles such as ambulances and fire trucks cannot access the lots during the winter when significant amounts of snow and ice are present. Indeed, David Carpenter only testified that ambulances and fire trucks could not get down the driveways in the winter.

gency responders to access the cottages and homes in the winter by traversing defendant's property instead of using a driveway, an easement by necessity is not an easement of convenience. *Waubun Beach*, 274 Mich at 609, 611-612. Again, Michigan "has never recognized the doctrine that the mere fact that one has to go upgrade in getting to or from his land or that he would have to make or improve a way therefrom, gave him a right to a way of necessity." *Id*. at 611; see also *Schadewald*, 225 Mich App at 41 n 4 ("The lack of any access except over a steep grade is insufficient to establish an easement by necessity.").

Accordingly, we conclude that the trial court erred in case number 07-007789-CH by awarding an easement by necessity when no strict necessity existed.[11]

V. CONCLUSION

We hold that an easement by necessity no longer exists because there is no longer a strict necessity for its existence. The trial court erred in case number 07-007789-CH by awarding an easement by necessity when

[11] We decline to address the Murray plaintiffs' argument that the trial court's failure to award them an easement by necessity over the defendants' lots for general vehicular traffic violated their liberty to contract and right to freedom of association under the United States Constitution. Not only are these issues unpreserved because they are raised for the first time on appeal, they are abandoned because they have been presented in a cursory fashion, with little citation to supporting authority, and without any meaningful discussion of liberty-to-contract and freedom-of-association principles. See *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) ("Issues raised for the first time on appeal are not ordinarily subject to review."); *Wiggins v City of Burton*, 291 Mich App 532, 574; 805 NW2d 517 (2011) ("We decline to address this issue for the first time on appeal."); *Barrow v Detroit Election Comm*, 301 Mich App 404, 418 n 6; 836 NW2d 498 (2013) (concluding that a constitutional argument was abandoned because it was given cursory treatment).

no strict necessity existed. However, the trial court properly extinguished the easement by necessity in case number 08-007889-CH.

We affirm in part and reverse in part the trial court's judgment in case number 07-007789-CH. We affirm the trial court's judgment in case number 08-007889-CH.

WILDER, P.J., and DONOFRIO, J., concurred with BECKERING, J.

In re MOILES

Docket No. 314970. Submitted August 6, 2013, at Grand Rapids. Decided October 29, 2013, at 9:00 a.m. Reversed in part and remanded at 495 Mich 944.

Petitioner, Tasha Weeks, filed an action in the Mecosta Circuit Court, Family Division, seeking an order revoking respondent, Kenneth L. Moiles's acknowledgment of parentage of the minor child, EM. The parties were romantically involved for seven years. They separated in 2006 and the child was born in 2007. The parties had at some point resumed their relationship, Moiles signed an acknowledgment of parentage, and the parties' relationship again ended in 2009. In 2012, Weeks asserted in the petition that the child had been conceived during the time she and Moiles were separated and that the child was not his biological child. The circuit court, Marco Menezes, J., ordered the parties to permit DNA analysis, which indicated there was a zero percent chance that Moiles was the child's biological father. Weeks filed a motion to revoke Moiles's acknowledgment of parentage and the court heard testimony only from the lab technician who had analyzed the DNA samples. The court granted Weeks's petition and revoked Moiles's acknowledgment of parentage under MCL 722.1443(2), finding that one or both parties knew or should have known that Moiles was not the child's biological child when they signed the acknowledgment and that it was a misrepresentation of a material fact and was fraudulently executed by the two parties. The court further found that there was clear and convincing evidence that Moiles was not the child's biological father and revoked his acknowledgment of parentage. Moiles appealed.

The Court of Appeals *held*:

1. The Paternity Act, MCL 722.711*et seq*., the Acknowledgment of Parentage Act, MCL 722.1001, *et seq*., and the Revocation of Paternity Act, MCL 722.1431 *et seq*., serve the interrelated purposes of establishing or disestablishing a child's paternity, are *in pari materia*, are construed together as one law, and are read reasonably and in context with each other.

2. Under MCL 722.1437, a child's mother, acknowledged father, alleged father, or a prosecuting attorney may file an action to revoke an acknowledgment of parentage within (1) three years

after the child's birth, (2) one year after the acknowledgment of parentage was signed, or (3) one year after the Revocation of Paternity Act, MCL722.1431 *et seq*., went into effect, whichever is later. The affidavit supporting the petition must contain a statement of facts that establishes one of the following: (1) mistake of fact, (2) newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed, (3) fraud, (4) misrepresentation or misconduct, or (5) duress in signing the acknowledgment. Under MCL 722.1443(2) a trial court may (1) revoke an acknowledgment of parentage, (2) set aside an order of filiation, (3) determine that a child was born out of wedlock, or (4) make a determination of paternity and enter an order of filiation. A trial court must order blood or tissue typing or DNA identification profiling in accordance with the Paternity Act, MCL 722.716, if the affidavit supporting the petition is sufficient. Looking to the Paternity Act for guidance, under MCL 722.716(5) and (6), the test results presumptively establish the child's paternity if there is a 99 percent or higher probability of paternity; either party may move for summary disposition on the petition if the presumption of paternity is established. MCL 722.1443(5) provides that the test results assist the trial court in making a determination but are not binding.

3. For purposes of MCL 722.1437(2)(d), the term "misrepresentation", as defined in Black's Law Dictionary, means the act of making a false or misleading assertion about something, usually with the intent to deceive. The definition of "misrepresentation," as established in the common-law context of fraudulent misrepresentation and innocent misrepresentation in contract cases, is not applicable to defining "misrepresentation" as used in the Revocation of Paternity Act because, in the common-law context, misrepresentation requires that it encompass the act of one party making a false representation that deceives the other party. The Legislature clearly intended that the term "misrepresentation" not include only the common-law definition, which would have required the misrepresentation to have been made to a party who signed the acknowledgment of parentage. Instead, MCL 722.1437(2)(d) only requires that (1) a misrepresentation was made, and (2) the circumstances of the misrepresentation were set forth in an affidavit signed by the person filing the action. The Legislature chose to not word the statute to require that the misrepresentation be made from one party to the other party. In this case, the trial court correctly determined that the acknowledgment of parentage was a misrepresentation of a material fact under MCL 722.1437(2)(d) because the acknowledgment was made under oath to the effect that Moiles was the child's biological father. While the Acknowledgment of Parentage Act does not prohibit

a child from being acknowledged by a man who is later determined not to be his or her biological child, the man's belief at the time of acknowledgment must have been honest. A man may not execute such an acknowledgment knowing the child is not his biological child because the acknowledgment creates the legal presumption that the man is the child's natural father. In this case, Moiles knew or should have known he was not the child's biological father because of the lack of contact with Weeks at the time of conception. Weeks's affidavit, which set forth the misrepresentation, supported revocation of the acknowledgment under MCL 722.1437(2)(d).

4. In the alternative, the trial court did not clearly err by concluding that the acknowledgment of parentage was executed fraudulently by Moiles and Weeks, as set forth in MCL 722.1437(2)(c). Moiles's acknowledgment that the child was his natural child was either knowingly false when made or recklessly made as a positive assertion because he knew that he was most likely not the child's natural father. In addition, although not binding on the court, the DNA results conclusively established that Moiles was not the child's biological father, which further supported the trial court's conclusion.

5. Under MCL 722.1443(2)(d), the trial court may make a determination of paternity and enter an order of filiation as provided for under MCL 722.717 of the Paternity Act. For purposes of MCL 722.1443(4), a court may refuse to enter an order setting aside a paternity determination or determining that a child was born out of wedlock, if the court finds evidence that the order would not be in the best interests of the child. Because an acknowledgment of parentage is not a paternity determination as that term is used in the Revocation of Paternity Act, the trial court did not err by concluding that the best-interest determination of MCL 722.1443(4) did not apply. A trial court is not required to conduct the best-interest analysis of MCL 722.1443(4) during a hearing to revoke an acknowledgment of parentage under MCL 722.1443(2)(a) because, by its own language, MCL 722.1443(4) applies only to paternity determinations brought under MCL 722.717 and determinations that a child was born out of wedlock.

6. The Court of Appeals declined to address Moiles's unpreserved due-process challenges because he failed to show plain error affecting his substantial rights.

Affirmed.

WHITBECK, P.J., concurring in part and dissenting in part, agreed with the majority that the trial court did not need to make a best-interest determination under MCL 722.1443(4) when revoking an acknowledgment of parentage and agreed for different

reasons that it was appropriate to decline consideration of Moiles's unpreserved due-process challenges. Judge WHITBECK would have concluded that the trial court clearly erred when it found that Moiles's action in signing the acknowledgment of parentage when he was not the child's biological child was a fraud or misrepresentation under MCL 722.1437. He reasoned that the act does not prohibit a child from being acknowledged by a man that is not his or her biological father and noted that whether Moiles knew or should have known he was not the child's biological father, Moiles did not represent that he was the biological father of the child. Judge WHITBECK did not believe the trial court followed the proper procedure under MCL 722.1437 for revoking the acknowledgment of parentage. He would have reversed the trial court's order and remanded for the trial court to determine if the parties made a misrepresentation or committed fraud consistent with the legal meaning of those words, not as defined by a dictionary.

1. REVOCATION OF PATERNITY ACT — ACKNOWLEDGMENT OF PARENTAGE ACT — PATERNITY ACT — IN PARI MATERIA.

The Paternity Act, MCL 722.711 *et seq*., the Acknowledgment of Parentage Act, MCL 722.1001, *et seq*., and the Revocation of Paternity Act, MCL 722.1431 *et seq*., serve the interrelated purposes of establishing or disestablishing a child's paternity, are *in pari materia*, are construed together as one law, and are read reasonably and in context with each other.

2. CHILD AND PARENT — ACKNOWLEDGMENT OF PARENTAGE — REVOCATION OF PATERNITY — BEST-INTEREST ANALYSIS.

A trial court is not required to conduct the best-interest analysis of MCL 722.1443(4) during a hearing to revoke an acknowledgment of parentage under MCL 722.1443(2)(a) because, by its own language, MCL 722.1443(4) applies only to paternity determinations brought under MCL 722.717 and determinations that a child was born out of wedlock.

3. CHILD AND PARENT — REVOCATION OF PATERNITY — MISREPRESENTATION — ACKNOWLEDGMENT OF PARENTAGE — HONEST BELIEF.

Under MCL 722.1437(2)(d) and MCL 722.1443(2)(a), a party's acknowledgment of parentage of a child may be revoked on the basis of misrepresentation if it is proven that (1) a misrepresentation was made, and (2) the circumstances of the misrepresentation were set forth in an affidavit signed by the person filing the action; the misrepresentation does not have to made by one party to the other party; the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., does not prohibit a child from being acknowledged

> by a man who is later determined to not be his or her biological child but the man's belief at the time of acknowledgment must have been honest or it is grounds for revocation of paternity on the basis of misrepresentation under MCL 722.1437(2)(d).

Lobert & Fransted, P.C. (by *Emily W. Fransted*) for Tasha Weeks.

Samuels Law Office (by *Stacy Flanery*) for Kenneth L. Moiles.

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

OWENS, J. Respondent, Kenneth L. Moiles, appeals as of right the circuit court's order granting the motion of petitioner, Tasha Weeks, to revoke Moiles's acknowledgment of parentage of the minor child, EM (the child). Because we conclude that the trial court complied with the statute in question, the Revocation of Paternity Act (the Act),[1] we affirm.

I. FACTS

Moiles and Weeks were romantically involved for seven years, but ended their romantic involvement in December 2009. Weeks testified that the parties had temporarily separated in 2006 and the child was born in 2007. Even though both parties were aware that there was a possibility that Moiles was not the biological father of the child, Moiles signed an acknowledgment of parentage, affirming under penalty of perjury that he was the child's natural father. Under the Acknowledgment of Parentage Act,[2] an acknowledgment establishes a child's paternity without requiring further adjudica-

[1] MCL 722.1431 *et seq*.

[2] MCL 722.1001 *et seq*.

tion.[3] The parties had a child in 2009, KNM, and they do not dispute that Moiles is the natural father of KNM.

In May 2011, Moiles was involved in a Child Protective Services (CPS) investigation concerning bruises to his child, KAM, from a previous marriage. Moiles pleaded to jurisdiction in that case. Moiles was also involved in another CPS investigation in October 2011. In the trial that followed, Weeks testified that in October 2011, Moiles had returned KNM to her home with a bruise on his face. A jury eventually found that the trial court had jurisdiction over the child and KNM. Services in that case remained ongoing through December 2012.

In June 2012, the Michigan Legislature passed the Revocation of Paternity Act (the act),[4] which provides in part a means by which a trial court can revoke an acknowledgment of parentage.[5] The act allows a mother, acknowledged father, alleged father, or prosecuting attorney to move to revoke an acknowledgment of parentage within three years after the child's birth, within one year after the acknowledgment of parentage was signed, or within one year after the effective date of the act, whichever is later.[6]

In August 2012, Weeks filed a petition, seeking to revoke Moiles's acknowledgment of the child's parentage. Weeks asserted that the child was conceived during the time that she and Moiles were separated and that the child was not his biological child. A DNA analysis indicated a zero percent chance that Moiles was the child's biological father.

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[3] MCL 722.1004.

[4] MCL 722.1431 *et seq*.

[5] MCL 722.1443(2)(a).

[6] MCL 722.1437(1).

In December 2012, Weeks petitioned the trial court to suspend Moiles's parenting time on the basis that his oldest son had sexually abused the child. Moiles testified that he did not believe that the allegation was true, and that he instead believed that Weeks had manufactured it "so that she can keep her parenting time."

On January 12, 2013, Weeks provided the trial court with a brief in support of her petition requesting the revocation of Moiles's acknowledgment of parentage. On January 22, 2013, the trial court heard Weeks's petition to revoke Moiles's acknowledgment of parentage. The trial court heard testimony solely from the technician who had analyzed the DNA samples. Moiles contended that the act was not applicable to this case because the parties had not made any misrepresentations to each other. Moiles also contended that the trial court must consider the child's best interests before revoking his paternity.

The trial court found that the act was unambiguous and applied to Moiles's case because one or both parties knew or should have known that he was not the child's biological father when they signed the acknowledgment. Thus, the trial found that the acknowledgment "was a misrepresentation of the material fact and was executed fraud[ul]ently by the two parties." The trial court further found by clear and convincing evidence that Moiles was not the child's "biological father," and revoked the acknowledgment of parentage.

II. STANDARD OF REVIEW

The Revocation of Paternity Act does not provide a standard by which this Court should review the trial court's decision. Generally, this Court reviews for clear error the trial court's factual findings in proceedings involving the rights of children, and reviews de novo

issues of statutory interpretation and application.[7] The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake.[8]

Consistently with the general standards of review in actions involving the care and custody of children, we conclude that this Court should review for clear error the trial court's findings concerning the sufficiency of an affidavit and whether there is clear and convincing evidence that a man is not a child's father under MCL 722.1437(3). We also conclude that we should review de novo the trial court's conclusions of law.

III. INTERPRETATION OF THE REVOCATION OF PATERNITY ACT

A. STATUTORY LANGUAGE

The act allows the trial court to (1) revoke an acknowledgment of parentage, (2) set aside an order of filiation, (3) determine that a child was born out of wedlock, or (4) make a determination of paternity and enter an order of filiation.[9] Pertinent to this case, the act provides that MCL 722.1437 "governs an action to set aside an acknowledgment of parentage."[10]

Under MCL 722.1437, a child's mother, acknowledged father, alleged father, or a prosecuting attorney may file an action to revoke an acknowledgment of parentage within (1) three years after the child's birth, (2) one year after the acknowledgment of parentage was signed, or (3) one year after the act went into effect, whichever is later.[11] The affidavit supporting the peti-

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[7] MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

[8] *In re Mason*, 486 Mich at 152.

[9] MCL 722.1443(2).

[10] MCL 722.1435.

[11] MCL 722.1437(1).

tion must contain a statement of facts that establishes one of five grounds to revoke an acknowledgment:

> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment.[12]

If the trial court finds that the affidavit is sufficient, it must "order blood or tissue typing or DNA identification profiling" in accordance with the Paternity Act.[13] Under the section of the Paternity Act to which the Revocation of Paternity Act refers, the results of a blood, tissue, or DNA test presumptively establish the child's paternity if there is a 99 percent or higher probability of paternity.[14] If the testing establishes a presumption of paternity, "either party may move for summary disposition under the court rules."[15] Under the Revocation of Paternity Act, the purpose of the blood typing, tissue typing, or DNA identification profiling is "to assist the court in making a determination," but the results "are not binding on a court in making a determination under [the Act]."[16]

B. PRINCIPLES OF STATUTORY INTERPRETATION

This case requires this Court to interpret the Revocation of Paternity Act. When interpreting a statute,

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[12] MCL 722.1437(2).

[13] MCL 722.1437(3); MCL 722.1443(5); see MCL 722.716.

[14] MCL 722.716(5).

[15] MCL 722.716(6).

[16] MCL 722.1443(5).

our goal is to give effect to the intent of the Legislature.[17] The language of the statute itself is the primary indication of the Legislature's intent.[18] This Court enforces unambiguous statutes as written.[19] We must read the statute as a whole and may not read statutory provisions in isolation.[20] This Court reads the provisions of statutes "reasonably and in context," and reads subsections of cohesive statutory provisions together.[21]

Generally we construe statutory terms according to their plain and ordinary meanings.[22] However, if the Legislature has chosen words that " 'have acquired a peculiar and appropriate meaning in the law,' " we construe those terms according to such peculiar and appropriate meanings.[23] Thus, "when the Legislature chooses to employ a common-law term without indicating an intent to alter the common law, the term will be interpreted consistent with its common-law meaning."[24] This is true even when the common-law meaning is from another area of the law.[25]

This Court construes the Acknowledgment of Parentage Act and the Paternity Act *in pari materia*.[26] Statutes *in pari materia* relate to the same subject or share a

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[17] *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

[18] *Id*.

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

[20] *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010).

[21] *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

[22] *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013).

[23] *Id*., quoting MCL 8.3a.

[24] *In re Bradley Estate*, 494 Mich at 377.

[25] *Ford Motor Co v Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006).

[26] *Sinicropi v Mazurek*, 273 Mich App 149, 156-157; 729 NW2d 256 (2006); *Aichele v Hodge*, 259 Mich App 146, 161; 673 NW2d 452 (2003).

common purpose, and we must read and construe them together as one law.[27] Like the Acknowledgment of Parentage Act and the Paternity Act, the Revocation of Paternity Act deals with the same subject matter—the determination of a child's legal father—and these acts all serve the interrelated purposes of establishing or disestablishing a child's paternity. Therefore, we will construe these statutes *in pari materia*.

C. MISREPRESENTATION UNDER MCL 722.1437(2)(d)

Moiles contends that the trial court improperly determined that the Revocation of Paternity Act applied to this case on the grounds of misrepresentation because the type of misrepresentation that Weeks alleged was not a misrepresentation under the act. We disagree with his contention.

The act does not define "misrepresentation." We must read statutes in context to discern the Legislature's intent.[28] In this case, the context in which the Legislature has used the word "misrepresentation" is in a list with other common-law legal terms, including fraud, mistake of fact, and duress. We conclude that the Legislature meant to use the more particular, legal meanings of these terms. We are also not blind to the fact that an acknowledgment of parentage is a legally binding, signed writing. This further buttresses our conclusion that the Legislature meant to use the common-law legal meaning of the word "misrepresentation," as it is understood in the context of other legally binding writings. Because there is no indication that the Legislature intended to alter the common-law meaning of "misrepresentation," we examine Michi-

[27] *Sinicropi*, 273 Mich App at 157.

[28] *McCahan*, 492 at 739.

gan's common law to determine its meaning.[29] Moreover, because we conclude that "misrepresentation" is a legal term, we may also turn to a legal dictionary to determine its meaning.[30]

Black's Law Dictionary defines "misrepresentation" as "[t]he act of making a false or misleading assertion about something, usu. with the intent to deceive."[31]

In the common law, the word "misrepresentation" is typically discussed in the context of fraudulent and innocent misrepresentations, as defenses to contracts.[32] In the context of contracts, the elements of fraudulent misrepresentation are (1) a party made a material misrepresentation; (2) the representation was false; (3) when the party made the representation, he or she either knew it was false or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) the party making the misrepresentation intended that the other party act on it; (5) the other party acted in reliance on it; and (6) the other party was injured.[33]

An innocent misrepresentation is different from a fraudulent misrepresentation.[34] The elements of innocent misrepresentation are (1) a representation in a transaction between two parties; (2) that is false; (3) that actually deceives the other party; (4) that the other party relied on; (5) that the other party suffered damage from; and (6) the party making the misrepresentation

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[29] See *Ford Motor Co*, 475 Mich at 439-440.

[30] *Id*. at 440; see also *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 190; 740 NW2d 678 (2007) (applying the Black's Law Dictionary definition to define the term "mistake of fact" as used in the Acknowledgment of Parentage Act, MCL 722.1011(2)(a).

[31] Black's Law Dictionary (9th ed).

[32] *Titan Ins Co v Hyten*, 491 Mich 547, 555-556; 817 NW2d 562 (2012).

[33] *Id*. at 555.

[34] *United States Fidelity*, 412 Mich at 114.

benefitted from it.[35] An innocent misrepresentation is different from a fraudulent misrepresentation because the party making the misrepresentation need not be aware that the representation is false and need not intend the other party to act on it.[36] Also, with an innocent misrepresentation, the person making the misrepresentation must benefit from the other party's injury or damage.[37]

However, because the definitions of fraudulent and innocent misrepresentations both encompass the act of making a false representation that deceives another, we find that the Black's Law Dictionary definition is most helpful in the context of interpreting its meaning in MCL 722.1437(2)(d).[38]

Moiles argues that the misrepresentation had to be made from one party to another. Although in the context of contracts fraudulent and innocent misrepresentations are typically made from one party to another, in this context, there is no indication of a legislative intent for the term "misrepresentation" to only include misrepresentations made to a party signing the acknowledgment of parentage. The statute only requires that a misrepresentation was made and the circumstances of it are set forth in "an affidavit signed by the person filing the action."[39] Had the Legislature intended that the misrepresentation be made from one party to the other party, it could have so provided.[40]

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[35] *Id*. at 116.

[36] *Id*. at 117.

[37] *Id*. at 118.

[38] This is consistent with how this Court previously defined "mistake of fact" as used in the statute.

[39] MCL 722.1437(2).

[40] See *Bay Co Prosecutor*, 276 Mich App at 189 ("We may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.") (quotation marks and citation omitted).

D. APPLYING THE STANDARDS

We conclude that the trial court correctly determined that the acknowledgment of parentage "was a misrepresentation of the material fact." Alternatively, the trial court also correctly determined that the acknowledgment of parentage was "executed fraud[ul]ently by the two parties."

The trial court determined that the parties' representation was a misrepresentation because the "acknowledgment was made under oath to the effect that [Moiles] was the biological father of [the child]." We recognize that in *In re Daniels Estate*, we stated that "the Acknowledgment of Parentage Act does not prohibit a child from being acknowledged by a man who is not his or her biological father."[41] However, this statement did not refer to the situation in which a man knowingly executed a false acknowledgment of parentage. Rather, it referred to the situation in which a man honestly, but mistakenly, believed that he was the biological father of a child and signed an acknowledgment of parentage under such belief. This statement does not stand for the proposition that a man may execute a valid acknowledgment of parentage knowing he is not the child's biological father, particularly because signing the acknowledgment of parentage creates the legal presumption that the man is the child's natural father.[42] This is consistent with the purpose of the Acknowledgment of Parentage Act, which allows a man who honestly believes he is the natural father of a child born out of wedlock to sign an affidavit acknowledging such, rather than having to go through proceedings to establish paternity in circuit court.[43]

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[41] See *In re Daniels Estate*, 301 Mich App 450, 457; 837 NW2d 1 (2013).

[42] MCL 722.1003(1).

[43] See MCL 722.1004.

When Moiles signed the affidavit of parentage form, he affirmed "under penalty of perjury" that he was the natural parent of the child.[44] Since the parties knew, or should have known due to the lack of contact at conception, that Moiles was possibly not the child's natural father, Moiles made a false statement when he signed the acknowledgment of parentage indicating that he was the child's natural father. This false statement deceived the child and the world, as it held Moiles out to the world as something he is uncontrovertibly not: the child's natural father. By falsely signing the acknowledgment of parentage, Moiles became fraudulently entitled to benefits to which he was not entitled, such as the child's companionship, possible public assistance benefits, potential child support, custody, or parenting time, inheritance benefits, and potential wrongful death benefits. Accordingly, the ground of misrepresentation, as alleged in Weeks's affidavit, was established to support revocation of the acknowledgment.

Alternatively, the trial court also did not err when it determined that there was a second ground to support revocation of the acknowledgment: fraud. The trial court also determined that the acknowledgment of parentage was "executed fraudulently by the two parties." "Fraud" also requires a party to make a representation that is false.[45] As previously discussed, Moiles signed the acknowledgment attesting "under penalty of perjury" that he was the child's natural father. However, because he knew that he was most likely not the

[44] Department of Community Health affidavit of parentage form, available at <http://www.michigan.gov/documents/Parentage_10872_7.pdf> (accessed September 23, 2013). The form also provides, "Alteration of this form or the making of false statements with the affidavit for the purposes of deception is a crime. (MCL 333.2894)"

[45] *Titan Ins Co*, 491 Mich at 555.

natural father, the acknowledgment was fraudulent, as it was either knowingly false or was made recklessly as a positive assertion.[46]

Additionally, although DNA test results are not binding on a court, the trial court may use the results "to assist the court in making a determination under [the Act]."[47] The DNA test ordered by the trial court conclusively established that Moiles was not the child's biological father. Therefore, the trial court's finding that the acknowledgment of parentage "was a misrepresentation of the material fact and was executed fraud[u-l]ently by the two parties," was not clearly erroneous.

E. BEST-INTEREST DETERMINATION UNDER MCL 722.1443

Moiles additionally contends that the trial court erred by failing to consider the child's best interests when determining whether to revoke his acknowledgment of parentage. We disagree.

MCL 722.1443 provides the procedures by which the trial court considers actions filed under the Revocation of Paternity Act and provides in part:

> (2) In an action filed under this act, the court may do any of the following:
>
> (a) Revoke an acknowledgment of parentage.
>
> (b) Set aside an order of filiation or a paternity order.
>
> (c) Determine that a child was born out of wedlock.
>
> (d) Make a determination of paternity and enter an order of filiation as provided for under section 7 of the paternity act, 1956 PA 205, MCL 722.717.

* * *

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[46] *Id*.

[47] MCL 722.1443(5)

> (4) A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. The court shall state its reasons for refusing to enter an order on the record.

Moiles contends that an acknowledgment of parentage *is* a paternity determination because it establishes a child's paternity. We disagree, and conclude that the trial court correctly determined that an acknowledgment of parentage is not a paternity determination as that term is used in the statute, and therefore, that MCL 722.1443(4) did not apply. An acknowledgment of parentage does establish the paternity of a child born out of wedlock and does establish the man as a child's natural and legal father.[48] However, in MCL 722.1443(2)(d), the Legislature expressly linked a "determination of paternity" to § 7 of the Paternity Act. We conclude that the Legislature's use of the phrase "paternity determination" in MCL 722.1443(4) specifically refers to a "determination of paternity" under MCL 722.717, and the resulting order of filiation.[49]

When a statute expressly mentions one thing, it implies the exclusion of other similar things.[50] In this case, while MCL 722.1443 generally applies to any of the actions listed in subsection (2), including the revocation of an acknowledgment of parentage,[51] subsection (4) specifically addresses only paternity determinations[52] and determinations that a child is born out of

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[48] *Sinicropi*, 273 Mich App at 163; see MCL 722.1004.

[49] MCL 722.717(1).

[50] *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997).

[51] MCL 722.1443(2)(a).

[52] MCL 722.1443(2)(b).

wedlock.[53] These are only two of the four types of actions that the trial court may take under the Revocation of Paternity Act.[54] Had the Legislature wanted the trial court to make a determination of the child's best interests relative to revoking an acknowledgment of parentage, it could have included language to that effect. But it did not.

Therefore, we conclude that MCL 722.1443(4) did not require the trial court to make a best-interest determination before revoking Moiles's acknowledgment of parentage.

IV. DUE PROCESS

Moiles raises several unpreserved due-process challenges that we decline to address because he has failed to show plain error affecting his substantial rights.[55]

V. CONCLUSION

The trial court did not clearly err when it found that Moiles's action of signing an acknowledgment of parentage, knowing that he was possibly not the child's biological father, constituted a fraudulent execution of the acknowledgment and also contained a misrepresentation of a material fact (his parentage), under MCL 722.1437. In addition, the trial court did not err when it determined that it was not required to make a best-interests determination under MCL 722.1443(4) before revoking Moiles's acknowledgment of parentage.

We affirm.

M. J. KELLY, J., concurred with OWENS, J.

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[53] MCL 722.1443(2)(c).

[54] MCL 722.1443(2).

[55] See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

WHITBECK, P.J., (*concurring in part and dissenting in part*). Respondent, Kenneth L. Moiles, appeals as of right the circuit court's order granting the motion of petitioner, Tasha Weeks, to revoke Moiles's acknowledgment of paternity of the minor child. I acknowledge at the outset that, as the old adage asserts, bad facts make bad law. This case certainly involves bad facts, particularly with respect to Moiles's alleged child abuse. But the question before us is not a factual one. It is purely a legal one, involving the interpretation of a statute. Because I would conclude that the trial court did not comply with the Revocation of Paternity Act,[1] I would reverse and remand.

I agree with the majority's statement of the facts in this case, and its statements of the standard of review and applicable law. Where I diverge from the majority's opinion is in its application of the law to the facts in this case. The majority concludes that when Moiles signed an acknowledgment of parentage acknowledging that he was the child's "natural father," he made a false statement because he was not the child's biological father. For the reasons below, I would conclude that (1) the terms biological and natural father are not interchangeable and (2) Moiles did not make a false statement when he signed the acknowledgment of parentage.

I. MISREPRESENTATION UNDER MCL 722.1437(2)(d)

Moiles contends that the trial court improperly determined that the Revocation of Paternity Act applied to this case on the grounds of misrepresentation and fraud. I agree with his contention.

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[1] MCL 722.1431 *et seq*.

Weeks urges this Court to look to the dictionary to determine what the Legislature meant by "misrepresentation." This Court may resort to a dictionary to determine a word's common meaning.[2] If the word "misrepresentation" stood alone in the statute, I might agree that the Legislature intended to give the word its common, dictionary meaning. But we must read statutes in context to discern the Legislature's intent.[3]

In this case, the context in which the Legislature has used the word "misrepresentation" is in a list with other common-law legal terms, including fraud, mistake of fact, and duress. I agree with the majority's conclusion that the Legislature meant to use the more particular, legal meanings of these terms, and its reasoning for so doing. I also agree with the majority's definitions of fraudulent and innocent misrepresentation. However, while recognizing that the Legislature used particular legal terms in the Revocation of Paternity Act, the majority concludes that the Black's Law Dictionary definition of misrepresentation is the most helpful tool in ascertaining the Legislature's intent in this context. I disagree.

II. APPLYING THE STANDARDS

I would conclude that the trial court's determination that a misrepresentation or fraud occurred in this case was incorrect. Moiles contended that the type of misrepresentation that Weeks alleged he committed was not a misrepresentation under the act. Despite the parties' urging, the trial court did not delve into the meaning of the words "fraud" and "misrepresentation" as contemplated by the act. It is clear, however, that

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[2] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011).

[3] *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

both fraud and misrepresentation require a party to make a representation that is false.[4]

In this case, the trial court found that Moiles and Weeks both knew or should have known that Moiles was not the child's biological father. Therefore, it opined that the acknowledgment of paternity was a "misrepresentation of the material fact and was executed fraud[ul]ently by the parties." The trial court determined that the parties' representation was a misrepresentation because "acknowledgment was made under oath to the effect that [Moiles] was the *biological father* of [the child]." The trial court failed to recognize that, as stated in *In re Daniels Estate*, "the Acknowledgement of Parentage Act does not prohibit a child from being acknowledged by a man that is not his or her biological father."[5] While *In re Daniels Estate* involved a situation that was factually distinguishable from this case,[6] its statement of the law is accurate. The Acknowledgment of Parentage Act itself does not require a man to be the child's *biological* father to acknowledge the child,[7] nor does the affidavit of parentage form itself require the father to represent that he is the child's *biological* father.

Further, in the Revocation of Paternity Act, MCL 722.1431 *et seq*., the Legislature stated that the blood, tissue, or DNA test is "to assist the court in making a determination under [the Act]" and that "[t]he results of the blood or tissue typing or DNA identification

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[4] *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012); *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 117; 313 NW2d 77 (1981).

[5] *In re Daniels Estate*, 301 Mich App 450, 457; 837 NW2d 1 (2013).

[6] *Id*. at 451-452 (the child was born while the decedent and the child's mother were cohabitating and the decedent introduced the child as his son).

[7] MCL 722.1003.

profiling *are not binding on a court* in making a determination under [the Act]."[8] These statements further buttress my conclusion that the Legislature was not solely concerned about the child's *biological* relationship to the man who signed the acknowledgment of parentage.

Whether Moiles knew or should have known that he was not the child's biological father, he did not represent that he was the *biological* father of the child on the acknowledgment of parentage. Therefore, I would conclude that the trial court's finding that an "acknowledgment was made under oath to the effect that [Moiles] was the *biological father* of [the child]"[9] was clearly erroneous. And, to the extent that the trial court may have relied on that finding to determine that Moiles misrepresented to the state his status relating to the child, the trial court erred.

III. CONCERNS ABOUT THE TRIAL COURT'S PROCEDURES

I also note my concern that, in this case, the trial court departed from the procedures delineated in the act. It first determined by a written order that DNA testing was warranted. It then, in a subsequent proceeding, determined that a misrepresentation occurred and revoked Moiles's acknowledgment of parentage.

I do not believe that this procedure was that which the statute contemplates. MCL 722.1437(3) provides that

> [i]f the court in an action for revocation under this section finds that an affidavit under [MCL 722.1437(2)] is sufficient, the court shall order blood or tissue typing or DNA identification as required by [MCL 722.1443(5)]. The per-

[8] MCL 722.1443(5).

[9] Emphasis added.

> son filing the action has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child.

The first sentence of this section is a classic "if-then" statement: *if* the trial court finds that the affidavit is sufficient, *then* it must order blood, tissue or DNA analysis. The second sentence provides that, after the testing, the person filing the action must prove by clear and convincing evidence that the acknowledged father is not the child's father. MCL 722.1445(5), to which MCL 722.1437(2) refers, in turn refers to the procedures under the MCL 722.716; a section which concerns blood, tissue, and DNA testing under the Paternity Act. MCL 722.716 provides that the blood, tissue, or DNA testing establishes a presumption of paternity.[10] The Paternity Act's procedures provide that after the results of the blood, tissue, or DNA analysis, a party may move for summary disposition.[11]

Given the grammar of MCL 722.1437(3), and keeping in mind our courts' general disapproval of leaving children in legal limbo,[12] I conclude that MCL 722.1437 contemplates a multi-step process for terminating an acknowledgment of parentage. First, the trial court must determine *if* the affidavit is sufficient and, if it finds that it is, *then* it must order blood, tissue, or DNA analysis. And second, the trial court must review the results of the blood, tissue, or DNA analysis and make a determination regarding whether to revoke the acknowledgment of parentage in a separate proceeding.

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[10] MCL 722.716(5).

[11] MCL 722.716(6).

[12] See *In re Trejo Minors*, 462 Mich 341, 364; 612 NW2d 407 (2000) (favoring permanency for children).

IV. BEST-INTEREST DETERMINATION UNDER MCL 722.1443

I agree with the majority's well-reasoned conclusion that the trial court did not need to make a best-interest determination under MCL 722.1443(4) when revoking an acknowledgment of parentage.

V. DUE PROCESS

Because I would conclude that remand is necessary for compliance with the statute, I would also decline to consider Moiles's unpreserved due-process challenges.

VI. SUMMARY AND CONCLUSION

I would conclude that the trial court's determination to revoke an acknowledgment of parentage must be a two-step process—(1) the trial court must determine whether the affidavit is sufficient and, if necessary, order blood, tissue, or DNA testing, and (2) the trial court must then determine whether the petitioner has proven by clear and convincing evidence that the man is not the child's father.

For the reasons stated, I would conclude that the trial court clearly erred when it found that Moiles's action in signing an acknowledgment of parentage when he was not the child's biological child was a fraud or misrepresentation under MCL 722.1437. Therefore, I would reverse the trial court's order and remand for it to determine if the parties made a misrepresentation or committed fraud consistent with the legal meanings of those words.

LADD v MOTOR CITY PLASTICS CO

Docket No. 303018. Submitted September 4, 2013, at Detroit. Decided October 31, 2013, at 9:00 a.m.

David C. Ladd brought an action in the Monroe Circuit Court to recover a judgment of $113,200 he had been awarded in an employment action against Motor City Plastics Company. In an effort to recover on the judgment, Ladd had served a writ of garnishment on United Bank and Trust, where Motor City had $41,000 in deposit accounts, but the bank responded in a garnishee disclosure that Motor City owed it $1.5 million in defaulted loans and that the bank therefore had a right of setoff. Believing that it was not required to exercise this right in order to preserve it, the bank had opted not to withhold or remove funds from Motor City's accounts to avoid forcing Motor City out of business, thereby destroying the bank's collateral. By the time plaintiff served a subpoena on the bank, Motor City's loans had been discounted and sold to a third party. After a trial conducted pursuant to MCR 3.101(M), the court, Joseph A. Costello, Jr., J., denied plaintiff's motion for amount due on the judgment, ruling that the bank was not required to withhold funds from Motor City's accounts in order to claim its setoff rights. The court also denied plaintiff's motion for sanctions after concluding that the bank had not intentionally lied on its garnishee disclosure form. Plaintiff appealed, and the bank cross-appealed the court's denial of its request for attorney fees.

The Court of Appeals *held*:

1. The bank's motion to dismiss plaintiff's appeal under MCR 7.216(A)(10) was denied because, although plaintiff had violated MCR 7.210(B)(1)(a) by ordering only a partial transcript of the trial court's decision from the bench, this defect was minor and promptly cured.

2. The trial court did not abuse its discretion by declining to hold the bank in contempt. Although the preprinted garnishee disclosure form the bank submitted did not precisely fit the circumstances of this case, the form was not willfully misleading in light of the bank's added statement regarding its claimed setoff rights.

3. The trial court correctly ruled that the bank was not required to actually exercise its setoff rights in order to deny the release of funds under the writ of garnishment. MCR 3.101(H)(1)(a) requires a garnishee holding money or assets of the debtor to file a disclosure indicating any setoff that the garnishee "would have" against the debtor, which connotes the idea that the right to a setoff is one that the garnishee would have against the defendant if it chose to exercise that right. Making a claim to one's setoff rights is not the same as exercising the right to set off. Therefore, the bank properly claimed its right to a setoff when it received the garnishment, and it was not required to exercise this right before denying the release of funds to plaintiff.

4. The bank did not waive its right to a setoff or its security interest by allowing Motor City to continue using its bank accounts after plaintiff served the garnishment writ. Under MCL 440.9104, the bank had a perfected security interest in all of Motor City's deposit accounts, and the bank had control of the accounts even if Motor City retained the right to direct the disposition of funds from them.

5. The trial court did not clearly err by denying the bank's motion for costs and attorney fees under MCR 2.625(A)(2) because the action involved an unsettled point of law and was not frivolous, and the trial court did not abuse its discretion by denying the motion under MCR 2.625(E)(2).

Affirmed.

Judge JANSEN, concurring in all but parts III(C) and (D), would have held that MCR 3.101(H)(1)(a) does not allow a garnishee to claim a right of setoff without actually exercising the right in a seasonable manner. She would have reversed the trial court's ruling to the contrary and remanded for entry of judgment in favor of plaintiff in the amount of Motor City's funds on deposit with the bank when the garnishment writ was served, up to the amount of the underlying judgment plus statutory interest.

GARNISHMENT — CLAIMS TO SETOFF RIGHTS.

A garnishee is not required to actually exercise its setoff rights in order to deny the release of funds under a writ of garnishment; MCR 3.101(H)(1)(a) requires only that a garnishee holding money or assets of the debtor file a disclosure setting forth any setoff that the garnishee would have against the debtor if the garnishee chose to exercise its setoff rights.

Lyden, Liebenthal & Chappell, Ltd. (by *Erik G. Chappell* and *Julie A. Douglas*), for David C. Ladd.

Robison, Curphey & O'Connell, LLC (by *Jean Ann S. Sieler*), for United Bank and Trust.

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

MURRAY, J. Plaintiff David C. Ladd appeals by right the circuit court's order (1) denying his motion for amount due on judgment and contempt sanctions, (2) determining that garnishee United Bank & Trust ("UBT" or "the bank") was not required to actually exercise its claimed right of setoff against the deposit accounts of defendant Motor City Plastics Company ("Motor City"), (3) determining that UBT followed proper procedures and was not in contempt, and (4) denying UBT's request for attorney fees. UBT cross-appeals the same order. We affirm.

I. FACTUAL BACKGROUND

Following trial in the underlying employment litigation, plaintiff received a judgment against Motor City in the amount of $113,200, plus statutory interest. On January 22, 2010, believing that Motor City had funds on deposit at UBT, plaintiff served a writ of nonperiodic garnishment on UBT. The writ of garnishment stated that the total amount due on the unsatisfied judgment against Motor City was $119,555.23.

On January 29, 2010, UBT submitted a garnishee disclosure stating that it was "not indebted to [Motor City] for any amount" and did not "possess or control [Motor City's] property, money, etc." Instead, UBT asserted that it was claiming a right of "setoff" against any money that Motor City had on deposit at the bank.

UBT attached a short supplement to its garnishee disclosure, explaining that Motor City was in default with respect to certain loans that were payable to UBT and that Motor City was "indebted to UBT under [the] loan documents in an amount in excess of the value of [Motor City's] accounts with UBT."

At a debtor's exam, Motor City's president, Keith Ruby, testified that UBT never exercised its claimed right of setoff against Motor City's accounts. Ruby confirmed that Motor City continued to use its accounts and withdraw funds, even after the writ of garnishment was served on UBT.

In an affidavit, UBT's executive vice president, John Wanke, averred that "[o]n January 29, 2010, [Motor City] was indebted to UBT under multiple loan documents in an amount in excess of the value of [Motor City's] accounts with UBT" and that "[p]ursuant to certain of the above referenced loan documents, UBT had rights of setoff . . . ." Citing UBT's "confidentiality policies," Wanke refused to confirm the specific amount that Motor City had on deposit with the bank.

At his deposition, Wanke testified that Motor City had defaulted on its loan obligations to UBT as of July 2009. A letter from UBT to Motor City, dated July 16, 2009, indicated that Motor City was in default on three different loans, totaling more than $1.5 million.[1] Wanke confirmed that Motor City had a business checking account with UBT, as well as a smaller "sweep account."

When the writ of garnishment was served on January 23, 2010, Wanke instructed bank employee Annette Kurowicki to delay releasing any funds from Motor City's deposit accounts until he could first

[1] UBT eventually discounted and sold Motor City's outstanding loans to a third party in the spring of 2010.

obtain advice from UBT's legal counsel.[2] Wanke confirmed that Motor City had money on deposit in its accounts when the writ of garnishment was served. Banking records showed that a payment of $107,000 was deposited into Motor City's business checking account on January 29, 2010, only one week after the writ of garnishment was served.

After several additional discovery requests, Wanke submitted a second affidavit in which he confirmed that on January 23, 2010, the balance in Motor City's business checking account was $36,045.50, and the balance in Motor City's sweep account was $5,255.87. Wanke explained that UBT had initially intended to exercise its right of setoff, but "[t]he Bank was advised by counsel that it had a superior right to setoff and . . . was not required to withhold funds under the court rules; thus, the funds were not physically removed from the account."

On October 6, 2010, plaintiff filed a motion for amount due on the judgment and for contempt sanctions. Plaintiff pointed out that UBT had never exercised its claimed right of setoff and argued that UBT had knowingly provided false answers on its garnishee disclosure. Plaintiff contended that UBT was liable to it in the full amount due on the underlying judgment against Motor City.[3] Plaintiff argued that, given the allegedly misleading statements in UBT's garnishee

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[2] Kurowicki averred in her affidavit that she had placed an informal hold on Motor City's accounts upon receiving the writ of garnishment on January 23, 2010. However, this informal hold was lifted on Monday, January 25, 2010, at about 4:00 p.m.

[3] Among other authorities, plaintiff relied on MCL 600.4051, which provides: "Any person summoned as a garnishee or any officer, agent, or other person who appears and answers for a corporation summoned as a garnishee, who knowingly and wilfully answers falsely upon his disclosure or examination on oath is liable to the plaintiff in garnishment, or to

disclosure, the circuit court should hold UBT in contempt and award sanctions, including reasonable attorney fees, pursuant to MCR 3.101(S).

In response, UBT argued that plaintiff had failed to follow the proper steps under MCR 3.101(L) and (M). UBT maintained that it had properly filed its garnishee disclosure in accordance with MCR 3.101(H) and that it had not misstated any facts on the disclosure form. UBT alleged that it had properly claimed its right of setoff in accordance with MCR 3.101(H)(1)(a). Citing an unpublished opinion of this Court, UBT asserted that "[i]f the garnishee claims a right to setoff which exceeds the amount of any debt owing to the defendant, then the garnishee is not indebted to the defendant." UBT also asserted that Michigan law did not require it to actually remove or withhold funds from Motor City's deposit accounts in order to claim its setoff rights. UBT sought judgment in its favor, arguing that there was no genuine issue of material fact, that no law required it to actually exercise the setoff, that it had properly complied with the requirements of MCR 3.101, and that the statements on its garnishee disclosure had not been designed to mislead plaintiff.

Trial was held on December 14 and 15, 2010.[4] Wanke testified that Kurowicki received the writ of garnishment on Saturday, January 23, 2010. Wanke's initial inclination was to immediately exercise UBT's right of setoff. However, Wanke decided to first seek the opinion of UBT's legal counsel. Wanke confirmed that no money was ever physically removed from Motor City's deposit

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his executors or administrators, to pay out of his own goods and estate the full amount due on the judgment recovered with interest, to be recovered in a civil action."

[4] The circuit court characterized the proceedings as an "evidentiary hearing." However, it is clear that the hearing actually constituted a bench trial under MCR 3.101(M).

accounts or applied to Motor City's outstanding loan debt. In fact, Motor City continued to have unrestricted access to its deposit accounts at UBT.[5] Wanke was concerned that, by actually removing funds from Motor City's accounts and applying those funds toward the loan debt, UBT might inadvertently destroy its collateral by forcing Motor City out of business. Wanke believed that UBT could best preserve its collateral by declining to exercise the setoff.

The loan documents originally executed by Motor City and UBT specifically authorized UBT to remove funds from Motor City's deposit accounts to offset any sums owing on Motor City's loans. The total amount in Motor City's deposit accounts was about $41,000 on the morning of Saturday, January 23, 2010. On that same day, the total amount owed to UBT by Motor City was in excess of $1.5 million. UBT did not receive any objections or discovery requests from plaintiff for several months after the garnishee disclosure was submitted. By the time UBT finally received a subpoena from plaintiff on May 4, 2010, Motor City's loans had been discounted and sold to a third party.

Following the presentation of testimony, counsel for UBT orally moved for a directed verdict. Counsel argued that the bank's right of setoff was superior to any right that plaintiff had as a garnishor. Relying on MCR 3.101(H)(1), *Sears, Roebuck & Co v AT&G Co, Inc*, 66 Mich App 359; 239 NW2d 614 (1976), and *Carpenters South California Admin Corp v Mfr Nat'l Bank of Detroit*, 910 F2d 1339 (CA 6, 1990), counsel also argued that "there is no requirement in Michigan that the

[5] Ruby testified that Motor City's access to its deposit accounts at UBT did not change after the bank received the writ of garnishment in January 2010. Motor City was never told to stop writing checks or to stop using its accounts.

funds actually be removed and applied against a loan in order to claim your right of setoff and protect your right to control the use of those funds . . . ."

With respect to plaintiff's request for contempt sanctions and attorney fees, UBT argued that it had not knowingly or willfully provided false answers on its garnishee disclosure. Counsel pointed out that plaintiff had not objected to the garnishee disclosure or served additional discovery requests within 14 days as required by MCR 3.101(L)(1). Counsel contended that plaintiff had severely prejudiced UBT by waiting more than three months, until after Motor City's outstanding loans had already been discounted and sold, to object to the garnishee disclosure and subpoena additional bank records.

Plaintiff's attorney responded by arguing that "there is no case, rule, or statute that says that a bank simply has to claim a right of setoff and then can do whatever [it] want[s] to do with the funds that are on . . . deposit." Plaintiff's counsel noted that, according to the plain text of MCR 3.101(G)(1), a garnishee's liability is subject to "any setoff permitted by law"—not any *claimed* setoff permitted by law. Based on this language, plaintiff's counsel argued that a garnishee must *actually exercise* a right of setoff in order to claim it on a garnishee disclosure.

Plaintiff's counsel also argued that UBT's garnishee disclosure was "patently false" because it stated that the bank did not "possess or control" any of Motor City's property, money, or assets. The evidence showed that there was approximately $41,000 on deposit in Motor City's accounts at the time the writ of garnishment was served. Plaintiff contended that UBT had knowingly provided misleading answers on its gar-

nishee disclosure and that the court should find UBT in contempt under MCR 3.101(S)(2).

The circuit court delivered its ruling from the bench on December 22, 2010. The court first concluded that UBT had not intentionally lied on its garnishee disclosure. The court observed that the language of the preprinted garnishee disclosure form supplied by the State Court Administrative Office, SCAO Form MC14, was misleading. Thus, the court understood why plaintiff had been confused. According to the court, UBT should have struck the inapplicable language from the preprinted form or prepared its own garnishee disclosure without using the preprinted form. However, the court did not believe that UBT had intended to mislead plaintiff. The court announced that it would not hold UBT in contempt. However, because the form was misleading, the court stated that it would not order plaintiff to pay costs or attorney fees to UBT either.

The circuit court went on to rule that UBT was not required to actually remove funds from Motor City's deposit accounts and apply them toward Motor City's outstanding loan debt in order to claim a setoff:

> [W]e know that initially [UBT] did not exercise the setoff other than to say [that it had] the right to one and the [c]ourt did not believe that that was . . . the most appropriate thing to do. . . . [I]f someone is going to claim a setoff then they should proceed with it.
>
> As we went through the . . . hearing and listened to oral arguments, certainly I . . . rethought some of my initial thoughts on this case. . . . I can understand why a secured creditor might want to hold off on that as opposed to trying to compel . . . the debtor into some type of bankruptcy or to close down their operations, which would reduce the opportunity for the bank to collect on monies owed to it . . . .

> So, I can't say that the bank was commercially unreasonable in doing what [it] did[,] nor can I find that there was any type of collusion between [UBT] and Motor City Plastics to deny [plaintiff] monies that are certainly due and owed to him.
>
> * * *
>
> I can't find under any of the case law cited by either side that . . . the bank had to go through and actually exercise that setoff in order to deny the release of . . . monies to a garnishor, that being the plaintiff in this . . . case.
>
> * * *
>
> I cannot find that [UBT] violated the procedure to the extent that I can compel [UBT] to now be responsible for the payment that should've come from Motor City Plastics Company to the benefit of [plaintiff].

On February 18, 2011, the circuit court entered an order in which it (1) denied plaintiff's motion for amount due on the judgment and for contempt sanctions, (2) determined that UBT had "followed proper procedures" and "not act[ed] in any way to defy legal process," (3) concluded that UBT had not been required to withhold funds from Motor City's deposit accounts in order to claim its right of setoff, and (4) denied UBT's request for attorney fees.

II. STANDARD OF REVIEW

The evidentiary hearing conducted by the circuit court constituted a bench trial under MCR 3.101(M). The circuit court's findings of fact, if any, following a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

III. ANALYSIS

A. FAILURE TO ORDER A COMPLETE TRANSCRIPT

UBT argues that this appeal should be dismissed because plaintiff failed to order a complete transcript of the circuit court's ruling from the bench and, therefore, this Court is unable to properly review the circuit court's decision.

It is true that plaintiff originally ordered only a partial transcript of the circuit court's oral decision,[6] which technically constituted a violation of MCR 7.210(B)(1)(a). However, a complete transcript of the circuit court's oral decision was subsequently ordered and was filed with the circuit court on November 21, 2011, more than a month before the circuit court record was received by this Court. Although this Court "may . . . dismiss an appeal or an original proceeding for . . . failure of the appellant . . . to pursue the case in conformity with the rules," MCR 7.216(A)(10), plaintiff's violation of MCR 7.210(B)(1)(a) was minor and was subsequently cured. Thus, in the exercise of our discretion, we decline to dismiss the appeal under MCR 7.216(A)(10). See *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007).

B. FAILURE TO FOLLOW PROPER PROCEDURES UNDER MCR 3.101(G)(1) AND (H)(1)

Plaintiff contends that UBT's garnishee disclosure was willfully misleading, that UBT failed to follow proper procedures under MCR 3.101(G)(1) and (H)(1) when it refused to release funds from Motor City's deposit accounts pursuant to the writ of garnishment,

[6] The portion of the transcript that was not originally ordered contained only the court's recitation of the facts of the case, and not its final ruling.

and that the circuit court should have held UBT in contempt of court. Plaintiff also argues that the circuit court erred by determining that UBT had "followed proper procedures" and did "not act in any way to defy legal process." UBT, of course, disagrees with each of these assertions and argues that the circuit court properly declined to hold it in contempt.

We review the circuit court's decision whether to hold a party in contempt for an abuse of discretion. *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). Whether UBT followed proper procedures is a question of law that we review de novo. See *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007); *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2002).

"If there is a dispute regarding the garnishee's liability . . . , the issue shall be tried in the same manner as other civil actions." MCR 3.101(M)(1); see also *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 309; 486 NW2d 351 (1992). Following trial, the circuit court concluded that UBT had "followed proper procedures" and had "not act[ed] in any way to defy legal process[.]" The circuit court's decision was factually and legally sound.

UBT submitted its garnishee disclosure on preprinted SCAO Form MC14. Form MC14 is confusing insofar as it does not provide a checkbox or blank where a garnishee can claim a right of setoff. Instead, under the heading "Nonperiodic Garnishments," Form MC14 requires a garnishee to check one of the following three statements:

> a. The garnishee is not indebted to the defendant for any amount and does not possess or control the defendant's property, money, etc. Reason:_____
> _____.

b. The garnishee is indebted to the defendant for nonperiodic payments as follows: _____ _____. The amount to be withheld is $_____ and does not exceed the amount stated in item 2 of the writ.

c. Withholding is exempt because_____ _____.

UBT checked "a. The garnishee is not indebted to the defendant for any amount and does not possess or control the defendant's property, money, etc.," but went on to explain in the blank space provided that it was claiming a right of setoff against Motor City's deposit accounts. Plaintiff argues that this was misleading because UBT possessed or controlled the funds in Motor City's accounts.

As the circuit court correctly noted, UBT should have struck the inapplicable language from the form or prepared its own garnishee disclosure without using the preprinted form. By doing so, UBT could have acknowledged its possession and control of the funds in Motor City's deposit accounts while at the same time claiming a setoff against those funds in accordance with MCR 3.101(H)(1)(a). In this way, UBT would not have been forced to check one of the three statements on Form MC14, none of which precisely fit the circumstances of this case.

We acknowledge, as did the circuit court, that UBT's use of the preprinted form likely added to the confusion in this case. But it should have been clear to plaintiff upon inspection of the garnishee disclosure that UBT did possess and control the funds in Motor City's deposit accounts. After all, if UBT had not possessed and controlled the funds, the additional language provided by UBT concerning its claimed setoff would have been nonsensical. Moreover, both Wanke and Kurowicki

testified that they filled out the garnishee disclosure form to the best of their abilities and did not intend to mislead plaintiff in any way. We cannot conclude that the circuit court erred by determining that UBT followed proper procedures with respect to its garnishee disclosure. The overwhelming weight of the evidence established that, although UBT's garnishee disclosure might have been confusing, UBT did not intentionally mislead plaintiff, nor did the circuit court abuse its discretion by declining to hold UBT in contempt of court on this basis.

C. RIGHT OF SETOFF

Plaintiff next argues that UBT was required to actually exercise its right of setoff against Motor City's deposit accounts in order to deny the release of funds pursuant to the writ of garnishment. However, the circuit court correctly ruled that it was sufficient for UBT to merely claim its right of setoff on the garnishee disclosure, given that it was not required to exercise that right or seize the funds.

Whether a garnishee must actually exercise its claimed right of setoff in order to deny the release of funds under a writ of garnishment constitutes a question of law reviewed de novo. See *MacInnes v MacInnes*, 260 Mich App 280, 283; 677 NW2d 889 (2004). Additionally, resolving this issue requires interpretation of the Michigan Court Rules governing garnishment procedures, which also constitutes a question of law reviewed de novo. *Badeen v PAR, Inc*, 300 Mich App 430, 439; 834 NW2d 85 (2013). "[T]he goal in interpreting [a court rule] is to give effect to the rulemaker's intent as expressed in the court rule's terms, giving the words their plain and ordinary meaning." *Id*.

In Michigan, "[g]arnishment actions are authorized by statute." *Nationsbanc Mortgage Corp of Georgia v Luptak*, 243 Mich App 560, 564; 625 NW2d 385 (2000). "The court may exercise its garnishment power only in accordance with the Michigan Court Rules." *Id*.; see also MCL 600.4011(2). Postjudgment garnishment proceedings are governed by MCR 3.101. *Nationsbanc*, 243 Mich App at 564.

"The general rule . . . is that the bank has a lien on all moneys, notes, and funds of a customer in its possession, for any indebtedness of the customer to the bank which is due and unpaid." *Gibbons v Hecox*, 105 Mich 509, 513; 63 NW 519 (1895); see also *White Truck Sales of Saginaw, Inc v Citizens Commercial & Savings Bank*, 348 Mich 110, 117; 82 NW2d 518 (1957); 3 Michigan Civil Jurisprudence, Banking & Money Affairs, § 109, p 221. This lien is more accurately known as a "setoff" insofar as it relates to a customer's deposit accounts. See 1 Graham, Banking Law, Lien & Setoff, § 11.03, pp 11-9 and 11-10; see also *Westland Park Apartments v Ricco, Inc*, 77 Mich App 101, 105; 258 NW2d 62 (1977) (W. F. HOOD, J., dissenting).[7]

The issue of setoff frequently arises when a depositor's bank account is garnished. The general rule is that "[a] bank may set off against the amount of a deposit that has been garnished the amount of any matured indebtedness due it by the depositor." 6 Am Jur 2d,

[7] As explained by one commentator, there is a technical distinction between a bank's lien and a bank's right of setoff: "The banker's lien extends to securities and other valuables in the possession of the bank, title to which is still in the debtor. General deposits become the property of the bank. It cannot properly be said that the bank has a lien on its own funds. Rather, the bank is allowed to set off its debt to the depositor (represented by the balance in the deposit account) against debts owed to it from the same depositor." 1 Graham, Banking Law, Lien & Setoff, § 11.03, pp 11-9 and 11-10.

Attachment & Garnishment, § 373, p 748. A garnishee bank may exercise its right of setoff against a depositor's accounts even after the writ of garnishment has been served. 27 Michigan Law & Practice, Remedies, § 104, p 304.

A bank may set off against the funds contained in a depositor's accounts the amount of a depositor's indebtedness to the bank only if the following conditions are met:

> (1) that the funds used for the setoff were the property of the debtor, (2) that such funds were deposited in a general account without restriction as to the use therefore [sic], (3) that the existing indebtedness was due and owing at the time of the setoff, and (4) that there was a mutuality of obligation between the debtor . . . and his creditor . . . , as well as between the debt and the funds on deposit. [*Hansman v Imlay City State Bank*, 121 Mich App 424, 430; 328 NW2d 653 (1982).]

In the context of nonperiodic garnishments, if the garnishee holds money or assets of the debtor, Michigan law requires that the garnishee file a disclosure setting forth, among other things, "any setoff that the garnishee *would* have against the [judgment debtor], except for claims for unliquidated damages for wrongs or injuries." MCR 3.101(H)(1)(a) (emphasis added); see also MCR 3.101(G)(1) (providing that a garnishee's liability is "[s]ubject to . . . any setoff permitted by law or these rules"). Although there is no Michigan caselaw that specifically addresses whether a garnishee bank must actually remove or withhold money from its depositor's accounts in order to claim its right of setoff, the language of the court rules themselves provides the answer to this question.

Pursuant to the language of MCR 3.101(H)(1)(a), UBT, the garnishee, was required to claim any setoff it "would

have" against Motor City. The phrase "would have" connotes the idea that the right of setoff is one that the garnishee would have against the defendant if it chose to exercise that right. In other words, the court rule requires that, in response to a writ of garnishment, the garnishee inform the garnishor of any claim to a right of setoff that it would have if it exercised that right.

This reading of the court rule is not only consistent with its ordinary meaning, but is also consistent with the meaning of a "right." In the context of a debtor situation like we have here, a right is defined as "[t]he interest, claim, or ownership that one has in tangible or intangible property[.]" Black's Law Dictionary (7th ed, 1999), def 5. Hence, in claiming a *right* to a setoff, one is claiming an interest or ownership in tangible or intangible property. Making a *claim* to such an interest or right, however, is not the same as *exercising the right* to the setoff. See generally *Attorney General v Chisholm*, 245 Mich 285, 289; 222 NW 761 (1929) (stating "It is apparent that it must be but an insignificant part of the fund of $700,000, which defendants are claiming the right to administer by virtue of the act of 1915, which they insist is still in force, and the exercise of which right is here involved and should be determined," thus making a distinction between the claiming of the right at issue and the exercising of that right). Here, UBT claimed its right to a setoff when it received the garnishment. It properly informed plaintiff that it had the right to a setoff against all of Motor City's UBT accounts, as Motor City owed UBT more than what was contained in those accounts. Once this was declared, plaintiff then had the opportunity to challenge the declaration through discovery and, ultimately, a trial. See MCR 3.101(L) and (M).[8]

[8] From what has been presented to us, it appears that plaintiff did not timely challenge UBT's disclosure. See MCR 3.101(L)(1). Even though

UBT's declaration that it had the right to a setoff without exercising the right does no injustice to plaintiff, for there is no question but that UBT had as to plaintiff a superior right to any funds in the Motor City accounts up to the amount owed to UBT. *Blow v Blow*, 134 Mich App 408, 411-412; 350 NW2d 890 (1984). Because the evidence suggests that there was never an amount in the accounts at any point in these proceedings that came close to what was owed UBT, plaintiff would never have been entitled to any of the funds claimed by UBT as a setoff. *Buckenhizer v Times Publishing Co*, 267 Mich 393, 395; 255 NW 213 (1934) ("[P]laintiff cannot recover a judgment in any amount because defendant has a set-off of a greater amount[.]").[9]

The partial dissent asserts that allowing a garnishee to merely claim a right of setoff without exercising it "facilitates collusion between the garnishee and judgment debtor" and claims that this is "exactly what happened in this case." To the contrary, the designated fact-finder in this case—the trial court—found *no* evidence of collusion or ulterior motive on the part of UBT and Motor City. We simply cannot ignore that finding, particularly when no evidence suggests that this finding was clearly erroneous. And, we are confident that by following the garnishment court rules that any challenge that alleges collusion can be resolved by the trial court through the trial permitted under MCR 3.101(L) and (M).

UBT contested the timeliness of plaintiff's challenge to the disclosure in the circuit court, it has not pressed the issue in this Court.

[9] We note that had there been at the time the garnishment was served, or during the course of the discovery proceedings, more funds in the accounts than necessary to satisfy the obligations Motor City owed to UBT, this would be a different matter. However, given that these facts are not presently before this Court, we decline to explore this hypothetical scenario further.

D. WAIVER OF THE RIGHT TO SET OFF

Plaintiff argues that even if UBT had effectuated a setoff, it waived the right to set off by allowing Motor City to continue using its bank accounts after plaintiff's service of the garnishment, so UBT's perfected security interest is not a valid defense against a writ for garnishment. UBT argues that by failing to raise these arguments below, plaintiff has waived them, and even if they were not waived, they fail on the merits as well. We disagree with UBT on the former point, but agree on the latter.

Whether a secured party has waived its right to set off constitutes a question of law subject to review de novo. See *MacInnes*, 260 Mich App at 283 ("[T]he question of what constitutes a waiver is a question of law.").

We first hold that plaintiff has preserved this issue for appeal. Specifically, plaintiff noted in his trial briefs that UBT allowed Motor City to continue accessing its account and, therefore, there was never an informal hold placed on the account because funds were freely transferred. In rendering its decision, the trial court explained that it could "understand why a secured creditor might want to hold off on that as opposed to trying to compel . . . the debtor into some type of bankruptcy or to close down their operations, which would reduce the opportunity for the bank to collect on monies owed to it, again as a secured creditor." Therefore, the issue of whether UBT's permitting Motor City to continue accessing its account affected the right to set off was generally addressed below and thus was preserved for appeal. See *Lenawee Co v Wagley*, 301 Mich App 134, 164; 836 NW2d 193 (2013). We conclude that UBT did not waive its right to a setoff or its perfected security interest in Motor City's deposit accounts by authorizing

Motor City to continue to withdraw funds from its accounts after it defaulted on its loans.

Under Michigan law, a security interest in a deposit account is perfected when the secured party is in control of the account. MCL 440.9314(1) and (2). A secured party has control of a deposit account if "[t]he secured party is the bank with which the deposit account is maintained," MCL 440.9104(1)(a), "even if the debtor retains the right to direct the disposition of funds from the deposit account," MCL 440.9104(2). "[A] security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party." MCL 440.9327(c). Upon default, a bank that "holds a security interest in a deposit account perfected by control under [MCL 440.9104(1)(a)]" may "apply the balance of the deposit account to the obligation secured by the deposit account." MCL 440.9607(1)(d).

UBT did not waive its right to a setoff. Given that the loan documents executed by Motor City gave UBT a security interest in all of Motor City's deposit accounts at the bank, it is clear that UBT had a perfected security interest in Motor City's deposit accounts. It is undisputed that UBT permitted Motor City to continue withdrawing funds from its accounts, well after Motor City had defaulted on its loans. However, for the reasons previously stated, the court rules only require the garnishee to declare the right to a setoff that it *would* have, not to actually exercise that right. That being the case, and given the fact that UBT unquestionably had a superior right to the funds in all of Motor City's accounts, there can be no waiver of a right when the right to be asserted is absolute over the plaintiff, who has no more rights to the account funds than defendant

Motor City. *Blow*, 134 Mich App at 411-412; see also *Buckenhizer*, 267 Mich at 395.[10]

More broadly, UBT also did not waive its security interest. MCL 440.9315(1)(a) provides: "A security interest . . . continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest . . . ." However, while it is undisputed that UBT permitted Motor City to continue withdrawing funds from its accounts after Motor City defaulted, there are no facts to suggest that UBT authorized Motor City's dispositions of the funds in the account *free of UBT's security interest*.

Therefore, we conclude that UBT waived neither the right to a setoff nor its security interest by allowing Motor City to continue using its bank accounts after plaintiff's service of the garnishment. Accordingly, under the facts of this case, a perfected security interest is a valid defense against a writ for garnishment.

E. COSTS AND ATTORNEY FEES

On cross-appeal, UBT argues that the circuit court should have awarded it costs and attorney fees pursuant to MCR 2.625(E)(2). We review for clear error the circuit court's decision to impose sanctions on the ground that an action was frivolous within the meaning of MCR 2.625(A)(2) and MCL 600.2591. *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 533-534; 773 NW2d 57 (2009). We review for an abuse of discretion the circuit court's decision whether to award costs and attorney fees in a garnishment

[10] This Court has recognized that "a bank may, by express agreement, waive its right to set-off[.]" *Hansman*, 121 Mich App at 429. However, there are no facts to suggest that UBT made an express waiver.

action under MCR 2.625(E)(2). See *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008).

UBT requested an award of costs and attorney fees in the circuit court, but did not do so on the basis of MCR 2.625(E)(2). Instead, UBT claimed that it was entitled to an award of costs and attorney fees for having to defend against plaintiff's garnishment request, which it described as frivolous and unfounded. Accordingly, although the issue of UBT's entitlement to costs and attorney fees under MCR 2.625(A)(2) and MCL 600.2591 is otherwise preserved, the issue of UBT's entitlement to costs and attorney fees under MCR 2.625(E)(2) is not preserved for appellate review. See *Wagley*, 301 Mich App at 164.

The obvious problem is that UBT cites only MCR 2.625(E)(2) on cross-appeal and does not argue that it is entitled to costs and attorney fees for having been required to defend against a frivolous action. An issue that is neither contained in the statement of questions presented nor briefed on appeal is not properly presented for this Court's review. MCR 7.212(C)(5) and (7); *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 66; 807 NW2d 354 (2011); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). In other words, the specific issue that is otherwise preserved for appellate review has not been properly presented, and the specific issue that has been properly presented is unpreserved for appellate review.

Regardless of preservation issues, we conclude that UBT is not entitled to costs and attorney fees under MCR 2.625(A)(2) and MCL 600.2591 for having to defend against a frivolous action. MCR 2.625(A)(2) and MCL 600.2591 "mandate[] that a court tax costs . . . to reimburse a prevailing party for its costs incurred

during the course of frivolous litigation." *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). Given that there was no binding precedent governing whether a garnishee is required to actually exercise its right to a setoff in order to deny the release of funds pursuant to a writ of garnishment, the instant garnishment action was not frivolous. Additionally, in its order, the trial court specifically found that the disclosure form UBT used was "misleading" and cited this as one of its reasons for denying attorney fees. Even if this issue were properly before this Court, we would be unable to conclude that the trial court clearly erred in this regard. Therefore, UBT is not entitled to costs or attorney fees under MCR 2.625(A)(2) and MCL 600.2591.

Further, MCR 2.625(E) specifically governs the taxation of costs and award of attorney fees in garnishment proceedings. MCR 2.625(E)(2) applies when the issue of the garnishee's liability to the principal defendant, here Motor City, has been brought to trial, as it was in this case. MCR 2.625(E)(2) provides:

> The court may award the garnishee defendant, against the plaintiff, the total costs of the garnishee defendant's defense, including all necessary expenses and reasonable attorney fees, if the issue of the garnishee defendant's liability to the principal defendant is tried and
>
> (a) the garnishee defendant is held liable in a sum no greater than that admitted in disclosure, or
>
> (b) the plaintiff fails to recover judgment against the principal defendant.
>
> In either (a) or (b), the garnishee defendant may withhold from the amount due the principal defendant the sum awarded for costs, and is chargeable only for the balance.

Because UBT did not request attorney fees pursuant to MCR 2.625(E)(2) in the circuit court, thereby failing to

preserve this particular issue, defendant has waived this issue on appeal. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (holding that "a litigant must preserve an issue for appellate review by raising it in the trial court," and failure to do so waives that issue on appeal). However, we note that had UBT raised this issue in the trial court, the decision to award attorney fees and costs would have been discretionary with the trial court because the court rule's use of the word "may" indicates that the rule merely permits, but does not require, the trial court to award the garnishee defendant attorney fees and costs if the conditions in the court rule have been met. See *People v Watkins*, 491 Mich 450, 483-484; 818 NW2d 296 (2012) (explaining that the generally accepted meaning of "may" is that it indicates something is permissive rather than mandatory).

Affirmed.

MURPHY, C.J., concurred with MURRAY, J.

JANSEN, J. (*concurring in part and dissenting in part*). I fully concur with parts I, II, III(A), III(B), and III(E) of the majority opinion. I must respectfully dissent, however, with respect to parts III(C) and III(D) of the majority opinion.

MCR 3.101(H) governs the matter of garnishee disclosures. The majority correctly points out that, among other things, MCR 3.101(H)(1)(a) requires a garnishee to "claim[] any setoff that the garnishee *would* have against the defendant . . . ." (Emphasis added). Given the language of this court rule, the majority concludes that *making a claim* of setoff is not the same as *exercising a right* of setoff. The majority goes on to conclude that, for purposes of MCR 3.101(H), a gar-

nishee must only *claim* its right of setoff and need not ever actually *exercise* the right. I cannot agree.

In my opinion, the language of MCR 3.101(H)(1)(a), standing alone, is insufficient to answer the question presented in this case. As an initial matter, I believe that the majority's interpretation of MCR 3.101(H)(1)(a), permitting a garnishee to merely claim a right of setoff without ever exercising it, facilitates collusion between the garnishee and judgment debtor to defeat the garnishor's claim. Indeed, I believe this is exactly what happened in the present case. Plaintiff, as a judgment creditor, already had a valid, fully adjudicated claim against Motor City. Motor City had been in default on its loan obligations for six months at the time UBT's garnishee disclosure was submitted on January 29, 2010. Yet UBT continued to allow Motor City to use its deposit accounts and withdraw funds therefrom, and, in fact, shortly thereafter discounted Motor City's notes and sold them, totally defeating the rights of the garnishor. UBT's actions in this regard were certainly inconsistent with any purported intent to set off. *Mich Carpenters' Council Pension Fund v Smith & Andrews Construction Co*, 681 F Supp 1252, 1255 (ED Mich, 1988).

Instead, I conclude that a garnishee must seasonably exercise its right of setoff in order to claim the setoff under MCR 3.101(H)(1)(a). The general rule is that "[w]here a garnishee claims a debt due from the debtor as a set-off, the garnishee *must in fact apply* such debt on the amount due from him or her to the debtor." 38 CJS, Garnishment, § 272, p 542 (emphasis added). Similarly, § 4-303(1) of the Uniform Commercial Code (UCC) suggests that a bank's right of setoff against a customer's deposit accounts is not effective until it is "exercised." See *Baker v Nat'l City Bank of Cleveland*, 511 F2d 1016, 1018 (CA 6, 1975); see also Official

Comment 5 to UCC § 4-303(1) (stating that "[i]n the case of setoff the effective time is when the setoff is actually made"). The Michigan Legislature has adopted § 4-303(1) of the UCC, MCL 440.4303(1), evidencing a legislative intent that bank setoffs be "exercised" before becoming effective.

Perhaps more importantly, other courts have held that no setoff can be claimed until the bank performs some overt act accomplishing the setoff and makes a record verifying that the setoff has in fact been exercised. *Mich Carpenters' Council*, 681 F Supp at 1255; see also *Walters v Bank of America Nat'l Trust & Sav Ass'n*, 9 Cal 2d 46, 55-58; 69 P2d 839 (1937). "[T]he act must be unequivocal, objectively ascertainable and final . . . ." *Normand Josef Enterprises, Inc v Connecticut Nat'l Bank*, 230 Conn 486, 506; 646 A2d 1289 (1994). The law requires something more than a mere declaration of intent to exercise the setoff. See *Baker*, 511 F2d at 1018; see also *In re Archer*, 34 BR 28, 30 (Bkrtcy ND Tex, 1983).

It is undisputed that UBT never exercised the setoff against Motor City's deposit accounts. UBT did not withhold or remove money from the deposit accounts and certainly did not apply any of the deposited funds toward Motor City's loan debt. Nor did it, for obvious reasons, make any record verifying that it had made a setoff. At most, UBT declared its intent to possibly exercise a setoff at some future time. This was not sufficient. See *Baker*, 511 F2d at 1018. Mere declarations by a bank, accompanied by no affirmative acts or steps to record the transaction, are insufficient to support the bank's claimed right of setoff. *Id*. at 1019.

In order to properly invoke its claimed right of setoff against Motor City's deposit accounts, UBT was re-

quired to actually exercise the setoff and apply the deposited funds toward Motor City's outstanding loan debt. I conclude that, because UBT never exercised its claimed right of setoff against the funds in Motor City's deposit accounts, it was not entitled to claim the right on its garnishee disclosure or rely on the right to deny the release of Motor City's deposited funds to plaintiff under the writ of garnishment. See *Mich Carpenters' Council*, 681 F Supp at 1255.

I further conclude that, even if UBT had exercised its right of setoff, its subsequent actions unquestionably constituted a waiver of that right. "[A] garnishee's treatment of a debtor's assets which is inconsistent with the claimed setoff is a waiver of that right in the face of the garnish[o]r's claim." *Id*. Even after submitting its garnishee disclosure, UBT continued to allow Motor City to use its deposit accounts and withdraw funds therefrom. In my opinion, this conduct amounted to a knowing waiver of any setoff right that UBT may have possessed.

It also strikes me that UBT waived its perfected security interest in Motor City's deposit accounts.[1] "A security interest . . . continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof *unless the secured party authorized the disposition free of the security interest* . . . ." MCL 440.9315(1)(a) (emphasis added). Under this section, which is derived from the former UCC § 9-306(2), a

[1] The loan documents executed by Motor City gave UBT a security interest in all of Motor City's deposit accounts at the bank. Under Michigan law, a security interest in a deposit account is perfected when the secured party is in control of the account. MCL 440.9314(1) and (2); *United States v One Silicon Valley Bank Account*, 549 F Supp 2d 940, 959 (WD Mich, 2008). A secured party has control of a deposit account if "[t]he secured party is the bank with which the deposit account is maintained." MCL 440.9104(1)(a).

secured party that authorizes the disposition or dissipation of collateral waives its security interest in that specific collateral. See *Lifewise Master Funding v Telebank*, 374 F3d 917, 923-924 (CA 10, 2004); see also *Producers Cotton Oil Co v Amstar Corp*, 197 Cal App 3d 638, 647; 242 Cal Rptr 914 (1988); *Colorado State Bank of Walsh v Hoffner*, 701 P2d 151, 153 (Colo App, 1985). In my opinion, UBT waived its perfected security interest by authorizing Motor City to continue withdrawing funds from its deposit accounts after it had defaulted. See MCL 440.9315(1)(a); see also *In re Mycro-Tek, Inc*, 191 BR 188, 194-195 (Bkrtcy D Kan, 1996).

In sum, I do not believe that MCR 3.101(H)(1)(a) permits a garnishee to merely claim a right of setoff without actually exercising the right in a seasonable manner. On the contrary, I conclude that in order to claim a right of setoff on its garnishee disclosure under MCR 3.101(H)(1)(a), UBT was required to actually exercise the setoff and apply the funds in Motor City's deposit accounts toward the outstanding loan debt. See *Mich Carpenters' Council*, 681 F Supp at 1255. In my opinion, UBT is liable to plaintiff in the amount of Motor City's funds on deposit with the bank at the time the writ of garnishment was served on January 23, 2010, not to exceed the amount of the underlying judgment plus statutory interest. See MCR 3.101(O)(1). I would reverse the circuit court's ruling on this issue and remand for entry of judgment in favor of plaintiff accordingly.

PEOPLE v VANSICKLE

Docket No. 309555. Submitted August 6, 2013, at Detroit. Decided September 12, 2013. Approved for publication November 5, 2013, at 9:00 a.m.

Jason L. Vansickle was convicted following a bench trial in the Oakland Circuit Court, Daniel Patrick O'Brien, J., of delivery of marijuana. The conviction arose from defendant's sale of marijuana to undercover police officers in the parking lot of a marijuana dispensary, where defendant, a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., had gone with the alleged intention to sell the excess marijuana he had grown. Defendant initially met the officers in the dispensary's waiting area, where the officers were conducting an undercover investigation of the dispensary, and offered to sell them marijuana. The parties ultimately left the dispensary and completed the sale in defendant's truck, which was parked in the dispensary's parking lot. Defendant appealed.

The Court of Appeals *held*:

1. The undercover officers merely provided defendant with an opportunity to commit the crime. The evidence was insufficient to establish entrapment. The trial court properly denied defendant's motion to dismiss on the basis of entrapment.

2. The trial court did not abuse its discretion when it granted the prosecutor's motion in limine to preclude any mention of the MMMA at the trial. No provision of the MMMA expressly grants a qualifying patient the right to sell marijuana to another allegedly qualifying patient. The retroactive application of the decision in *Michigan v McQueen*, 293 Mich App 644 (2011), which held that patient-to-patient sales of marijuana are not permitted under the MMMA, was not a violation of defendant's right to due process of law.

3. The trial court properly determined that the fact that the trial court had dismissed marijuana-related charges against seven defendants in other actions involving those defendants' operation of the dispensary did not require collateral estoppel to apply to the charge against defendant. The legality of defendant's sale of

marijuana to the undercover officers was neither litigated nor determined in the marijuana-dispensary cases.

Affirmed.

1. CRIMINAL LAW — ENTRAPMENT.

Entrapment occurs if the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or the police engage in conduct so reprehensible that the court cannot tolerate it; the police do not engage in entrapment by merely providing a person with the opportunity to commit a crime; an official may employ deceptive methods to obtain evidence of a crime as long as the activity does not result in the manufacturing of criminal behavior.

2. CRIMINAL LAW — ENTRAPMENT.

Factors to consider in determining whether a defendant was impermissibly induced by the police to commit a crime include: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he or she was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrests, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted.

3. MICHIGAN MEDICAL MARIHUANA ACT — QUALIFYING PATIENT-TO-QUALIFYING PATIENT SALES.

Sales of marijuana by a qualifying patient to another qualifying patient are not permitted under the Michigan Medical Marihuana Act (MCL 333.26421 *et seq*.).

4. JUDICIAL DECISIONS — RETROACTIVE EFFECT — PROSPECTIVE APPLICATION.

Judicial decisions generally are given full retroactive effect and complete prospective application is limited to decisions that overrule clear and uncontradicted caselaw; a violation of due process protections occurs when a retroactively applied judicial decision operates or acts as an ex post facto law; a judicial decision may not

be given retroactive effect if the result is that previously innocent conduct is rendered criminal conduct.

5. ESTOPPEL — COLLATERAL ESTOPPEL.

Collateral estoppel precludes the relitigation of issues between the same parties; the proponent of collateral estoppel must show that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, that the same parties had a full and fair opportunity to litigate the issue, and that there was mutuality of estoppel.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Jeffrey M. Kaelin*, Assistant Prosecuting Attorney, for the people.

The Rasor Law Firm (by *James B. Rasor*) for defendant.

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM. Defendant appeals as of right his conviction of delivery of marijuana following a bench trial. See MCL 333.7401(2)(d)(*iii*). We affirm.

Defendant's conviction arises from his sale of 3.8 grams of marijuana to undercover Narcotic Enforcement Team (NET) officers in the parking lot of a marijuana dispensary. The evidence showed that the undercover officers and defendant initially met inside the dispensary, which was under investigation, where they discussed the sale of defendant's "overage" supply of marijuana. Defendant, a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*,[1] possessed marijuana that he

[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).

claimed was "overage" from his own harvested supply and that he intended to transfer to the marijuana dispensary. According to the testimony of the officers, defendant offered to sell the officers one ounce of marijuana. After the officers said that they did not have sufficient funds for that quantity, defendant offered to sell them a lesser amount. The parties ultimately left the dispensary and entered defendant's truck, where defendant produced a digital scale and marijuana from a glass jar. The officers gave defendant $50 in exchange for the marijuana. After the sale, defendant and the officers discussed opportunities for future transactions involving larger amounts of marijuana.

Before trial, defendant filed a motion to dismiss on the basis of entrapment, which the trial court denied. Defendant also filed a motion to dismiss on the basis of collateral estoppel and argued that, because the court had dismissed charges against several other defendants in a separate prosecution arising from the NET investigation of the marijuana dispensary, the charge against him should also be dismissed. The trial court denied the motion. Before trial, the prosecutor filed a motion in limine seeking to preclude any evidence related to the MMMA, including defendant's alleged claim of immunity under the MMMA and his status as a "medical marijuana patient." That motion was granted. Defendant later waived his right to a jury trial and was convicted of delivery of marijuana in a bench trial. This appeal followed.

Defendant argues that the trial court erred by denying his motion to dismiss on the basis of entrapment. We disagree. We review de novo as a matter of law whether the police entrapped a defendant, but the trial court's specific findings of fact are reviewed for clear error. *People v Fyda*, 288 Mich App 446, 456; 793 NW2d

712 (2010). Findings of fact are clearly erroneous if we are left with a firm conviction that the trial court made a mistake. *Id*.

Defendant had the burden of proving by a preponderance of the evidence that he was entrapped. *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). "Entrapment occurs if (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or (2) the police engage in conduct so reprehensible that the court cannot tolerate it." *Fyda*, 288 Mich App at 456. The police do not engage in entrapment by merely providing a defendant with the opportunity to commit a crime. *Johnson*, 466 Mich at 498. In determining whether a defendant was impermissibly induced by the police to commit a crime, we consider the following factors:

> (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. [*Id*. at 498-499.]

In this case, the trial court held that defendant failed to establish either that the police engaged in impermissible conduct that would induce an otherwise law-

abiding person to commit the crime in similar circumstances or that the police engaged in conduct so reprehensible that the court could not tolerate it. We agree. The evidence established that defendant was not a target of the undercover investigation of the marijuana dispensary and that the officers were not familiar with defendant. Instead, the officers had contact with defendant by chance inside the marijuana dispensary's waiting room. Defendant admitted that he was there to transfer his excess marijuana and obtain reimbursement for his expenses. Testimony indicated that before arriving at the marijuana dispensary, defendant had packaged the surplus marijuana that was at his home, placed it in his vehicle for transport to the marijuana dispensary, and traveled more than an hour with the specific intent of transferring the marijuana to the marijuana dispensary. While in the front waiting area, however, defendant discussed selling the officers some of his marijuana. When the officers indicated that they did not have enough money to purchase the quantity that defendant offered, he offered them a smaller amount. Although an officer ultimately suggested that they go outside to complete the transaction, defendant admitted that he felt uncomfortable discussing the transaction inside the marijuana dispensary "out of respect for the business." Once outside, defendant suggested that the men go to his truck, where defendant produced a digital scale and some marijuana and the transaction was completed.

Although defendant alleges that he engaged in "friendly banter" with the officers that induced him to sell them the marijuana, such "friendly banter" does not establish "impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances . . . ." *Fyda*, 288 Mich App at 456. Further, the testimony indicated that during their

interaction, the officers did not appeal to defendant's sympathy, offer him any unusually attractive inducements or excessive consideration, or use any other means to pressure defendant to sell them marijuana. And although defendant complains that it was reprehensible for the officers to falsely pose as legitimate patients at the dispensary, our Supreme Court has held: "An official may employ deceptive methods to obtain evidence of a crime as long as the activity does not result in the manufacturing of criminal behavior." *People v Jamieson*, 436 Mich 61, 82; 461 NW2d 884 (1990) (opinion by BRICKLEY, J.). Moreover, the testimony indicated that the officers presented their forged marijuana registry patient identification cards to the dispensary's employees, not to defendant. And defendant never asked to see the officers' marijuana registry patient identification cards and never asked them any questions about their status as qualifying patients. In summary, the undercover officers merely provided defendant with an opportunity to commit the crime, which is insufficient to establish entrapment. See *Johnson*, 466 Mich at 498. Accordingly, we affirm the trial court's order denying defendant's motion to dismiss on the basis of entrapment.

Defendant next argues that the trial court erred by granting the prosecutor's pretrial motion in limine to preclude any mention of the MMMA at trial because he had the right to argue that, as "a section 4 patient[,] he was entitled to transfer medical marijuana to a person who he reasonably believed was a MMMA patient pursuant to the statute." We disagree. We review for an abuse of discretion a trial court's pretrial ruling on a motion in limine. *Elezovic v Ford Motor Co*, 472 Mich 408, 431; 697 NW2d 851 (2005). "An abuse of discretion occurs when the decision results in an outcome falling outside the

range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

In a renewed motion in limine, the prosecutor argued that defendant was not entitled to the protections afforded under the MMMA; thus, defendant should be prohibited from referring to the MMMA to explain his actions or defend against the charge. In part, the prosecutor argued that, in *Michigan v McQueen*, 293 Mich App 644, 670; 811 NW2d 513 (2011), aff'd on other grounds 493 Mich 135 (2013), this Court held that patient-to-patient sales of marijuana are not protected activity under the MMMA. Accordingly, defendant did not have a right under § 4 of the MMMA, MCL 333.26424, to immunity related to his sale of marijuana; thus, any evidence related to the MMMA or his alleged status as a legitimate "medical marijuana patient" was irrelevant and must be excluded at trial. In granting the prosecutor's motion in limine, the trial court adopted the reasons set forth by the prosecutor. While it is unclear from the ruling whether the trial court applied this Court's holding in *McQueen*, because it was a specific argument raised by the prosecutor, we will assume that to be the case.

On appeal, defendant challenges, in a footnote in his brief, the retroactive application of our holding in *McQueen*, arguing that, because the plain text of the MMMA "would indicate that [patient-to-patient] transfers were legal prior to the *McQueen* decision," applying the *McQueen* holding retroactively implicated his due process rights. We disagree. Although defendant's conduct giving rise to the charge at issue in this case occurred before this Court's decision in *McQueen*, 293 Mich App 644, and before our Supreme Court affirmed that decision on other grounds, *McQueen*, 493 Mich at 142, we reject defendant's argument that principles of

due process precluded the retroactive application of our *McQueen* decision. In *McQueen*, we held that the definition of "medical use" did not include the "sale" of marijuana and, thus, patient-to-patient sales of marijuana are not permitted under the MMMA. *McQueen*, 293 Mich App at 668-670. Our Supreme Court also held that patient-to-patient sales of marijuana are not permitted under the MMMA, although the "sale" of marijuana does fall within the definition of "medical use." *Michigan v McQueen*, 493 Mich 135, 152, 160; 828 NW2d 644 (2013).

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 Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996); *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). However, due process concerns arise when an unforeseeable interpretation of a criminal statute is given retroactive effect. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000). When a retroactively applied judicial decision operates or acts as an ex post facto law, a violation of due process occurs. *Doyle*, 451 Mich at 100. Accordingly, a judicial decision may not be given retroactive effect if the result is that previously innocent conduct is rendered criminal conduct. *Id*.

Here, defendant was not charged with violating any penalty provision of the MMMA; rather, defendant was charged with violating a controlled substance provision of the Public Health Code, MCL 333.7401(2)(d)(*iii*). In defense of the charge, defendant alleged that he was entitled to immunity as set forth in § 4 of the MMMA. Accordingly, the retroactive application of our decision in *McQueen* did not present due process concerns be-

cause it did not operate as an ex post facto law. The possession, use, manufacture, or delivery of marijuana was, and remains, illegal under the Public Health Code, MCL 333.1101 *et seq*. Our holding in *McQueen* did not have the effect of criminalizing previously innocent conduct. *Doyle*, 451 Mich at 100. Further, our holding did not have the effect of overruling clear and uncontradicted caselaw. See *id*. at 104. And we reject defendant's claim that our holding in *McQueen* was unforeseeable. In that regard, defendant argues that, before our decision, patient-to-patient transfers of marijuana were legal. However, there is no provision in the MMMA that expressly grants "a qualifying patient" the right to sell marijuana to another allegedly "qualifying patient." Therefore, defendant's argument that the retroactive application of our decision in *McQueen* violated due process protections is without merit.

It follows, then, that we reject defendant's claim that he was improperly denied the right to argue "that because he was a section 4 patient he was entitled to transfer medical marijuana to a person who he reasonably believed was a MMMA patient pursuant to the statute." Defendant did not have the right to sell marijuana under § 4 of the MMMA. The Michigan Rules of Evidence prohibit the admission of evidence that is not relevant. MRE 402. Accordingly, the trial court's order granting the prosecutor's motion in limine to exclude evidence related to defendant's purported claim of immunity under § 4 of the MMMA, as well as evidence related to the MMMA or defendant's alleged status as a legitimate "medical marijuana" patient, did not constitute an abuse of discretion. See *Elezovic*, 472 Mich at 431.

Finally, defendant argues that, because the trial court dismissed marijuana-related charges against

seven defendants involved in the operation of the marijuana dispensary where the events giving rise to his charge arose, collateral estoppel applied and his charge should have been dismissed. We disagree.

We review de novo the application of collateral estoppel. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). "Collateral estoppel precludes relitigation of issues between the same parties." *VanVorous v Burmeister*, 262 Mich App 467, 479; 687 NW2d 132 (2004). "Generally, the proponent of the application of collateral estoppel must show 'that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.' " *Trakhtenberg*, 493 Mich at 48 (citation omitted).

The trial court properly determined that collateral estoppel did not apply to this matter. The charges against the marijuana dispensary defendants arose from a law enforcement investigation of that facility. Those charges involved different parties and were based on facts and circumstances distinct from defendant's charged conduct. The seven defendants in the marijuana-dispensary cases were charged with several drug-related offenses as a result of their operation of or employment at the marijuana dispensary on several days in July and August 2010. The charge against defendant was based on a single delivery of marijuana to undercover officers. Although that delivery took place in the parking lot of the marijuana dispensary, defendant was not an owner, employee, or operator of the facility, and he was not charged in connection with the sale of controlled substances from the marijuana dispensary. The legality of defendant's sale of marijuana to the undercover officers in the parking lot was

neither litigated nor determined in the marijuana-dispensary cases. Accordingly, collateral estoppel does not apply to this case and defendant's motion to dismiss was properly denied.

Affirmed.

SERVITTO, P.J., and CAVANAGH and WILDER, JJ., concurred.

CONA v AVONDALE SCHOOL DISTRICT

Docket No. 310893. Submitted November 5, 2013, at Detroit. Decided November 12, 2013, 9:00 a.m. Leave to appeal sought.

The superintendent of the Avondale School District filed written tenure charges with the Avondale School District Board of Education, alleging that Frank Cona, a teacher employed by the district, had been convicted of operating a motor vehicle while impaired, had been placed on probation, and had violated his probation twice by using marijuana and alcohol and been given the choice of a jail sentence or an additional year of probation. The superintendent alleged that Cona had chosen to serve a jail sentence, had been sentenced to 30 days in jail, and had been unable to perform his teaching duties for 17 days during his incarceration. The superintendent noted that Cona had given false reasons for his absence and that Cona's effectiveness as a teacher had been compromised after some of his students learned of his incarceration. The superintendent requested that the board proceed on the written charges, which called for Cona's discharge from employment, in accordance with the teachers' tenure act, MCL 38.71 *et seq*. The board voted to proceed on the tenure charges and to discharge Cona. Cona filed a claim of appeal with the State Tenure Commission. Following a hearing, the hearing referee issued a preliminary decision and order that, in part, determined that the board's decision to discipline Cona was not arbitrary or capricious. The hearing referee recommended that Cona be reinstated to his employment at a reduced salary. The parties filed exceptions and cross-exceptions to the preliminary decision and order. The State Tenure Commission granted in part and denied in part the parties' exceptions and eventually entered a final decision and order discharging Cona from employment. The Court of Appeals granted Cona's application for leave to appeal.

The Court of Appeals *held*:

1. The State Tenure Commission correctly applied the "not arbitrary or capricious" standard contained in MCL 38.101(1), as amended, effective July 19, 2011. Although the conduct that supported the charges against Cona occurred before July 19, 2011, the written tenure charges were brought against Cona

more than a month after the amendment of the statute was effective. Although the retrospective application of a law is improper when it would take away or impair a vested right acquired under an existing statute, Cona cannot demonstrate that he had any such vested right in this case. Until the tenure charges were actually filed, Cona had no more than a mere expectancy that any particular statutory standard would be applied to his conduct.

2. Although the written tenure charges did not contain any allegations concerning Cona's use of marijuana or that his conduct had undermined the school district's substance-abuse policies, evidence regarding Cona's use of marijuana and whether his conduct undermined the district's substance-abuse policies was properly admitted. The teachers' tenure act does not require that the evidence conform strictly to the written allegations. Generally, the parties may present any evidence at the hearing that is relevant to an issue under consideration, as long as it is not otherwise inadmissible. The State Tenure Commission properly considered evidence regarding these issues, which were both included in the school district's statement of exceptions to the referee's preliminary decision and order and based on the evidence presented at the hearing.

3. The State Tenure Commission did not err by determining that Cona's conduct had had an adverse effect on the school community and environment. There was competent, material, and substantial evidence to support the commission's determination.

4. There is no merit to Cona's argument that the State Tenure Commission erred by determining that evidence of the parties' settlement negotiations was inadmissible. Cona failed to demonstrate a sufficient basis for admitting the evidence.

5. The school district had principled reasons for discharging Cona that were not arbitrary or capricious and were not based on prejudice, animus, or improper motives. The State Tenure Commission's determination that the district's reasons were not arbitrary or capricious within the meaning of MCL 38.101(1), as amended, was authorized by law and supported by competent, material, and substantial evidence on the whole record.

Affirmed.

1. STATUTES — RETROSPECTIVE APPLICATION — VESTED RIGHTS.

The retrospective application of a law is improper when it would take away or impair a vested right under an existing statute.

2. TEACHERS' TENURE ACT — TENURE CHARGES — HEARINGS — EVIDENCE.

The parties may present any evidence that is relevant to an issue under consideration at a hearing regarding tenure charges against a teacher conducted in accordance with the teachers' tenure act, as long as the evidence is not otherwise inadmissible; the act does not require that the evidence conform strictly to the written allegations (MCL 38.71 *et seq*.).

3. TEACHERS' TENURE ACT — TENURE CHARGES — WORDS AND PHRASES — ARBITRARY — CAPRICIOUS.

A school district may discharge a teacher only for a reason that is not arbitrary or capricious; "arbitrary" means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance; "capricious" means apt to change suddenly, freakish, or whimsical; a reason that is based on prejudice, animus, or improper motives is arbitrary and capricious (MCL 38.101[1]).

Law Offices of Lee & Correll (by *Michael K. Lee* and *Megan R. McGown*) for petitioner.

Clark Hill PLC (by *Mark W. McInerney*) for respondent.

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

JANSEN, J. Petitioner appeals by leave granted[1] the final decision and order of the State Tenure Commission (Commission) discharging him from employment. For the reasons set forth in this opinion, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioner began working for respondent during the

[1] "A party aggrieved by a final decision and order of the tenure commission may appeal the decision and order to the court of appeals in accordance with the Michigan court rules . . . ." MCL 38.104(7). Final decisions of the State Tenure Commission are appealable to this Court by leave granted. MCR 7.203(B)(3); *Watt v Ann Arbor Bd of Ed*, 234 Mich App 701, 705-707; 600 NW2d 95 (1999).

1997-1998 school year, and obtained tenure during the 2001-2002 school year. Petitioner taught social studies at Avondale High School at the time of the events underlying this case.

The tenure charges against petitioner arose out of his 17-day absence from school in April and May 2011. In February 2010, petitioner was arrested for operating a motor vehicle while intoxicated. In May 2010, petitioner pleaded guilty to the lesser charge of operating a motor vehicle while impaired and was sentenced to 12 months of probation. The conditions of petitioner's probation required that he refrain from using alcohol and nonprescription drugs and submit to random drug and alcohol testing. Later in May 2010, petitioner tested positive for marijuana. Then, in August 2010, petitioner tested positive for alcohol. Petitioner was charged with a probation violation and ultimately pleaded guilty to that charge. In September 2010, the terms of petitioner's probation were amended to require twice weekly drug and alcohol screening.

In February 2011, petitioner admitted using alcohol. In addition, petitioner again tested positive for marijuana. In April 2011, petitioner's probation officer filed a motion alleging a new probation violation. Petitioner was directed to appear in district court for the alleged probation violation.

Petitioner appeared before the district court on Wednesday, April 13, 2011. This was a school day, and petitioner reported to respondent that his absence from work was due to illness. Petitioner was offered a choice between jail time and an additional year of probation. Petitioner chose jail because he believed that his probation officer would recommend a 15-day sentence and that he would be permitted to serve the sentence on

weekends, thereby allowing him to continue teaching during the week.[2] However, petitioner was mistaken. After pleading guilty to the charge of violating his probation, petitioner was sentenced to 30 days in jail. The district court ordered that his sentence begin immediately.

Petitioner was permitted one telephone call after he was sentenced. He called his ex-wife, Deborah Cona (Cona), and instructed her how to use AESOP, the computer system used by respondent's teachers to report their absences. Petitioner also gave Cona his confidential AESOP password. Petitioner asked Cona to enter "personal days" in the AESOP computer system to cover his absence. Cona attempted to do this, but the AESOP system would not allow her to enter the personal days as requested by petitioner. Instead, Cona entered "family illness" as the reason for petitioner's absence, believing that this was the best option because the family illness designation was for unpaid leave.

During a 30-second telephone call on April 16, 2011, petitioner instructed Cona to use AESOP again to enter a leave of absence for him. When Cona attempted to do this, "leave of absence" was not an available option. Instead, Cona reported in the AESOP system that petitioner's father was ill. Petitioner and Cona spoke again on April 17, 2011. Cona told petitioner that she had reported that his father had had a stroke and that petitioner had gone to Florida. Petitioner told Cona to go to respondent's superintendent and tell him the

[2] A condition of petitioner's continued probation would have required him to remain in Michigan. Petitioner has two adult children who live outside the state. Petitioner apparently wanted the freedom to leave Michigan to visit his children.

truth. On Tuesday, April 19, 2011, Cona visited the superintendent, Dr. George Heitsch, and told him what had happened.

According to Avondale High School Principal Frederick Cromie, petitioner's incarceration in the Oakland County jail was then discovered by the students. One student learned of petitioner's incarceration from his brother, who was in jail at the same time as petitioner. The information spread quickly among the students. Cromie did not know who was actually responsible for spreading the stories at school.

Petitioner was released from jail on the night of Friday, May 6, 2011, or the early morning of Saturday, May 7, 2011. He called Heitsch on the following Monday and they agreed to meet. Petitioner expressed a desire to return to work immediately. However, after the meeting, petitioner was placed on administrative leave for the remainder of the 2010-2011 school year.

On June 22, 2011, Heitsch sent petitioner a letter stating that "[p]ending the successful resolution of [his] suspension," petitioner would be placed as a social studies teacher in the middle school for the 2011-2012 school year. The parties then entered into settlement negotiations, but the negotiations eventually broke down and no resolution was ever reached.

On September 6, 2011, Heitsch filed written tenure charges against petitioner with respondent's board of education (the Board). See MCL 38.102. In the written charges, Heitsch explained the circumstances of petitioner's original impaired-driving conviction and petitioner's two probation violations. Heitsch also explained that petitioner had missed work from April 13, 2011, through May 9, 2011, because of his incarceration, and noted that petitioner had given false reasons for his absence. Heitsch alleged that the students had

learned of petitioner's incarceration and that "[a]s a consequence, [petitioner's] moral authority as a teacher [h]as been substantially compromised, which has affected his ability to be an effective teacher." The tenure charges went on to allege:

> 6. [Petitioner's] unprofessional and illegal conduct has had an adverse impact on the educational and learning environment of Avondale High School. First, his incarceration resulted in him being unable to teach school for approximately a month, or about 19 school days. While a substitute teacher was retained to fill in on these days, the instruction received by students in these circumstances obviously suffered. Moreover, as previously noted, [petitioner] could have chosen to extend his probation and not miss any school days to teach students, but he instead chose jail, knowing full well that his students would be deprived of his services as a teacher for an extended period of time.
>
> 7. [Petitioner's] unprofessional and illegal conduct also has had an adverse impact on the educational and learning environment of Avondale High School in another way. It is a teacher's duty to model appropriate behavior. A professional teacher in Michigan who commits a misdemeanor, violates probation, is incarcerated, and as a result misses several weeks of teaching, is not comporting himself in a manner consistent with the standard to which teachers are reasonably held. Moreover, District teachers, especially those at the high school, are expected to support and promote the education of students about the dangers of alcohol and drug abuse, and of operating a motor vehicle while impaired by, or under the influence of, alcohol and/or drugs. [Petitioner's] ability to effectively support the District's educational mission in this regard has been completely undercut by his own disregard for these principles.
>
> 8. [Petitioner's] initial use of alcohol prior to operating a motor vehicle, his subsequent use of alcohol in violation of his probation, the consequential jail time and missed days of work, and public knowledge of his conduct, especially by

students, provide more than adequate basis for his dismissal under MCL § 38.101(1).

9. Finally, [petitioner's] record with the District over his approximately 13 years in the District has not been exemplary. He has been disciplined in the past. For example, on October 25, 2007, he received a written reprimand for making a statement to one of his students that was essentially as follows: "If I held a gun to your head, it still wouldn't make you shut up, would it?" Given the seriously unprofessional, illegal, and violative conduct detailed above related to his incarceration, as well as [petitioner's] other past behaviors, I have determined that [petitioner] can no longer be effective in contributing in a positive way to the educational and learning environment of Avondale High School and the District as a whole.

Heitsch requested that the Board proceed on the written tenure charges, which called for petitioner's discharge from employment, in accordance with the teachers' tenure act (the Act), MCL 38.71 *et seq*. The Board voted unanimously to proceed on the tenure charges and to discharge petitioner. See MCL 38.102.

On September 27, 2011, petitioner filed a claim of appeal with the Commission. See MCL 38.104(1). A hearing was conducted before a hearing referee in late November 2011. The hearing referee issued his preliminary decision and order on March 12, 2012.

The hearing referee first addressed the proper statutory standard for reviewing respondent's decision to discharge petitioner. This issue arose because the Act had been amended by 2011 PA 100, effective July 19, 2011, and the amendment had changed the applicable standard. Prior to July 19, 2011, MCL 38.101, as amended by 2005 PA 136, effective January 1, 2006, had stated in relevant part: "Except as otherwise provided in section 1a of this article, discharge or demotion of a teacher on continuing tenure may be made only for

reasonable and just cause and only as provided in this act." (Emphasis added.) The 2011 amendment modified the language of MCL 38.101 and added subsections (1) and (2). Subsection (1) now states: "Except as otherwise provided in section 1a of this article, discharge or demotion of a teacher on continuing tenure may be made only for *a reason that is not arbitrary or capricious* and only as provided in this act." (Emphasis added.)

Petitioner had argued that because the tenure charges were based on conduct that occurred before July 19, 2011, the "reasonable and just cause" standard of the former MCL 38.101 should be applied. In contrast, respondent had asserted that the "not arbitrary or capricious" standard of MCL 38.101(1), as amended, should be applied because the tenure charges had been brought after the amendment took effect. The hearing referee agreed with respondent and applied the amended standard.

The hearing referee determined that neither petitioner's 2010 conviction nor his first probation violation had a direct nexus to his responsibilities as a teacher. With regard to petitioner's second probation violation and the proceedings of April 13, 2012, the hearing referee noted that petitioner would not have missed any work if he had simply agreed to an additional year of probation rather than jail time.

Next, the hearing referee determined that petitioner's "conduct of providing his wife with his confidential [AESOP password] and resultant false information being entered into the system warrants discipline." The referee opined that there was a direct nexus between petitioner's absence from school for 17 days and his responsibility, as a teacher, to be present in the classroom. The referee found that this had adversely affected petitioner's students and the school, and that it

justified discipline. The referee ultimately determined that the Board's decision to discipline petitioner was "not arbitrary or capricious." See MCL 38.101(1), as amended.

To determine the appropriate level of discipline, the hearing referee considered each paragraph of the written tenure charges. The referee ultimately concluded:

> There is a direct nexus between [petitioner's] role in providing false information to the district via AESOP and [his] election to serve a jail sentence in lieu of serving [an] additional year on probation, which election caused [petitioner] to be absent from school for 17 days. To the extent that the proposed termination of [petitioner's] employment relies on conduct not connected to his teaching responsibilities, the district's reason to terminate [his] employment is arbitrary and capricious. [However, petitioner] should be disciplined for sharing his password in violation of district policy, for entry of false information into AESOP and for his absence from school. Because [petitioner's] primary misconduct relates to [his] absence from school it is incongruous to suspend [him] from his teaching duties at school as discipline. Reinstating [petitioner] to his employment at a reduced salary is appropriate discipline.

Pursuant to MCL 38.104(5)(j) and (k), both parties timely filed exceptions and cross-exceptions to the referee's preliminary decision and order. On May 31, 2012, the Commission issued its final decision and order. See MCL 38.104(5)(m).

The Commission addressed petitioner's first exception, in which petitioner argued that the referee had improperly applied the amended "not arbitrary or capricious" standard of MCL 38.101(1), as amended. The Commission denied this exception, concluding that the amended "not arbitrary or capricious" standard applied in this case because the written tenure charges were not filed until after the statutory amendment took effect.

After an extensive review of the testimony presented before the referee, the Commission denied petitioner's second exception and concluded that the referee had not erred by finding that petitioner's conduct adversely affected the school community. The Commission noted that "[t]he evidence established that [petitioner's] illegal conduct was at odds with the high school's efforts to convey a strong message against drinking and driving and with the district's reasonable expectation that teachers model appropriate behavior." The Commission further explained:

> [T]he importance of substance abuse education in Michigan schools and [respondent's] strong message against drinking and driving provide a direct nexus between [petitioner's] illegal conduct and his responsibilities as a teacher. [Petitioner] can reasonably be held accountable for public knowledge of his illegal conduct, which was a clear violation of his responsibility to model appropriate behavior.

The Commission further determined that several substitute teachers had been required to cover for petitioner during his term of incarceration and that this had disrupted the learning process for the students in petitioner's classes. It also addressed the evidence that petitioner had initially provided false reasons for his absence from work. In particular, the Commission found that petitioner's initial report that he was on sick leave "was a deliberate, dishonest act that was inconsistent with modeling the behavior that is reasonably expected of professional educators and that undermines the trust that is essential in the relationship between a teacher and school administrators." The Commission concluded that respondent had sufficiently established that petitioner's conduct adversely affected the school community. The Commission therefore denied petitioner's second exception.

Petitioner's third exception dealt with the referee's finding that he had shared AESOP information with Cona and had directed her to enter false information into AESOP. Petitioner also challenged the referee's exclusion of evidence concerning the parties' settlement negotiations. The Commission determined that petitioner was accountable for Cona's entry of false information, but found "significant circumstances that mitigate the seriousness of this infraction." The Commission concluded that petitioner's sharing of his AESOP password with Cona did not constitute misconduct for which he should be disciplined. However, the Commission concluded that petitioner's 17-day absence "clearly support[ed] discipline," and that the referee had properly excluded evidence of the settlement negotiations.

Petitioner's fourth exception challenged the referee's factual finding that respondent had previously disciplined him. The Commission denied this exception, concluding that the referee's decision was not based on any prior disciplinary incidents.

Respondent filed exceptions as well. For instance, respondent challenged the referee's determination that it had the burden of proving that its decision to discipline petitioner was not arbitrary or capricious. The Commission agreed with the referee and denied this exception.[3] Respondent also challenged the referee's findings concerning the appropriate level of discipline to impose on petitioner. The Commission ultimately determined that the referee had erred by failing to

[3] In proceedings before the Commission, the respondent has the burden of establishing that its stated reasons for disciplining a teacher are "not arbitrary or capricious" within the meaning of MCL 38.101(1), as amended. See *Satterfield v Grand Rapids Pub Sch Bd of Ed*, 219 Mich App 435, 437; 556 NW2d 888 (1996).

consider petitioner's original conviction and first probation violation when determining the appropriate form of discipline.

In another exception, respondent argued that the referee had erred by failing to consider that petitioner's second probation violation was based, at least in part, on his use of marijuana. Petitioner argued that because the written tenure charges had not referred to his marijuana use, the referee correctly declined to consider it. The Commission reasoned:

> The key element of the charge was [petitioner's] violation of the terms of his probation. It was not necessary that [respondent] list every basis for the violation in the charges. During the hearing, evidence was presented that the violation was based on both alcohol and marijuana use. Dr. Heitsch testified about the district's efforts to educate students about substance abuse, and Mr. Cromie testified about the significant negative effect of [petitioner's] use of marijuana. We agree with [respondent] that the evidence of [petitioner's] marijuana use is relevant and it is taken into consideration in our review of the issue of the appropriate level of discipline.

Respondent also challenged the referee's failure to consider whether petitioner's original conviction and probation violations had undermined the school's anti-drug and anti-alcohol efforts. The Commission essentially agreed with respondent, noting that "[respondent's] substance abuse efforts are relevant in determining the seriousness of [petitioner's] conduct, and our discussion of the appropriate level of discipline takes into account the incongruity between those efforts and [petitioner's] conduct."

Respondent's final exception challenged the referee's determination of the appropriate level of discipline to be imposed. The Commission stated that the referee had found that "since [petitioner's] primary misconduct

was his absence from school, it would be 'incongruous' to impose discipline that removed him from his teaching duties." The Commission concluded that the referee's reasoning was flawed, noting:

> Presence on the job is an employee's fundamental obligation. . . . A tenured teacher's unauthorized or excessive absences have supported a finding of reasonable and just cause for discharge. . . . [T]he fact that [petitioner] was absent for 17 days is unquestionably a relevant consideration and there is nothing incongruous about suspending or discharging a teacher due to absences.

In the end, the Commission concluded that respondent had proved the allegations contained in the tenure charges by a preponderance of the evidence and that respondent's stated reasons for discharging petitioner were neither arbitrary nor capricious. In its final decision and order dated May 31, 2012, the Commission granted in part and denied in part the parties' exceptions, and ordered petitioner's discharge.

We granted petitioner's application for leave to appeal on March 19, 2013. *Cona v Avondale Sch Dist*, unpublished order of the Court of Appeals, entered March 19, 2013 (Docket No. 310893).

II. STANDARDS OF REVIEW

We must uphold a final decision of the Commission if it is authorized by law and is supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; see also *Widdoes v Detroit Pub Sch*, 242 Mich App 403, 408; 619 NW2d 12 (2000); *Nolte v Port Huron Area Sch Dist Bd of Ed*, 152 Mich App 637, 646; 394 NW2d 54 (1986). "[W]e review the entire record, not just the portions that support the commission's findings." *Parker v Byron Ctr Pub Sch Bd of Ed*, 229 Mich App 565, 578; 582 NW2d 859 (1998).

"[W]hether a statute applies in a particular case is a question of law that we review de novo." *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 632; 774 NW2d 332 (2009). We similarly review de novo as a question of law whether the Legislature's amendment of MCL 38.101(1) applies retrospectively. *Brewer v A D Transport Express, Inc*, 486 Mich 50, 53; 782 NW2d 475 (2010).

III. APPLICABLE STATUTORY STANDARD

We conclude that the Commission correctly applied the amended "not arbitrary or capricious" standard of MCL 38.101(1), as amended. As noted previously, MCL 38.101 was amended, effective July 19, 2011. See 2011 PA 100. Prior to July 19, 2011, MCL 38.101 had prescribed a "reasonable and just cause" standard. The 2011 amendment modified the statute, which now prescribes a "not arbitrary or capricious" standard.

Petitioner argues that, because the underlying conduct that formed the basis of the tenure charges against him occurred before July 19, 2011, the Commission should have applied the "reasonable and just cause" standard of the former MCL 38.101. We disagree. Although petitioner's conduct occurred before July 19, 2011, the written tenure charges were brought on September 6, 2011, more than a month after the effective date of the amendment. Whereas the retrospective application of a law is improper when it would take away or impair a vested right acquired under an existing statute, *Morgan v Taylor Sch Dist*, 187 Mich App 5, 9-10; 466 NW2d 322 (1991), petitioner cannot demonstrate the existence of any such vested right in this case. "It is the general rule that that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a

vested right, and the holder thereof may be deprived of it." *Lahti v Fosterling*, 357 Mich 578, 589; 99 NW2d 490 (1959). Until the tenure charges against petitioner were actually filed, petitioner had no more than a mere expectancy that any particular statutory standard would be applied to his conduct. See *Morgan*, 187 Mich App at 12; see also *Detroit v Walker*, 445 Mich 682, 700; 520 NW2d 135 (1994). The Commission properly applied the amended "not arbitrary or capricious" standard of MCL 38.101(1) in this case.

IV. MARIJUANA USE AND OTHER UNCHARGED ALLEGATIONS

Petitioner argues that the Commission erred by considering his positive tests for marijuana and the question whether his conduct undermined respondent's substance-abuse policies because these issues were not alleged in the written tenure charges. We disagree.

We acknowledge that the written tenure charges did not contain any allegations concerning petitioner's marijuana use or positive tests for marijuana. Nor did the written charges allege that petitioner's conduct undermined respondent's substance-abuse policies. "All charges against a teacher shall be made in writing, signed by the person making the charges, and filed with the . . . board, and a copy of the charges shall be provided to the teacher." MCL 38.102. However, it does not follow that the hearing referee may not consider evidence beyond the scope of the original written charges. See *Sutherby v Gobles Bd of Ed (After Remand)*, 132 Mich App 579, 589; 348 NW2d 277 (1984). Generally, the parties may present any evidence at the hearing that is relevant to an issue under consideration, as long as it is not otherwise inadmissible. See MCL 24.275; MCL 38.104(4); see also *Sutherby v Gobles Bd of Ed*, 73 Mich App 506, 510; 252 NW2d 503 (1977). This includes

both testimony and documentary evidence. See MCL 38.104(5)(d) and (f). The Act does not require that the evidence conform strictly to the written allegations. Evidence concerning petitioner's positive tests for marijuana, and whether his conduct infringed on or undermined respondent's substance-abuse policies, was properly introduced at the hearing despite the fact that these issues were not specifically mentioned in the written tenure charges. See *Sutherby*, 132 Mich App at 589.

It is true that "[t]he tenure commission shall not hear any additional evidence and its review shall be limited to consideration of the issues raised in the exceptions based solely on the evidence contained in the record from the hearing." MCL 38.104(5)(m). However, the Commission did not hear any new evidence concerning petitioner's marijuana use and alleged infringement of respondent's substance-abuse policies. The Commission considered only the evidence that was presented at the hearing before the referee. Moreover, these matters were raised in respondent's exceptions to the referee's preliminary decision and order. In its statement of exceptions filed on April 3, 2012, respondent challenged several of the referee's findings of fact. Respondent specifically observed that "the [referee] seems to have overlooked the fact that . . . [petitioner] had failed a test for marijuana." Respondent also took issue with "the [referee's] failure to consider . . . the fact that [petitioner's] convictions and probation violations undercut [respondent's] consistent anti-drug and anti-alcohol messages." We conclude that the Commission properly considered petitioner's positive tests for marijuana and the question whether petitioner's conduct undermined respondent's substance-abuse policies—issues that were both included in respondent's statement of excep-

tions and based on the evidence presented at the hearing. MCL 38.104(5)(*l*) and (m).

V. ADVERSE EFFECT ON THE SCHOOL COMMUNITY

Petitioner also argues that the Commission erred by determining that his conduct had an adverse effect on the school community and environment. Again, we disagree.

Petitioner asserts that because his conduct occurred away from school property and outside regular school hours, the Commission's determination that his actions adversely affected the school community was not supported by competent, material, and substantial evidence. He also asserts that there was no evidence to establish that his conduct had an adverse effect on the students or their learning environment. However, there was evidence that petitioner's 17-day absence necessitated the use of various substitute teachers and hampered the learning process for the students in his classes. There was also evidence that the students who discovered petitioner's incarceration had planned protests and other potentially disruptive activities. Lastly, there was at least some evidence to suggest that the widespread knowledge of petitioner's conduct posed a threat to the school's anti-alcohol efforts.

Petitioner's challenge is simply unconvincing. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a scintilla but may be substantially less than a preponderance." *Parker*, 229 Mich App at 578. This Court may not substitute its judgment for that of the Commission, even if we would have reached a different result in its place. *Sutherby*, 132 Mich App at 589; see also *Black v Dep't of Social Servs*, 195 Mich App 27, 30; 489 NW2d 493 (1992). Heitsch specifically testified that petition-

er's conduct was contrary to respondent's substance-abuse policies, and other witnesses testified regarding the planned protests by the students. There was competent, material, and substantial evidence to support the Commission's determination that petitioner's conduct had adversely affected the school community and environment.

VI. EVIDENCE OF SETTLEMENT NEGOTIATIONS

Petitioner argues that the Commission erred by concluding that evidence of the parties' settlement negotiations was inadmissible. This argument is without merit. Before Heitsch filed the written tenure charges, the parties were engaged in settlement negotiations. During that time, respondent notified petitioner of a teaching assignment for the following school year. It appears that petitioner did not accept the offer because it required him to repay $1,500 to respondent.

Petitioner contends that evidence of the settlement negotiations should have been admitted to show that respondent had originally intended to continue his employment and assign him to another position within the district for the 2011-2012 school year. He also contends that he should have been permitted to introduce this evidence to impeach Heitsch's credibility.

As petitioner correctly notes, MRE 408 precludes the admission of "[e]vidence of conduct or statements made in compromise negotiations," but "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . . ." However, the fact that Heitsch initially offered petitioner a teaching assignment for the 2011-2012 school year, but then filed tenure charges against him, does not constitute evidence of bias. Heitsch simply attempted to work with petitioner. Once the

negotiations fell through, Heitsch moved forward with tenure charges and sought petitioner's discharge. As the Commission correctly noted, "even assuming that evidence of a settlement offer may be admissible for impeachment purposes, the record . . . contain[s] no allegations of fact that call into question the testimony of Dr. Heitsch or Mr. Cromie." Petitioner has not demonstrated a sufficient basis for admitting evidence regarding the settlement negotiations. See MRE 408; MCL 24.275; MCL 38.104(4).

VII. DISCHARGE OF PETITIONER

Lastly, petitioner argues that the Commission erred by ordering his discharge. He contends that a less severe penalty, such as that recommended by the hearing referee, would have been more appropriate. We perceive no error with respect to this issue.

The Commission provided the following detailed reasons, among others, for its decision to uphold respondent's reasons for discharging petitioner:

> Based on our review of the record, we do not find that [respondent's] decision to discharge [petitioner] was based on a reason that is arbitrary or capricious. Many of the factors that are supported by the evidence and which provide a reasonable explanation for the decision have long been considered relevant in fashioning an appropriate discipline for professional misconduct. . . . It is not unreasonable for [respondent] to have significant concerns, based on [petitioner's] deliberate and criminal conduct, about [petitioner's] ability to act as a role model and to be a credible messenger of the district's strong substance abuse message. [Petitioner's] false claim of a medical reason for his absence on April 13, 2011, contradicts the district's expectation of honesty. In addition, the remaining 16 days of absence could have been avoided if [petitioner] had opted for an extension of his probation, and his 17 day

> absence disrupted the educational process for his students. Further, there was no evidence of efforts . . . [by petitioner] to address [his] issues of alcohol or illegal drug use.
>
> There are some factors that would support a less drastic level of discipline, including the evidence of [petitioner's] teaching competence. But our duty is not to fashion the penalty that we ourselves would prefer but to review the controlling board's decision for arbitrariness and capriciousness. Under this standard of review, we find that the [referee] erred in declining to order [petitioner's] discharge.

Respondent had the burden of establishing a factual basis for discharging petitioner. See *Comstock Pub Sch v Wildfong*, 92 Mich App 279, 284; 284 NW2d 527 (1979). As noted earlier, under the standard of MCL 38.101(1), as amended, a school district may discharge a teacher "only for a reason that is not arbitrary or capricious . . . ." " 'Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, and capricious means apt to change suddenly, freakish or whimsical[.]' " *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 141; 807 NW2d 866 (2011), quoting *Nolan v Dep't of Licensing & Regulation*, 151 Mich App 641, 652; 391 NW2d 424 (1986). For instance, a reason is arbitrary and capricious if it is based on prejudice, animus, or improper motives. See *Mich Farm Bureau*, 292 Mich App at 145.

Respondent had principled reasons for discharging petitioner from employment. The written tenure charges were developed with reference to specific circumstances and conduct that, in Heitsch's professional judgment, affected petitioner's ability to continue serving as a teacher. Petitioner had been convicted of

driving while impaired,[4] had violated the terms of his probation by using drugs and alcohol, had missed 17 days of work as a result of his incarceration, and had provided false reasons for his absence. Moreover, petitioner's 17-day absence disrupted the learning process at Avondale High School, at least for those students in petitioner's classes. Respondent's reasons for discharging petitioner were developed with reference to these particular facts and circumstances, and were not freakish, whimsical, or apt to change suddenly. See *Mich Farm Bureau*, 292 Mich App at 141. Nor is there any evidence to suggest that respondent's reasons were based on prejudice, animus, or improper motives. See *id*. at 145. In light of the record evidence presented in this case, the Commission determined that respondent's reasons were "not arbitrary or capricious" within the meaning of MCL 38.101(1), as amended. We conclude that the Commission's determination in this regard was authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28.[5]

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[4] Petitioner correctly points out that the offense of driving while impaired is not listed in § 1535a of the Revised School Code, MCL 380.1535a. Therefore petitioner's conviction of driving while impaired, *standing alone*, would not necessarily have provided sufficient reason for his discharge. MCL 38.101a. However, petitioner's conviction of driving while impaired was only one of numerous pieces of evidence on which the Commission relied to support its final decision. MCL 38.101a does not preclude the Commission from considering a teacher's conviction of a nonlisted offense in conjunction with other admissible evidence.

[5] Petitioner argues that a lesser form of discipline, such as that recommended by the hearing referee, would have been more appropriate. However, the Commission may "adopt, modify, or reverse the preliminary decision and order" of the hearing referee, MCL 38.104(5)(m), and it is solely within the province of the Commission to determine the appropriate penalty for teacher misconduct, see *Lewis v Bridgman Pub Sch (On Remand)*, 279 Mich App 488, 496-497; 760 NW2d 242 (2008) (opinion by FITZGERALD, J.). We defer to the Commission's determination of the

Affirmed.

OWENS, P.J., and HOEKSTRA, J., concurred with JANSEN, J.

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appropriate level of discipline because this is a matter within its area of administrative expertise. See *Sutherby*, 132 Mich App at 588-589. Our task "is not to determine whether, in our own judgment, we believe a teacher should or should not be discharged, but only whether there is 'competent, material and substantial evidence' on the record to sustain the decision of the Tenure Commission." *Clark v Swartz Creek Community Sch*, 488 Mich 993 (2010) (MARKMAN, J., concurring), quoting Const 1963, art 6, § 28.

PEOPLE v KOSIK

Docket No. 312518. Submitted November 6, 2013, at Lansing. Decided November 12, 2013, at 9:05 a.m. Leave to appeal sought.

Dustin J. Kosik was convicted by a jury in the Bay Circuit Court of unlawful imprisonment, MCL 750.349b, and assault and battery, MCL 750.81(1), after he forced a shoe store clerk into a back room of the shoe store. After forcing her into the back room, defendant tried to convince the victim that he had been joking, asked her not to tell anyone about the incident, and then left the store. Defendant moved for judgment notwithstanding the verdict, a new trial, or resentencing. The court, Harry P. Gill, J., denied the motion. Defendant appealed.

The Court of Appeals *held*:

1. A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under circumstances in which the restrained person was secretly confined by either keeping the confinement of the restrained person a secret, or keeping the location of the restrained person a secret. Secret confinement means the victim is deprived of the assistance of others by virtue of the victim's inability to communicate his or her predicament to others. In this case, sufficient evidence was presented that defendant confined the victim and that the confinement was secret given that defendant assaulted the victim when she was alone in the store; took the victim into an enclosed area against her will; the enclosed area would not have been visible to anyone passing by; defendant stood in front of the door to the enclosed area, preventing the victim from escaping; and defendant took a phone away from the victim so that she could not call for help. Whether and when defendant chose to release the victim is immaterial. The determination whether a person has been secretly confined generally is not dependent on the duration of the confinement.

2. Jury instructions must include all the elements of the charged offense, and must not exclude material issues, defenses, or theories if the evidence supports them. In this case, the trial court read CJI2d 20.26, which states that to prove the charge, the prosecution does not have to show that the complainant resisted

the defendant. The trial court did not abuse its discretion by giving the instruction, which clarified that the victim did not need to resist in order for defendant to be convicted. This was appropriate in light of language used by defense counsel, which arguably suggested that the victim had consented to go to the backroom with defendant. The instruction did not diminish the prosecution's burden of proof.

3. Offense variable (OV) 8 concerns victim asportation or captivity. Under MCL 777.38(2)(b), zero points are to be assessed for OV 8 when the sentencing offense is kidnapping. When the sentencing guidelines were enacted, the kidnapping statute, MCL 750.349, proscribed several forms of conduct, including forcibly or secretly confining or imprisoning any other person within this state against his or her will. The Legislature subsequently amended the kidnapping statute, MCL 750.349, and added the unlawful imprisonment statute, MCL 750.349b, thereby differentiating unlawful imprisonment from kidnapping. The Legislature is presumed to have been aware of the language in the sentencing guidelines when it amended the kidnapping statute and differentiated unlawful imprisonment from kidnapping. The Legislature also is presumed to have considered the consequence of failing to include unlawful imprisonment in MCL 777.38(2)(b), and thus to have intended that MCL 777.38(2)(b) direct the assessment of zero points for OV 8 only when the sentencing offense is kidnapping. Accordingly, the trial court did not err by assessing defendant 15 points for OV 8.

4. OV 10 concerns the exploitation of a vulnerable victim. Fifteen points must be assessed for OV 10 when predatory conduct was involved. The timing of an offense, including watching the victim and waiting until the victim is alone before victimizing him or her, may be evidence of predatory conduct. The trial court did not err by assessing defendant 15 points under OV 10 in light of the evidence that defendant investigated the store and waited until the victim was alone before assaulting her. It is of no consequence that the victim did not suffer from an inherent vulnerability because the trial court determined that the circumstances of the offense rendered the victim vulnerable.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 8 — VICTIM ASPORTATION OR CAPTIVITY — UNLAWFUL IMPRISONMENT.

Under MCL 777.38(2)(b), zero points are to be assessed for offense variable 8 when the sentencing offense is kidnapping; unlawful

imprisonment is now a separate offense from kidnapping, and MCL 777.38(2)(b) does not apply to unlawful imprisonment.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kurt C. Asbury*, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for the people.

Peter Ellenson for defendant.

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

BOONSTRA, J. Defendant appeals by right his convictions for unlawful imprisonment, MCL 750.349b, and assault and battery, MCL 750.81(1). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to a term of 106 months to 30 years' imprisonment for unlawful imprisonment, and to a concurrent term of 93 days' imprisonment for assault and battery. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On February 2, 2012, defendant entered the shoe store where the victim worked. The victim was present with another coworker. Defendant was ostensibly looking for dress shoes, but the store did not have defendant's size in the style of shoe he wanted. The victim "print[ed] off a little slip that said all the different stores that had that select shoe on it, and then [she] handed that to" defendant. The victim's coworker was preparing to take her break at the time and had her jacket and purse with her. Defendant left the store. Shortly thereafter, the coworker left to take her break.

Defendant returned to the store after "[m]aybe five minutes." The victim testified that defendant "asked [her] if [she] could call over to the store that the shoes

were located at. And he asked [her] to go over to the actual shoes to double-check to make sure that they were the right shoes that he was looking for." The victim went over to the shoes, knelt down, pulled out the box of the particular shoe defendant wanted, and called another store on a cordless phone to verify that it had the shoe in stock. The victim testified that once she stood up, defendant "lunged towards [her] and grabbed [her], and turned [her] around . . . ." "[H]e was standing a little bit behind me," she testified, "and he had to come at me and grab me, and put his arm all the way around me, so it'd be all the way around my far right side, and my left arm would be up against him."

The victim further testified that defendant took the phone from her and "told [her] to keep walking" as he led her into "the conference room." The victim testified that as defendant led her into the conference room, he asked whether there were any security cameras in the store. She told him that she did not know. The victim testified that defendant closed the door after he led her into the room. She further testified that a person in the main area of the store would not be able to see into the conference room if the door was shut, and that the conference room had no windows. When asked whether there were any doors leading out of the conference room, the victim responded, "Not into the conference room. Once you go into the very back room, there's an emergency exit there." The victim testified that defendant was "[p]robably about an arm's distance away" while they were in the conference room.

The victim testified that once they were in the conference room, defendant attempted to convince her that he was "joking." He asked the victim not to tell anyone about the incident and said he was "just kid-

ding." Defendant then left the store and the victim called 911. Defendant was apprehended by police shortly thereafter.

During deliberations the jury sent out a note asking, "Does a 'secret location' remain secret if there is an exit for a victim to leave (behind her)." The trial court reinstructed the jury on the elements of unlawful imprisonment. The Court then stated, "That is all I can tell you. It is for you to decide as to both of those questions."

Following sentencing, defendant moved for a judgment of acquittal, a new trial, or resentencing, raising most of the points later presented in this appeal. The trial court concluded that none of the arguments merited relief and denied the motion. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence presented at trial was insufficient to support his conviction for unlawful imprisonment. We disagree.

We review de novo a defendant's challenge to the sufficiency of the evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of the evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). It is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be

afforded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt "in the face of whatever contradictory evidence the defendant may provide." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (quotation marks and citation omitted). Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

MCL 750.349b provides in pertinent part:

> (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> * * *
>
> (b) The restrained person was secretly confined.
>
> * * *
>
> (3) As used in this section:
>
> (a) "Restrain" means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.
>
> (b) "Secretly confined" means either of the following:
>
> (*i*) To keep the confinement of the restrained person a secret.
>
> (*ii*) To keep the location of the restrained person a secret.

Defendant first argues that the evidence did not show that the victim was confined. Defendant further argues that any confinement was not "secret." The statute does not define the word "confine." Our Supreme Court has stated that "secret confinement" means the "deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994). In *People v Railer*, 288 Mich App 213, 215-216, 218; 792 NW2d 776 (2010), this Court held that the prosecution had presented sufficient evidence of unlawful imprisonment when the evidence indicated that the victim was forced into her car, driven to various locations, beaten severely, had her car keys and phone taken away from her, and was told not to disclose her location when forced to answer a call from her sister. This Court determined that sufficient evidence of confinement had been presented even though the car had been parked twice, because the victim "dared not leave while in defendant's presence . . . ." *Id*. at 218.

In this case, there was sufficient evidence presented for a rational jury to find both that defendant confined the victim and that the confinement was secret. The victim was taken against her will into a conference room. She was held there in an enclosed area that was not visible to anyone who may have been passing by or in the store. Defendant was standing in front of the door to the conference room. If the victim had tried to escape, defendant was within arm's reach of her and could have prevented her from doing so. The victim testified that she was frightened by defendant. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant restricted the victim's movement within the bounds of the conference room.

Defendant also argues that the victim was not secretly confined because the incident was too brief in duration. This argument miscomprehends the meaning of confinement, as well as what is required for a confinement to be secret. The determination whether a person has been secretly confined is generally not dependent on the duration of the confinement. See *Jaffray*, 445 Mich at 308. Further, the record shows that the victim was moved to a location outside the view of others, and was confined and restricted within the bounds of the conference room for a significant period. Whether and when defendant chose to release the victim is immaterial to whether there was secret confinement. Defendant's argument that he did not "keep" the victim's confinement or the location of her confinement secret because of the brief duration of the confinement fails for the same reason.

Defendant next argues that the circumstances of the confinement were not sufficiently egregious to satisfy the elements of unlawful imprisonment. Defendant contends that the victim could have been discovered if an employee or customer had come in and walked into the conference room and that the victim could have escaped from the conference room. Defendant argues further that he did not bind the victim, gag her, lock the doors, or threaten her.

Nothing in the statute requires a certain level of difficulty of discovery or escape. "Secret confinement" means the "deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *Id*. at 309. Viewing the evidence in the light most favorable to the prosecution, the victim was unable to communicate her predicament. Defendant waited until the victim's coworker left on her break to return to the store. There were no customers in the

store when defendant came back. Defendant forcefully grabbed the victim, led her into a conference room, and closed the door behind him. The room had no windows. The victim was in an enclosed area not visible to anyone who may have walked by or come into the store. Defendant was standing in front of the door to the conference room. Defendant took the phone away from the victim so that she could not call for help. Given these circumstances, a rational jury could find that the victim was deprived of the assistance of others by virtue of her inability to communicate her predicament. We conclude that the evidence was sufficient to support defendant's conviction.

III. GREAT WEIGHT OF THE EVIDENCE

Similarly, we find that the verdict was not against the great weight of the evidence and that the trial court did not abuse its discretion by refusing to grant defendant a new trial. We review a trial court's determination that a verdict was not against the great weight of the evidence for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant raises essentially the same arguments with regard to the weight of the evidence as he raised with regard to its sufficiency, which we reject for the same reasons. Additionally, defendant alleges that the jury's note indicates that the jury questioned whether

there was sufficient evidence of secret confinement. However, the jury rendered a guilty verdict. The fact that it may have sought clarification regarding the meaning of "secret location" does not undermine the validity of that verdict.

IV. JURY INSTRUCTIONS

Next, defendant argues that the trial court erred by instructing the jury that the victim did not have to resist for defendant to be guilty of unlawful imprisonment. A trial court's determination that a certain instruction "is applicable to the facts of a case" is reviewed for an abuse of discretion. *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013). We hold that the trial court did not abuse its discretion in giving the challenged instruction under the facts of this case.

Jury instructions must include all the elements of the charged offense, and must not exclude material issues, defenses, or theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they "fairly presented the issues for trial and sufficiently protected the defendant's rights." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439, 441 (2000). " 'The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice.' " *Guajardo*, 300 Mich App at 34 (citation omitted).

The trial court read CJI2d 20.26 to the jury, which is located in the chapter concerning "Sex Crimes." It provides, "To prove this charge, the prosecutor does not have to show that *[name complainant]* resisted the defendant." Defendant objected, arguing that the instruction minimized or eliminated the requirement that the prosecution prove the victim was restrained or confined. The trial court found that the instruction was

"a clarifying instruction" that did not alter the prosecution's burden, but simply indicated that the victim had no duty to resist defendant.

Defendant's argument that this instruction diminished the prosecution's burden of proof is without merit. The instruction merely informed the jury that the victim did not need to resist in order for defendant to be convicted of unlawful imprisonment. The instruction did not state or imply that defendant could be convicted even if the prosecution failed to prove an element of the crime beyond a reasonable doubt. Indeed, the trial court instructed the jury that it had to find that the prosecution proved each element of unlawful imprisonment beyond a reasonable doubt. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Further, defense counsel's use, in his opening and closing arguments, of the words "led," "escort[ed]," and "took" in reference to defendant's conduct toward the victim arguably implied that the victim consented to going into the conference room with defendant. It was not unreasonable for the trial court to interpret this phrasing as suggesting a lack of resistance and, therefore, conclude that it was necessary to instruct the jury that the victim did not have to resist in order for defendant to be convicted of unlawful imprisonment. The instruction clarified an issue that the trial court felt the jurors might have questioned, and the court did not abuse its discretion by giving the instruction because doing so fell within the range of principled outcomes.

Finally, it is irrelevant that the instruction was adapted from one found within the "Sex Crimes" chapter of the second edition of the Michigan Criminal Jury

Instructions. The instruction did not refer to sex crimes and the trial court did not in any way suggest that this was a sex crime.

V. OFFENSE VARIABLES

Defendant argues that the trial court erred in the scoring of offense variables (OVs) 8 and 10. We disagree.

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (citations omitted).]

A. OV 8

Defendant first argues that OV 8 (victim asportation or captivity) was incorrectly scored at 15 points. MCL 777.38(2)(b) states that zero points should be assessed for OV 8 "if the sentencing offense is kidnapping." The statute does not provide a statutory reference for "kidnapping." When the sentencing guidelines were enacted, the kidnapping statute, MCL 750.349, read, in part, as follows:

> Any person who wilfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or shall inveigle or kidnap any other person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be guilty of a felony, punishable by imprisonment in the state

> prison for life or for any term of years. [MCL 750.349, as added by 1931 PA 328, § 349.[1]]

In *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984), our Supreme Court held that the statute proscribed several forms of conduct, including "forcibly or secretly confin[ing] or imprison[ing] any other person within this state against his will[.]"

In 2006, the Legislature amended MCL 750.349 and added MCL 750.349b, differentiating unlawful imprisonment from kidnapping. 2006 PA 159; 2006 PA 160. However, the Legislature did not amend MCL 777.38. Thus, the question is whether "kidnapping" as used in MCL 777.38(2)(b) refers to kidnapping as defined in the current MCL 750.349 or in the broader sense of the former statute, which included unlawful imprisonment.

The primary objective in interpreting a statute is to "give effect to the Legislature's intent." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). "This Court may not speculate regarding the probable intent of the Legislature beyond the language expressed in the statute." *People v Hock Shop, Inc*, 261 Mich App 521, 528; 681 NW2d 669 (2004). Moreover, "[t]he Legislature is presumed to be familiar with the rules of statutory construction, and when it is promulgating new laws it is presumed to be aware of the consequences of its use or omission of statutory language." *Id*. Further, "[i]t is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *People v Feezel*, 486 Mich 184, 211; 783 NW2d 67 (2010) (quotation marks and citation omitted).

Simply put, the plain language of MCL 777.38 directs the assessment of zero points for OV 8 only when the

[1] MCL 750.349 was subsequently amended by 2006 PA 159.

sentencing offense is "kidnapping." The Legislature made unlawful imprisonment a distinct crime, but chose not to amend MCL 777.38(2)(b) to direct the assessment of zero points for OV 8 when the sentencing offense is unlawful imprisonment—even though it amended MCL 777.16q to include unlawful imprisonment in the list of crimes to which the sentencing guidelines apply. The Legislature is presumed to have been aware of the language in MCL 777.38 when it revised MCL 750.349 and added MCL 750.349b, and it is presumed to have considered the consequences of failing to include unlawful imprisonment in MCL 777.38(2)(b). In light of these presumptions, we conclude that the Legislature intended that MCL 777.38(2)(b) direct the assessment of zero points for OV 8 only when the sentencing offense is kidnapping. Accordingly, the trial court in this case did not err by assessing 15 points under OV 8.

B. OV 10

Lastly, defendant argues that the trial court erroneously assessed 15 points under OV 10 (exploitation of vulnerable victim) because it incorrectly determined that defendant's preoffense conduct was predatory. MCL 777.40(1)(a) provides that 15 points must be assessed for OV 10 when "[p]redatory conduct was involved." "Predatory conduct" is defined in the statute as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). " 'Victimize' is defined as 'to make a victim of.' " *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008) (citation omitted). " '[V]ictim' is defined as a person who suffers from a destructive or injurious action . . . ." *People v Huston*, 489 Mich 451, 463; 802 NW2d 261 (2011) (quotation marks and citation omitted). "There-

fore, 'predatory conduct' under the statute is behavior that is predatory in nature, precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action . . . ." *Id*. (quotation marks and citation omitted; alteration in original). However, predatory conduct does not encompass "*any* preoffense conduct, but rather only those forms of preoffense conduct that are commonly understood as being predatory in nature . . . as opposed to purely opportunistic criminal conduct or preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *Id*. at 462 (quotation marks and citation omitted).

In this case, the trial court determined that defendant engaged in predatory conduct by investigating the store and waiting until the victim was alone to strike. We agree. The timing of an offense, including watching the victim and waiting until the victim is alone before victimizing him or her, may be evidence of predatory conduct. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003).

Defendant further argues that the victim was not vulnerable, because she was "a healthy adult, sober, alert and working in a fully lit store, that was open to the public, during the afternoon." This contention was rejected by our Supreme Court in *Huston*. "Vulnerability" is defined in MCL 777.40(3)(c) as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." In *Huston*, the Court held that "[t]he statute does not mandate that this 'susceptibility' be *inherent* in the victim. Rather, the statutory language allows for susceptibility arising from external circumstances as well." *Huston*, 489 Mich at 466. In this case, the trial court found that the

circumstances of the offense rendered the victim vulnerable. This is sufficient; the trial court did not need to find that the victim possessed some inherent vulnerability.

We find no error in the trial court's scoring of the challenged offense variables.

Affirmed.

MURRAY, P.J., and DONOFRIO, J., concurred with BOONSTRA, J.

KING v MICHIGAN STATE POLICE DEPARTMENT

Docket No. 305474. Submitted February 13, 2013, at Detroit. Decided November 12, 2013, at 9:10 a.m.

Barry L. King and Christopher K. King were, respectively, the father and brother of Timothy King. An attorney filed a request under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., on Barry King's behalf, seeking documents from the Michigan State Police Department (MSP) regarding Christopher Busch's possible involvement in a series of unsolved crimes in the mid-1970s known as the Oakland County Child Killings. Busch had briefly been considered a suspect in the murder of the first victim, but was allegedly cleared by law enforcement officials following a polygraph examination. Timothy King was the final victim of the killing spree, and Busch committed suicide about 1½ years later. The MSP granted the request with respect to nonexempt records in its possession that fell within the scope of the request and estimated a total fee of $11,525.49 to locate and provide the requested documents, requesting a deposit of ½ of the estimate to proceed. Another attorney from the law firm sent the MSP a letter questioning whether any files were exempt and stating that King wanted only those files related to Busch. He enclosed a check for the deposit. Barry King then filed a complaint in the Oakland Circuit Court against the MSP, alleging that it had not identified the materials claimed to be exempt and demanding that it identify any purportedly exempt materials before proceeding. The MSP filed an answer and affirmative defenses, asserting that the first FOIA request submitted was not made in a representative capacity and did not identify King as the requester and further asserting that the court lacked jurisdiction. Plaintiffs filed a request for several admissions. The court, Colleen A. O'Brien, J., permitted the addition of Christopher King, who had previously made similar FOIA requests to the MSP and received the same response, as a plaintiff. After plaintiffs paid the balance of the fees owed, the MSP produced what it deemed to be the nonexempt records, stating that the FOIA request was granted in part and denied in part. The MSP stated that certain materials were withheld under MCL 15.243(1)(d) as records specifically exempted from disclosure by statute. The MSP then moved for summary disposition, arguing

that plaintiffs had brought their action prematurely because they filed it before the MSP had denied the requests or had a chance to make a final determination after having searched for and reviewed the documents and separated exempt from nonexempt information. The MSP further contended that the case was moot because it had provided plaintiffs with the nonexempt records in its possession. In addition, the MSP asserted that plaintiffs were not entitled to attorney fees and costs because the court had not ordered disclosure of records and plaintiffs were therefore not prevailing parties as defined in the FOIA. Plaintiffs opposed the motion, arguing that a dispute existed regarding the appropriate processing fee given that only 1/3 of the documents provided were related to Busch. Plaintiffs also asserted that they were entitled to attorney fees. The MSP also argued that, in the interest of judicial economy, plaintiffs' brief opposing the summary disposition motion should be treated as plaintiffs' appeal of the MSP's final decision to uphold the partial denial of the FOIA requests. The court denied the MSP's summary disposition motion and treated plaintiffs' response to the motion as an appeal of the partial denial. The court ordered the MSP to reimburse plaintiffs $5,600 for documents provided that were not covered by plaintiffs' request, upheld the denial of some documents, and ordered the MSP to produce the polygraph examination reports for the court's in camera review. Subsequently, the court held that the reports were exempt from disclosure under MCL 15.243(1)(d). Following a hearing, the court concluded that $2,500 in attorney fees was a fair and reasonable sanction for the MSP to pay plaintiffs. Plaintiffs appealed, and the MSP cross-appealed.

The Court of Appeals *held*:

1. The trial court did not err by ruling that the polygraph examination reports were exempt from disclosure. MCL 15.243(1)(d) exempts from disclosure under FOIA records or information specifically described and exempted from disclosure by statute. MCL 338.1728(3), a provision of the Forensic Polygraph Examiners Act (FPEA), MCL 338.1701 *et seq*., provides that any recipient of information, reports, or results from a licensed polygraph examiner, other than the person tested, may not disclose the information, reports, or results to a third party except as required by law or the administrative rules promulgated under the act. The MSP was the recipient of information covered by this provision, and because no law or rules required disclosure, the MSP was prohibited from disclosing it. Accordingly, because the polygraph examination reports were exempt from disclosure by the FPEA, they were likewise exempt under FOIA.

2. The trial court abused its discretion by ordering the MSP to pay attorney fees as sanctions for its refusal to admit that Barry King had standing to file his FOIA action. Under MCR 2.312(A), a party in a civil case may request admissions from the other party before trial. MCR 2.313(C) provides that if a party denies the genuineness of a document or the truth of a matter as requested and the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The trial court must enter the order unless (1) the request was held objectionable, (2) the admission sought was of no substantial importance, (3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (4) there was other good reason for the failure to admit. The parties here did not settle the matter that was the subject of the requests for admissions, i.e., whether Barry King had standing because the law firm that submitted the FOIA request did so in a representative capacity for Barry King, and the issue became moot when Christopher King was added to the case because he was seeking the same records on the basis of his own FOIA request. Although the MSP challenged Barry King's standing in its affirmative defenses, it did not file a dispositive motion raising the issue, and the trial court did not decide that issue. Plaintiffs thus did not prove the truth of the matter regarding which they requested admissions because there was no hearing or trial at which plaintiffs were required to do so. Accordingly, the trial court abused its discretion by awarding attorney fees to plaintiffs as a discovery sanction.

3. The trial court erred by requiring the MSP to refund a portion of the costs charged for processing plaintiffs' FOIA requests. MCL 15.234(1) provides that a public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or providing a copy of a public record. The fee must be limited to actual mailing costs and the actual incremental cost of duplication or publication, including labor, the cost of the search, examination, and review and the deletion and separation of exempt from nonexempt information. MCL 15.234(2) provides that the public body may require a good faith deposit when the request is made if the fee will exceed $50, but the deposit may not exceed 1/2 of the total fee. The trial court's decision was clearly erroneous because the court did not provide a factual basis for reducing the MSP's processing fee to $5,600. The MSP was entitled to reimbursement for the costs incurred in honoring plaintiffs' FOIA request. The MSP's assistant FOIA coordinator set forth in detail the manner in which the fee was calculated. The

total fee of $10,667.15 was made up of $9,267.47 for the labor costs of searching for, retrieving, examining, and reviewing records to separate exempt from nonexempt material and $1,399.68 for photocopying. Although plaintiffs claimed that their request was limited to information regarding Busch and that approximately 2/3 of the documents provided did not involve Busch, the FOIA coordinator explained that the individuals involved in the investigation were so closely intertwined that the documents could not be separated. Moreover, even assuming that the MSP could have reduced its photocopying charges by providing fewer pages, it would not have reduced the total processing costs to $5,600 because the photocopying came to only $1,399.68 of the total fee and the remaining amount was for retrieving and reviewing the records and separating exempt from nonexempt material. The trial court's determination of the processing fee had to be vacated and the case remanded for calculation of the fee using facts contained in the record.

4. The trial court did not err by denying the MSP's motion for summary disposition under MCR 2.116(C)(8), premised on the ground that plaintiffs had filed their FOIA claims prematurely, before the MSP denied their FOIA requests. MCL 15.235(7) provides that if a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion of that public record, the requesting person may (1) appeal the denial to the head of the public body or (2) commence an action in the circuit court. Although the MSP contended that it had granted plaintiffs' requests, its response letters reflect that the requests were effectively granted in part and denied in part because the letters contemplated the separation of exempt material and thereby implicitly denied the requests with respect to that material. Therefore, plaintiffs' claims were filed after the MSP had effectively denied their FOIA requests with respect to potentially exempt materials and they did not file the action prematurely. Moreover, after plaintiffs filed this action, the MSP expressly indicated that it was denying a portion of their requests, and it subsequently urged the trial court to treat plaintiffs' brief as an appeal of the MSP's decision to uphold the partial denial. Therefore, even if plaintiffs had originally filed their action prematurely, the premature filing would have become irrelevant at that point. A party cannot argue on appeal that an action it stipulated was erroneous.

5. The trial court did not err by denying the MSP's motion for summary disposition under MCR 2.116(C)(10), premised on the ground that plaintiffs' claims were rendered moot after it pro-

duced some of its records. The MSP did not produce all of its records. Plaintiffs contested the MSP's asserted exemptions for some withheld documents and sought to depose the FOIA coordinator. Plaintiffs also sought attorney fees and a partial refund of the processing fee. Therefore, the MSP's disclosure of some documents did not make it impossible for the trial court to grant relief to plaintiffs, and plaintiffs' claims were not moot.

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

RECORDS — FREEDOM OF INFORMATION ACT — DISCLOSURE — EXEMPT RECORDS — POLYGRAPH EXAMINATION RESULTS.

The Freedom of Information Act (FOIA), MCL 15.231 *et seq*., exempts from disclosure records or information specifically described and exempted from disclosure by statute; the Forensic Polygraph Examiners Act (FPEA), MCL 338.1701 *et seq*., provides that any recipient of information, reports, or results from a licensed polygraph examiner, other than the person tested, may not disclose the information, reports, or results to a third party except as required by law or the administrative rules promulgated under the act; accordingly, polygraph examination reports that are exempt from disclosure under the FPEA are likewise exempt under FOIA (MCL 15.243(1)(d); MCL 338.1728(3)).

Barry L. King *in propria persona* and for Christopher K. King.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kathleen L. Cavanaugh*, Assistant Attorney General, for the Michigan State Police Department.

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

WILDER, J. Plaintiffs appeal as of right an order awarding attorney fees to plaintiffs and closing the case. Defendant cross-appeals as of right the same order. We affirm in part, vacate in part, reverse in part, and remand for further proceedings consistent with this opinion.

This case arises out of requests under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., submitted in 2010 to defendant, the Michigan State Police Department, for documents regarding Christopher Busch's possible involvement in the abductions and killings of four children in Oakland County in 1976 and 1977, a series of crimes known as the Oakland County Child Killings (OCCK or OCCKs). Plaintiffs, Barry L. King and Christopher K. King, are, respectively, the father and the brother of Timothy King, the fourth and final victim of the OCCKs. In January and February 1977, after three of the children had been killed, Busch was briefly considered a suspect in the murder of the first OCCK victim, but he was allegedly cleared by law-enforcement officials following a polygraph examination. Then, in March 1977, Timothy King was abducted and killed. In November 1978, Busch died in an apparent suicide. The OCCKs remain unsolved to this day, but numerous persons other than Busch have been considered as possible suspects over the last 35 years.

On January 6, 2010, attorney William H. Horton of the law firm Giarmarco, Mullins & Horton, P.C., submitted a cover letter and FOIA request to defendant for documents regarding Busch and another deceased suspect in the OCCKs, Gregory Green. The cover letter did not indicate that Horton was making the request for plaintiffs in a representative capacity. However, attached to the cover letter was defendant's standard FOIA request form that had been completed for the purpose of making the FOIA request. In a space designated as "Your client or insured," the name "Barry King" was listed.

In response, defendant granted the request with respect to "existing, non-exempt records in the possession of the Michigan State Police that fall within the

scope of the request." Defendant provided an estimated total fee of $11,525.49 to locate and provide the requested documents. Defendant further stated that it would proceed upon receipt of a deposit of half of the estimate, which was $5,762.74.

On April 22, 2010, David Binkley, an attorney in the same law firm as Horton, sent a letter to defendant stating that

> the King family does not believe that any of the Michigan State Police ("MSP") files are exempt under the Freedom of Information Act ("FOIA"). The King family does not want access to all of the OCCK files, it only wants a determination as to whether Christopher Busch participated in the murder of Timothy King.

Binkley's letter stated that he was enclosing

> my client's check for $5,762.74. You have authority to cash this check when you agree to make the entire MSP file on Christopher Busch available to my client. If you claim there are exempt portions of the file, please identify the documents which we understand to be your responsibility pursuant to FOIA. We will then take the matter up with the Oakland County Circuit Court and you may cash the check when the appeal period has expired on any order from the trial court.

On April 27, 2010, Barry King filed a complaint alleging that defendant had not identified the materials claimed to be exempt and demanded that defendant identify any purportedly exempt materials before proceeding further. On May 25, 2010, defendant filed an answer and affirmative defenses. Defendant's answer asserted, in part, that the January 6, 2010, FOIA request submitted by Giarmarco, Mullins & Horton, P.C. was not made in a representative capacity and did not identify Barry King as the FOIA requester. Defendant denied that the trial court had jurisdiction and

denied that Barry King was entitled to any relief because he had not made the FOIA request.

On June 8, 2010, Barry King requested defendant to admit that

> 1. The attached January 6, 2010 letter . . . from Giarmarco, Mullins & Horton, P.C. specifically identifies Barry L. King as its client on the accompanying Michigan State Police Request for Public Records, Michigan Freedom of Information Act Form in Item 9 [and] is a true copy.
>
> 2. The request was filed by the law firm in a representative capacity for Barry L. King as its client.

On September 1, 2010, the circuit court permitted Christopher King, who had previously made similar FOIA requests to defendant and received the same response, to be added as a plaintiff.

On December 15, 2010, plaintiffs paid the balance of the fees owed for the FOIA request, and defendant then produced what it deemed to be nonexempt records in its possession that fell within the scope of the request. In a December 22, 2010, letter, defendant stated that the FOIA request was granted in part and denied in part. Regarding the portion of the materials that were considered exempt from disclosure, the letter stated, in relevant part:

> Under section 13(1)(d) of the FOIA, MCL 15.243(1)(d), those portions of records composed of information specifically described and exempted from disclosure by statute likewise are withheld from public disclosure under the FOIA. In this particular instance, information obtained from or through, or contained in, DNA profiles; the Law Enforcement Information Network (LEIN); the Sex Motivated Crimes Report (DD-79); investigative subpoena; and polygraphs is withheld, respectively, under MCL 28.176; MCL 28.214(3); MCL 28.247; MCL 767A.8; and MCL 338.1728. In addition, documents presently known to, and protected from disclosure under the seal of, the 48th

District Court, the Hon. Kimberly F. Small, cannot be disclosed publicly without further court order directing otherwise.

On January 11, 2011, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendant argued that plaintiffs brought this action prematurely because it was filed before their FOIA requests were denied and before defendant had a chance to make a final determination after having searched for and reviewed the documents and separated exempt from nonexempt information. Defendant further contended that the case was moot because defendant had provided plaintiffs with the nonexempt records in its possession and the relief requested had thus been granted. In addition, defendant asserted that plaintiffs were not entitled to attorney fees and costs because the trial court did not order disclosure of records and plaintiffs were not prevailing parties as defined in the FOIA.

On April 6, 2011, plaintiffs filed a brief opposing defendant's motion for summary disposition. Plaintiffs argued that a dispute existed regarding the appropriate processing fee. The records produced consisted of 3,411 pages of information, but according to plaintiffs, only 1/3 of the documents provided were related to Busch. Plaintiffs thus opined that they were charged approximately $11,000 for $4,000 worth of records. Further, plaintiffs contended that they were entitled to additional relief. In particular, plaintiffs had requested the affidavits underlying a warrant to search Busch's former residence. Plaintiffs also sought production of a PowerPoint presentation prepared by the investigating officers regarding Busch's involvement in the OCCKs. Plaintiffs also sought to take the discovery depositions of two of defendant's employees to determine why

plaintiffs were charged $11,000 for $4,000 worth of records. Finally, plaintiffs asserted that the trial court was required to determine the amount of attorney fees to be awarded to plaintiffs. Plaintiffs thus asked the trial court to deny defendant's motion for summary disposition and grant plaintiffs the relief they requested.

In its April 14, 2011, reply brief in support of its motion for summary disposition, defendant argued that it was entitled to reimbursement of the costs incurred in processing plaintiffs' FOIA requests and that the interconnectedness of the records required defendant to search for, retrieve, and separate records to the same extent regardless of plaintiffs' limitation of their requests to documents relating to Busch. Further, defendant asserted that it did not possess records regarding the PowerPoint presentation. This assertion was supported by an affidavit of an employee, stating: "To the best of the Department's knowledge, information, and belief, the PowerPoint slides do not exist within the Department. A PowerPoint was created by the Oakland County Prosecutor's Office but is not in the possession of the Michigan State Police." Finally, defendant asserted that, in the interest of judicial economy, plaintiffs' brief opposing defendant's motion for summary disposition should be treated as plaintiffs' appeal of defendant's decision to uphold the partial denial of plaintiffs' FOIA requests.

On April 19, 2011, the trial court dispensed with oral argument and denied defendant's motion for summary disposition. The trial court further ordered that "[i]n the interest of judicial economy and to expedite this matter, the Court will treat Plaintiffs' response to the instant motion as an appeal of Defendant's December 22, 2010

final determination to partially deny Plaintiffs' FOIA requests."

After holding a pretrial hearing, the trial court entered an order on May 13, 2011, which provided, in part, the following:

> At issue is the amount of the processing fees paid by the Plaintiffs to Defendant pursuant to MCL 15.234. Plaintiffs have paid the amount of $11,200.00. The Court recognizes that Defendant, in keeping with the spirit of the Freedom of Information Act ("FOIA["]), responded to Plaintiffs' FOIA requests with voluminous pages of material concerning the "Oakland County Child Killer." However, the FOIA requests, as modified by Plaintiffs, were confined to information concerning Christopher Busch. Therefore, [the] Court finds the amount of $5,600.00 to be reasonable. Accordingly, Defendant shall reimburse Plaintiffs the amount of $5,600.00.
>
> In regard to the request for the affidavit referenced in the 48th District Court's order of April 29, 2010, the Court finds Defendant's denial to be appropriate and upholds the same.
>
> In regard to the request for the Power Point, the Court directs Defendant to prepare and submit an appropriate affidavit stating that the same does not exist.
>
> In regard to the requested polygraph examiners reports, the Court directs Defendant to submit un-redacted copies to this Court for an in camera review within 14 days in addition to providing the Court with Defendant's legal basis for its denial of the same. Thereafter, Plaintiff shall have 14 days to file a response.
>
> The Court reserves the issue of attorney fees.

After receiving additional briefing from the parties related to the polygraph test results and after conducting the in camera review, the trial court entered an order on June 29, 2011, making the following determinations:

> The Court upholds the Defendant's denial of the Report for the reason that the Report is exempted from disclosure by the Forensic Polygraph Examiners Act ("FPEA") which makes the Report's disclosure a crime. Here, Section 13(1)(d) of the FOIA provides an exemption from public disclosure for "[r]ecords or information specifically described and exempted from disclosure by statute.["] MCL 15.243(1)(d). Therefore, Defendant properly exempted the Report from disclosure. The Court concludes that Defendant was justified in denying Plaintiffs' request for the report. Plaintiffs offer no law that would call for a contrary result.
>
> In addition, the Court finds that Defendant has submitted the appropriate affidavit establishing the nonexistence of the Power Point slides and programs requested by Plaintiffs.

A hearing was held on July 18, 2011, the date that was scheduled for trial. Plaintiffs' counsel stated that the issue before the court was whether to award attorney fees to plaintiffs. Plaintiffs' counsel stated that plaintiffs were not requesting fees under the FOIA as the prevailing parties. Rather, plaintiffs sought attorney fees relative to their requests to admit regarding the trial court's jurisdiction, which defendant had denied. Plaintiffs' counsel stated that although Barry King was a member of the law firm representing plaintiffs, Barry King had demanded that counsel memorialize the time spent on the case. Plaintiffs' counsel indicated that he was asking for $5,000, which represented 20 percent of his time on the case.

In response, defense counsel indicated that attorney fees were not warranted because there had been reasonable grounds for refusing to admit that the court had jurisdiction, given that the FOIA request was submitted by the law firm rather than by the client. Defense counsel also found it unreasonable to say that

the jurisdictional issue could have taken 20 percent of the time plaintiffs' counsel's spent on the case.

The trial court concluded that "$2,500 would be a fair and reasonable sanction to be paid by the defendant to the plaintiff[s] in this matter."

I. PLAINTIFFS' ARGUMENTS ON APPEAL

Plaintiffs initially argued on appeal that the trial court erred by concluding that reports regarding Busch's polygraph examination and a search warrant and supporting affidavit related to a search of Busch's former residence were exempt from disclosure under the FOIA. Plaintiffs also challenged the trial court's conclusion that defendant did not possess records regarding a PowerPoint presentation made by law-enforcement officials about the OCCKs investigation. In particular, plaintiffs seek to depose defendant's FOIA coordinator regarding whether defendant possesses "backup files" concerning the PowerPoint presentation. At oral argument, plaintiffs withdrew their request for the PowerPoint presentation, and in a supplemental brief filed by plaintiffs after oral argument, plaintiffs also withdrew their claims concerning the search warrant and supporting affidavit. Thus, the only issue remaining for this Court's review involves the trial court's ruling that the polygraph report is exempt from disclosure.

"This Court . . . reviews de novo a trial court's legal determination in a FOIA case." *Hopkins v Duncan Twp*, 294 Mich App 401, 408; 812 NW2d 27 (2011). "[T]he clear error standard of review applies in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the

definite and firm conviction that a mistake has been made by the trial court." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). Any discretionary determinations in FOIA cases are reviewed for an abuse of discretion. *Id*. A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id*. "This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion." *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

Also, questions of statutory interpretation are reviewed de novo. *Dep't of Transp v Gilling*, 289 Mich App 219, 228; 796 NW2d 476 (2010). Regarding the interpretation of statutes, our Supreme Court has explained:

> It is axiomatic that statutory language expresses legislative intent. A fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. Where the statute unambiguously conveys the Legislature's intent, the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. [*Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008) (quotation marks and citations omitted).]

The purpose of the FOIA is set forth in MCL 15.231(2):

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act [i.e., the FOIA]. The people shall be informed so that they may fully participate in the democratic process.

"The FOIA provides that 'a person' has a right to inspect, copy, or receive public records upon providing a

written request to the FOIA coordinator of the public body." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). "Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins*, 294 Mich App at 409; see also MCL 15.233(1).

> The Legislature codified the FOIA to facilitate disclosure to the public of public records held by public bodies. However, by expressly codifying exemptions to the FOIA, the Legislature shielded some affairs of government from public view. The FOIA exemptions signal particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure. In many of these instances, the Legislature has made a policy determination that full disclosure of certain public records could prove harmful to the proper functioning of the public body. [*Eastern Mich Regents*, 475 Mich at 472-473 (quotation marks and citations omitted).]

Initially, we note that in their argument on the polygraph reports issue, plaintiffs acknowledge that they failed to cite any authority. "This Court will not search for authority to sustain or reject a party's position. The failure to cite sufficient authority results in the abandonment of an issue on appeal." *Hughes v Almena Twp*, 284 Mich App 50, 71-72; 771 NW2d 453 (2009) (citation omitted). Nevertheless, we will address this issue.

MCL 15.243(1)(d) exempts from disclosure under the FOIA "[r]ecords or information specifically described and exempted from disclosure by statute." A provision of the Forensic Polygraph Examiners Act (FPEA), MCL 338.1701 *et seq.*, provides:

> (1) Any person who is or has been an employee of a licensed examiner shall not divulge to anyone other than his employer or former employer, or as the employer shall

> direct, except as he may be required by law, any information acquired by him during his employment in respect to any of the work to which he shall have been assigned by the employer. Any employee violating the provisions of this section and any employee who makes a false report to his employer in respect to any work is guilty of a misdemeanor.
>
> (2) . . . Any communications, oral or written, furnished by a professional man or client to a licensed examiner, or any information secured in connection with an assignment for a client, shall be deemed privileged with the same authority and dignity as are other privileged communications recognized by the courts of this state.
>
> (3) Any recipient of information, report or results from a polygraph examiner, except for the person tested, shall not provide, disclose or convey such information, report or results to a third party except as may be required by law and the rules promulgated by the [Department of Licensing and Regulatory Affairs] in accordance with [MCL 338.1707]. [MCL 338.1728.]

In *In re Petition of Delaware*, 91 Mich App 399, 400-403; 283 NW2d 754 (1979), the state of Delaware sought to compel the respondent, a Michigan-licensed polygraph examiner, to testify before a grand jury regarding his polygraph examination in Michigan of a Delaware murder suspect. This Court affirmed the denial of the state of Delaware's petition and, while citing the privilege contained in MCL 338.1728(2), stated the following:

> We think that this is a situation which clearly falls within the letter and spirit of the polygrapher privilege statute. That statute represents a declaration by the Legislature of the policy of the State of Michigan, a policy which the courts of this state have a duty to enforce. We are of the opinion that the aforementioned policy would be ill served by permitting the Attorney General of Delaware to use the powers of a Michigan court to force an unwilling

> witness to appear before a grand jury which will then use its powers to require the policy of the State of Michigan to be violated. [*Id*. at 405.]

Here, the trial court directed defendant to submit unredacted copies of the polygraph reports to the court for an in camera review. Following its in camera review, the trial court upheld defendant's denial of the request to disclose information related to the polygraph examinations.

The trial court did not err. MCL 338.1728(3) provides that

> [a]ny recipient of information, report or results from a polygraph examiner, except for the person tested, shall not provide, disclose or convey such information, report or results to a third party except as may be required by law and the rules promulgated by the [Department of Licensing and Regulatory Affairs] in accordance with [MCL 338.1707].

It is undisputed that defendant was the recipient of information, reports, or results from a polygraph examiner. Defendant was therefore prohibited from providing, disclosing, or conveying that information, those reports, or those results to a third party except as required by law or administrative rules. Plaintiffs identify no law or rules that would require disclosure. Accordingly, because the polygraph reports are exempt from disclosure by the FPEA, they are likewise exempt under the FOIA. MCL 15.243(1)(d).

As noted earlier, plaintiffs acknowledge that they have cited no legal authority to support their argument on this issue. Plaintiffs contend that in lieu of legal authority, this Court should apply "the law of common sense" by holding that when a public body publishes polygraph information that is later contradicted by other experts, the subsequent information should be

made public. Assuming arguendo that plaintiffs' theory that "the law of common sense" should govern in this instance, plaintiffs' argument nevertheless fails because it is based on two factual premises that are unsupported in the record.

First, plaintiffs assert that in February 1977, the Oakland County Prosecutor announced the results of Busch's polygraph examination to the news media. In making this claim, plaintiffs rely on two newspaper articles from February 1977. However, neither article indicates that the Oakland County Prosecutor announced the results of Busch's polygraph examination. The February 20, 1977, *Detroit News* article did not refer to the polygraph examination. And the February 22, 1977, article from an unidentified newspaper reported on the alleged sexual exploitation of boys in Flint and an extension of that investigation into Oakland County and contained the following information:

> [Then Oakland County Prosecutor L. Brooks] Patterson emphasized that the cases are seemingly unrelated to the murder of Mark Stebbins, a 12-year-old Ferndale boy, sexually molested and then killed early last year.
>
> [Flint Police Officer Thomas] Waldron said Oakland County investigators have interviewed two of the men arrested in Flint, have given them lie-detector tests and have concluded the men are not suspects in the Stebbins case.
>
> The three Flint men, Douglas Bennett, 19, Gregory Green, 26, and Christopher Busch, 40, were arrested, arraigned and bound over for trial in the last two weeks on multiple charges of criminal sexual conduct. They are charged with using gifts, threats and physical force to persuade the boys to engage in sodomy, oral sex and lewd photography sessions.

This article does not say that Busch passed a polygraph examination; instead, it reflects a state-

ment by Waldron that two of the three suspects were given polygraph examinations and were not suspects in the Stebbins murder. To the extent that this could amount to an implicit assertion that two of the three suspects passed a polygraph examination, importantly, Busch was not identified as one of the two who passed the test. Therefore, plaintiffs' assertion that the articles established that Busch's polygraph examination results were revealed is not supported. Moreover, the information is attributed to Waldron, who appears from the newspaper article to have been "[a]n officer in the juvenile section of the Flint police department . . . ." Thus, the article does not suggest that the Oakland County Prosecutor published the result of Busch's polygraph examination to the news media. Although the article suggests that Patterson made a general statement that the sexual exploitation cases were "seemingly unrelated" to the murder of Stebbins, no indication exists that Patterson revealed that Busch had passed a polygraph examination. In any event, Patterson's and Waldron's comments would not constitute a disclosure by defendant, which is a separate legal entity from the Oakland County Prosecutor's Office and the Flint Police Department.[1]

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[1] The record also contains a page from what appears to be a police report prepared in January 1977, stating that Busch was cleared by a polygraph examination. However, the report does not indicate what agency prepared the report. Assuming that the report was generated by defendant, there is no evidence that defendant released this report to the public before it was provided to plaintiffs in December 2010 in response to their FOIA requests in this case.

Also, although plaintiffs assert that the January 1977 polygraph examination was administered by a polygraph examiner employed by defendant, this does not establish that defendant was thereby responsible for any public release of information regarding the polygraph examination by another law enforcement agency. "Information, reports, or results

Second, plaintiffs aver that three subsequent polygraph examiners concluded that the original interpretation of the polygraph examination was erroneous. But again, the record does not support this assertion. Without identifying a source, plaintiffs merely claim that their family has been "orally advised" that three subsequent examiners found that the original interpretation of the results was incorrect and that either Busch failed the test or the results were inconclusive. There is no evidence to support this unattributed hearsay. Accordingly, plaintiffs' contention that a polygraph interpretation must be published if it challenges or contradicts an earlier published interpretation is both unsupported by legal authority and premised on factual assumptions that lack any basis in the record.

Therefore, the trial court properly upheld the denial of the requests for the polygraph reports on the basis of MCL 15.243(1)(d), exempting from disclosure under the FOIA "[r]ecords or information specifically described and exempted from disclosure by statute," and we need not consider defendant's alternative arguments for affirming.

II. DEFENDANT'S ARGUMENTS ON CROSS-APPEAL

A. ATTORNEY FEES AS SANCTIONS

Defendant first argues on cross-appeal that the trial court abused its discretion by ordering defendant to pay attorney fees as sanctions for refusing to admit that Barry King had standing to file this FOIA action. We agree. "A trial court's decision on a motion for sanctions based on the failure to admit is reviewed for an abuse of

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from a polygraph examiner may be provided, disclosed, or conveyed between public law enforcement agencies or between licensed polygraph examiners." Mich Admin Code, R 338.9004(8).

discretion." *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 349-350; 793 NW2d 246 (2010). "A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes." *Hackel v Macomb Co Comm*, 298 Mich App 311, 334; 826 NW2d 753 (2012).

"Pursuant to MCR 2.312(A), a party in a civil case may request certain admissions from the other party before trial." *Midwest Bus*, 288 Mich App at 350. MCR 2.313(C) provides:

> If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court shall enter the order unless it finds that
>
> (1) the request was held objectionable pursuant to MCR 2.312,
>
> (2) the admission sought was of no substantial importance,
>
> (3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (4) there was other good reason for the failure to admit.

"The mere fact that the matter was proved at trial does not, of itself, establish that the denial in response to the request for an admission was unreasonable." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 457; 540 NW2d 696 (1995) (quotation marks and citations omitted).

In *Midwest Bus*, 288 Mich App at 350, the plaintiff requested sanctions on the ground that the defendants had failed to admit certain facts alleged in the plaintiff's amended complaint. This Court concluded that an

award of sanctions under MCR 2.313(C) was not warranted because the parties had voluntarily settled their dispute regarding the aspect of the case that was the subject of the request for admissions before the hearing on the parties' cross-motions for summary disposition and before the case was summarily dismissed. *Id*. This Court offered the following analysis:

> In *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413; 551 NW2d 698 (1996), our Supreme Court explained that admissions under MCR 2.312 are more a matter of civil procedure because an admission conclusively establishes the admitted facts " 'and the opposing side need not introduce evidence to prove the facts.' " *Id*. at 420, quoting 2 Jones, Evidence (6th ed), § 13C:14, p 310 (November 1995 supp). "A request for admission is not a typical discovery device, however, because the purpose 'is not to discover facts but rather to establish some of the material facts in a case without the necessity of formal proof at trial . . . so that issues which are disputed might be clearly and succinctly presented to the trier of facts.' " *Id*. at 420 n 6, quoting 23 Am Jur 2d, Depositions and Discovery, § 314, p 613. The *Radtke* Court further explained that these judicial admissions are formal concessions " 'that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.' " *Id*. at 420, quoting 2 McCormick, Evidence (4th ed), § 254, p 142. In this case, because the disputed issue was settled before final judicial disposition, plaintiff was not required to prove the allegation by further litigation and, therefore, was not entitled to "expenses incurred in making that proof" within the contemplation of MCR 2.313(C). Thus, the Court of Claims did not abuse its discretion when it denied plaintiff's request for sanctions under MCR 2.313(C). [*Id*. at 350-351.]

Unlike in *Midwest Bus*, the parties here did not settle the matter that comprised the subject of the requests for admissions, i.e., whether Barry King had standing because the law firm that submitted the FOIA request

did so in a representative capacity for Barry King. Nonetheless, that issue became moot when Christopher King was added to the case, as he was seeking the same records through his own FOIA request. Moreover, although defendant challenged Barry King's standing in its affirmative defenses, defendant did not file a dispositive motion raising the issue, and the trial court did not decide that issue. Plaintiffs thus did not prove the truth of the matter regarding which admissions were requested under MCR 2.312, as there was no hearing or trial in which plaintiffs were required to do so. Accordingly, the trial court's award of attorney fees under MCR 2.313(C) fell outside the range of principled outcomes.

Accordingly, because plaintiffs did not prove the truth of the matter that was the subject of the requests for admissions, the trial court abused its discretion by awarding attorney fees to plaintiffs as a discovery sanction. It is therefore unnecessary to address defendant's additional arguments that it had a reasonable ground to believe it might prevail on the matter and that neither plaintiffs nor the trial court articulated a basis for awarding fees in the amount of $2,500.

We note that plaintiffs' brief on cross-appeal asserts other grounds on which they claim to be entitled to attorney fees, including an incomprehensible assertion regarding discussions with defense counsel regarding settlement (for which plaintiffs admit the record contains no reference), a vague reference to defense counsel's discussions with the trial court's research attorney, and defendant's allegedly inadequate responses to written interrogatories that necessitated a motion for amended answers. Plaintiffs submit that they are "ready to submit evidence on the above matters and the fees exceed the amount awarded." Because none of these grounds for awarding attorney fees was raised or

decided below, they are not preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Although this Court "may review an unpreserved issue if it presents a question of law and all the facts necessary for its resolution are before the Court," *Macatawa Bank v Wipperfurth*, 294 Mich App 617, 619; 822 NW2d 237 (2011), all the facts necessary to resolve plaintiffs' new arguments for awarding sanctions are not before this Court, as plaintiffs impliedly concede when they assert that they "are ready to submit evidence on the above matters." Moreover, this issue does not present a question of law because an award of attorney fees is generally reviewed for an abuse of discretion. *Hines*, 265 Mich App at 438. There is no exercise of discretion to review with respect to plaintiffs' newly asserted grounds for awarding attorney fees. Accordingly, we decline to review plaintiffs' unpreserved arguments regarding this issue.

B. PARTIAL REFUND OF FOIA PROCESSING COSTS

Defendant's next argument on cross-appeal is that the trial court erred by requiring defendant to refund a portion of the costs charged for processing plaintiffs' FOIA requests. We agree. A trial court's decision regarding the appropriate fee charged to process a FOIA request constitutes a finding of fact that is reviewed for clear error. See, generally, *Tallman v Cheboygan Area Sch*, 183 Mich App 123; 454 NW2d 171 (1990). A finding of fact is clearly erroneous when no evidence supports the finding or, on the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id*. at 126.

MCL 15.234(1) provides that "[a] public body may charge a fee for a public record search, the necessary

copying of a public record for inspection, or for providing a copy of a public record." The fee must be "limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information . . . ." *Id*. Also, "[a] public body may require at the time a request is made a good faith deposit from the person requesting the public record or series of public records, if the fee authorized under this section exceeds $50.00. The deposit shall not exceed 1/2 of the total fee." MCL 15.234(2).

> The FOIA clearly provides a method for determining the charge for records. It is incumbent on a public body, if it chooses to exercise its legislatively granted right to charge a fee for providing a copy of a public record, to comply with the legislative directive on how to charge. The statute contemplates only a reimbursement to the public body for the cost incurred in honoring a given request—nothing more, nothing less. If the statutorily computed charge is $1 per page for the request, then $1 per page may be charged. However, if the computed charge is $0.09 per page, no more can be charged, regardless of the ease of application of a "policy" or the difficulty in determining the legislatively mandated computation. [*Tallman*, 183 Mich App at 130.]

The trial court's decision in this case was clearly erroneous because it did not provide a factual basis for reducing defendant's processing fee to $5,600. Defendant is entitled to reimbursement "for the cost incurred in honoring" plaintiffs' FOIA request—"nothing more, nothing less." *Id*. Defendant's assistant FOIA coordinator set forth in detail the manner in which the processing fee was calculated. The total fee of $10,667.15 was made up of $9,267.47 for the labor costs of searching for, retrieving, examining, and reviewing records to separate exempt from non-

exempt material and $1,399.68 for photocopying 3,437 pages, including the use of redacting tape. Although plaintiffs claimed that their request was limited to information regarding Busch and that approximately 2/3 of the documents provided by defendant did not involve Busch, Barry King's amended request for public records and Christopher King's request for public records listed 32 items, 9 of which did *not* refer to Busch. Also, defendant's FOIA coordinator explained that "the individuals involved in the investigation are so closely intertwined that the documents could not be separated. A request for 'all documents related to' Busch or [another suspect for which information had originally been requested] required the production of all the files [plaintiffs] received."

Moreover, even assuming that the FOIA requests were limited to Busch and that defendant could have reduced its photocopying charges by providing fewer pages to plaintiffs, this would not have reduced the total processing costs to $5,600, the amount awarded by the trial court. The charges for photocopying came to only $1,399.68 of the total fee. The remaining amount, $9.267.47, was for retrieving and reviewing the records and separating exempt from nonexempt material. Neither plaintiffs nor the trial court have identified a factual basis in the record to challenge defendant's calculation of this amount or offered a reason to conclude that retrieving, examining, and separating these documents was not necessary to honor plaintiffs' request.

Accordingly, we conclude that the trial court clearly erred by finding that defendant's total processing costs were limited to $5,600. We vacate the trial court's determination of the processing fee and remand the

case to the trial court to calculate the fee on the basis of facts contained in the record.

C. SUMMARY DISPOSITION—MCR 2.116(C)(8)

Defendant next argues on cross-appeal that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(8) because plaintiffs filed their FOIA claims prematurely, before defendant denied their FOIA requests. We disagree.

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the basis of the pleadings alone and the ruling is reviewed de novo. "The motion must be granted if no factual development could justify the plaintiff's claim for relief." When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations contained in the complaint. [*Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013) (citations omitted).]

Questions regarding ripeness are also reviewed de novo. *Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008).

"The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Id*. at 615 (quotation marks and citation omitted). A claim that rests on contingent future events is not ripe. *Id*. at 615-616. "Hence, when considering the issue of ripeness, the timing of the action is the primary focus of concern." *Id*. at 616.

Under the FOIA, a public body must respond to a request for a public record within five business days. MCL 15.235(2). The public body's response must grant, deny, or grant in part and deny in part the request; the public body may also extend the response period for up to 10 business days. MCL 15.235(2)(a) through (d). A public body's failure to timely respond to a request under the FOIA

constitutes a final determination to deny the request. MCL 15.235(3); *Scharret v City of Berkley*, 249 Mich App 405, 411-412; 642 NW2d 685 (2002).

MCL 15.235(7) provides:

> If a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion of that public record, the requesting person may do either of the following:
>
> (a) Appeal the denial to the head of the public body pursuant to [MCL 15.240].
>
> (b) Commence an action in circuit court, pursuant to [MCL 15.240].

MCL 15.240(1), in turn, provides:

> If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
>
> (a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.
>
> (b) Commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

Defendant contends that it *granted* plaintiffs' FOIA requests and that this lawsuit was thus filed prematurely because a circuit court action may not be filed on the basis of a public body's grant of a FOIA request. We disagree with defendant's premise that it granted the FOIA requests in their entirety. A party's choice of labels is not binding on this Court. See, generally, *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). In responding to Barry King's January 6, 2010, FOIA request, defendant's response letter stated: "Your request is granted *as to*

existing, *non-exempt* records in the possession of the Michigan State Police that fall within the scope of the request." (Emphasis added.) The letter also requested a deposit based in part on estimated labor costs for "separating exempt and nonexempt material." The letter further indicated that upon receipt of the requested deposit, defendant would process the request and notify Barry King of the statutory basis for the exemption of any records or portions of records. Defendant included similar language in its letter responding to Christopher King's FOIA request. Thus, although defendant contends that it granted the requests, its response letters reflect that the requests were effectively granted in part and denied in part, as the letters contemplated the separation of exempt material and thereby implicitly denied the requests with respect to such material.

It could be argued that defendant's responses did not expressly deny any portion of the requests but merely asserted the possibility that an exemption would later be asserted. In that event, however, defendant must be deemed to have failed to timely respond to the FOIA requests in their entirety by granting, denying, or granting in part and denying in part the requests. In other words, defendant granted the requests in part but failed to respond with respect to all the requested documents because the response suggested some material might be withheld as exempt but failed to state conclusively whether the response was granted or denied with respect to those potentially exempt items. A public body's failure to timely respond to a request as required by the FOIA constitutes a final determination to deny the request. MCL 15.235(3); *Scharret*, 249 Mich App at 411-412.

In either event, then, defendant's responses are deemed to reflect a partial denial of the FOIA requests. Therefore, plaintiffs' FOIA claims did not rest on contingent future events. *Huntington Woods*, 279 Mich App at 615-616. Rather, the claims were filed after defendant had effectively denied the FOIA requests with respect to potentially exempt materials. Thus, plaintiffs did not file this action prematurely.

Moreover, it should be noted that after this action was filed, defendant *expressly* indicated that it was denying a portion of plaintiffs' FOIA requests. In its December 22, 2010, letter granting in part and denying in part plaintiffs' requests, defendant asserted various exemptions and declined to produce certain documents. Following plaintiffs' internal appeal to defendant's department head, defendant upheld the partial denial of plaintiffs' FOIA requests. Defendant then urged the trial court, in the interest of judicial economy, to treat plaintiffs' brief opposing defendant's motion for summary disposition as plaintiffs' appeal of defendant's decision to uphold the partial denial of plaintiffs' FOIA requests. The trial court followed defendant's suggestion and ruled, "In the interest of judicial economy and to expedite this matter, the Court will treat Plaintiffs' response to the instant motion as an appeal of Defendant's December 22, 2010 final determination to partially deny Plaintiffs' FOIA requests." Therefore, even if this action had originally been filed prematurely, that fact would have become irrelevant after defendant expressly denied in part plaintiffs' FOIA requests and the trial court, at defendant's urging, treated plaintiffs' response to the motion for summary disposition as an "appeal" from the partial denial of the FOIA requests. A party cannot argue on appeal that an action to which it stipulated was erroneous. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523,

529; 695 NW2d 508 (2004). Thus, defendant may not challenge the trial court's decision to review this matter as an appeal of defendant's December 22, 2010, partial denial of plaintiffs' FOIA requests.

Further, this Court generally does not address moot questions or declare legal principles that have no practical effect in a case. *Morales v Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003). "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010) (citation omitted). Whether this action was originally filed prematurely is moot because the trial court ultimately followed defendant's suggestion to treat plaintiffs' response to the motion for summary disposition as an appeal of the December 22, 2010, partial denial of the FOIA requests. Given this procedural development, it makes no practical difference whether the action was originally filed prematurely. The only possible exception to this conclusion pertains to the challenge to discovery sanctions discussed earlier, as those sanctions were imposed for defendant's refusal to admit certain facts *before* plaintiffs filed their "appeal" of the December 22, 2010, partial denial of the FOIA requests. As discussed, however, the sanctions award is reversed for other reasons. It is thus unnecessary to rely on the allegedly premature filing of this case to dispose of the discovery-sanctions issue.

Next, we note that, in responding to defendant's argument on this issue, plaintiffs argue that defendant failed to provide a list of exempt and nonexempt documents. Because this argument was not raised below, it is

not preserved for appellate review. *Hines*, 265 Mich App at 443. Moreover, although this Court may review an unpreserved issue if it presents a question of law for which the necessary facts have been presented, *Macatawa Bank*, 294 Mich App at 619, this issue does not present merely a question of law. A review of plaintiffs' argument would require determining whether defendant failed to provide the required list, which would be at least in part a factual question to be reviewed for clear error. See, generally, *Eastern Mich Regents*, 475 Mich at 472 (the clear-error standard applies in FOIA cases when a party challenges the underlying facts). Because this issue was not raised below, the trial court made no finding of fact that this Court could review for clear error. Even if the issue were preserved, plaintiffs fail to cite any authority in support of their argument, which is thus deemed abandoned. *Hughes*, 284 Mich App at 71-72. We thus decline to review this argument.

D. SUMMARY DISPOSITION—MCR 2.116(C)(10)

Defendant's final argument on cross-appeal is that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(10) because plaintiffs' claims were rendered moot after defendant produced some of its records. We disagree. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the

moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

As previously discussed, this Court generally does not address moot questions or declare legal principles that have no practical effect in a case. *Morales*, 260 Mich App at 32. "When the disclosure that a [FOIA] suit seeks has already been made, the substance of the controversy disappears and becomes moot." *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 270-271; 568 NW2d 411 (1997); see also *Densmore v Dep't of Corrections*, 203 Mich App 363, 366; 512 NW2d 72 (1994) ("Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made.") (internal quotation marks and citation omitted); *Traverse City Record Eagle v Traverse City Area Pub Sch*, 184 Mich App 609, 610; 459 NW2d 28 (1990) (noting that the plaintiff, which sought access to a tentative collective-bargaining agreement, "was given a copy of the agreement at issue after it was ratified by the contracting parties, rendering the issue in this case moot").

Defendant contends that plaintiffs' claims became moot after defendant produced its nonexempt documents in December 2010. However, defendant did not produce all of its records. As discussed earlier, plaintiffs contested defendant's asserted exemptions for certain withheld documents, including the search warrant, the warrant's supporting affidavit, and the polygraph examination reports. In addition, plaintiffs sought to depose defendant's FOIA coordinator regarding possible backup files related to the PowerPoint presentation. Plaintiffs also sought attorney fees and a partial refund of the processing fee. Therefore, defendant's disclosure of some documents did not make it impos-

sible for the trial court to grant relief to plaintiffs. Defendant has thus failed to establish that plaintiffs' claims were moot.

Affirmed in part, vacated in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. A public question being involved, no costs may be taxed. MCR 7.219(A).

MURRAY, P.J., and OWENS, J., concurred with WILDER, J.

THOMAI v MIBA HYDRAMECHANICA CORPORATION

Docket No. 310755. Submitted November 5, 2013, at Detroit. Decided November 14, 2013, at 9:05 a.m. Leave to appeal sought.

Naum and Zhulieta Thomai brought an action in the Macomb Circuit Court, John C. Foster, J., against MIBA Hydramechanica Corporation and two unknown corporations, seeking damages for injuries sustained by Naum Thomai while operating a grooving machine during his employment by MIBA. Plaintiffs alleged a claim premised on gross negligence, an intentional-tort claim, and a claim for loss of consortium. Following the denial of MIBA's first motion for summary disposition, plaintiffs filed an amended complaint, alleging a single intentional-tort claim to the effect that, by requiring Naum to work with a machine that MIBA knew was continually dangerous and certain to injure him, MIBA's actions amounted to an intentional tort within the exception to the exclusive-remedy provision of the worker's compensation act, MCL 418.131(1). The court then denied MIBA's second motion for summary disposition in order to allow plaintiffs time to conduct what it characterized as "limited discovery." MIBA then refused to answer some of plaintiffs' requests for admissions or to allow plaintiffs to inspect and photograph the machine. MIBA then sought, and was granted, a protective order that plaintiffs could not photograph or inspect the machine. The order also limited plaintiffs' scope of discovery. The court then granted MIBA's third motion for summary disposition on the basis that plaintiffs had failed to support their intentional-tort claim by showing that the machine was defective, that anyone other than Naum had been injured or nearly injured while operating the machine, or that MIBA's management knew about any alleged defect. Plaintiffs appealed the dismissal of their complaint.

The Court of Appeals *held*:

1. If plaintiffs properly plead a claim that falls within the exception to the worker's compensation act's exclusive-remedy provision, the trial court has jurisdiction to hear that claim and the claim would also necessarily meet the minimum requirements to avoid dismissal under MCR 2.116(C)(8).

2. A deliberate act can be one of commission or omission. An employer's failure to remedy a continuously operative dangerous condition can satisfy the "deliberate act" requirement for an intentional tort under the intentional-tort exception to the exclusive-remedy provision of the worker's compensation act if the omission occurs along with the intent to injure. A plaintiff, in order to establish a claim that falls within the exception, must plead (and eventually be able to prove) that the employer engaged in a deliberate act with a specific intent to injure. An employer has the intent to injure when the employer acts or fails to act with the particular purpose of inflicting an injury upon his or her employee. A plaintiff may prove that his or her employer had the intent to injure through circumstantial evidence or through direct evidence that one of the employer's agents acted or failed to act with that intent. A plaintiff, in order to establish an employer's intent in the absence of direct evidence, must plead and be able to prove that the employer deliberately acted or failed to act and did so with actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do. An employee may prove that his or her employer knew that the employee was certain to be injured when the evidence shows that the employer subjected the employee to a continuously operative dangerous condition that it knew would cause an injury, yet refrained from informing the employee about the dangerous condition so that the employee was unable to take steps to avoid injury. Evidence of mere negligence is insufficient to show willful disregard.

3. A plaintiff seeking to bring a claim under the intentional-tort exception to the exclusive-remedy provision of the worker's compensation act must plead with a sufficient degree of precision to reasonably inform the defendant of the nature of the intentional tort and the basis for establishing the requisite intent. The plaintiffs' allegations were sufficient to give MIBA reasonable notice that plaintiffs were asserting an intentional tort under the intentional-tort exception. Plaintiffs adequately alleged MIBA's intent to injure. Plaintiffs gave MIBA sufficient information for it to take a responsive position. The trial court erred by holding that plaintiffs had to allege or prove that other persons had been injured or nearly injured while operating the machine in the past. Evidence of a prior injury or incident is not an element of an intentional-tort claim stated under MCL 418.131(1). Although evidence of prior incidents may permit an inference that the

employer had actual knowledge, a plaintiff is not limited to proving actual knowledge through such incidents. Plaintiffs adequately pleaded a claim asserting the existence of an intentional tort within the exception provided under MCL 418.131(1). The trial court erred to the extent that it dismissed plaintiffs' complaint under MCR 2.116(C)(4) and (8).

4. In the absence of good cause, a trial court abuses its discretion when it prevents the discovery of relevant evidence. Because the trial court limited plaintiffs' ability to conduct discovery under a mistaken belief of law, it necessarily abused its discretion.

5. The trial court also abused its discretion by limiting plaintiffs' ability to discover information that was directly relevant to a matter at issue in the case or reasonably calculated to lead to the discovery of admissible evidence without making the necessary findings under MCR 2.302(C).

6. The trial court abused its discretion by limiting the scope of plaintiffs' ability to depose MIBA's employees, managers, and supervisors. The trial court erred by concluding that plaintiffs had no general right to discover records or information that might bear on MIBA's knowledge concerning the hazards posed by the machine and whether it was certain to injure its operator. Because the erroneous protective order precluded plaintiffs from conducting discovery, the trial court erred by granting MIBA's motion for summary disposition under MCR 2.116(C)(10).

7. The trial court's protective order and order granting summary disposition must be vacated and its decision to dismiss plaintiffs' claim must be reversed. The matter must be remanded to the trial court for further proceedings.

Reversed in part, vacated in part, and remanded.

1. COURTS — CIRCUIT COURTS — WORKER'S DISABILITY COMPENSATION ACT — INTENTIONAL-TORT EXCEPTION.

A circuit court has jurisdiction to hear a properly pleaded claim that falls within the intentional-tort exception to the exclusive-remedy provision of the Worker's Disability Compensation Act (MCL 418.131[1]).

2. WORKER'S DISABILITY COMPENSATION ACT — INTENTIONAL-TORT EXCEPTION — DELIBERATE ACTS — INTENT TO INJURE.

An employer's failure to remedy a continuously operative dangerous condition can satisfy the "deliberate act" requirement for an intentional tort under the intentional-tort exception to the exclusive-remedy provision of the Worker's Disability Compensa-

tion Act if the omission occurs along with the intent to injure; an employer has the intent to injure when the employer acts or fails to act with the particular purpose of inflicting an injury upon the employer's employee; a plaintiff may prove that his or her employer had the intent to injure through direct evidence that one of the employer's agents acted or failed to act with that intent; an employer's intent may also be proved through circumstantial evidence that the employer deliberately acted or failed to act with actual knowledge that an injury was certain to occur and willfully disregarded that knowledge (MCL 418.131[1]).

3. WORKER'S DISABILITY COMPENSATION ACT — INTENTIONAL-TORT EXCEPTION — INJURIES CERTAIN TO OCCUR.

An injury is certain to occur for purposes of the intentional-tort exception to the exclusive-remedy provision of the Worker's Disability Compensation Act when no doubt exists with regard to whether it will occur; a plaintiff may prove that his or her employer knew that the plaintiff was certain to be injured by evidence that the employer subjected the plaintiff to a continuously operative dangerous condition that it knew would cause an injury yet refrained from informing that plaintiff so that the plaintiff was unable to take steps to keep from being injured (MCL 418.131[1]).

4. WORKER'S DISABILITY COMPENSATION ACT — INTENTIONAL-TORT EXCEPTION — PLEADING.

A plaintiff seeking to plead a claim under the intentional-tort exception to the exclusive-remedy provision of the Worker's Disability Compensation Act must plead with a sufficient degree of precision to reasonably inform the defendant of the nature of the intentional tort and the basis for establishing the requisite intent (MCL 418.131[1]).

5. EVIDENCE — DISCOVERY.

All information is subject to discovery, including information that will be inadmissible at trial, as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence; parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action; a trial court may limit discovery for good cause in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense; in the absence of good cause, a trial court abuses its discretion when it prevents the discovery of relevant evidence (MCR 2.302[B][1] and [C]).

Hilborn & Hilborn (by *Craig E. Hilborn*) and *Bendure & Thomas* (by *Mark R. Bendure*) for Naum and Zhulieta Thomai.

Collins, Einhorn, Farrell & Ulanoff, PC (by *Noreen L. Slank*), for MIBA Hydramechanica Corporation.

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

M. J. KELLY, P.J. In this suit to recover damages beyond those permitted under the Worker's Disability Compensation Act, see MCL 418.101 *et seq.*, plaintiffs, Naum Thomai and his wife, Zhulieta Thomai,[1] appeal as of right the trial court's opinion and order granting summary disposition in favor of defendant MIBA Hydramechanica Corporation (MIBA).[2] On appeal, Thomai argues that the trial court abused its discretion when it imposed strict limits on his ability to conduct discovery, which prevented him from discovering potentially relevant evidence to support his claim. The trial court then compounded its error, he maintains, by granting MIBA's third motion for summary disposition on the ground that Thomai did not have evidence to establish facts that would permit him to seek damages beyond those provided under the workers' compensation act. We agree that the trial court abused its discretion when it unduly restricted Thomai's ability to conduct discovery. We also agree that the trial court should not have dismissed Thomai's claim without first giving him the opportunity to conduct reasonable dis-

[1] For ease of reference, we will use "Thomai" to refer to Naum Thomai individually and as the representative for plaintiffs.

[2] Thomai and his wife also sued two unknown corporations—Corporations X and Y—that they believed might be MIBA subsidiaries. We shall use MIBA to collectively refer to all defendants.

covery. For these reasons, we vacate the trial court's December 2011 order restricting Thomai's ability to conduct discovery. We also reverse the trial court's decision to dismiss Thomai's claim, vacate its May 2012 order granting summary disposition in MIBA's favor, and remand to the trial court for further proceedings.

I. BASIC FACTS

By May 2008, Thomai had been working for MIBA for a few months.[3] He operated a grooving machine that cut grooves into "friction discs" that were used in clutch and brake systems. Initially, he was expected to cut grooves in 300 discs in one shift. However, a few weeks before his injury, a maintenance man made modifications to the machine, after which Thomai was expected to produce 600 discs each shift.

In an affidavit, Thomai described a series of steps that had to be done every time he cycled the machine. Thomai averred that the machine perpetually leaked oil and that he had been instructed—as one additional step among the many that had to be performed with each cycle—to clean any oil "using the cleaning rags while the machine was running." He had to walk along the sides of the machine to check "the sliding base and rails for oil or grease." If there was oil or grease, he would stop the machine and clean it. After the machine was modified, he had to perform each step of the operation twice as fast in order to maintain production levels. Thomai averred that he told the technicians who modified the machine that the changes made the machine extremely dangerous, but "they ignored" him.

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[3] We have taken these facts from Thomai's pleadings and the exhibits attached in response to MIBA's third motion for summary disposition.

In May 2008, Thomai was operating the machine as usual. He stated that he was walking along the side of the machine while it was running in preparation "to lubricate the rails" when he slipped on the oily floor. His sleeve got caught in one of the machine's "unguarded" spindles with 56 rotating circular blades and it pulled his right hand and forearm into the machine. Thomai's coworkers responded to his screaming, stopped the machine, and pulled his arm free. Thomai had to have his arm amputated near the elbow.

Thomai and his wife sued MIBA in May 2011. They alleged three claims: a claim premised on gross negligence, an intentional-tort claim, and a claim for loss of consortium. With regard to the intentional-tort claim, Thomai alleged that the machine at issue was not safe, that MIBA knew it was unsafe and knew that injuries like Thomai's injury were "certain to occur" if the machine was used in its unsafe condition, and that MIBA "willfully disregarded" the danger.

MIBA responded in June 2011 by moving for summary disposition. MIBA argued that Thomai failed to plead allegations that would entitle him to relief beyond that provided in the worker's compensation act. MIBA maintained that Thomai failed to allege that the machine was defective or in a state of disrepair, failed to allege that MIBA knew about the condition, and failed to allege that MIBA knew that it would injure someone, as required under MCL 418.131(1). It therefore asked the trial court to dismiss the complaint for lack of jurisdiction under MCR 2.116(C)(4) and for failing to state a claim on which relief can be granted under MCR 2.116(C)(8). MIBA also argued that the trial court could, in the alternative, dismiss the complaint under MCR 2.116(C)(10) because Thomai had no evidence that MIBA intended to cause his injury.

The trial court denied MIBA's motion in August 2011, but agreed that Thomai's complaint was deficient: "[Y]ou did not allege in the confines of your complaint that there were other near miss accidents that gave them notice . . . ." Accordingly, it ordered Thomai to file an amended complaint, which he did in that same month.

Thomai alleged a single tort claim in his amended complaint. He alleged that MIBA knew that the machine at issue did not have proper guards, among other safety concerns, and nevertheless required him to operate it "without proper guarding" and with knowledge that it "was certain to produce injury" because the "danger was a continuously operative dangerous condition." That is, despite MIBA's "actual knowledge" that the machine was "inadequately guarded," it required him to face the "known imminent danger which was certain to produce severe injury." By requiring him to work with a machine that it knew was continuously dangerous and certain to injure him, MIBA's actions amounted to an intentional tort within the exception to the exclusive-remedy provision under the worker's compensation act. See MCL 418.131(1).

After Thomai amended his complaint, MIBA again moved for summary disposition under MCR 2.116(C)(4), (8), and (10). MIBA argued that Thomai's allegations were still inadequate to permit recovery beyond that provided under the worker's compensation act. MIBA maintained that Thomai had to allege and be able to prove that someone other than Thomai had been injured or nearly injured by the machine at issue and that a person with some level of responsibility at MIBA knew about the prior incident. Because Thomai did not make such an allegation and, in any event, could not prove that the machine at issue had injured or nearly

injured someone else in the past, MIBA asked the trial court to dismiss the complaint.

The trial court held a hearing on MIBA's second motion for summary disposition in October 2011. The court noted that Thomai had a very high hurdle to satisfy the intentional-tort exception stated under MCL 418.131(1) and continued to accept MIBA's contention that Thomai could not establish his claim unless he had proof that there had been a prior injury or near injury. However, the trial court also acknowledged that there had been no discovery yet and Thomai had recently indicated that a mechanic had modified the machine just weeks before his injury. Given this, the trial court felt that Thomai should have the opportunity to depose the mechanic to learn about the modifications and perhaps identify whether someone had been previously injured. Accordingly, it denied MIBA's motion in order to allow Thomai time to conduct what it characterized as "limited discovery."

After defending against the two motions and finally receiving MIBA's answer, Thomai began to make discovery requests. He first submitted a request for admissions. In response, MIBA refused to answer 15 out of the 22 requests on the grounds that the requests were outside the scope of discovery; they did not "illuminate the issue of whether or not a past injury occurred in reference to the subject machine" and did not involve whether the machine had been modified or the identity of the mechanic who made the alleged modifications. For similar reasons, MIBA refused Thomai's request to inspect and photograph the grooving machine.

MIBA moved for a protective order in December 2011. MIBA argued that it needed a protective order because Thomai had repeatedly made discovery requests that did not "illuminate either of the issues to

which the court has limited discovery." MIBA stated that it had learned that Thomai was also trying to obtain copies of his workers' compensation claim from a third-party. Because Thomai had "indicated an unwillingness to abandon his current expansive pursuit of discovery" and plainly intended to conduct similarly expansive depositions, MIBA asked the trial court to issue a protective order that limited Thomai's ability to conduct discovery.

The trial court agreed. The trial court ordered that Thomai "may not inspect and or photograph the subject machine." It also stated that he may not "request" and was not "entitled to receive answers to discovery" that did not "directly relate to the identity of the mechanic at issue, alleged defects in the subject machine at the time of [Thomai's] injury or whether or not a prior injury or near injury occurred on the subject machine . . . ." It also ordered that Thomai was not "entitled to conduct a general deposition of fact witnesses." Rather, any deposition must be limited to "identifying the mechanic" and discussing any "alleged defects in the subject machine" or any other "injury or near injury" that occurred on the "subject machine."

In March 2012, MIBA again moved for summary disposition under MCR 2.116(C)(4), (8), and (10). MIBA argued that Thomai had had ample opportunity to conduct discovery and yet still had no evidence that the machine at issue was defective, that anyone else had been injured or nearly injured while operating the machine, or that management knew about any alleged defect. Accordingly, it asked the court to dismiss the complaint.

In May 2012, the trial court issued its opinion and order granting MIBA's third motion for summary disposition on each ground. The trial court explained that

Thomai had had an adequate opportunity to discover evidence to support his claim: "Procedurally, [Thomai] has been granted sufficient time to find supporting evidence for his claims, but has failed to produce material evidence in order to sustain a claim of intentional tort." Because Thomai could not establish an intentional tort, the claim was "barred by the exclusive remedy provision under MCL 418.131." The trial court also determined that Thomai should not be given an opportunity to amend his complaint because it had already allowed "amendments" and "extended dates for discovery and case evaluation, all to no avail." Accordingly, it dismissed the complaint and closed the case. This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court properly interpreted and applied statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

B. JURISDICTION AND FAILURE TO STATE A CLAIM

Because the grounds for dismissal are interrelated under the facts involved here, we shall first address whether the trial court properly dismissed Thomai's claim under MCR 2.116(C)(4) and (8). A trial court properly dismisses a claim under MCR 2.116(C)(4) when it "lacks jurisdiction of the subject matter" involved and properly dismisses a claim under MCR 2.116(C)(8) when the com-

plaint fails "to state a claim on which relief can be granted."

1. JURISDICTION OVER THE SUBJECT MATTER

Michigan's circuit courts are courts of general jurisdiction that "have all the power and jurisdiction possessed by English chancery courts in 1847, except 'as altered by the constitution and laws of this state . . . .' " *Bowie v Arder*, 441 Mich 23, 50; 490 NW2d 568 (1992), quoting MCL 600.601(2) before its amendment by 1966 PA 388. By granting exclusive jurisdiction over disputes concerning compensation arising under the worker's compensation act to the Worker's Compensation Agency, see MCL 418.841(1), the Legislature divested circuit courts of the authority to adjudicate those disputes. See MCL 600.605. For that reason, this Court has held that a challenge to a claim premised on the exclusive-remedy provision stated under MCL 418.131(1) constitutes a challenge to the circuit court's jurisdiction over the subject matter. See *Harris v Vernier*, 242 Mich App 306, 312-313; 617 NW2d 764 (2000). Although the Court in *Harris* discussed whether a challenge premised on the exclusive-remedy provision constituted a challenge to jurisdiction, it addressed that issue in the context of determining whether a defendant can waive a challenge to jurisdiction under MCR 2.111(F)(2); it did not address whether and to what extent the trial court in that case actually had jurisdiction over the claims as pleaded.

It is well settled that a circuit court's subject-matter jurisdiction depends on the nature of the case brought before it: "Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the

abstract power to try a case of the kind or character of the one pending." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). Therefore, whether the trial court has jurisdiction of the subject matter in the first instance must be determined from the pleadings. See *In re Hatcher*, 443 Mich 426, 437; 505 NW2d 834 (1993) ("We hold, however, that the probate court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous."); *Fox v Martin*, 287 Mich 147, 151; 283 NW 9 (1938) ("Jurisdiction does not depend upon the facts, but upon the allegations."); *Altman*, 197 Mich App at 472 ("Jurisdiction always depends on the allegations and never upon the facts."). Accordingly, if a plaintiff alleges facts that—on the face of the pleadings—establish a claim over which the circuit court has subject-matter jurisdiction, the court will have jurisdiction to consider the claim without regard to the truth or falsity of the allegations. *In re Hatcher*, 443 Mich at 441-442 (stating that a party's failure to produce "evidentiary facts to support an exercise of subject matter jurisdiction" is grounds to challenge the exercise of jurisdiction and not the existence of jurisdiction); *Altman*, 197 Mich App at 472 ("The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry."). Hence, the mere fact that circuit courts generally do not have jurisdiction to consider claims that fall within the ambit of the worker's compensation act does not mean that a circuit court is divested of subject-matter jurisdiction whenever a defendant successfully challenges a plaintiff's ability to provide *factual support* for a claim that falls under the exception stated in MCL 418.131(1). See *In re Hatcher*, 443 Mich at 443 ("That the evidence failed to support

the petition did not affect the jurisdiction of the court, in the proper sense of the term, to hear the cause and to make the order.") (quotation marks and citations omitted). Stated another way, if a plaintiff properly pleads a claim that falls within the exception stated under MCL 418.131(1), then the trial court has jurisdiction to hear that claim. If the plaintiff is subsequently unable to establish a question of fact regarding one or more elements of that claim, the trial court should dismiss the claim in response to a properly supported motion for summary disposition; but not because it has suddenly lost jurisdiction (it had and continues to have jurisdiction over claims falling within the exception); rather, it is required to dismiss the claim because the plaintiff was unable to establish an essential element of an otherwise proper claim. See MCR 2.116(C)(10).

Accordingly, whether the trial court in this case properly dismissed the complaint under MCR 2.116(C)(4) depends on whether Thomai properly pleaded a claim that fell within the exception stated under MCL 418.131(1). See *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 154; 551 NW2d 132 (1996) (opinion by BOYLE, J.) (stating that "it is a question of law for the court whether the facts as alleged" in the complaint are sufficient to meet the intentional-tort exception, but whether the "facts alleged are in fact true" is matter for the jury). Whether Thomai successfully pleaded such a claim also implicates the trial court's decision to dismiss under MCR 2.116(C)(8). A trial court should grant a motion to dismiss under MCR 2.116(C)(8) only when the "claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citation omitted). If Thomai properly pleaded a claim that fell within the exception

to the worker's compensation act's exclusive-remedy provision, the trial court had jurisdiction to hear that claim and the claim would also necessarily meet the minimum requirements to avoid dismissal under MCR 2.116(C)(8).

2. THE EXCEPTION TO THE EXCLUSIVE REMEDY

The Legislature determined that an employee's right to recover benefits under the worker's compensation act "shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." MCL 418.131(1). Accordingly, if an employee's injury falls within the scope of the worker's compensation act, the employee may not recover damages from the employer beyond those provided in the act. *Szydlowski v Gen Motors Corp*, 397 Mich 356, 358; 245 NW2d 26 (1976). However, the Legislature created an exception to the exclusive remedy:

> The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. [MCL 418.131(1).]

Our Supreme Court has recognized that a deliberate act can be one of commission or omission. *Travis*, 453 Mich at 169 (opinion by BOYLE, J.).[4] Therefore, an employer's failure to remedy a continuously operative dangerous condition can satisfy the "deliberate act"

[4] Although only one other justice joined Justice BOYLE's opinion in full, three other justices agreed that Justice BOYLE properly stated the test for establishing an intentional-tort exception under the worker's compensation act. See *Travis*, 452 Mich at 191-192.

requirement if the omission occurs along with the intent to injure. *Id*. In order to establish a claim that falls within this exception, a plaintiff must plead (and eventually be able to prove) that the employer engaged "in a deliberate act (commission or omission) with a specific intent to injure." *Id*. at 172. An employer has the intent to injure when the employer acts or fails to act with "the particular purpose of inflicting an injury upon his [or her] employee." *Id*.

A plaintiff may prove that his or her employer had the intent to injure through direct evidence that one of the employer's agents acted or failed to act with that intent. But an employer's intent can also be proved through circumstantial evidence. *Id*. at 173. In order to establish an employer's intent in the absence of direct evidence, a plaintiff must plead and be able to prove that the employer deliberately acted or failed to act and did so with "actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1). By using the term "actual knowledge," the Legislature meant that it would be insufficient to establish the requisite intent through constructive, implied, or imputed knowledge; as such, it is insufficient to establish the intent to injure through allegations that the "employer should have known, or had reason to believe, that injury was certain to occur." *Travis*, 453 Mich at 173 (opinion by BOYLE, J.). "A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Id*. at 173-174.

A plaintiff must also plead and eventually be able to prove the very high standard that the employer knew that the injury was certain to occur. An injury is certain

to occur when "no doubt exists with regard to whether it will occur." *Id*. at 174. Whether something is certain to occur does not depend on "the laws of probability"; accordingly, evidence that "one out of ten persons will be injured if exposed to a particular risk, is insufficient to prove certainty." *Id*. In order to meet the certainty requirement, a plaintiff must establish that his or her employer not only knew about the dangerous condition but was also "aware that injury is certain to occur from what the actor does[.]" *Id*. at 176. A plaintiff may prove that his or her employer knew that the actor was certain to be injured when the employer "subjects [the] employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured . . . ." *Id*. at 178. Finally, the Legislature's use of the phrase "willfully disregarded" underscores the fact that evidence of mere negligence is insufficient. *Id*. at 178-179.

3. PLEADING THE EXCEPTION

In Michigan the primary function of a pleading "is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). Because plaintiffs "cannot know in advance exactly what the proofs will establish," the court rules only require a plaintiff to provide "reasonable notice of the claims made, in sufficient detail only that there be no misleading of either party nor a denial to him of information necessary to a fair preparation and presentation of his case." *Jean v Hall*, 364 Mich 434, 437; 111 NW2d 111 (1961). A plaintiff need only plead "the specific allega-

tions necessary *reasonably* to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]" MCR 2.111(B)(1) (emphasis added). Notwithstanding these liberal standards, the degree of specificity may vary with the complexity of the claim. See *Kincaid v Cardwell*, 300 Mich App 513, 529; 834 NW2d 122 (2013). Because the intentional-tort exception provided under MCL 418.131(1) is quite narrow, a plaintiff must plead with a sufficient degree of precision to reasonably inform the defendant of the nature of the intentional tort and the basis for establishing the requisite intent.

In his amended complaint, Thomai alleged that—among other dangers involved at the work site—the machine at issue did not have adequate guards on it and that MIBA had actual knowledge of that fact and "failed" or "refused" to rectify the danger. Moreover, MIBA "intentionally and willfully disregarded and ignored the clear and present danger" and required Thomai to operate the machine with "an inadequately staffed job [and] without proper guarding[.]" It also "refrained from informing [Thomai] about the dangerous condition of the grooving machine," which prevented him from taking "steps to keep himself from being injured." Under these conditions, he further alleged, MIBA knew that the inadequately guarded machine posed a "continuously operative dangerous condition" and knew that an injury was certain to occur if Thomai operated the machine under the identified conditions. Finally, Thomai alleged that, by requiring him to work with a machine that MIBA knew was dangerous and certain to injure him, MIBA's actions amounted to an intentional tort within the exception to the exclusive-remedy provision of the worker's compensation act.

These allegations were sufficient to give MIBA reasonable notice that Thomai was asserting an intentional tort under MCL 418.131(1). *Jean*, 364 Mich at 437. Thomai gave MIBA notice that his claim was premised on the failure to remedy a dangerous condition: the inadequately guarded grooving machine. Contrary to MIBA's contention in the trial court, Thomai did not have to establish that the machine was defective or in a state of disrepair; he had to allege that the machine was dangerous and had to reasonably identify what made it dangerous. See *Travis*, 453 Mich at 169 (opinion by BOYLE, J.) (stating that the intentional-tort exception applies to an employer's failure to "remedy a dangerous condition"). Thomai also adequately alleged MIBA's intent to injure; he alleged that MIBA actually knew the machine was inadequately guarded and knew that injury was certain to occur and yet willfully ignored that knowledge. He maintained that—without adequate guards and other safety measures—the machine constituted a continuously operative dangerous condition. Although Thomai did not identify the specific supervisory or managerial employee who had the requisite knowledge that an injury would follow from the failure to remedy the dangerous condition, we do not believe that Thomai had the obligation to identify a specific manager or supervisor at this early stage in the litigation; rather, the identity of the manager or supervisor was a matter for discovery. By informing MIBA of his theory concerning MIBA's intent, Thomai gave MIBA sufficient information to take a responsive position. *Stanke*, 200 Mich App at 317. Finally, Thomai did not have to allege or prove that other persons had been injured or nearly injured while operating the machine in the past because a prior injury or incident is not an element of an intentional-tort claim stated under MCL 418.131(1). See *Travis*, 453 Mich at 174 (opinion by

BOYLE, J.). Although evidence of prior incidents may permit an inference that the employer had actual knowledge, a plaintiff is not limited to proving actual knowledge through such incidents.

Thomai adequately pleaded a claim asserting the existence of an intentional tort within the exception provided under MCL 418.131(1); therefore, the trial court erred to the extent that it dismissed Thomai's complaint under MCR 2.116(C)(4) and (8).

C. FACTUAL SUPPORT AND DISCOVERY

We shall next address whether the trial court properly dismissed Thomai's complaint under MCR 2.116(C)(10). Thomai argues that the trial court erred when it granted summary disposition under MCR 2.116(C)(10), in part, because the trial court improperly prevented him from conducting reasonable discovery. In so doing, he maintains, the trial court made it impossible for him to marshal evidence to support his claim. We agree that the trial court's decision to limit Thomai's ability to conduct discovery is inextricably connected to the propriety of its decision to dismiss under MCR 2.116(C)(10). This Court reviews a trial court's decision to limit discovery for an abuse of discretion. *Holman v Rasak*, 486 Mich 429, 436, 448 n 10; 785 NW2d 98 (2010). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 120. A party may be entitled to summary disposition under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact . . . ." The moving party must first identify the matters about which it believes there are no

genuine issues and support its claim with affidavits, depositions, admissions, or other documentary evidence. *Barnard Mfg*, 285 Mich App at 369. If the moving party properly supports its motion, the burden shifts to the nonmoving party to come forward with evidence to establish the existence of a genuine issue of disputed fact. *Id*. at 370.

Because a motion under MCR 2.116(C)(10) tests a party's ability to factually support a claim, a trial court should not decide the motion when the parties have not yet had an opportunity to conduct discovery. See *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009) (stating that a decision under MCR 2.116(C)(10) is generally premature if discovery has not been completed). Whether a motion for summary disposition under this rule would be premature depends on "whether further discovery stands a fair chance of uncovering factual support for the litigant's position." *Crider v Borg*, 109 Mich App 771, 772-773; 312 NW2d 156 (1981).

Here, the trial court determined that Thomai had had adequate time to conduct discovery. Thomai did have several months within which to conduct discovery. However, before he could begin discovery, Thomai was compelled to defend against two motions for summary disposition. And, during the hearing on MIBA's second motion for summary disposition, the trial court suggested that Thomai should be limited to discovery on a narrow class of issues. The trial court subsequently entered a protective order that restricted Thomai's ability to conduct discovery in the weeks leading to MIBA's third motion for summary disposition. Therefore, before we can determine whether the trial court properly dismissed Thomai's claim on the ground that he failed to present evidence to establish a disputed

question of fact, we must first determine whether the trial court's decision to limit Thomai's discovery fell within the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526.

"This state has a strong historical commitment to a far-reaching, open, and effective discovery practice." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 36; 594 NW2d 455 (1999). To that end, the parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter." MCR 2.302(B)(1). Indeed, all information is subject to discovery, including information that will be inadmissible at trial, as long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*; *Harrison v Olde Fin Corp*, 225 Mich App 601, 614; 572 NW2d 679 (1997).

Trial courts do have the authority to limit discovery. MCR 2.302(C). But that discretion is not unlimited: a trial court may enter a protective order on a motion "and for good cause" in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." *Id.* In the absence of good cause, a trial court abuses its discretion when it prevents the discovery of relevant evidence. *Szpak v Inyang*, 290 Mich App 711, 715-716; 803 NW2d 904 (2010) (stating that generalized fears that discovery will lead to the intimidation of witnesses is insufficient to warrant a protective order limiting discovery of otherwise relevant evidence); *Harrison*, 225 Mich App at 614-616 (holding that the trial court abused its discre-

tion when it precluded the plaintiff from discovering reports on the ground that the reports were irrelevant without first inspecting the reports in camera to determine if they were subject to discovery).

Here, the trial court issued a protective order that severely limited Thomai's ability to conduct discovery. The trial court entered this sweeping order without making the necessary findings: it did not find that "justice require[d]" the order to protect MIBA from annoyance, embarrassment, oppression, or undue burden or expense. MCR 2.302(C). The trial court further did not address whether any specific requests were "relevant to the subject matter involved in the pending action . . . ." MCR 2.302(B)(1). Instead, the trial court apparently entered the order under a mistaken belief that Thomai could only proceed with his case if he could first identify someone who had been injured in a prior accident involving the same machine or who was nearly injured in an incident involving the same machine. As we have already noted, Thomai did not have to prove that there was a prior accident or near accident with the same machine in order to establish that MIBA knew the machine constituted a dangerous condition that was certain to cause injury. See *Travis*, 453 Mich at 174 (opinion by BOYLE, J.). Rather, Thomai could rely on any relevant evidence that might permit an inference that MIBA actually knew that the machine constituted a dangerous condition that was certain to injure. Because the trial court limited Thomai's ability to conduct discovery under a mistaken understanding of the law, it necessarily abused its discretion. *Gay v Select Specialty Hosp*, 295 Mich App 284, 294; 813 NW2d 354 (2012).

The trial court also abused its discretion by limiting Thomai's ability to discover information that was directly relevant to a matter at issue in the case or

reasonably calculated to lead to the discovery of admissible evidence without making the necessary findings. See MCR 2.302(C). The trial court specifically precluded Thomai from inspecting and photographing the grooving machine despite the fact that the primary issue in this case was whether the grooving machine constituted a dangerous condition. It is difficult to see how Thomai would be able to prove this threshold issue without being able to inspect the machine. Absent an inspection, Thomai had to accept MIBA's representations concerning the machine: he could not independently establish whether it had been modified, could not independently assess the safety measures that were in place to protect the operator, could not study and photograph the machine in order to facilitate a consultation with an expert, and could not even verify if the guards on the machine were actually inadequate. It is similarly difficult to contemplate how permitting such an inspection would result in annoyance, embarrassment, oppression, or undue burden or expense given that this is precisely the kind of efficient and inexpensive discovery that was intended to allow the narrowing of issues for trial. *Ewer v Dietrich*, 346 Mich 535, 542; 78 NW2d 97 (1956) (stating that the discovery rules should be "liberally construed" to "promote the discovery of the true facts and circumstances of a controversy" and narrow and clarify the issues for trial).

The trial court similarly abused its discretion by limiting the scope of Thomai's ability to depose MIBA's employees, managers, and supervisors. The trial court effectively precluded Thomai from eliciting any information from MIBA's managers and supervisors concerning whether they actually knew that the grooving machine was dangerous and certain

to injure someone, which was plainly at issue in this case. While the trial court might have been justified in issuing a protective order to prevent Thomai from generally deposing MIBA's high-ranking personnel as part of a fishing expedition, it did not justify the limitations that it imposed on the basis that Thomai had other, less obtrusive or burdensome, ways to obtain the information. See *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336-343; 796 NW2d 490 (2010). Instead, it apparently decided to limit the scope of Thomai's discovery on the mistaken belief that the only evidence that Thomai could use to establish MIBA's intent was evidence that someone had been previously injured or nearly injured on the machine at issue.

Finally, we cannot agree with the trial court's apparent conclusion that Thomai had no general right to discover records or information that might bear on MIBA's knowledge concerning the hazards posed by the grooving machine and whether it was certain to injure its operator. The trial court offered no reason to justify a blanket protective order against such discovery and there is no record evidence that such a prophylactic measure was warranted.

On this record, we must conclude that the trial court abused its discretion when it entered a sweeping protective order limiting Thomai's right to conduct reasonable discovery without making the findings required under MCR 2.302(C) and while operating under a mistaken understanding of the law. *Gay*, 295 Mich App at 294. Because this erroneous protective order essentially precluded Thomai from conducting discovery, we must also conclude that the trial court erred when it granted MIBA's motion for summary disposition under MCR 2.116(C)(10). Absent the improper limitation,

there was a reasonable probability that further discovery would uncover factual support for Thomai's position; accordingly, summary disposition was premature. *Crider*, 109 Mich App at 772-773.

III. CONCLUSION

Thomai alleged sufficient facts to establish an intentional-tort claim under MCL 418.131(1). Therefore, the trial court erred to the extent that it dismissed Thomai's complaint under MCR 2.116(C)(4) and (8). The trial court also abused its discretion when it entered a sweeping protective order limiting Thomai's ability to conduct reasonable discovery without complying with MCR 2.302(C) and while laboring under a mistake of law. Because the erroneous protective order prevented Thomai from conducting discovery that stood a reasonable probability of uncovering factual support for his claims, the trial court's decision to grant summary disposition under MCR 2.116(C)(10) was premature. Consequently, we vacate the trial court's December 2011 protective order. We also reverse the trial court's decision to dismiss Thomai's claim, vacate its May 2012 order granting summary disposition in MIBA's favor, and remand to the trial court for further proceedings.

Reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Thomai may tax his costs. MCR 7.219(A).

CAVANAGH and SHAPIRO, JJ., concurred with M. J. KELLY, P.J.

KING v OAKLAND COUNTY PROSECUTOR

Docket Nos. 305299 and 305369. Submitted February 13, 2013, at Detroit. Decided November 14, 2013, at 9:00 a.m.

Barry L. King and Christopher K. King filed separate Freedom of Information Act (FOIA), MCL 15.231 *et seq*., actions in the Oakland Circuit Court against the Oakland County Prosecutor after defendant refused to provide plaintiffs with public records in her possession concerning the possible involvement of Christopher Busch in the abductions and killings of four children in Oakland County in 1976 and 1977. The court, Wendy L. Potts, J., granted defendant's motion to consolidate the cases. Defendant also moved for summary disposition. The court denied the motion, concluding that defendant had failed to demonstrate that the records in question were exempt from disclosure. Defendant was then ordered to show cause why the records should not be disclosed, and defendant subsequently provided the court with affidavits and other documents supporting her claim that the records were exempt from disclosure under FOIA. The court reviewed those documents in camera. Following that review, the court issued an opinion and order in which it stated that defendant had met its burden of demonstrating an exemption to FOIA disclosure under MCL 15.243(l)(b)(*i*). Plaintiffs moved for reconsideration. The court denied the motion and dismissed plaintiffs' claims. Plaintiffs appealed, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Under MCL 15.243(1)(b)(*i*), a public body may exempt from disclosure investigative records compiled for law enforcement purposes to the extent that disclosure would interfere with law enforcement proceedings. A finding that disclosure of the requested information could hamper an investigation is insufficient to satisfy the law-enforcement-proceedings exemption. In this case, however, the court properly made particularized findings that there was an active, ongoing investigation, and that the requested information regarding Busch was inextricably intertwined with other sensitive information, the release of which would have interfered with the ongoing investi-

gation at the time of the FOIA denials. Accordingly, the circuit court did not abuse its discretion by denying plaintiffs' motion for reconsideration.

2. Under Const 1963, art 1, § 24, crime victims have the right to confer with the prosecution as provided by law. Through the Crime Victim's Rights Act, MCL 780.751 *et seq*., the Legislature has prescribed the manner by which that constitutional right may be enforced. Specifically, MCL 780.756 enumerates certain duties owed by the prosecuting attorney to crime victims. However, that statute only applies to crimes committed on or after October 9, 1985, and, thus, was inapplicable in this case. Moreover, MCL 780.756 prescribes the duties owed by the prosecuting attorney to each victim after the criminal defendant has been arraigned for the crime. In this case, no charges had been brought and no arraignment had occurred. Accordingly, plaintiffs failed to establish that defendant violated any statutory or constitutional duty to confer with them.

Affirmed.

MURRAY, P.J., dissented from the conclusion in the majority opinion that the circuit court gave a sufficiently particularized decision with regard to whether the law-enforcement-proceedings exemption applied and would have vacated that part of the circuit court's order and remanded for the circuit court to make more particularized findings, but otherwise concurred in the majority opinion. The circuit court's conclusion, that the information concerning Busch was inextricably intertwined with other sensitive information, was conclusory and failed to explain how the release of the requested documents would have interfered with the ongoing investigation.

Bowen, Radabaugh & Milton, PC (by *Lisa T. Milton*), for plaintiffs.

Jessica R. Cooper, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Jeffrey M. Kaelin*, Assistant Prosecuting Attorney, for defendant.

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

WILDER, J. This matter involves two consolidated appeals from two cases that were also consolidated in

the lower court.[1] Plaintiffs appeal as of right the circuit court's opinion and order denying their motion for reconsideration of the court's denial of their requests under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, and dismissing their claims. We affirm in both cases.

These cases arise out of FOIA requests submitted in 2010 to defendant, the Oakland County Prosecutor, for documents regarding Christopher Busch's possible involvement in the abductions and killings of four children in Oakland County in 1976 and 1977, a series of crimes known as the Oakland County Child Killings (OCCK). Plaintiffs, Barry L. King and Christopher K. King, are, respectively, the father and brother of Timothy King, the fourth and final victim of the OCCK. In January and February 1977, after three of the children had been killed, Busch was briefly considered a suspect in the murder of the first OCCK victim, but he was allegedly cleared by law enforcement officials following a polygraph examination. Then, in March 1977, Timothy King was abducted and killed. In November 1978, Busch died in an apparent suicide. The OCCK remain unsolved to this day, but numerous persons other than Busch have been considered as possible suspects over the last 35 years. Defendant denied plaintiffs' FOIA requests for information regarding Busch's possible involvement in the OCCK, and the circuit court upheld the FOIA denials given the existence of an active, ongoing investigation and dismissed the cases.

Plaintiffs argue that the circuit court erred by concluding that the FOIA exception for investigative

[1] This Court consolidated the appeals in these two cases "to advance the efficient administration of the appellate process." *King v Oakland Co Prosecutor*, unpublished order of the Court of Appeals, entered August 17, 2011 (Docket Nos. 305299, 305369).

records, the disclosure of which would interfere with law enforcement proceedings, MCL 15.243(1)(b)(*i*), exempted defendant from producing the requested documents and that the circuit court failed to follow the required procedure in making its decision. We disagree. This Court "review[s] for an abuse of discretion a trial court's decision on a motion for reconsideration. A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes." *Luckow Estate v Luckow*, 291 Mich App 417, 423; 805 NW2d 453 (2011) (citation omitted). "This Court . . . reviews de novo a trial court's legal determination in a FOIA case." *Hopkins v Duncan Twp*, 294 Mich App 401, 408; 812 NW2d 27 (2011). "[T]he clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). Any discretionary determinations in FOIA cases are reviewed for an abuse of discretion. *Id*.

The purpose of FOIA is set forth in MCL 15.231(2):

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act [i.e., FOIA]. The people shall be informed so that they may fully participate in the democratic process.

"FOIA provides that 'a person' has a right to inspect, copy, or receive public records upon providing a written

request to the FOIA coordinator of the public body." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). "Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins*, 294 Mich App at 409. See also MCL 15.233(1).

> The Legislature codified the FOIA to facilitate disclosure to the public of public records held by public bodies. However, by expressly codifying exemptions to the FOIA, the Legislature shielded some affairs of government from public view. The FOIA exemptions signal particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure. In many of these instances, the Legislature has made a policy determination that full disclosure of certain public records could prove harmful to the proper functioning of the public body. [*Eastern Mich Univ Bd of Regents*, 475 Mich at 472-473 (quotation marks and citations omitted).]

MCL 15.243 permits a public body to exempt certain records and information from disclosure. The exemption at issue here is set forth in MCL 15.243(1)(b)(*i*), which states:

> A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> (*i*) Interfere with law enforcement proceedings.

In *Evening News Ass'n v City of Troy*, 417 Mich 481, 486; 339 NW2d 421 (1983), our Supreme Court held that a generic determination that the release of

documents would interfere with law enforcement proceedings is not sufficient to sustain a denial under the law-enforcement-proceedings exemption. Relying on provisions in our FOIA and on federal caselaw interpreting the similar federal FOIA,[2] the *Evening News* Court identified six rules that a court should use when analyzing a claimed exemption under FOIA:

> 1. The burden of proof is on the party claiming exemption from disclosure.
>
> 2. Exemptions must be interpreted narrowly.
>
> 3. [T]he public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.
>
> 4. [D]etailed affidavits describing the matters withheld must be supplied by the agency.
>
> 5. Justification of exemption must be more than conclusory, i.e., simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings.
>
> 6. The mere showing of a direct relationship between records sought and an investigation is inadequate. [*Id*. at 503 (quotation marks and citations omitted; alterations in original).]

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[2] 5 USC 552. "Because of the similarity between the Michigan and the federal FOIA, this Court and the Michigan Supreme Court have often looked to federal decisions for guidance in interpreting the various provisions." *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218; 514 NW2d 213 (1994). We recognize, however, that the law-enforcement-proceedings exemption in the Michigan FOIA is narrower than the comparable federal provision because the federal counterpart allows exemption of documents that "could" reasonably be expected to interfere with law enforcement proceedings, while Michigan allows an exemption only if the release of the documents "would" interfere with such proceedings. See *Herald Co, Inc v Kalamazoo*, 229 Mich App 376, 380; 581 NW2d 295 (1998).

The *Evening News* Court also discussed the procedural difficulties that inhere in determining whether a FOIA exemption applies in light of the asserted confidentiality of the information contained in the requested documents. "Where one party is cognizant of the subject matter of litigation and the other is not, the normal common-law tradition of adversarial resolution of matters is decidedly hampered, if not brought to a complete impasse." *Id*. at 514. Again turning to federal caselaw for guidance, the *Evening News* Court identified a three-step procedure that trial courts should use in analyzing an asserted exemption:

> 1. The court should receive a complete particularized justification as set forth in the six rules above . . . ; or
>
> 2. the court should conduct a hearing in camera based on *de novo* review to determine whether complete particularized justification pursuant to the six rules exists; or
>
> 3. the court can consider allowing plaintiff's counsel to have access to the contested documents *in camera* under special agreement whenever possible. [*Id*. at 516 (quotation marks and citations omitted).]

The use of the conjunctive "or" in this three-step process indicates that "a trial court need not use all three of these alternatives in every case before concluding that an FOIA request is properly denied." *Herald Co, Inc v Kalamazoo*, 229 Mich App 376, 384 n 3; 581 NW2d 295 (1998).

> [T]he Michigan Supreme Court did not mandate application of each step of the three-step procedure. Rather, as appropriate in a particular case, a trial court may follow one *or* more of the three steps. Indeed, the use of step three, allowing a plaintiff's counsel to have access in camera to contested documents, should be strictly limited. [*Id*. at 391 (citation omitted).]

In this case, the record reflects that the circuit court was aware of and followed the proper procedure set forth in *Evening News*. The circuit court had earlier denied defendant's motion for summary disposition because defendant failed to present admissible evidence that the investigation of Busch was active and ongoing and that release of documents relating to Busch would interfere with the investigation. But later, in connection with plaintiffs' motion for an order to show cause why the requested documents should not be produced, the court ordered that defendant could file affidavits or other documents for the court to review in camera. The court subsequently entered a clarifying order allowing defendant to submit documents for in camera review for the purpose of substantiating statements made in affidavits that defendant had already presented to the circuit court. On December 17, 2010, following its in camera review of the affidavits and documents submitted by defendant, the circuit court issued a written opinion and order noting that defendant had

> the burden of demonstrating that disclosure of the requested information **would** "interfere with law enforcement proceedings." MCL 15.243(1)(b)(i); MCL 15.240(4); *Evening News Assn v Troy*, 417 Mich 481, 503 (1983). After thoroughly reviewing the materials presented by Defendant, the Court is convinced that there is an active, open, and ongoing investigation that **could** be compromised by release of any information regarding Christopher Busch. The information submitted by Defendant *in camera* is sufficient to establish that the investigation of the OCCK is active and the information Defendant possesses regarding Christopher Busch is inextricably intertwined with other sensitive information such that release of any information **could** interfere with the investigation. Because Defendant has met its burden of demonstrating an exemption to FOIA disclosure under MCL 15.243(1)(b)(i), the Court concludes

> that Plaintiffs are not entitled to compel release of the information sought in their FOIA requests. [Bold emphasis added.]

Then, after plaintiffs asked for reconsideration, the circuit court issued an opinion and order on July 7, 2011, denying reconsideration, dismissing plaintiffs' claims without prejudice to their ability to submit a new FOIA request, and closing the case. The court reasoned, in relevant part:

> This Court is charged with determining whether the FOIA exemptions asserted existed at the time Defendant denied Plaintiffs' requests in March and May 2010. Based on the information Defendant presented *in camera*, there was an ongoing investigation involving Christopher Busch in March and May 2010 when Defendant denied the FOIA requests, and in December 2010 when the Court issued its opinion. Further, release of information regarding Christopher Busch **would** have interfered with the investigation during those times. The fact that the Michigan State Police released a portion of their records in December 2010 does not alter the facts as they existed in March, May, or December 2010.
>
> Plaintiffs also argue that subsequent information gleaned from the State Police proves that Defendant had non-exempt records in its possession in March or May 2010. But Plaintiffs fail to explain how the Court can conclude that records the State Police provided to Plaintiffs are or were in the possession of Defendant. The fact that the State Police determined that it had non-exempt records does not negate Defendant's assertion that its records are all exempt.
>
> Plaintiffs also object to the lack of discovery and claim that this Court's review of information submitted *in camera* violates the standard set by *Evening News Assn v City of Troy*, 417 Mich 481 (1983). Plaintiff is correct that Defendant bears the burden of proving that the claimed FOIA exemptions are applicable and Defendant must produce evidence justifying the exemption. *Evening News*,

> *supra* at 503. But Plaintiff cites no authority holding that the evidence must be submitted on the public record. The *Evening News* analysis can be accomplished through an *in camera* review of materials presented by the public agency. See *Herald Co v City of Kalamazoo*, 229 Mich App 376, 381 (1988). . . .
>
> For all of these reasons, the Court finds no basis for reconsideration of its December 2010 decision concluding that release of the information sought by Plaintiffs **would** interfere with an active and ongoing investigation. Further, the Court dismisses Plaintiffs' claims without prejudice to Plaintiffs' ability to submit a new FOIA request. [Bold emphasis added.]

A review of the circuit court's orders and opinions reflects that the court properly understood and followed the *Evening News* procedures. The court recognized that defendant bore the burden of proving that the asserted exemption applied and, thus, denied defendant's motion for summary disposition because defendant had not yet submitted affidavits and documents to sustain that burden. The court further recognized that to establish the law-enforcement-proceedings exemption, defendant had to show both that an investigation was open and ongoing and that release of the requested documents "would" interfere with law enforcement proceedings.

Plaintiffs have conceded that an investigation is ongoing,[3] but contend that the circuit court applied an erroneous standard in finding that releasing the documents *could* interfere with law enforcement proceedings. In its December 17, 2010, opinion and order, the circuit court correctly stated that defendant had the "burden of demonstrating that disclosure of the requested information *would* interfere with law enforce-

[3] By contrast, the defendants in *Evening News* conceded that the investigation in that case was closed. *Evening News*, 417 Mich at 517.

ment proceedings." (Quotation marks and citations omitted; emphasis added.) However, despite its correct recitation of the proper standard, the circuit court found that the law-enforcement-proceedings exemption applied in this case because the investigation "*could* be compromised by release of any information regarding Christopher Busch." (Emphasis added.) The circuit court further explained that the information regarding Busch was "inextricably intertwined with other sensitive information such that release of any information *could* interfere with the investigation." (Emphasis added.)

If this was the extent of the circuit court's findings, we would agree that the findings would not have supported the circuit court's decision to sustain defendant's refusal to release the requested materials under the law-enforcement-proceedings exception. Our Supreme Court has made it clear that finding that the requested information merely "could" hamper an investigation is insufficient to satisfy the law-enforcement-proceedings exemption under MCL 15.243(1)(b)(*i*). *Evening News*, 417 Mich at 505-508. "Could" and "would" are "obviously not the same thing. The statute is positive. [An] opinion [using "could"] is tentative." *Id*. at 506. However, the circuit court's findings in its opinion and order denying plaintiffs' request for reconsideration constituted a clarification of its December 17, 2010, opinion, by again reciting the correct standard and by indicating that the release of the requested information *would* interfere with an active and ongoing investigation.[4] Therefore, we conclude that the circuit court found that the release of the information *would*

[4] While we recognize that this is an unusual occurrence, in *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000), this Court stated as follows:

interfere with law enforcement proceedings and that this finding supported its legal determination to sustain defendant's denial of disclosure.

In addition, the circuit court did not make a generic determination that the exemption applied. Following its in camera review of the submitted documents, the court made a particularized finding that did not merely recite the statutory language. It found that the information submitted in camera established that the investigation was active, open, and ongoing; that "law enforcement officials are tenaciously pursuing a resolution to the investigation into these terrible crimes"; and that that the requested information regarding Busch "is inextricably intertwined with other sensitive information . . . ." Thus, unlike in *Evening News*, 417 Mich at 506, the circuit court here gave a reason why disclosure would interfere with law enforcement proceedings. The court's particularized finding regarding why the information concerning Busch fell within the exemption is consistent with the undisputed fact that Busch's death did not end the investigation; indeed, plaintiffs concede that there have been numerous other suspects in the investigation. The court's order denying reconsidera-

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> A court's decision to grant a motion for reconsideration is an exercise of discretion. Thus, "[i]f a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion." The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties. [Citations omitted; alterations in original.]

To the extent, then, that the trial court erred in its initial ruling on December 17, 2010, by concluding that the release of the requested information "could" interfere with an active and ongoing investigation, the trial court was well within its "considerable discretion" to correct its "mistake" when ruling on reconsideration that the release of the information "would" interfere with an active and ongoing investigation.

tion clarifies that releasing this inextricably intertwined sensitive information would have interfered with the investigation at the time of the FOIA denials. Given the sensitive nature of the requested information, the active and ongoing status of the investigation, and the existence of numerous suspects over the years, it is reasonable to conclude that releasing the requested documents would have had a detrimental effect on the investigation. See *Dickerson v Dep't of Justice*, 992 F2d 1426, 1433 (CA 6, 1993) (noting that releasing documents during the ongoing criminal investigation risked revealing to the crime's true perpetrators what investigative leads the Federal Bureau of Investigation was pursuing, thereby permitting the perpetrators to take steps to destroy or tamper with evidence, intimidate witnesses, or construct false alibis). We conclude that the circuit court made particularized findings that conformed to the requirements of *Evening News*.

Further, the circuit court appropriately reviewed in camera the affidavits and documents submitted by defendant, as allowed under step two of the *Evening News* three-step procedure. Although the circuit court did not permit plaintiff's counsel to review the materials in camera, it was not required to do so. *Kalamazoo*, 229 Mich App at 384 n 3, 391.

Plaintiffs also contend that the circuit court erred by failing to require defendant to separate nonexempt from exempt material and to make the nonexempt material regarding Busch available to plaintiffs. However, this argument is based on a false premise; the circuit court did not find that defendant possessed any nonexempt material regarding Busch. Rather, the circuit court's findings, as previously quoted in this opinion, reflect a determination that all the material regarding Busch was "inextricably intertwined with other

sensitive information," that the release of this material would have interfered with the investigation, and that the requested information therefore fell within the exemption. The circuit court's findings thus establish that the requested material was exempt. In addition, as the circuit court's opinion denying reconsideration noted, the fact that the Michigan State Police Department later released certain records to plaintiffs does not establish that *defendant* possessed nonexempt records at the time of the denials of plaintiffs' FOIA requests. See *State News v Mich State Univ*, 481 Mich 692, 695, 704; 753 NW2d 20 (2008) (stating that "[t]he passage of time and the course of events after the assertion of a FOIA exception do not affect whether a public record was initially exempt from disclosure," and that "[t]here is no indication from the text of . . . the law-enforcement-purposes exemption . . . that the public body's assertion of a FOIA exemption may be reexamined by the circuit court or an appellate court while taking into consideration information not available to the public body when it denied the request").

Because the circuit court clarified on reconsideration that release of the documents *would* impact an ongoing law enforcement investigation, it did not abuse its discretion by denying plaintiffs' motion for reconsideration on July 7, 2011.[5]

Given that the requested material was exempt from disclosure under the law-enforcement-proceedings exemption, it is not necessary to address defendant's argument that the material was also exempt under the

[5] As previously noted, the exempt status of the requested materials at the time of the FOIA denials does not preclude plaintiffs from making another FOIA request if they "believe[] that, because of changed circumstances, the record can no longer be withheld from disclosure." *State News*, 481 Mich at 705.

work-product doctrine. Moreover, the circuit court did not address the work-product doctrine. Given the absence of findings regarding that doctrine following the court's in camera review of the affidavits and documents submitted by defendant, the issue regarding the work-product doctrine does not constitute a question of law for which the necessary facts have been presented. Cf. *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996). Thus, it is not feasible or necessary for this Court to analyze the applicability of the work-product doctrine in this case.

Plaintiffs next argue that the circuit court erred by denying plaintiffs' requests to compel the depositions of Oakland County Prosecutor Jessica Cooper and Chief Assistant Prosecutor Paul T. Walton or to require their availability for examination at the show cause hearing. We disagree. "This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion." *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

Initially, we note that plaintiffs have failed to cite any authority in support of their argument on this issue. "This Court will not search for authority to sustain or reject a party's position. The failure to cite sufficient authority results in the abandonment of an issue on appeal." *Hughes v Almena Twp*, 284 Mich App 50, 71-72; 771 NW2d 453 (2009) (citation omitted). Therefore, this issue is deemed abandoned.

In any event, plaintiffs have failed to establish that the denials of their requests to depose Cooper and Walton or to require their availability for examination at the show cause hearing fell outside the range of principled outcomes. In *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 636; 591 NW2d 393 (1998), the plaintiff had previously been prosecuted for man-

slaughter. After he was acquitted, the plaintiff filed a FOIA request seeking to obtain his criminal case file. The prosecutor refused to disclose some documents, and the plaintiff filed a FOIA action against the prosecutor. Following an in camera review, the circuit court concluded that some documents were exempt from disclosure. *Id*. The "[p]laintiff had scheduled a deposition of an attorney who had personally participated in preparations for the prosecution of plaintiff, but the court reasoned that the additional discovery would not assist in its in camera review of the documents in question and so decided the case without allowing the deposition to take place." *Id*. On appeal, the plaintiff argued that the circuit court had erred by deciding the case before the scheduled deposition of the assistant prosecutor. *Id*. at 646. This Court held that because the assertion of a public interest in disclosure could not overcome the statutory FOIA exemption at issue in that case, the circuit court was not required to permit the deposition. *Id*. This Court additionally reasoned as follows:

> Further, public policy imperatives for ensuring the effective functioning of the prosecutor's office militate against requiring prosecutors to submit to oral discovery concerning their work on a particular case. See *Fitzpatrick v Secretary of State*, 176 Mich App 615, 617-618; 440 NW2d 45 (1989) ("Department heads and other similarly high-ranking officials should not be compelled to personally give testimony by deposition unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it."); *Sheffield Development Co v City of Troy*, 99 Mich App 527, 532-533; 298 NW2d 23 (1980) (separation-of-powers principles counsel against judicial inquiry into the individual motivations of officials acting within other branches of government). In this case, even if plaintiff were entitled to argue the public interest in disclosure of the documents at issue, because

> deposing the assistant prosecutor would have amounted to little more than a "fishing expedition" by plaintiff, the trial court would nonetheless have properly decided the case without allowing that deposition to take place. [*Messenger*, 232 Mich App at 646-647.]

See also *Augustine v Allstate Ins Co*, 292 Mich App 408, 419-420; 807 NW2d 77 (2011) ("Michigan's commitment to open and far-reaching discovery does not encompass fishing expedition[s]. Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition.") (quotation marks and citations omitted; alteration in original).

In this case, plaintiffs have failed to articulate a sufficient reason why they should have been permitted to depose Cooper and Walton or to examine them at the show cause hearing. Plaintiffs merely assert that the credibility of Cooper and Walton was at issue and speculate about possible motives that Cooper or her office may have had for withholding information regarding Busch. Plaintiffs identify no evidence in the record to support these assertions. Nor have plaintiffs identified any disputed factual issues regarding which Cooper or Walton should have been compelled to testify. Plaintiffs have thus failed to establish that deposing these officials was essential to prevent prejudice or injustice, or that a deposition would have amounted to anything more than a fishing expedition. See *Messenger*, 232 Mich App at 646-647.

Furthermore, the circuit court properly made its determination regarding the applicability of the exemption on the basis of an in camera review of the affidavits and documents submitted by defendant, in accordance with the procedures set forth in *Evening News*. There is no basis to conclude that requiring Cooper and Walton to be deposed or to be available for examination at the

show cause hearing would have aided the circuit court's determination regarding whether the requested material fell within the law-enforcement-proceedings exemption.

Plaintiffs' final argument on appeal is that defendant violated a constitutional duty to confer with plaintiffs. We disagree. Generally, an issue must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Plaintiffs first raised this issue when they requested reconsideration of the circuit court's December 17, 2010, decision.[6] "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Moreover, plaintiffs' complaints did not allege claims for violations of their right to confer with the prosecutor, but rather asserted claims for alleged FOIA violations. Thus, this issue is not preserved.

This Court reviews unpreserved issues for plain error affecting substantial rights. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009). Also, questions of statutory and constitutional interpretation are reviewed de novo. *Dep't of Transp v Gilling*, 289 Mich App 219, 228; 796 NW2d 476 (2010).

"The primary objective in interpreting a constitutional provision is to determine the original meaning of

[6] Plaintiffs briefly addressed the constitutional right to confer with the prosecution in their March 30, 2011, brief in support of their motion to compel Cooper's deposition, which was filed a few weeks before their April 21, 2011, request for reconsideration. However, even if the short reference to this issue in the brief in support of the motion to compel was sufficient to raise the issue, that brief was filed *after* the December 17, 2010, opinion and order deciding the case and, thus, it did not timely raise the issue for purposes of preservation.

the provision to the ratifiers, 'we the people,' at the time of ratification." *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 67; 748 NW2d 524 (2008). "This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification." *Id*. at 67-68. "Technical legal terms must be interpreted in light of the meaning that those sophisticated in the law would have given those terms at the time of ratification." *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008).

Regarding the interpretation of statutes, our Supreme Court has explained that

> [i]t is axiomatic that statutory language expresses legislative intent. A fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. Where the statute unambiguously conveys the Legislature's intent, the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. [*Id*. (quotation marks and citations omitted).]

In 1988, Michigan's Constitution was amended to enumerate the rights of crime victims. *People v Peters*, 449 Mich 515, 524; 537 NW2d 160 (1995). In particular, Const 1963, art 1, § 24 was added, which provides, in relevant part, as follows:

> (1) Crime victims, as defined by law, shall have the following rights, as provided by law:
>
> * * *
>
> The right to confer with the prosecution.
>
> * * *
>
> (2) The legislature may provide by law for the enforcement of this section.

The phrase "provided by law" has been consistently construed as vesting in the Legislature the authority to act. *People v Bulger*, 462 Mich 495, 508; 614 NW2d 103 (2000), overruled in part on other grounds in *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005); see also *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009) ("The phrase 'provided by law' vests the authority to act in the Legislature . . . ."). Thus, the language of Const 1963, art 1, § 24 granting to crime victims the right to confer with the prosecution "as provided by law," and the additional language expressly stating that "[t]he legislature may provide by law for the enforcement of this section," is reasonably understood as granting to the Legislature the authority to prescribe the manner of affording to crime victims the constitutional right of conferral with the prosecution.

The Legislature has acted in this area through the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*. However, article 1 of the CVRA, MCL 780.751 to MCL 780.775, "appl[ies] only to crimes committed on or after October 9, 1985." MCL 780.775(2). And regarding a prosecutor's duties owed to a victim under article 1 of the CVRA, MCL 780.756 states, in relevant part, as follows:

> (1) Not later than 7 days after the defendant's arraignment for a crime, but not less than 24 hours before a preliminary examination, the prosecuting attorney shall give to each victim a written notice in plain English of each of the following:
>
> (a) A brief statement of the procedural steps in the processing of a criminal case.
>
> (b) A specific list of the rights and procedures under this article.
>
> (c) A convenient means for the victim to notify the prosecuting attorney that the victim chooses to exercise his or her rights under this article.

(d) Details and eligibility requirements for compensation from the crime victim services commission under 1976 PA 223, MCL 18.351 to 18.368.

(e) Suggested procedures if the victim is subjected to threats or intimidation.

(f) The person to contact for further information.

(2) If the victim requests, the prosecuting attorney shall give the victim notice of any scheduled court proceedings and any changes in that schedule.

(3) Before finalizing any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the prosecution for the crime, including the victim's views about dismissal, plea or sentence negotiations, and pretrial diversion programs.

Because it is undisputed that the crime at issue here was committed in March 1977 and because article 1 of the CVRA only applies to crimes committed after October 9, 1985, the CVRA does not apply to the present case. Nonetheless, even assuming that the CVRA did apply, plaintiffs have failed to identify any provision that requires a prosecutor to confer with victims *before* charges are filed. MCL 780.756 prescribes the duties owed by the prosecutor to each victim *after* the criminal defendant has been arraigned for the crime. No charges have been filed and no arraignment has occurred in this matter.[7] Accordingly, plaintiffs have failed to establish that defendant has violated any constitutional or statutory duty to confer with plaintiffs, and no plain error affecting substantial rights has been demonstrated.

[7] Defendant has represented to this Court that, although the CVRA does not apply given the date restrictions, if charges are filed as a result of this investigation, any crime victims who register with defendant's office will be appropriately consulted during the criminal proceedings.

In light of our resolution of the these issues, it is not necessary to address the alternative ground for affirmance urged by defendant—that plaintiffs lacked standing to bring these actions.

Affirmed in both cases. A public question being involved, no costs may be taxed. MCR 7.219(A).

OWENS, J., concurred with WILDER, J.

MURRAY, P.J. (*concurring in part, dissenting in part*). I concur in the reasoning and conclusions contained in the majority opinion except for the conclusion that the circuit court gave a sufficiently particularized decision as to why the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., exemption at issue applied. Instead, I would hold that the circuit court's decision was too conclusory and, thus, did not comply with the particularized findings requirement set forth in *Evening News Ass'n v City of Troy*, 417 Mich 481; 339 NW2d 421 (1983), and would vacate that part of the trial court's order and remand for the trial court to make the appropriate findings.

No one disputes that under *Evening News* a trial court is required to give particularized findings of fact as to why a claimed exemption is appropriate. See, e.g., *Post-Newsweek Stations v City of Detroit*, 179 Mich App 331, 336-338; 445 NW2d 529 (1989). The difficult issue is *what constitutes* a sufficiently particularized finding. There is certainly no clear-cut answer. Nevertheless, in canvassing the published opinions issued since *Evening News*, it seems apparent that the trial court's findings in this case were not sufficient.

As the majority opinion has described, the trial court's rationale for upholding the exemption under MCL 15.243(1)(b)(*i*) was that release of any information

regarding Christopher Busch would compromise the open and ongoing investigation because the Busch information was "inextricably intertwined with other sensitive information . . . ." This finding amounts to nothing more than a partial recitation of the statutory exemption (that an ongoing investigation exists) coupled with a conclusory statement that all the information regarding Busch was "inextricably intertwined" with the other documents in defendant's possession related to the ongoing investigation. Our caselaw requires more than that.

For instance, in *State News v Michigan State Univ*, 274 Mich App 558, 583; 735 NW2d 649 (2007), rev'd in part on other grounds, 481 Mich 692 (2008), our Court held that "a justification must 'indicate factually *how* a particular document, or category of documents, interferes with law enforcement proceedings[,]' " quoting *Evening News*, 417 Mich at 503 (emphasis added). That documents may be intertwined with others containing sensitive information does not explain *how* release of those documents would interfere with the ongoing investigation. Likewise, in *Payne v Grand Rapids Police Chief*, 178 Mich App 193, 201; 443 NW2d 481 (1989), our Court reversed a trial court's decision upholding an exemption because the trial court's opinion—though somewhat lengthy—was composed of entirely conclusory comments. And, contrary to the majority's assertion, even though the trial court in this case properly conducted an in camera review under *Evening News*, it was still required to give particularized findings of fact indicating *why* the claimed exemptions applied. *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218; 514 NW2d 213 (1994), citing *Post-Newsweek Stations*, 179 Mich App at 337-338. In other words, although it is true that a trial court can use any one of the three *Evening News* procedures to review the

evidence, it must still sufficiently explain its decision after employing one of the three *Evening News* procedures. *Id*. ("Even when the court chooses to conduct an in camera review, the court still must . . . give particularized findings of fact indicating why the claimed exemptions are appropriate.").

For these reasons, I would hold that the trial court did not give sufficiently particularized findings as to why the exemption applies, i.e., *how* release of the documents regarding Busch that are inextricably intertwined[1] with the other documents regarding this ongoing investigation would actually interfere with the ongoing investigation. Of course, as noted earlier, how the trial court complies with this specific requirement is somewhat of an open question. However, it could include a particularization of the different categories or types of documents that were submitted by defendant (e.g., letters, memos, reports, etc.) along with general descriptions as to why divulging the contents of those documents would interfere with the ongoing investigation. See, e.g., *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 277-278; 568 NW2d 411 (1997). Compounding the problem, while making these findings the trial court must take significant caution to ensure that no specific content is divulged that would cause to occur what the exemption is attempting to prevent, i.e., release of information that would interfere with an ongoing investigation. One possible measure that could be taken to remedy this last concern would be for the trial court to make the particularized findings in camera, and seal those findings (along with the documents

[1] And how are these documents inextricably intertwined with the sensitive documents? Do the Busch documents (i.e., documents focusing on Busch) contain reference to other witnesses, suspects, etc., or are references to Busch contained in documents focusing on others aspects of the investigation?

reviewed) for further appellate review. See *Detroit Free Press, Inc v City of Detroit*, 429 Mich 860; 412 NW2d 653 (1987). In any event, I recognize compliance with these measures entails a difficult and delicate task, but it is a task that *Evening News* appears to place on the trial courts of this state.

PEOPLE v HARTWICK

Docket No. 312308. Submitted October 8, 2013, at Detroit. Decided November 19, 2013, at 9:00 a.m. Leave to appeal sought.

Richard L. Hartwick was charged in the Oakland Circuit Court with manufacturing marijuana and possessing it with the intent to deliver it. Defendant moved to dismiss the charges on the bases that he was entitled to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424, and dismissal pursuant to the affirmative defense provided under § 8 of the MMMA, MCL 333.26428. The trial court, Colleen A. O'Brien, J., held that defendant was not entitled to immunity under § 4 and denied defendant's requests for dismissal under § 8 or to present a § 8 defense at trial. Defendant, who alleged that he possessed a registry identification card issued pursuant to the MMMA that identified him as a patient and his own caregiver and also alleged that he possessed five additional cards for five patients for whom he acted as a caregiver under the MMMA, filed a delayed application for leave to appeal in the Court of Appeals. The Court of Appeals denied the application in an unpublished order entered October 11, 2012 (Docket No. 312308). Defendant sought leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, entered an order remanding the matter to the Court of Appeals for consideration as on leave granted. *People v Hartwick*, 493 Mich 950 (2013).

The Court of Appeals *held*:

1. Proper analysis of the MMMA must focus on its overriding medical purpose. The expressed purpose of the act is to allow a limited class of individuals the medical use of marijuana. The act's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individual's marijuana use is carried out in accordance with the provisions of the act.

2. The trial court acts as the fact-finder to determine whether § 4 immunity applies. The trial court clearly determined that defendant possessed five more marijuana plants than he was permitted to possess under MCL 333.26424(b)(2).

3. Mere possession of a state-issued registry identification card does not guarantee that the cardholder's subsequent use and

production of marijuana is for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition. MCL 333.26424(d)(1) and (2).

4. Defendant was not holding true to the medical purposes of the MMMA. Defendant failed to introduce evidence regarding some of his patients' medical conditions, the amount of marijuana they reasonably required for treatment and for how long the treatment should continue, and the identity of their physicians. Defendant failed to produce sufficient evidence to qualify for the presumption of immunity under MCL 333.26424(d). Defendant is not entitled to immunity under § 4 of the MMMA.

5. A defendant must demonstrate three elements before the defendant can assert the affirmative defense provided in MCL 333.26428(a). Section 8(a) requires evidence of every element for the defense to be presumed valid.

6. Section 8 weaves together the obligations of each individual involved in the prescription, use, and production of marijuana for medical purposes. Under the act, doctors must have an ongoing relationship with their patients, where the doctor continuously reviews the patient's condition and revises the patient's marijuana prescription accordingly. Further, patients must provide certain basic information regarding their marijuana use to their caregivers. To be protected under the MMMA, caregivers must ask for basic information detailing how much marijuana the patient is supposed to use and how long that use is supposed to continue. Patients and caregivers, for their own protection from criminal prosecution, must comply with the medical purpose of the MMMA: patients by supplying the necessary documentation to their caregivers and caregivers by only supplying patients who provide the statutorily mandated information.

7. Possession of a registry identification card, without more, does nothing to address the medical requirements of § 8. It offers no proof of the existence of an ongoing relationship between a patient and a physician, as mandated by § 8(a)(1). It does not prove that the caregiver is aware of how much marijuana the patient is prescribed or for how long the patient is supposed to use the drug, as mandated by § 8(a)(2). It does not establish that the marijuana provided by the caregiver is actually being used by the patient for medical reasons, as mandated by § 8(a)(3). Possession of a registry identification card is necessary, but not sufficient, to comply with the provisions of the MMMA, but such possession does not satisfy the requirements of § 8 for a total defense to a charge of violation of the MMMA.

8. Defendant presented evidence of a bona fide physician-patient relationship between him and his doctor but presented no evidence that his patients have bona fide physician-patient relationships with their certifying physicians. Although the MMMA does not explicitly impose a duty on patients to provide such basic medical information to their primary caregivers, the plain language of § 8 requires such information for a patient or caregiver to effectively assert the § 8 defense. The trial court correctly ruled that defendant did not present valid evidence with respect to the first element of the § 8 defense.

9. The volume limitations listed in MCL 333.26424(b) do not define what is a "reasonably necessary" amount of marijuana for purposes of establishing a § 8 defense. Defendant failed to satisfy the second element of the § 8 defense because he lacks the requisite knowledge of how much marijuana is required to treat his patients' conditions or his own condition. The trial court properly held that defendant did not create a question of fact regarding this issue.

10. A letter from a patient's physician to the caregiver that details a bona fide physician-patient relationship, the patient's medical condition, how much marijuana is needed to alleviate the condition, and for how long the patient should take the marijuana can serve as evidence that the marijuana supplied by the caregiver is actually used for medical purposes under MCL 333.26428(a)(3).

Affirmed.

JANSEN, J., concurring, concurred in the result only.

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

Section 4(d) of the Michigan Medical Marihuana Act creates a presumption that if a patient or primary caregiver is in possession of a registry identification card and an amount of marijuana that does not exceed the amount allowed under the act, he or she is engaged in the medical use of marijuana in accordance with the act; the prosecution may rebut this presumption with evidence that conduct related to marijuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition (MCL 333.26424(d)(2)).

2. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — PRESUMPTIONS — REGISTRY IDENTIFICATION CARDS.

Mere possession of a state-issued registry identification card does not guarantee that the cardholder's subsequent use and production of

marijuana was for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition (MCL 333.26424(d)).

3. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — REGISTRY IDENTIFICATION CARDS — AFFIRMATIVE DEFENSE — MEDICAL REQUIREMENTS.

Possession of a registry identification card, without more, does nothing to address the medical requirements for assertion of the affirmative defense provided in § 8 of the Michigan Medical Marihuana Act; it offers no proof of the existence of an ongoing relationship between a patient and a physician, as mandated by § 8(a)(1); it does not prove that the caregiver is aware of how much marijuana the patient has been prescribed or for how long the patient is supposed to use the drug, as mandated by § 8(a)(2); it does not establish that the marijuana provided by the caregiver is actually being used by the patient for medical reasons, as mandated by § 8(a)(3) (MCL 333.26428(a)(1) to (3)).

4. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — AFFIRMATIVE DEFENSES — REASONABLY NECESSARY AMOUNT OF MARIJUANA.

The volume limitations listed in § 4(b) of the Michigan Medical Marihuana Act do not define what is a "reasonably necessary" amount of marijuana for purposes of establishing an affirmative defense to any prosecution involving marijuana under § 8 of the act (MCL 333.26424(b); MCL 333.26428).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Kathryn G. Barnes*, Assistant Prosecuting Attorney, for the people.

Frederick J. Miller for defendant.

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

SAAD, P.J. Defendant appeals the trial court's order that (1) held that he was not entitled to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424, and (2) denied defendant's requests for dismissal under § 8 of the MMMA,

MCL 333.26428, and to present a § 8 defense at trial. For the reasons set forth in this opinion, we affirm.

I. NATURE OF THE CASE

Defendant, who was arrested for illegally growing and possessing marijuana,[1] holds a registry identification card under the MMMA, MCL 333.26421 *et seq*. He claims that mere possession of the card entitles him to (1) immunity from prosecution under § 4 of the MMMA and, in the alternative, (2) an affirmative defense under § 8 of the MMMA. The trial court rejected defendant's theory and instead held that defendant was not entitled to immunity under § 4 and that he had not presented the requisite evidence to make an affirmative defense under § 8.

We uphold the trial court and fully explore defendant's specific arguments that his possession of a registry identification card automatically immunizes him from prosecution under § 4 and grants him a complete defense under § 8. We reject these arguments because they ignore the primary purpose and plain language of the MMMA, which is to ensure that any marijuana production and use permitted by the statute is medical in nature and only for treating a patient's debilitating medical condition. See *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012) ("the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms"). To adopt defendant's argument would also put the MMMA at risk of abuse and undermine the act's stated aim of helping a select group of people with serious medical conditions that may be alleviated if treated in compli-

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

ance with the MMMA. We therefore reject defendant's claim and hold that the trial court did not abuse its discretion when it (1) ruled that defendant was not entitled to immunity from criminal prosecution under § 4 and (2) denied defendant's request for dismissal under § 8 and held that he could not present the § 8 defense at trial.

II. FACTS AND PROCEDURAL HISTORY

Detective Mark Ferguson, a member of the Oakland County Sheriff's Office, received a tip that someone was distributing marijuana at a single-family home in Pontiac. On September 27, 2011, Detective Ferguson visited the house in question and met defendant outside. Detective Ferguson asked defendant if there was marijuana in the house. Defendant replied that there was and that he was growing marijuana in compliance with the MMMA. Ferguson asked if he could see the marijuana, and defendant led him inside the house.

Defendant and Detective Ferguson went into a back bedroom that served as a grow room for the marijuana. The grow room door was unlocked and the room housed many marijuana plants. Detective Ferguson then asked if he could search the house; defendant agreed. Throughout the home, Detective Ferguson found additional marijuana plants, a shoebox of dried marijuana in the freezer, mason jars filled with marijuana in defendant's bedroom, and amounts of the drug that were not in containers near an entertainment stand in the living room.

Detective Ferguson then asked defendant if he sold marijuana. Defendant replied that he did not. He told Detective Ferguson that he acted as a caregiver for patients who used marijuana.

The prosecuting attorney subsequently charged defendant with manufacturing marijuana and possessing it with the intent to deliver it. After the prosecutor presented his proofs at the preliminary examination, defendant moved to dismiss the charges under the MMMA's § 4 grant of immunity and the § 8 defense provision. In the alternative, defendant sought to assert a § 8 defense at trial.

THE EVIDENTIARY HEARING

Defendant was the only testifying witness at the evidentiary hearing. He claimed that (1) he was a medical marijuana patient and his own caregiver, and (2) he also served as a caregiver for five additional medical marijuana patients. Defendant possessed registry identification cards for himself and his five patients, and submitted the cards as evidence. The prosecution stipulated the validity of defendant's own registry identification card. Further, the cards demonstrate that defendant served as caregiver for the five additional patients in September 2011, when the police recovered marijuana from his home.[2] Yet defendant was unfamiliar with the health background of his patients and could not identify the maladies or "debilitating conditions" suffered by two of his patients. He was not aware of how much marijuana any of his patients were supposed to use to treat their respective conditions or for how long his patients were supposed to use "medical marijuana." And he could not name each patient's certifying physician.

Defendant also testified that he had 71 plants in small Styrofoam cups. On cross-examination, the pros-

[2] Actually, his father's home—defendant explained that his father owns the property.

ecutor asked defendant about this number, because Detective Ferguson's report had indicated that there were 77 plants. Defendant responded that the detective had included "six plants that I had just cut down and there was still the stalk there." The prosecutor pressed this point in closing arguments, noting that defendant was not entitled to dismissal under § 4 because he had more plants than permitted by that section.[3]

But the prosecutor stressed that the number of plants was not the ultimate issue in the case. Instead, the prosecutor stated that he had rebutted defendant's § 4(d) presumption of immunity by showing defendant's failure to comply with the underlying purpose of the MMMA: the use and manufacture of marijuana for *medical* purposes. The prosecutor noted that "by [defendant's] own testimony he could not have been [providing marijuana to people diagnosed with a debilitating medical condition because] he doesn't know if anybody had a debilitating medical condition, what that is, what they require to use it. There's no way that it's possible for him to have been acting in accordance with the act."

The trial court agreed with the prosecutor's reasoning and held that defendant was not entitled to dismissal under § 4. It said it agreed with the prosecutor but provided no other reasoning on the record.

With respect to § 8, the prosecutor referred to the fact that defendant did not know the amount of marijuana necessary to treat his patients' debilitating medical conditions—meaning that defendant could not meet the evidentiary requirements of the § 8 affirmative

[3] The parties stipulated the admission of an Oakland County Sheriff's Office forensic laboratory report, which indicates that 104.6 grams (roughly 3.69 ounces) of "plant material" were recovered from defendant's house.

defense. Defense counsel replied that defendant's possession of patient and caregiver identification cards absolved defendant of this failure and that the cards were all defendant needed "to establish the fact that these people were authorized by the state of Michigan and approved."

The trial court rejected defendant's argument, relied on the plain language of the statute, and held that defendant failed to produce testimony to support the defense under § 8. The court stressed that it heard no testimony regarding a "bona fide physician-patient relationship or a likelihood of receiving therapeutic or palliative benefit from the medical use of marijuana," or any testimony on whether defendant possessed no more marijuana than reasonably necessary for medical use. Accordingly, the trial court held that defendant failed to show that he was entitled to dismissal under § 8. In addition, because defendant did not present evidence to support all the elements of a § 8 affirmative defense, the court held that defendant could not raise that affirmative defense at trial.

Defendant filed a delayed application for leave to appeal in this Court in September 2012 and the application was denied.[4] Defendant then sought leave to appeal in the Michigan Supreme Court, which, in lieu of granting leave to appeal, entered an April 1, 2013, order remanding this case to the Court of Appeals for consideration as on leave granted.[5]

III. STANDARD OF REVIEW

A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *People v Bylsma*,

[4] *People v Hartwick*, unpublished order of the Court of Appeals, entered October 11, 2012 (Docket No. 312308).

[5] *People v Hartwick*, 493 Mich 950 (2013).

493 Mich 17, 26; 825 NW2d 543 (2012). "A trial court's findings of fact may not be set aside unless they are clearly erroneous." *Id*. A finding is "clearly erroneous 'if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.' " *Id*., quoting *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Questions of statutory interpretation, including interpretation of the MMMA, are reviewed de novo. See *Kolanek*, 491 Mich at 393.

IV. ANALYSIS

A. THE MMMA

The MMMA originated as a citizen's initiative petition and was approved by the people of Michigan in November 2008. *Kolanek*, 491 Mich at 393. Its expressed purpose is to allow a "limited class of individuals the medical use of marijuana . . . ." *Id*. The statute emphatically "does *not* create a general right for individuals to use and possess marijuana in Michigan." *Id*. at 394. Nonmedical-related possession, manufacture, and delivery of the drug (and medical-related possession, manufacture, and delivery not in compliance with the MMMA) "remain punishable offenses under Michigan law." *Id*. and n 24 (citing the specific state laws that criminalize the possession, manufacture, and delivery of marijuana). The MMMA is best viewed as an "exception to the Public Health Code's prohibition on the use of controlled substances [that permits] the medical use of marijuana when carried out in accordance with the MMMA's provisions." *Bylsma*, 493 Mich at 27. The statute's protections are "limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use 'is carried out in accordance with the provisions of

[the MMMA].' " *Kolanek*, 491 Mich at 394, quoting MCL 333.26427(a).

Accordingly, proper analysis of the MMMA must focus on its overriding medical purpose. The ballot initiative approved by the people specifically referred to "physician approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health." Michigan Proposal 08-1 (November 2008); see *Kolanek*, 491 Mich at 393 n 22. The MMMA explicitly states in its title the law's medical intentions ("[a]n initiation of Legislation to allow under state law the medical use of marihuana . . . ."),[6] and the MMMA makes explicit reference to its palliative, treatment-based goals throughout ("[m]odern medical research . . . has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions").[7]

With these medical aims in mind, we turn to the specific requirements of the statute's immunity provisions (§ 4)[8] and its § 8[9] defenses.[10]

B. SECTION 4 IMMUNITY

Section 4 contains multiple parts, only some of which are relevant to this case. "Sections 4(a) and 4(b) contain

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[6] 2008 PA, Initiated Law 1, title.

[7] MCL 333.26422(a).

[8] MCL 333.26424.

[9] MCL 333.26428.

[10] We note that our Supreme Court has held that "[b]ecause 'the plain language of § 8 does not require compliance with the requirements of § 4,' a defendant who is unable to satisfy the requirements of § 4 may nevertheless assert the § 8 affirmative defense." *Bylsma*, 493 Mich at 28. As such, "we . . . examine these provisions independently." *Id*.

parallel immunity provisions that apply, respectively, to registered qualifying patients and to registered primary caregivers." *Bylsma*, 493 Mich at 28. With some conditions, § 4(a) provides "qualifying patient[s]"[11] who hold "registry identification card[s]"[12] immunity from criminal prosecution and other penalties. *Kolanek*, 491 Mich at 394. In the relevant part, it states:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, 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. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [MCL 333.26424(a).]

Section 4(b) provides similar rights to a "primary caregiver,"[13] who, among other things: (1) grows marijuana for patients "to whom he or she is connected through the department's registration process"; (2) has

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

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

[13] MCL 333.26423(h) defines "primary caregiver" or "caregiver" as: "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime . . . ."

been "issued and possesses a registry identification card"; and (3) complies with certain volume and security requirements. MCL 333.26424(b)(1) to (3).[14]

Section 4(d) creates a presumption that if the 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," he is engaged in the medical use of marijuana in accordance with the MMMA. MCL 333.26424(d)(1) and (2). The prosecution may rebut this presumption with "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 . . . ." MCL 333.26424(d)(2).

Here, defendant relies on § 4(b), but ignores § 4(d). Defendant asserts that the number of plants he allegedly possessed places his conduct within the number of marijuana plants permissible under § 4(b). He then claims that mere possession of a valid, state-issued registry identification card prevents the prosecution from rebutting the presumption that he was "engaged in the medical use of marihuana in accordance with this act" under § 4(d).

Neither argument is convincing. The first, related to the number of plants possessed by defendant, is moot. The trial court acts as the fact-finder to determine whether § 4 immunity applies. *People v Jones*, 301 Mich App 566, 576–577; 837 NW2d 7 (2013). Here, the trial court clearly agreed with the prosecution's count of defendant's marijuana plants: 77, not the 71 claimed by defendant. Accord-

[14] Specifically, like patients (as specified in § 4(a)), primary caregivers cannot possess more than 2.5 ounces of usable marijuana for each qualifying patient and 12 marijuana plants kept in an "enclosed, locked facility . . . ."

ingly, defendant possessed 77 plants—five more than permitted to him by § 4(b)(2).[15]

Yet, were we to accept defendant's numerical assessment, defendant would nonetheless not qualify for § 4 immunity. His interpretation of the MMMA ignores the underlying medical purposes of the statute, explicitly referred to in § 4(d). Mere possession of a state-issued card—even one backed by a state investigation—does not guarantee that the cardholder's *subsequent* use and production of marijuana was "for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition . . . ." MCL 333.26424(d)(2). Indeed, defendant's testimony provided ample evidence that he was not holding true to the medical purposes of the statute. He failed to introduce evidence of (1) some of his patients' medical conditions, (2) the amount of marijuana they reasonably required for treatment and how long the treatment should continue, and (3) the identity of their physicians.

Accordingly, we hold that defendant failed to produce sufficient evidence at the evidentiary hearing to qualify for the § 4(d) presumption of immunity and that he is not entitled to immunity under § 4 of the MMMA.

C. SECTION 8(a) DEFENSE

The § 8(a) defense specifies three elements that an MMMA defendant must demonstrate before he can assert this defense. This burden is premised on the medical reasons that underlie the statute, and the

[15] Under § 4(b)(2), defendant could possess up to 72 plants and, subject to certain volume limitations, remain in compliance with the MMMA. The statute allows him to possess 12 plants for himself, plus 12 plants for every patient for whom he is a primary caregiver (6 x 12 = 72).

specified elements are inclusive: § 8(a) requires evidence of every element for the defense to be presumed valid. MCL 333.26428(a).[16]

Before we address each subdivision of § 8(a), it is important to consider the mandate of the section as a whole. Because the MMMA creates a limited statutory exception to the general federal and state prohibition of marijuana, the MMMA provides a comprehensive statutory scheme that must be followed if caregivers and patients wish to comply with the law. Section 8 outlines the possible defenses a defendant can raise when charged with violating the act. In so doing, the section weaves together the obligations of each individual involved in the prescription, use, and production of marijuana for medical purposes. Under the act, doctors must have an ongoing relationship with their patients, where the doctor continuously reviews the patient's condition and revises his marijuana prescription accordingly.[17]

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[16] The Michigan Supreme Court recently outlined very specific steps and procedural outcomes for MMMA defendants who assert the § 8(a) affirmative defense. If the defendant establishes the three § 8(a) elements during a pretrial evidentiary hearing, and there are no material questions of fact, the defendant is entitled to dismissal of the charges. *Kolanek*, 491 Mich at 412. If a defendant establishes evidence of each element, but there are still material questions of fact, then the § 8(a) affirmative defense must be submitted to a jury. *Id*. Finally, if no reasonable juror could conclude that the defendant has satisfied the elements of the § 8(a) affirmative defense, then the defense fails as a matter of law and the defendant is precluded from asserting it at trial. *Id*. at 412–413.

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

[17] The importance of a legitimate, ongoing relationship between the marijuana-prescribing doctor and the marijuana-using patient is stressed throughout the MMMA. Section 4(f), which provides a qualified immunity for physicians, mandates that the immunity only applies to physi-

Further, patients must provide certain basic information regarding their marijuana use to their caregivers. And caregivers, to be protected under the MMMA, must ask for this basic information—specifically, information that details, as any pharmaceutical prescription would, how much marijuana the patient is supposed to use and how long that use is supposed to continue. Though patients and caregivers are ordinary citizens, not trained medical professionals, the MMMA's essential mandate is that marijuana be used for medical purposes. Accordingly, for their own protection from criminal prosecution, patients and caregivers must comply with this medical purpose—patients by supplying the necessary documentation to their caregivers, and caregivers by only supplying patients who provide the statutorily mandated information.

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

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cians that prescribe marijuana "in the course of a bona fide physician-patient relationship . . . ." MCL 333.26424(f). It further implies that this relationship must be ongoing by stressing that "nothing shall prevent a professional licensing board from sanctioning a physician for . . . otherwise violating the standard of care for evaluating medical conditions." This standard of care presumably includes follow-up visits with the patient. And § 6—as noted, the section that governs the issuance of registry identification cards—also implies its expectation of an ongoing physician-patient relationship. It states that "[i]f a . . . patient's certifying physician notifies the department in writing that the patient has ceased to suffer from a debilitating medical condition, the card shall become null and void upon notification by the department to the patient." MCL 333.26426(f).

ensure that the marijuana provided by the caregiver is actually being used by the patient for medical reasons, as mandated by § 8(a)(3).

In sum: a registry identification card is necessary, but not sufficient, to comply with the MMMA but clearly does not satisfy the § 8 requirements for a total defense to a charge of violation of this act.

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

The first element of the affirmative defense of § 8(a) requires a defendant to present evidence that

> [a] physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition[.] [MCL 333.26428(a)(1).]

Here, the crux of defendant's § 8(a) defense lies within this first element. Again, defendant asserts, incorrectly, that his possession of state-issued medical marijuana patient and caregiver identification cards is enough to satisfy the physician's statement and "bona fide physician-patient relationship" required by the statute.[18] Certainly, possession of a card does not dem-

[18] We note that another panel of this Court held in an unpublished opinion per curiam that an individual's state registration as a user of medical marijuana is "prima facie evidence of the first and third elements" of the affirmative defense. *People v Kiel*, issued July 17, 2012 (Docket No. 301427), p 6. The panel did not explain its reasoning beyond this statement. We do not agree with this interpretation of the MMMA. In addition, defendant did not cite *Kiel* in his brief, nor is *Kiel* binding precedent, because it is unpublished. MCR 7.215(C)(1).

onstrate an ongoing relationship with a physician envisioned by the MMMA, where a doctor can prescribe a certain amount of marijuana for use over a specified period.[19]

When the people enacted the MMMA, the statute did not define "bona fide physician patient relationship," see *People v Redden*, 290 Mich App 65, 86; 799 NW2d 184 (2010), but the MMMA has since been amended to include in MCL 333.26423(a) such a definition. See 2012 PA 512. But, the amendment became effective April 1, 2013, and therefore, the new definition may not be applicable to cases, like this one, that arose before April 1, 2013. See *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 377; 781 NW2d 310 (2009) ("[t]he general rule is that an amended statute is given prospective application unless the Legislature expressly or impliedly identifies its intention to give the statute retrospective effect"). If the MMMA had been originally enacted by the Legislature, the amendment could be considered evidence of what the Legislature intended "bona fide physician-patient relationship" to mean when it enacted the MMMA. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). But the

[19] In effect, defendant seeks to link the first element of the § 8(a) defense to another part of the MMMA: section 6. Section 6 explains the procedure, documentation, and certification required to obtain a patient's or caregiver's card. MCL 333.26426. One of the requirements is a "written certification" from a physician, regarding the patient's condition. This certification, however, does not require the certifying physician to attest to an ongoing relationship with the patient, nor does it require him to detail how much marijuana the patient needs, and for how long the patient should use the drug. MCL 333.26423(m). If authentic, the written certification merely constitutes evidence that a physician did the following: (1) stated he completed a full assessment of the patient's medical history; (2) conducted an in-person medical evaluation; (3) observed a debilitating medical condition; and (4) concluded that the patient is likely to benefit from the medical use of marijuana. These actions do not satisfy the mandates of § 8(a)(1).

people of Michigan—not the Legislature—enacted the MMMA through a voter initiative.[20] Courts thus must "ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself." *Kolanek*, 491 Mich at 397. Accordingly, we must construe the MMMA's language with the words' "ordinary and plain meaning as would have been understood by the electorate." *Id*.[21]

Other cases provide definitions of "bona fide" in § (8)(a)(1)'s preamendment context. In *Redden*, another panel of this Court used a dictionary definition of "bona fide." *Redden*, 290 Mich App at 86. *Random House Webster's College Dictionary* (2d ed, 1997) defines "bona fide" as "1. made, done, etc., in good faith; without deception or fraud. 2. authentic; genuine; real." For further guidance, the Michigan Supreme Court indicated its approval of a definition of "bona fide physician-patient relationship" from a joint statement issued by the Michigan Board of Medicine and the Michigan Board of Osteopathic Medicine and Surgery:

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

[21] However, upon close examination, it would appear that the definition adopted by the Legislature may be virtually the same as the definition understood by the electorate when they approved the initiative.

Defendant's claim would still fail under the added definition of "bona fide physician-patient relationship" now found at MCL 333.26423(a). He presented no evidence demonstrating that his patients' physicians had "a reasonable expectation that [the physician] will provide follow-up care to the patient to monitor the efficacy for the use of medical marihuana as a treatment of the patient's debilitating medical condition." MCL 333.26423(a)(3).

" 'a pre-existing and ongoing relationship with the patient as a treating physician.' " *Kolanek*, 491 Mich at 396 n 30 (citation omitted).

In light of these straightforward, common-sense definitions, defendant's argument becomes untenable. A registry identification card—even one verified by the state pursuant to the requirements of § 6—cannot demonstrate a "pre-existing" relationship between a physician and a patient, much less show "ongoing" contact between the two. Accordingly, mere possession of a patient's or caregiver's identification card does not satisfy the requirements of the first element of a § 8(a) defense. That the statute requires this outcome is in keeping with its medical purpose and protects the patients it is designed to serve. By requiring a bona fide physician-patient relationship for the § 8 defense, the MMMA prevents doctors who merely write prescriptions—such as the one featured in *Redden*[22]—from seeing a patient once, issuing a medical marijuana prescription, and never checking on whether that prescription actually treated the patient or served as a palliative.

Here, defendant presented evidence of a bona fide physician-patient relationship between him and his doctor. But he presented no evidence that his patients have bona fide physician-patient relationships with their certifying physicians. None of his patients testified. Nor was defendant able to provide the names of his patients' certifying physicians. While it is true that the MMMA does not explicitly impose a duty on patients to provide such basic medical information to their primary

[22] The *Redden* physician practiced medicine in six states, spent 30 minutes with each of the *Redden* defendants, and seemingly examined the patients with the express purpose of helping them qualify to receive marijuana for medical purposes. See *Redden*, 290 Mich App at 70–71.

caregivers, the plain language of § 8 obviously requires such information for a patient or caregiver to effectively assert the § 8 defense in a court of law.

Accordingly, we hold that mere possession of a patient's or caregiver's identification card does not satisfy the first element of § 8(a)'s affirmative defense. Therefore, the trial court was correct to rule that defendant did not present valid evidence with respect to the first element of the § 8 affirmative defense.

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

The second element of the § 8 affirmative defense requires a defendant to present evidence that

> [t]he patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than 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[.] [MCL 333.26428(a)(2).]

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

Here, defendant argues that the volume limitations listed in § 4(b) should apply to § 8: namely, if a patient or caregiver possesses less than the amounts specified in § 4(b), that patient or caregiver possesses no more than a "reasonably necessary" amount of marijuana for medical treatment pursuant to § 8(a)(2).

This approach misstates the law and ignores the medical purposes of the MMMA. This Court has explicitly held that the amounts permitted under § 4 do not define what is "reasonably necessary" to establish the

§ 8 defense: "Indeed, if the intent of the statute were to have the amount in § 4 apply to § 8, the § 4 amount would have been reinserted into § 8(a)(2), instead of the language concerning an amount reasonably necessary to ensure . . . uninterrupted availability . . . ." *Redden*, 290 Mich App at 87, quoting MCL 333.26428(a)(2) (quotation marks omitted). In addition, our Supreme Court recently stressed that § 4 and § 8 are separate sections, intended to address different situations with different standards. *Kolanek*, 491 Mich at 397-399.[23] Further, importing § 4(b)'s volume limitations to § 8(a)(2) ignores the treatment-oriented nature of the act and § 8(a)'s specific medical requirements. Those requirements are intended for a patient or caregiver that is intimately aware of exactly how much marijuana is required to treat a patient's condition, which he learns from a doctor with whom the patient has an ongoing relationship.

Here, defendant lacks the requisite knowledge of how much marijuana is required to treat his patients' conditions—and even his own condition. He presented no evidence regarding how much marijuana he required to treat his pain and how often it should be treated. And he testified that he did not know how much marijuana his patients required to treat their conditions. Defendant thus failed to satisfy the second element of the § 8 affirmative defense. Accordingly, again the trial court properly held that defendant did not create a question of fact on this issue.

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

The third element of the § 8 affirmative defense requires a defendant to present evidence that

[23] See also *Bylsma*, 493 Mich at 28, and n 10 of this opinion.

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

The trial court observed at the evidentiary hearing that defendant needed to satisfy § 8 (a)(3), but did not make a finding regarding whether he did so. Therefore, we need not address whether defendant satisfied this element through his testimony.[24]

Were the trial court to address this element of § 8, it appears that a letter from a patient's physician to the caregiver, which details: (1) a bona fide physician-patient relationship, (2) the patient's medical condition, (3) how much marijuana is needed to alleviate the condition, and (4) for how long the patient should take the drug, could serve as evidence that the marijuana supplied by the caregiver is actually used for medical purposes under § 8(a)(3).

Defendant's argument concerning § 8(a)(3) does not end with his testimony, however. Once again, defendant unconvincingly suggests that mere possession of state-issued registry identification cards is sufficient evidence to establish this element. Possession of a registry identification card indicates that the holder has gone through the requisite steps in § 6 required to obtain a card. It does not indicate that any marijuana possessed or manufactured by an individual is *actually* being used to treat or alleviate a debilitating medical condition or

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[24] In any event, even if defendant had satisfied the requirements of § 8(a)(3), the case would not be dismissed under § 8, nor would he be allowed to present the defense at trial—he failed to present a question of fact with regard to § 8(a)(1) and (2).

its symptoms. In other words, prior state issuance of a registry identification card does not guarantee that the holder's subsequent behavior will comply with the MMMA. Defendant's theory is akin to stating that possession of a Michigan driver's license establishes that the holder of the license always obeys state traffic laws.

V. CONCLUSION

Because (1) defendant possessed more marijuana than permitted under § 4(b), and (2) the prosecution presented evidence to rebut the medical-use presumption under § 4(d), defendant is not entitled to immunity from prosecution under § 4 of the MMMA. Further, because defendant did not present evidence demonstrating the first two elements of the § 8 defense, he was not entitled to have the case dismissed under that section, nor was he entitled to present the § 8 defense at trial. We therefore hold that the trial court did not abuse its discretion.

Affirmed.

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

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

PEOPLE v POWELL

Docket Nos. 306084 and 315767. Submitted November 8, 2013, at Detroit. Decided November 19, 2013, at 9:05 a.m.

Willie D. Powell was convicted by a jury in the Wayne Circuit Court, Daniel P. Ryan, J., of possession of a firearm during the commission of a felony (felony-firearm). The jury acquitted defendant of a charge of possession of marijuana with the intent to deliver it. Defendant appealed. (Docket No. 306084). Defendant then moved in the trial court for a new trial. The trial court, Daniel A. Hathaway, J., denied the motion. The Court of Appeals, while retaining jurisdiction, remanded the matter to the trial court for an evidentiary hearing regarding the motion for a new trial. On remand, the trial court, Daniel A. Hathaway, J., granted the motion for a new trial. The prosecution appealed by leave granted that opinion and order. (Docket No. 315767). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The felony-firearm statute, MCL 750.227b, does not violate defendant's right to bear arms. The right to bear arms does not encompass the possession of a firearm during the commission of a felony.

2. The trial court properly instructed the jury that it had to determine that defendant had committed the underlying felony of possession of marijuana with the intent to deliver it before it could convict defendant of the felony-firearm charge and that it was to consider each offense individually. The jury may have reached the conclusion that defendant was not guilty of possession of marijuana with the intent to deliver it under MCL 333.7401(2)(d)(*iii*), but that defendant did possess marijuana with the intent to deliver it for purposes of MCL 750.227b. A jury may reach different conclusions concerning an identical element of two different offenses.

3. There is no presumption that the trial court's ex parte communication to the jury following the jury's third note to the court prejudiced defendant. The communication was administrative in nature and defendant did not object to the instruction when made aware of it later.

4. The trial court properly determined that it had abused its discretion when it granted the prosecution's motion to exclude evidence that defendant possessed a concealed pistol license; the evidence was relevant and admissible.

5. The trial court did not abuse its discretion when it granted defendant's motion for a new trial. The trial court did not abuse its discretion when it determined that its exclusion of the evidence regarding the license materially affected defendant's right to present a defense

Affirmed.

CRIMINAL LAW — TRIAL — EX PARTE COMMUNICATIONS.

A trial court's ex parte communications with a deliberating jury may be categorized as substantive, administrative, or housekeeping; a substantive communication includes supplemental instruction on the law; a substantive communication results in a presumption of prejudice and places the burden to rebut the presumption on the prosecution; an administrative communication includes instructions that encourage the jury to continue its deliberations; an administrative communication has no presumption of prejudice and the failure to object when made aware of the communication is evidence that the instruction was not prejudicial, however, an appellate court may determine that the instruction was prejudicial to a defendant when it violated American Bar Association Standard Jury Instruction 5.4(b).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Julie A. Powell*, Assistant Prosecuting Attorney, for the people.

The Perkins Law Group, LLC (by *Todd R. Perkins*), for defendant.

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

PER CURIAM. A jury convicted defendant, Willie Dell Powell, of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two years' imprison-

ment for the felony-firearm conviction. In Docket No. 306084, defendant appealed as of right. Defendant then moved in the trial court for a new trial. The trial court denied the motion. While retaining jurisdiction, we remanded the case to the trial court to hold an evidentiary hearing regarding defendant's motion for a new trial. On remand, the trial court granted defendant's motion for a new trial. In Docket No. 315767, the prosecution appealed by leave granted the trial court's opinion and order granting defendant's motion for a new trial. We consolidated the two appeals. We affirm the trial court's opinion and order granting defendant's motion for a new trial.

Defendant first argues that MCL 750.227b violates his constitutional right to bear arms. We disagree.

This Court reviews constitutional questions de novo. *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011). "Both the United States Constitution and the Michigan Constitution grant individuals a right to keep and bear arms for self-defense." *People v Deroche*, 299 Mich App 301, 305; 829 NW2d 891 (2013) (quotation marks and citation omitted). However, this right is not unlimited. *Dist of Columbia v Heller*, 554 US 570, 595; 128 S Ct 2783; 171 L Ed 2d 637 (2008). Exceptions to the right to bear arms include regulation of gun possession by felons. *Deroche*, 299 Mich App at 307. Similarly, this Court has held, "[a] right to bear arms does not encompass the possession of a firearm during the commission of a felony." *People v Graham*, 125 Mich App 168, 172-173; 335 NW2d 658 (1983).

Defendant argues that the felony-firearm statute is unconstitutional as applied to him, because the jury acquitted him of the charged underlying felony of possession with the intent to deliver marijuana. However, in order for the jury to have properly convicted

defendant of the felony-firearm charge, it had to first determine that he was guilty of the underlying offense of possession with the intent to deliver marijuana. Felony-firearm necessarily includes a finding that the defendant committed or attempted to commit a felony. MCL 750.227b. The trial court properly instructed the jury that it had to determine that defendant had committed the underlying felony before it could convict him of the felony-firearm charge. The trial court also emphasized that the jury was to consider each offense individually. Juries are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). "[A] jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (opinion by LEVIN, J.). The jury may have reached the conclusion that defendant was not guilty of possession of marijuana with intent to deliver under MCL 333.7401(2)(d)(*iii*), but that he did possess marijuana with intent to deliver for purposes of MCL 750.227b. Therefore, despite the jury's failure to convict defendant on the charge of possession with intent to deliver marijuana, the holding in *Graham* is applicable.

Next, defendant argues that the trial court's instruction following a third note from the jury violated defendant's right to be present and have counsel at a critical stage of trial. We disagree.

This Court reviews constitutional questions de novo. *Brown*, 294 Mich App at 389. "The Sixth Amendment provides that the accused in a criminal prosecution 'shall enjoy the right . . . to have the Assistance of counsel for his defence.' " *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004), quoting US Const, Am VI. "It is well established that a total or complete

deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal." *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). A critical stage is " 'where counsel's absence might harm defendant's right to a fair trial.' " *People v Buie (On Remand)*, 298 Mich App 50, 61; 825 NW2d 361 (2012) (citation omitted). Similarly, "[a] defendant has a [constitutional and statutory] right to be present during . . . instructions to the jury . . . and any other stage of trial where the defendant's substantial rights might be adversely affected." *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984); see also MCL 768.3.

In *People v France*, 436 Mich 138, 161; 461 NW2d 621 (1990), the Michigan Supreme Court specifically addressed ex parte communications. It discouraged ex parte communications by a trial judge with a deliberating jury. Only ex parte communications that have "any reasonable possibility of prejudice" should result in a new trial. *Id*. at 162-163 (quotation marks and citation omitted). In order to determine the presumption of prejudice and the burden of showing prejudice, an appellate court should categorize the communication as substantive, administrative, or housekeeping. *Id*. at 163. A substantive communication includes "supplemental instruction on the law . . . ." *Id*. A substantive communication results in a presumption of prejudice and places the burden to rebut the presumption on the prosecution. *Id*. An administrative communication includes, "instructions that encourage a jury to continue its deliberations." *Id*. "An administrative communication has no presumption of prejudice. The failure to object when made aware of the communication will be taken as evidence that the instruction was not prejudicial." *Id*. However, an appellate court may determine that the instruction was prejudicial to a defendant because it violated American Bar Association (ABA) Standard Jury

Instruction 5.4(b). *Id*. at 164. " 'If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.['] " *People v Sullivan*, 392 Mich 324, 335; 220 NW2d 441 (1974), quoting ABA Standard Jury Instruction 5.4(b).

The trial court's instruction, following the third note, was administrative in nature. An administrative communication includes, "instructions that encourage a jury to continue its deliberations." *France*, 436 Mich at 163. The record indicates that the trial court instructed the jury to continue its deliberations until it could reach an agreement. Defendant did not object to the instruction when the trial court later raised the subject on the record. Therefore, there is no presumption that the instruction prejudiced defendant. *Id*. at 163. Furthermore, defendant's failure to object when the trial court raised the issue constitutes "evidence that the instruction was not prejudicial." *Id*. There is nothing to indicate that the trial judge said anything more than instructing the jury to continue to deliberate.

Finally, the prosecution argues that the trial court abused its discretion when it granted defendant a new trial on the basis of the exclusion of defendant's evidence regarding his possession of a concealed pistol license (CPL). We disagree.

This Court reviews a trial court's decision to refuse to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). However, this Court reviews de novo whether a rule of evidence precludes admission of the evidence. *Id*. "This Court reviews for an abuse of discretion a trial court's

decision to grant or deny a motion for a new trial. An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012) (citations omitted). "This Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

First, the trial court properly determined that it had abused its discretion when it granted the prosecutor's motion to exclude the CPL evidence. "Generally, all relevant evidence is admissible at trial." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001); see also MRE 402. "Evidence which is not relevant is not admissible." MRE 402. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence is "admissible if it is helpful in throwing light on any material point." *Aldrich*, 246 Mich App at 114. " '[T]he relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material.' " *People v Brooks*, 453 Mich 511, 520; 557 NW2d 106 (1996), quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993); see also *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001). "[A] material fact need not be an element of a crime or cause of action or defense but it must, at least, be in issue in the sense that it is within the range of litigated matters in controversy." *Brooks*, 453 Mich at 518 (citations and quotation marks omitted). " '[M]ateriality does not mean that the evidence must be directed at an element of a crime or an applicable defense.' " *Id.*, quoting *People v Mills*, 450 Mich 61, 67-68; 537 NW2d 909 (1995).

The CPL evidence was relevant and admissible. Defendant's argument was that he was innocently present in a flat where someone else had marijuana. A relevant fact was whether defendant was using a handgun in a legal manner. The prosecution specifically argued that defendant's possession of the handgun was evidence that he was involved in selling the marijuana. This argument implied that defendant was not using the handgun in a legal manner. Defendant argued that he was using the weapon in a legal manner. Defendant's CPL evidence lent credibility to his argument that he legally possessed the handgun. Therefore, defendant's testimony that he had a valid CPL was "within the range of litigated matters in controversy."

Second, the trial court did not abuse its discretion when it granted defendant's motion for a new trial. The court rules provide several bases for a trial court to award a defendant a new trial. MCR 2.611(A)(1)(a) provides that a court may grant a new trial "whenever [a defendant's] substantial rights are materially affected [by] . . . an order of the court or abuse of discretion which denied [a defendant] a fair trial." See also *People v Jones*, 203 Mich App 74, 79; 512 NW2d 26 (1993). MCR 6.431(B) provides, that "[o]n the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." The trial court could have properly granted defendant's motion for a new trial under several bases.

A NEW TRIAL PURSUANT TO MCR 2.611(A)(1)(a)

The trial court did not abuse its discretion when it determined that the trial court's exclusion of the CPL evidence materially affected defendant's right to

present a defense. "A criminal defendant has a right to present a defense under our state and federal constitutions." *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). "[A]t a minimum, . . . criminal defendants have the right to . . . put before a jury evidence that might influence the determination of guilt." *Id*. (citation and quotation marks omitted).

The trial court's exclusion of the CPL evidence denied defendant the right to present evidence that supported his argument that he legally possessed the handgun and the right to a fair trial. The prosecution specifically argued that defendant's possession of the handgun was evidence that he was involved in selling the marijuana. This argument implied that defendant was not using the handgun in a legal manner. Whether defendant legally possessed the handgun is an issue that may have influenced the jury's determination of guilt.

A NEW TRIAL PURSUANT TO MCR 6.431(B)

Even if the trial court improperly granted defendant a new trial pursuant to MCR 2.611(A)(1)(a), the trial court could have granted defendant a new trial on the basis of the fact that the exclusion of the evidence would have required reversal on appeal.[1] "The improper exclusion of evidence supporting [an] important element of the defense theory is error that warrants reversal." *Brooks*, 453 Mich at 520. Defendant's CPL evidence was an important part of his defense because the prosecution implied that defendant was involved in the drug trade because he carried a handgun. Evidence of the

[1] This Court "will not reverse when the trial court reaches the correct result for the wrong reason." *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003).

CPL, substantiating defendant's argument that he legally carried the handgun, would have likely removed this association.

Affirmed.

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

PEOPLE v MATZKE

Docket No. 312889. Submitted November 7, 2013, at Lansing. Decided November 19, 2013, at 9:10 a.m. Leave to appeal sought.

Dennis L. Matzke was convicted by a jury in the Saginaw Circuit Court of larceny of property with a value of $1,000 or more but less than $20,000. The trial court, Robert L. Kaczmarek, J., sentenced defendant to two years' probation and ordered him to pay $4,580 in restitution. Defendant appealed, alleging that the trial court erroneously considered hearsay evidence during the hearing to determine the amount of restitution.

The Court of Appeals *held*:

1. The Michigan Rules of Evidence apply to all proceedings except certain miscellaneous proceedings, including sentencing. The restitution hearing was exclusively conducted for purposes of sentencing. Hearsay evidence may be properly considered at a restitution hearing. The Court of Appeals has never held that a trial court can consider only evidence admissible under the Michigan Rules of Evidence when determining the proper amount of restitution as part of a defendant's sentence. The evidence supported the trial court's order of restitution.

Affirmed.

CRIMINAL LAW — EVIDENCE — HEARSAY EVIDENCE — RESTITUTION HEARINGS.

The Michigan Rules of Evidence apply to all proceedings except certain miscellaneous proceedings, including sentencing; hearsay evidence may be properly considered at a hearing exclusively conducted for purposes of sentencing, such as an evidentiary hearing conducted to determine the appropriate amount of restitution as part of a defendant's sentence (MRE 1101(b)(3)).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *John A. McColgan*, Prosecuting Attorney, and *Eric J. Hinojosa*, Assistant Prosecuting Attorney, for the people.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for defendant.

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

RIORDAN, J. Defendant appeals as of right his conviction following a jury trial of larceny of property with a value of $1,000 or more but less than $20,000, MCL 750.356(3)(a). Defendant was sentenced to two years' probation and ordered to pay $4,580 in restitution. We affirm.

I. FACTUAL BACKGROUND

The victim owned a gas-oil separator (the separator) as part of his oil well business. The separator was located near a road on property to which the victim owned the mineral rights and where he stored equipment relating to his business. Defendant rented a house on adjoining property also near the road.

On December 13, 2010, the victim was driving near the property when he noticed that defendant was driving away in a truck and attempting to transport the separator from the property on a trailer pulled by the truck. The victim got out of his truck and tried to stop defendant, but defendant continued driving. While calling 911, the victim followed defendant's truck and, after about three miles, defendant eventually pulled over.

The victim asked defendant to return the separator and defendant complied and drove it back to the property. In order for the separator to be removed from the trailer, defendant wrapped one end of a chain around a tree and then connected the other end to the separator. But, because of the great weight of the separator, the tree buckled and broke when defendant moved the trailer away from the tree. Defendant then sought out another, larger tree and again tied a chain to the

separator and wrapped the other end around the larger tree. This allowed the separator to be pulled off the trailer. Eventually, the police arrived at the scene and arrested defendant.

Defendant testified at trial that pursuant to an agreement with his landlord, he agreed to fix up the house he rented and clean the outside area. He claimed that he did not know the exact boundary lines of the property and assumed that the separator was on the property his landlord owned. He also testified that the property was in poor condition and that he thought the separator was junk, so he was taking it to the scrap yard when he encountered the victim.

The victim testified that the separator worked before the crime, but that after defendant's actions, it was "tore up" and bent. The victim's grandson, who arrived at the property shortly after the victim discovered defendant driving away with the separator, testified that there were no holes in the separator and that it was unbent before defendant's actions.

The jury found defendant guilty of larceny of property worth $1,000 or more but less than $20,000, MCL 750.356(3)(a). The trial court sentenced defendant to two years' probation and ordered restitution. At the hearing regarding restitution, defendant's probation officer testified that the victim submitted an estimate from a company indicating that it would cost $4,580 to repair the separator. Thus, the trial court ordered $4,580 in restitution. Defendant now appeals the order and the amount of restitution ordered.

II. RESTITUTION

A. STANDARD OF REVIEW

Interpretation of the rules of evidence is a question of

law we review de novo. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). As this Court recognized in *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2012) (citations omitted):

> A trial court does not have discretion to order a convicted defendant to pay restitution; it must order the defendant to pay restitution and the amount must fully compensate the defendant's victims. Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and this Court reviews de novo the proper interpretation of statutes. However, this Court reviews the findings underlying a trial court's restitution order for clear error. MCR 2.613(C). A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made.

B. ANALYSIS

Defendant first contends that the trial court erred by considering hearsay evidence at the restitution hearing. He argues that the Michigan Rules of Evidence apply to restitution hearings and thus the trial court erred by allowing hearsay evidence in making its determination.

Pursuant to MRE 1101(b)(3), the Michigan Rules of Evidence apply to all proceedings except certain miscellaneous proceedings, including "sentencing." Here, the evidentiary hearing was conducted to determine the appropriate amount of restitution as part of defendant's sentence. Having nothing to do with defendant's guilt or innocence, this hearing was exclusively conducted for purposes of sentencing. See MCL 780.766(2) ("when *sentencing* a defendant convicted of a crime, the court shall order" restitution when appropriate) (emphasis added).[1] Thus, because under the plain language of

[1] Defendant incorrectly characterizes a sentencing hearing as merely a perfunctory proceeding where the trial court enters a judgment, suppos-

MRE 1101 hearsay evidence may be properly considered at a restitution hearing, defendant's argument fails.[2]

Defendant also contends that the trial court erred in regard to the amount of restitution ordered. "Crime victims have a constitutional right to restitution." *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006), citing Const 1963, art 1, § 24. Section 16(2) of the Crime Victim's Rights Act, MCL 780.766(2) provides, in relevant part:

> [W]hen sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other

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edly unlike a restitution hearing where a trial court considers evidence. However, a trial court may consider evidence not admitted at trial during sentencing hearings, especially when scoring various offense variables. Further, as defendant acknowledges, the Michigan Supreme Court has held that a trial court may order restitution without a hearing and rely on out-of-court statements such as the presentence information report or letters. See *People v Grant*, 455 Mich 221, 242; 565 NW2d 389 (1997). Thus, the Court has never held that a trial court only can consider evidence admissible under the Michigan Rules of Evidence when determining the proper amount of restitution as part of a defendant's sentence.

[2] Nearly identical language in the Federal Rules of Evidence states that the rules of evidence do not apply to "sentencing." FRE 1101. Federal cases interpreting this rule likewise conclude that the rules of evidence do not apply to restitution hearings. See *United States v Gushlak*, 728 F3d 184, 197 n 10 (CA 2, 2013) ("The Federal Rules of Evidence do not apply at sentencing proceedings. Fed.R.Evid 1101(d)(3). Expert testimony in restitution cases is therefore not governed by the strictures of Fed.R.Evid. 702, nor, it follows, by authorities interpreting that Rule[.]"); see also *United States v Ogden*, 685 F3d 600, 606 (CA 6, 2012) (stating that while the defendant argued "that the district court should have admitted the chat logs during his restitution hearing," he "cites nothing in the record to suggest the district court actually excluded the chat logs from the restitution hearing" and even if defendant "assumes the court did so, he assumes too much: The rules of evidence do not apply during sentencing proceedings. *See* Fed.R.Evid. 1101(d). His argument is meritless.").

> penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

"The use of the word 'shall' indicates that the directive to order restitution is mandatory, unless the exception applies." *People v Bell*, 276 Mich App 342, 347; 741 NW2d 57 (2007). "Restitution encompasses only those losses that are easily ascertained and are a direct result of a defendant's criminal conduct," and "[t]he prosecution must prove the amount of the victim's loss by a preponderance of the evidence." *Gubachy*, 272 Mich App at 708.

In the instant case, the evidence supported the trial court's order of restitution. At trial, the victim testified that the separator was in workable condition and was in good shape before the crime. He also testified that defendant damaged the separator in his attempt to transport it. The victim's grandson likewise testified that the separator was functioning before defendant's actions, it did not have holes, and it was unbent. He testified that the separator was damaged when defendant was loading or unloading it. The victim submitted photographs of the damage to a repair company and that company calculated an estimated cost of $4,580 to repair the equipment. Defendant did not submit any evidence to counter this testimony or demonstrate that this figure inaccurately represented the cost of repairing the equipment.

Defendant has not shown that the trial court's findings of fact were clearly erroneous because we are not "left with the definite and firm conviction that a mistake has been made." *Allen*, 295 Mich App at 281. A preponderance of the evidence supports the trial court's

finding that the victim suffered a loss of $4,580 as a result of defendant's criminal conduct.

III. CONCLUSION

The trial court correctly ordered restitution. There are no errors requiring reversal or remand. We affirm.

METER, P.J., and SERVITTO, J., concurred with and RIORDAN, J.

AUTO-OWNERS INSURANCE COMPANY v ALL STAR LAWN SPECIALISTS PLUS, INC

Docket No. 307711. Submitted to special panel September 5, 2013, at Lansing. Decided December 3, 2013, at 9:00 a.m. Leave to appeal sought.

Joseph M. Derry initially brought an action in the Macomb Circuit Court against All Star Lawn Specialists Plus, Inc., and Jeffrey A. Harrison (a coowner of All Star), seeking damages for injuries sustained while working on a lawn maintenance crew operated by Harrison when a leaf vacuum machine that Derry was using to load leaves into a truck owned by All Star fell over, causing part of the machine to strike him. Derry claimed that Harrison had negligently failed to secure the machine to the truck. Derry also filed an action in the Macomb Circuit Court against Auto-Owners Insurance Company, seeking no-fault benefits under a commercial automobile insurance policy issued by Auto-Owners to All Star that insured the truck. Auto-Owners then brought the present action in the Macomb Circuit Court against All Star, Harrison, and Derry, seeking a declaratory judgment to determine the parties' rights and obligations under the automobile policy and two other policies issued by Auto-Owners to All Star, a commercial general liability policy and a workers' compensation policy. The court, John C. Foster, J., denied Auto-Owners' motion for summary disposition and granted summary disposition in favor of Derry, holding that Derry was an independent contractor at the time of his injury and that he was not an employee within the meaning of any of the insurance contracts. The court held that Derry was not entitled to coverage under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., and, therefore, not entitled to coverage under the workers' compensation policy, that the general liability policy provided coverage for Derry's negligence claim against All Star and Harrison, and that the automobile policy provided coverage for Derry's claim against Auto-Owners for no-fault benefits. Auto-Owners appealed. The Court of Appeals, JANSEN, P.J., and SAWYER and SERVITTO, JJ., affirmed in part, reversed in part, and remanded the case to the circuit court, concluding that when determining employee status under the WDCA for purposes of this case, MCL 418.161(1)(*l*) and (n) had to be read

together as separate and necessary qualifications. Because Derry was an employee within the meaning of subdivision (*l*), it was necessary to determine whether he was also an employee under subdivision (n), which sets forth three criteria for determining whether a person performing services for an employer qualifies as an independent contractor rather than an employee. *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569 (1992), held that if a person meets any of the three statutory criteria in MCL 418.161(1)(n), that person is an independent contractor and not an employee. The panel was required under MCR 7.215(J) to follow *Amerisure*. Had it not been obligated to do so, the panel would have reached a different interpretation of the statute and held that all three criteria must be met in order to determine that a person is an independent contractor. 301 Mich App 515 (2013). The Court of Appeals convened a special panel to resolve the conflict between this case and *Amerisure* and vacated part I, the second paragraph of part II, and the second paragraph of part III of its prior opinion in this case. 301 Mich App 801 (2013).

After consideration by the special panel, the Court of Appeals *held*:

1. MCL 418.161(1)(n) defines "employee" in relevant part as every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to the WDCA. In in its interpretation of the statute, *Amerisure* ignored the Legislature's use of the word "and," which indicated the legislative intent that all three criteria must be satisfied for the exception to the definition of "employee" in subdivision (n) to apply. *Amerisure* was overruled.

2. The trial court erred by entering summary disposition for Derry. There was no dispute that Derry was an employee as defined by MCL 418.161(1)(*l*). All three criteria in MCL 418.161(1)(n) must be met, however, before an individual is divested of employee status. Because Derry met only two of the three criteria, he remained an employee at the time of his injury, and his exclusive remedy was under the WDCA. Accordingly, only the workers' compensation policy provided coverage. The general liability and automobile policies included workers' compensation exclusions, and Auto-Owners had no obligation to provide coverage under those policies.

Reversed.

BORRELLO, J., dissenting, would have concluded that a person who does not meet the three criteria set forth in MCL 418.161(1)(n) cannot be considered an employee for purposes of the WDCA rather than concluding, as the majority did, that the criteria must be satisfied in order for a person to be divested of his or her employee status and therefore considered an independent contractor. The WDCA does not refer to "independent contractors," nor does it have a divesting provision. Reading MCL 418.161(1)(*l*) and (n) together indicated that a person is an employee under the WDCA if that person is in the service of another, under any contract of hire, and (1) does not maintain a separate business, (2) does not hold himself or herself out to render services to the public, and (3) is not an employer subject to the act. This was the correct result reached in *Amerisure*, which should not have been overruled. There was no dispute that Derry was in the service of All Star and under a contract of hire; at the same time, however, he maintained a separate business and held himself out to render services to the public. The inquiry should have ended there. Because Derry could not satisfy all three criteria under MCL 418.161(1)(n), he could not claim employee status under the act, and the trial court's holding that Derry was not an employee should have been affirmed.

WORKERS' COMPENSATION — EMPLOYEE STATUS — INDEPENDENT CONTRACTOR STATUS.

Benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., constitute an employee's exclusive remedy against his or her employer for a personal injury or occupational disease; MCL 418.161(1)(*l*) defines "employee" in relevant part as every person in the service of another, under any contract of hire, express or implied; MCL 418.161(1)(n) defines "employee" in relevant part as every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to the WDCA; all three criteria in MCL 418.161(1)(n) must be met before an individual who has employee status under MCL 418.161(1)(*l*) is divested of that status.

Kallas & Henk PC (by *Constantine N. Kallas* and *Michele L. Riker-Semon*), for Auto-Owners Insurance Company.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Thomas, Garvey, Garvey & Sciotti* (by *Daniel P. Beck*), for Joseph M. Derry.

Before: K. F. KELLY, P.J., and CAVANAGH, O'CONNELL, FORT HOOD, BORRELLO, STEPHENS, and M. J. KELLY, JJ.

K. F. KELLY, P.J. Pursuant to MCR 7.215(J), this Court convened a special panel to resolve the conflict between the prior opinion in this case, *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 301 Mich App 515; 838 NW2d 166 (2013), vacated in part by *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 301 Mich App 801 (2013), and *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569; 493 NW2d 482 (1992).[1] The issue that we must decide concerns the interpretation of § 161(1) of the Worker's Disability Compensation Act (WDCA),[2] MCL 418.161(1), which specifically defines who is an "employee" under the WDCA. We agree with the analysis of the prior opinion in this case and now overrule *Amerisure*, which held that if any one of the three statutory criteria in MCL 418.161(1)(n) are met, the person is an "independent contractor" and not an "employee." *Amerisure*, 196 Mich App at 574.[3] We instead adopt the reasoning in the prior opinion in this case and conclude that all three of the criteria in MCL 418.161(1)(n) must be met before an individual is divested of employee status. Because he met only two of the three criteria, we conclude that

[1] Specifically, we ordered "that the following portions of the opinion in this case released on July 9, 2013, are vacated: (I) Section I in its entirety, (2) Section II, paragraph 2, and (3) Section Ill, paragraph 2." *Auto-Owners*, 301 Mich App at 801.

[2] MCL 418.101 *et seq*.

[3] At the time *Amerisure* was decided, the applicable provision was codified as MCL 418.161(d), as amended by 1985 PA 103.

defendant Joseph M. Derry enjoyed the status of an employee rather than that of an independent contractor at the time he was injured performing work for defendant All Star Lawn Specialists Plus, Inc. As such, Derry's exclusive remedy for injuries he sustained while working for All Star was under the WDCA. Accordingly, of the three insurance policies issued by plaintiff Auto-Owners Insurance Company—workers' compensation, commercial general liability, and commercial automobile—only the workers' compensation policy provided coverage. Auto-Owners had no obligation to provide coverage under the remaining two policies because each contained exclusions for workers' compensation claims. Therefore, we reverse the trial court's order granting summary disposition in favor of Derry.

I. BASIC FACTS AND PROCEDURAL HISTORY

In a declaratory judgment action arising under the WDCA, Auto-Owners appealed as of right an order denying its motion for summary disposition and granting summary disposition in favor of Derry. Our Court provided the relevant background information in its previous opinion:

> This case arose after Derry was injured while working on a lawn crew of defendant All Star Lawn Specialists Plus, Inc. (All Star). At the time of his injury, Derry was performing a "fall cleanup" at an apartment complex and was using a leaf vacuum machine to suck up leaves into a truck. He sustained injuries after the leaf vacuum machine tipped over, causing its boom to strike him. It is undisputed that at the time of the incident, the mechanism attaching the leaf vacuum machine to the truck was unlatched or unlocked, and that if the latch had been "locked down," the machine would not have tipped over.
>
> Derry filed a personal injury action against All Star and Jeffrey Harrison, who coowned and worked for All Star,

claiming that Harrison negligently failed to lock the leaf vacuum machine to the truck, which caused the machine to tip over and strike him. Derry also filed an action against Auto-Owners, who insured All Star under a commercial automobile insurance policy, seeking no-fault insurance benefits for his injuries. Thereafter, Auto-Owners, who also insured All Star under commercial general liability and workers' compensation insurance policies filed this cause of action to determine the parties' right to insurance coverage under the various insurance policies, which was largely dependent on Derry's status as an employee or independent contractor at the time of his accidental injury.

Auto-Owners subsequently moved for summary disposition under MCR 2.116(C)(10), arguing that, as a matter of law, Derry was an "employee" of All Star at the time of his injuries as defined under § 161(1) of the Worker's Disability Compensation Act (WDCA), MCL 418.161(1), and thus, the Auto-Owners workers' compensation insurance policy was the appropriate policy to provide coverage for Derry's injuries. Derry argued that he was not an employee of All Star at the time of the injuries, but was an "independent contractor," and, thus, the workers' compensation policy did not apply to provide coverage for his injuries. Derry argued instead that the general liability insurance policy provides coverage for his negligence claim against All Star and the commercial automobile policy provides coverage for his claim for personal injury protection benefits under Michigan's no-fault vehicle insurance act. The trial court, in denying Auto-Owners' motion for summary disposition and granting summary disposition in favor of Derry, held that Derry was not an employee under the workers' compensation act, MCL 418.161(1), or within the meaning of any of the insurance contracts. The court then concluded that (1) Derry was not entitled to coverage under the workers' compensation act, and thus, was not entitled to recover under Auto-Owners' workers' compensation insurance policy, (2) Auto-Owners' general liability insurance policy provided coverage for Derry's negligence claim against All Star and Harrison, and (3) Auto-Owners' commercial automobile insurance policy provided coverage for

> Derry's claim for no-fault benefits. This appeal by Auto-Owners ensued. [*Auto-Owners*, 301 Mich App at 520-522.]

We affirmed the trial court's finding that Derry was not an employee in part because of our obligation to defer to the holding in *Amerisure*. We stated that, were it not for the constraints of MCR 7.215(J), we would have held that all three of the criteria in MCL 418.161(1)(n) had to be satisfied for a person otherwise fitting the definition of "employee" to be removed from that status because he or she is an independent contractor.

II. ANALYSIS

A. THE STATUTE

Derry's status as employee for purposes of the WDCA is critical because if he qualifies as an "employee" under the WDCA, he is entitled to compensation thereunder, but also as limited by it. MCL 418.131(1) (stating that except when an intentional tort is involved, benefits provided by the act constitute an employee's "exclusive remedy against the employer for a personal injury or occupational disease").

MCL 418.161(1) defines "employee," in relevant part, as:

> (*l*) Every person in the service of another, under any contract of hire, express or implied . . . .
>
> * * *
>
> (n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

There is no dispute that Derry was an "employee" as defined by MCL 418.161(1)(*l*). However, MCL 418.161(1)(*l*) and (n) "must be read together as separate and necessary qualifications in establishing employee status." *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 573; 592 NW2d 360 (1999). Thus, the mere fact that Derry qualifies as an employee under subdivision (*l*) does not end the inquiry. At issue is whether all three of the statutory criteria in subdivision (n)—that an individual "does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act"—must be shown for an individual to lose the employee classification (as the panel in *Auto-Owners* would have concluded) or whether just one of any of the three criteria will suffice (as the panel in *Amerisure* concluded).

B. THE *AMERISURE* CASE

In *Amerisure*, the defendant had a workers' compensation policy through the plaintiff insurer. Following an audit, the insurer determined that the defendant had not paid premiums for a number of its workers. The defendant argued that those workers were not "employees," but were "independent contractors." *Amerisure*, 196 Mich App at 570-571. On appeal of the trial court's finding that six of the individuals were not employees, the insurer argued that "that the correct interpretation of § 161(1)(d)[4] is that a person is an employee if he performs a service in the course of business of an employer, *unless* (1) the person maintains a separate business, (2) holds himself out to and renders service to the public, and (3) is an employer subject to the act" and, therefore, all three of the criteria must be met for

[4] Now § 161(1)(n).

an individual to be considered an independent contractor. *Id*. at 573. This Court rejected the insurer's approach because "[p]laintiff has disregarded the use of the word 'not.' " *Id*. The Court explained:

> The plain and ordinary meaning of the language of the statute involved in this case is clear. The latter portion of the statute is drafted in the negative, employing the word "not" before each provision: "provided the person in relation to this service does *not* maintain a separate business, does *not* hold himself or herself out to and render service to the public, and is *not* an employer subject to this act." By so employing the word "not," the Legislature intended that once one of these three provisions occurs, the individual is not an employee. Thus, each provision must be satisfied for an individual to be an employee. If the Legislature had intended otherwise, it would have drafted the statute as plaintiff suggests. [*Id*. at 574.]

The panel's interpretation of the statute and its consideration of the economic-reality test resulted in a conclusion that the six individuals were independent contractors for whom the defendant owed no workers' compensation premiums. *Id*. at 574-575.

C. THE *AUTO-OWNERS* CASE

As previously stated, the trial court in the underlying case concluded that Derry was an independent contractor. Although Derry was an "employee" as defined in MCL 418.161(1)(*l*), he did not meet the statutory criteria for being an "employee" under subsection (1)(n). The panel recognized that it was bound by *Amerisure*, but disagreed with *Amerisure*'s interpretation of the statute:

> While the wording of the statute in the negative does render it more difficult to properly read, we nonetheless conclude that the *Amerisure* Court focused on the wrong word in analyzing the statute. Instead of focusing on the

> word "not," the panel should have focused on the word "and." That is, the *Amerisure* Court erroneously concluded that a person is not an employee if any of the three criteria are met. But that overlooks the Legislature's use of the word "and" in linking the three criteria and the purpose behind the provision in the first place. The Legislature was endeavoring to define the difference between an "employee" (who is covered under the act) and an "independent contractor" (who is not covered under the act). So the Legislature wrote a definition of "employee" in the negative, saying essentially that an "employee" is a person who, with respect to the service provided to the employer, is not an independent contractor. It then lists the three criteria to determine if a person is an independent contractor, all of which must be met (hence the use of the word "and" in the listing). [*Auto-Owners*, 301 Mich App at 527.]

The panel examined the plurality opinion in *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005), for guidance on the interpretation of the statute:

> . . . Chief Justice TAYLOR restates the statute in the positive, avoiding the cumbersome negative definition: "[Section] 161(1)(n) provides that every person performing a service in the course of an employer's trade, business, profession, or occupation is an employee of that employer. However, the statute continues by excluding from this group any such person who: (1) maintains his or her own business in relation to the service he or she provides the employer, (2) holds himself or herself out to the public to render the same service that he or she performed for the employer, and (3) is himself or herself an employer subject to the WDCA." *Reed*, 473 Mich at 535 (opinion by TAYLOR, C.J.). Thus, the plurality opinion in Reed suggests that all three conditions must be met in order for the person not to be an employee. [*Auto-Owners*, 301 Mich App at 527-528.]

In addition to this insight from the Supreme Court, the prior panel believed that such an interpretation was more in keeping with the legislative intent of the WDCA, which was

> (1) to make it clear that a person employing an independent contractor does not have to provide workers' compensation coverage to that independent contractor, (2) to provide a definition that distinguishes between an employee and an independent contractor so that, either by accident or subterfuge, a person who should be covered as an employee under the act is not classified as an independent contractor and escapes coverage, and (3) to make it clear that a person can be an employee of one employer, while maintaining their own side business as an independent contractor. [*Id*. at 529.]

The panel identified situations in which an individual would lose his or her employee classification for merely picking up additional work, such as a music teacher who teaches private lessons or a secretary who offers typing services during off hours. The panel rejected the idea that these individuals should lose their protection under the WDCA merely because they held their services out to the public. *Id*. at 529-530.

Turning to the case before it, the panel concluded that Derry qualified as an independent contractor at the time of his injury because he held himself out to the public as someone who performed lawn maintenance and snow removal. *Id*. at 531-534. However, the panel also noted its dissatisfaction with that result:

> But, again, we reiterate that we only reach this conclusion because we are obligated to follow the erroneous *Amerisure* opinion. MCR 7.215(J). Were we free to do so, we would hold that § 161(1)(n) requires that, for a person to be classified as an independent contractor rather than an employee, all three of the factors listed in the statute must be met, rather than just one. And, while Derry does meet at least one of the factors, holding his service out to the public, he also fails to meet at least one of the factors, [in that] he is not an employer under the [workers'] compensation act. Therefore, while we are constrained to conclude that Derry is an independent contractor under the *Ameri-*

> *sure* interpretation, if we were free to apply our own interpretation of the statute, we would conclude that Derry is an employee of All Star because all three requirements under the statute to be considered an independent contractor were not met. [*Id*. at 534.]

D. RESOLVING THE CONFLICT

After thoroughly reviewing the statute and both cases, we conclude that *Amerisure* was wrongly decided and that the principles of statutory construction were inappropriately applied.

"Statutory interpretation is a question of law that is considered de novo on appeal." *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). "When construing a statute, we consider the statute's plain language and we enforce clear and unambiguous language as written." *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013). "If the language is clear and unambiguous, the statute must be enforced as written without judicial construction." *Petipren v Jaskowski*, 494 Mich 190, 201-202; 833 NW2d 247 (2013).

In concluding that MCL 418.161(1)(n) sets forth three separate, self-sufficient bases for regarding a person as an independent contractor, the *Amerisure* Court noted that the applicable subdivision first elaborated on the definition of "employee," then set forth opposing language consisting of three provisions, each introduced with the word "not" ("does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer"), and concluded that this indicated the legislative intention "that once one of these three provisions occurs, the individual is not an employee." *Amerisure*, 196 Mich App at 574. In so doing, the *Amerisure* Court ignored the Legislature's use of the word "and."

The Legislature is presumed to know the rules of grammar. *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 414; 766 NW2d 874 (2009). "When given its plain and ordinary meaning, the word 'and' between two phrases requires that both conditions be met." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428; 766 NW2d 878 (2009). "And" is a conjunction, meaning "with," "as well as," or "in addition to." *Id*. In contrast, " 'or' is a disjunctive term indicating a choice between alternatives . . . ." *Titan Ins Co v State Farm Mut Auto Ins Co*, 296 Mich App 75, 85; 817 NW2d 621 (2012). Although this distinction is often overlooked, including in statutes, it should be observed when doing so does not "render the statute dubious." *Id*. at 85-86.

In this case, treating the use of "and" in MCL 418.161(1)(n) as linking the three criteria for identifying independent contractors does not render the statute dubious. But reading the statute as if the Legislature had used "or" instead of "and," which seems to be the approach that *Amerisure* took, produces results that might fairly be so described. If only one of the three criteria has to be met to yield an independent contractor, then that status would apply to a full-time secretary who advertised to the public, and in fact performed, freelance typing outside that full-time employment. Likewise, it would apply to a school music teacher who supplements his or her income by advertising and providing music lessons on the side. Those situations present an employee in a given line of work maintaining a side business offering and performing similar work, but operating alone in that capacity, not as an employer of others. Only by adding the status of "employer" to an employee who maintains a side business in the same line of work did the Legislature avoid the "dubious" result whereby a bit of moonlighting causes an em-

ployee to lose the protections, and avoid the limitations, of the WDCA in connection with his or her regular employment. The prior panel in *Auto-Owners* properly emphasized that the three provisions are connected with the word "and," indicating the legislative intention that all three be satisfied for that exception to the definition of "employee" to apply.

Therefore, we now hold that all three of the statutory criteria in MCL 418.161(1)(n) must be met before an individual is divested of "employee" status. Because Derry met only two of the three criteria, we conclude that he remained an employee at the time of his injury and that his exclusive remedy was under the WDCA. Accordingly, only the workers' compensation policy provides coverage. The commercial general liability and commercial automobile policies included workers' compensation exclusions, and Auto-Owners had no obligation to provide coverage under those policies. The trial court erred by entering summary disposition for Derry.

Reversed.

CAVANAGH, O'CONNELL, STEPHENS, JJ., concurred with K. F. KELLY, P.J.

BORRELLO, J. (*dissenting*). My colleagues in the majority have aptly stated the facts and procedural history in this case; thus they need not be repeated here. As the majority correctly states, the issue presented to this conflict panel is whether under the Michigan Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., defendant Joseph M. Derry was an "employee" of defendant All Star Lawn Specialists Plus, Inc., at the time he was injured. Resolution of this issue turns on the interpretation and application of MCL 418.161(1), a provision of the WDCA that defines when an individual

should be considered an employee under the act. Contrary to the majority's reading of § 161(1), I would conclude that a person who does not meet all three of the criteria set forth in § 161(1)(n) cannot be considered an employee for purposes of the act. This contrasts with the majority's conclusion that the criteria must be satisfied in order for a person to be "*divested*" of his or her employee status and therefore considered an independent contractor. The WDCA does not refer to "independent contractors," nor does it contain a divesting provision. Therefore, I respectfully dissent.

I agree with the majority that resolution of this issue requires the interpretation and application of § 161(1) of the WDCA, which provides in relevant part as follows:

> As used in this act, "employee" means:
>
> * * *
>
> (*l*) Every person in the service of another, under any contract of hire, express or implied . . . .
>
> (n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act. [MCL 418.161(1).]

I further agree that subdivisions (*l*) and (n) " 'must be read together as separate and necessary qualifications in establishing employee status.' " *Ante* at 295, quoting *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 573; 592 NW2d 360 (1999). Indeed, one of the fundamental tenets of statutory interpretation is that statutory provisions must be read together as a whole and not in isolation. See *In re Moiles*, 303 Mich App 59, 68;

840 NW2d 790 (2013). As then Justice TAYLOR explained in *Hoste*, this holds true with respect to subdivisions (*l*) and (n) of § 161(1):

> [Sections 161(1)(*l*) and 161(1)(n)][1] . . . *must be read together as separate and necessary qualifications in establishing employee status*. . . . [I]t is plain that every individual claiming employee status under [subdivision (*l*)] must also be examined under [subdivision (n)]. Said another way, once an association with a private employer is found under [§ 161(1)(*l*)], the characteristics of that association must meet the criteria found in [§ 161(1)(n)]. [*Hoste*, 459 Mich at 573 (emphasis added).]

Reading subdivisions (*l*) and (n) together indicates that a person is an "employee" under the WDCA when that person is "in the service of another, under any contract of hire" and the person:

(1) does not maintain a separate business,

(2) does not hold himself or herself out to render services to the public, and

(3) is not an employer subject to the WDCA.

This was the precise and correct result reached by this Court in *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569, 574; 493 NW2d 482 (1992), wherein this Court explained that "each provision [in MCL 418.161(1)(n)] must be satisfied *for an individual to be an employee*." (Emphasis added.)

There is no dispute that Derry was in the service of All Star and under a contract of hire; however, as the majority correctly notes, at the same time Derry maintained a separate business and held himself out to render services to the public. The inquiry should have

[1] At the time of the injury in *Hoste*, what is now subdivision (*l*) was codified as subdivision (b) and what is now subdivision (n) was codified as subdivision (d). See 1985 PA 103.

ended there. Derry could not satisfy all three criteria under MCL 418.161(1)(n); therefore, he could not claim employee status under the act.

Accordingly, I reject the interpretation given by the prior panel in this case and accepted by the majority. I would therefore affirm the trial court's holding that Derry was not an employee under the WDCA.

FORT HOOD, and M. J. KELLY, JJ., concurred with BORRELLO, J.

BUREAU OF HEALTH PROFESSIONS v SERVEN

Docket No. 311939. Submitted November 7, 2013, at Lansing. Decided December 3, 2013, at 9:05 a.m.

The Michigan Bureau of Health Professions brought an administrative complaint against Bruce Devere Serven, D.C., before the Board of Chiropractic Disciplinary Subcommittee of the Department of Licensing and Regulatory Affairs, in connection with an independent chiropractic examination Serven conducted at the request of State Farm Insurance Company. The patient Serven examined had been injured in a 2004 car accident and had received chiropractic treatment at a facility called HealthQuest. Without reviewing the HealthQuest treatment records, Serven concluded that the patient's physical complaints were not caused by the accident and did not disable him from working, leading State Farm to terminate the patient's benefits. The complaint alleged that Serven's failure to review the HealthQuest records constituted negligence under MCL 333.16221(a) and that Serven's comment to a state investigator that HealthQuest had "a track record of performing unnecessary treatment" constituted a lack of good moral character under MCL 333.16221(b)(*vi*). After an administrative hearing, the hearing referee concluded that the complaint should be dismissed, but the disciplinary subcommittee disagreed and placed Serven on probation for one year. Serven appealed.

The Court of Appeals *held*:

1. The disciplinary subcommittee erred by finding Serven negligent under MCL 333.16221(a) because the duty of care he owed was not to the patient or to HealthQuest but to State Farm, and there was no evidence that Serven violated his duty to conduct an independent chiropractic examination.

2. Serven's isolated comment regarding HealthQuest's track record of performing unnecessary treatment did not constitute behavior that was unfair, dishonest, and secretive under MCL 338.41(1). Accordingly, the disciplinary subcommittee's ruling that Serven lacked good moral character was not supported by competent, material, and substantial evidence on the entire record.

Reversed and remanded to the disciplinary subcommittee to expunge Serven's record in this matter.

ADMINISTRATIVE LAW — PUBLIC HEALTH — LICENSED CHIROPRACTORS — INDEPENDENT CHIROPRACTIC EXAMINATIONS — NEGLIGENCE — DUTY.

A person who conducts an independent chiropractic examination owes a duty of care to the entity that requested it; the only duty the examiner owes to the examinee is to perform the examination in a manner that does not cause the examinee physical harm (MCL 333.16221(a)).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Robert J. Jenkins*, Assistant Attorney General, for petitioner.

Garan Lucow Miller, PC (by *Boyd E. Chapin, Jr.*, and *Caryn A. Gordon*) for respondent.

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

RIORDAN, J. Respondent, Bruce Devere Serven, D.C., appeals as of right the final order of the Disciplinary Subcommittee of the Department of the Michigan Board of Chiropractic, in this action that petitioner, the Bureau of Health Professions, initiated. On the basis of the subcommittee's finding of negligence, MCL 333.16221(a), and a lack of good moral character, MCL 333.16221(b)(*vi*), respondent was placed on probation for one year. We reverse and remand.

I. FACTUAL BACKGROUND

State Farm Insurance Company contacted respondent to request that he perform an independent chiropractic examination (ICE) of a patient, AE, who was receiving chiropractic treatment. The patient was in an automobile accident in 2004 and sought chiropractic treatment from a facility called HealthQuest in 2006.

Respondent agreed to perform the ICE, reviewed all the materials State Farm gave him (which included the

patient's previous medical records but not the chiropractic records from HealthQuest), took a patient history from AE, and physically examined AE. Further, as part of that examination, respondent interviewed AE about the treatment HealthQuest provided to him. Respondent subsequently generated a written report, concluding that the patient was not disabled from working as the result of any injuries resulting from the accident. He also concluded that AE's physical complaints were not causally related to the accident. He noted in the report that he had not reviewed AE's HealthQuest records.

State Farm then cut off AE's medical benefits. After State Farm denied further claims for payment submitted by HealthQuest, Salvio Cozzetto, a chiropractor and part owner of HealthQuest, filed a complaint against respondent, claiming that he had possibly harmed the patient's health. After an investigation, the Attorney General, on behalf of petitioner, filed an administrative complaint against respondent, claiming that his behavior constituted negligence under MCL 333.16221(a) and incompetence under MCL 333.16221(b)(*i*) of the Public Health Code. Petitioner also contended that in an interview with one of its investigators, respondent commented that HealthQuest "had a track record of performing unnecessary treatment." The Attorney General argued this statement constituted a lack of good moral character in violation of MCL 333.16221(b)(*vi*) of the Public Health Code.

An administrative hearing determined that respondent had not behaved negligently or incompetently and had not displayed a lack of good moral character. Upon review, however, the disciplinary subcommittee disagreed and issued a final decision. The subcommittee found that respondent's conduct in performing an ICE

and issuing a written report without first reviewing HealthQuest's chiropractic records was negligent in violation of MCL 333.16221(a) of the Public Health Code. The subcommittee also found that it was "quite likely" that respondent made the comment about HealthQuest's "track record," and therefore violated MCL 333.16221(b)(*vi*). However, the subcommittee agreed that respondent was not incompetent under MCL 333.16221(b)(*i*). Respondent was placed on probation for one year. Respondent now appeals.

II. STANDARD OF REVIEW

"We review an administrative agency's final decision to determine whether it is authorized by law and supported by competent, material, and substantial evidence on the whole record." *Cogan v Bd of Osteopathic Med & Surgery*, 200 Mich App 467, 469; 505 NW2d 1 (1993); see also Const 1963, art 6, § 28; *Dep't of Community Health v Anderson*, 299 Mich App 591, 597; 830 NW2d 814 (2013) (quotation marks and citation omitted) ("[I]n cases in which a hearing is required, as in this case, appellate review includes whether the agency's final decisions, findings, rulings, and orders are supported by competent, material and substantial evidence on the whole record."). Substantial evidence will be found when the decision is supported by evidence that a reasonable person would accept as sufficient. *Cogan*, 200 Mich App at 469-470. It is "more than a mere scintilla, but somewhat less than a preponderance." *Id*. at 470.

III. NEGLIGENCE

Respondent first contends that the disciplinary subcommittee erred by finding him negligent under

MCL 333.16221(a) because he owed no duty of care to the patient or to HealthQuest. We agree.

MCL 333.16221(a) authorizes disciplinary proceedings when there has been

> [a] violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition that impairs, or may impair, the ability to safely and skillfully practice the health profession.

In the instant case, State Farm asked respondent to perform an ICE of the patient, and respondent agreed. Therefore, the duty respondent owed was to perform an ICE for State Farm. He owed no duty to HealthQuest. The only duty respondent owed to the patient was "to perform the examination in a manner not to cause physical harm to the examinee." *Dyer v Trachtman*, 470 Mich 45, 50; 679 NW2d 311 (2004). Neither party has alleged that respondent physically harmed the patient in any way.

Moreover, respondent was not obligated to conduct his examination in a manner that preserved the patient's benefits or ensured that HealthQuest received payment. His role was to fulfill the duty he owed to State Farm—to act as an independent chiropractic examiner. There was no evidence that respondent failed to fulfill that duty, as he examined AE and the records provided to him. Respondent then formed an opinion based on his review, his examination, and his interview of the patient, and generated his report. Further, he disclosed to State Farm that he had neither received nor reviewed records from HealthQuest.[1]

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[1] Notably, petitioner failed to establish that respondent could have legally requested the records from HealthQuest directly.

"In the particularized setting of an IME, the physician's goal is to gather information for the examinee or a third party for use in employment or related financial decisions. It is not to provide a diagnosis or treatment of medical conditions." *Dyer*, 470 Mich at 51. Because respondent's only duty apart from not causing the patient harm was to act as an independent chiropractic examiner for State Farm, he had no obligation to provide a diagnosis or treatment of medical conditions to AE. Because there is no evidence that respondent violated this duty in any way, the subcommittee's finding that respondent behaved negligently under MCL 333.16221(a) is in error.

IV. GOOD MORAL CHARACTER

Respondent also argues that the disciplinary subcommittee erred by finding that he exhibited a lack of good moral character. The disciplinary subcommittee found that respondent was subject to discipline under MCL 333.16221(b)(*vi*), for "[l]ack of good moral character." The subcommittee found that respondent's bias against HealthQuest was evident in his comment that HealthQuest had a track record of performing unnecessary treatment, and that respondent commented on HealthQuest's treatment even though he failed to examine the records of that treatment.

Contrary to the subcommittee's finding, none of this conduct constituted a lack of good moral character. Even assuming respondent made the "track record" comment, this one isolated comment did not constitute a lack of good moral character. Good moral character is defined as "the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner." MCL 338.41(1). An alleged comment during an informal interview that HealthQuest

had a track record of performing medically unnecessary treatment does not constitute behavior that was unfair, dishonest, *and* secretive. In fact, respondent was attempting to be candid with petitioner's investigator, as he honestly communicated his opinion, based on his experience with HealthQuest. Furthermore, as discussed, respondent did not violate any duty that he had as an independent chiropractic examiner, as he fully complied with his responsibilities in reviewing the records given to him, examining and interviewing AE, and then forming an opinion and issuing a report based on this independent examination.

Therefore, we conclude that the disciplinary subcommittee's ruling of a lack of good moral character was not supported by competent, material, and substantial evidence on the entire record. Const 1963, art 6, § 28; *Cogan*, 200 Mich App at 469.

V. CONCLUSION

The disciplinary subcommittee erred by concluding that defendant violated MCL 333.16221(a) and MCL 333.16221(b)(*vi*). We reverse and remand for the disciplinary subcommittee to expunge respondent's record in this matter. We do not retain jurisdiction.

METER, P.J., and SERVITTO, J., concurred with RIORDAN, J.

HURON MOUNTAIN CLUB v MARQUETTE COUNTY ROAD COMMISSION

Docket No. 309075. Submitted October 1, 2013, at Marquette. Decided December 5, 2013, at 9:00 a.m. Leave to appeal sought.

The Huron Mountain Club (HMC) brought an action in the Marquette Circuit Court against the Marquette County Road Commission, seeking declaratory and injunctive relief after the road commission voted to declare that its prior resolution to abandon a portion of a county road that abuts only the HMC's property was defective and ineffective. The HMC sought to enforce the abandonment and an order quieting title to the road in favor of the HMC. The parties stipulated the intervention of Dan Collins, who has an easement from the HMC to use the road, as a defendant. The road commission sought summary disposition on the basis that the abandonment proceedings had been defective and, therefore, the abandonment should be deemed ineffective. The court, Thomas L. Solka, J., granted summary disposition in favor of the road commission, determining that because the petition for abandonment was not signed by seven freeholders of the township in which the road is located, as required by MCL 224.18(4), the notice required by MCL 224.18(5) and (6) was not given, and the abandonment resolution that was passed failed to include a determination that the abandonment was in the best interests of the public, as required by MCL 224.18(3), the attempted abandonment failed. The HMC appealed.

The Court of Appeals *held*:

1. The trial court did not err by concluding that MCL 224.18(4) requires seven or more freeholders to sign an abandonment petition even though the HMC is the sole owner of the land abutting the road. In § 18(4) the Legislature intended to distinguish the seven freeholders who must bring the petition from the occupants of each parcel abutting the road whose names and addresses must be on a list that accompanies the petition.

2. MCL 224.18(5) does not purport to address who must bring a petition; it addresses when an abbreviated abandonment procedure shall be used as opposed to when a public hearing is required. Section 18(5) provides that if all the owners and occupants of

abutting land signed the petition, the abbreviated procedure is to be used. It also provides that in all other cases, a hearing and notice is required.

3. Once an abandonment petition is initiated pursuant to § 18(4), compliance with the statute is mandatory and the petition must be signed by seven or more freeholders. The HMC failed to comply with § 18(4) because the petition was not signed by seven or more freeholders. The petition was fatally defective.

Affirmed.

HIGHWAYS — COUNTIES — ABANDONMENT OF HIGHWAYS.

Section 18(4) of the county road law provides that a board of county road commissioners may not abandon and discontinue any highway or part of a highway unless at least seven freeholders of the township in which the highway is located sign a petition for abandonment; when those seven or more signers also constitute all the owners and occupants of the land abutting the highway or the portion thereof sought to be abandoned, the abbreviated procedure provided in the first sentence of § 18(5) may be used; when there are owners or occupants of abutting land besides the seven or more freeholders who signed the petition, the procedure provided in the remainder of § 18(5), which requires a public hearing with appropriate notice, must be followed; once an abandonment petition is initiated pursuant to § 18(4), compliance with the statute is mandatory and the petition must be signed by seven or more freeholders (MCL 224.18(4) and (5)).

Steward & Sheridan, PLC (by *Brian D. Sheridan* and *Danielle M. DeRosia*), and *Foster, Swift, Collins & Smith, PC* (by *Michael D. Homier* and *Laura J. Garlinghouse*), for the Huron Mountain Club.

Henn Lesperance PLC (by *William L. Henn*) and *Kendricks, Bordeau, Adamini, Chilman & Greenlee, PC* (by *Ronald E. Greenlee, III*), for the Marquette County Road Commission.

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM. Huron Mountain Club (HMC) appeals as of right the trial court's order granting summary dis-

position to defendant Marquette County Road Commission (Road Commission). On appeal, the HMC argues that the trial court erred by holding that the Road Commission's abandonment of County Road KK (the road) was invalid. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The HMC is a local nonprofit corporation that owns property in Powell Township, Marquette County. The road includes a bridge over the Salmon Trout River, which ends 130 feet northwest of the bridge. Only the HMC owns property that abuts the road. However, the road provides access to forestry lands and to lands owned by other private-property owners, including intervening defendant, Dan Collins, who has an easement from the HMC to use the road.

In 2007, the Road Commission, which had jurisdiction over the road, reduced the load capacity of the bridge because of the bridge's deteriorating condition. The reduction impeded the use of the bridge by heavy vehicles such as the HMC's fire trucks and logging trucks. The Road Commission told the HMC that it could not afford to repair the bridge, but advised the HMC and the owner of some property being logged that they were welcome to make the repairs at their own expense. The HMC and the logging company made repairs sufficient to allow the Road Commission to lift the load restrictions, but the need for significant repairs remained. The Road Commission suggested that the HMC obtain ownership of the bridge and do further repairs and maintenance.

On January 12, 2009, the HMC filed a petition for abandonment of the road. Only the HMC was listed on that portion of the petition listing the "freeholders" requesting abandonment. An attachment to the peti-

tion also stated, "Please note that the Petitioner is the owner of all land abutting the portion of the road sought to be absolutely abandoned and discontinued . . . ."

The Road Commission's board held a public hearing on February 16, 2009. Minutes from the meeting indicate that the Road Commission's engineer/manager, James Iwanicki, "stated that the MDNR [Michigan Department of Natural Resources] has been contacted and they oppose the abandonment because the road serves as an access corridor to an area of Salmon Trout River." Iwanicki recommended that the abandonment request be denied because "although the Road Commission sees the abandonment as a positive, the issue regarding navigable waterways which gives the MDNR the first right of refusal could be an issue."

In spite of these concerns, the Road Commission approved a motion "to abandon the requested portion of County Road KK." A written resolution to that effect was subsequently issued. It provided, "THEREFORE BE IT RESOLVED, that it is in the best interest of the public that the above described County Road KK be absolutely abandoned and discontinued . . . ." On February 17, 2009, Iwanicki sent a letter to the township and the Department of Natural Resources (DNR) advising them of the abandonment and that they had the right to retain the road "under public ownership." There is no indication that either the township or the DNR responded. The resolution was published in a local paper on April 3, 2009. The Road Commission's director of engineering sent a letter to the Michigan Department of Transportation (DOT) informing it of the abandonment, that the bridge of the Salmon Trout River on the abandoned portion was "part of our Bridge inventory," and asking the DOT to remove the bridge from the bridge inventory.

In the summer of 2009, the HMC began making improvements, purchasing a 32-acre property for the purpose of creating a new turnaround and meeting with the Road Commission's director of engineering to determine the size and location of the turnaround. However, some area residents began voicing disagreement with the decision to abandon the road.

The Road Commission put the matter of "CR KK Abandonment" on the agenda for its August 17, 2009, meeting under the heading "UNFINISHED BUSINESS." At the meeting, several people voiced objection to the abandonment. The Road Commission approved a motion to consult with its attorneys about the abandonment. At the Road Commission's September 21, 2009, meeting, pursuant to advice from its counsel, the Road Commission voted to declare that the February 16, 2009, motion to abandon was "defective and ineffective" and "that the abandonment procedure be redone carefully adhering to the state abandonment statute . . . ." A public hearing was set, but was apparently canceled.

On November 30, 2009, the HMC filed the present suit seeking declaratory and injunctive relief enforcing the abandonment and an order quieting title to the road in its favor. The HMC later amended its complaint to assert a takings claim, a procedural due process claim, and one based on promissory estoppel. By stipulation of the parties, Dan Collins intervened as a defendant, claiming that access to his property and to the river would be affected by the abandonment.

The Road Commission moved for summary disposition under MCR 2.116(C)(8) and (10). The Road Commission argued that its abandonment proceedings were defective and, as a result, the abandonment should be deemed ineffective. The Road Commission's claim was

based on the requirements set forth in MCL 224.18 for a board of county road commissioners to abandon a road. Its main argument was premised on subsection 4 of that statute, quoted below, and on the part of subsection 5 also quoted below:

> (4) The board of county road commissioners shall not absolutely abandon and discontinue any highway, or part of a highway, except as provided in this section, upon the written petition of 7 or more freeholders of the township in which the road is sought to be absolutely abandoned and discontinued. The petition for absolutely abandoning and discontinuing a highway shall describe the road in general terms or by any name by which it is known, and if the absolute abandonment and discontinuance of only a portion of a road is asked for, that portion shall be specified. The petition shall be accompanied by a true and correct list of the names and mailing addresses of the occupants of each parcel of land abutting the highway, or portion of the highway, sought to be absolutely abandoned and discontinued, which list shall be certified to under oath by 1 of the persons making or presenting the petition.
>
> (5) If a petition for absolute abandonment and discontinuance of a road or portion of a road contains the signatures of all of the owners of record and occupants of land abutting the road, as ascertained from the records in the office of the register of deeds and the certified list provided for in subsection (4), the board of county road commissioners shall, within 20 days after receiving the petition, subject to subsection (8), determine the advisability of the abandonment and discontinuance and either grant or deny the petition without further proceedings. In all other cases the board shall, within 20 days after receiving a petition, issue a written notice stating the object of the petition and appointing a time and place of hearing, which notice shall be served on the township board of the township in which the road is situated and on the owners of record and occupants of lands through or adjoining which it is proposed to absolutely abandon and discontinue the road, by mailing a copy of the notice by

> first-class mail to the township board of the township in which the road is situated and to the residence of each owner of record or occupant at his or her last known address at least 30 days before the time of hearing. The township board of the township in which the road is situated shall have first priority to retain the property or portion of the property. The board shall also notify the township or municipality within which the road is situated, the state transportation department, and the department of natural resources if the action concerns any county road or portion of a county road that borders on, crosses, is adjacent to, or ends at a lake or the general course of a stream and the proposed action would result in the loss of public access.

The Road Commission argued that subsection 4 controls and, therefore, any petition to abandon must have the signature of seven or more freeholders regardless of the number of abutting landowners. In a separate motion for summary disposition, the Road Commission argued that the HMC lacked standing to bring its action against the Road Commission.

The trial court first determined that "[t]he statute may be confusing on first read, but it is not ambiguous," and concluded that "[s]ubsection (4) provides a statutory bar to abandonment under this statute unless the petition is signed by seven or more freeholders." The court then found that subsection 5 merely provides for an expedited process

> if the petition for abandonment contains the signatures of all owners of record and occupants of land abutting the road (and the court reads this portion of Subsection (5) consistent with Subsection (4)—there must be seven signatures) . . . . In other words, if the petition for abandonment contains [the signatures of] seven or more of all of the owners of records [sic] or occupants abutting the road, then, in that case, there is an expedited process for decision "without further proceeding."

Finding that the Road Commission "acted on a petition containing but one signature," the trial court held: "Even though there is no dispute of fact that the Huron Mountain Club is the owner of record of all of the land abutting the road, nonetheless, the statute requires a total of seven or more petitioners. Therefore, the [Road Commission] acted on a petition that failed to meet the requirements of subsection[s] (4) and (5) of section 18 of the statute." The trial court also found: "Even if the statute is construed to not require seven petitioners in the circumstances of this case, nonetheless the procedure followed by the [Road Commission] failed to conform to the statutory requirements of subsection[s] (3), (5), (6) and (8) of MCL 224.18."

The parts of subsection 5 referred to by the trial court noted that the required notice of the public hearing must be given to the township, the DOT, and the DNR "[i]n all other cases," i.e., where the petition for abandonment does not carry the required signatures. In an affidavit prepared by Iwanicki that the Road Commission attached to its motion for summary disposition, Iwanicki stated that the Road Commission sent a notice of the hearing to the township and the DNR, but not to the DOT or any private parties other than the HMC. He further stated that the affidavit required by MCL 224.18(6) was neither prepared nor attached to any service or notice of the hearing on the petition. The court concluded, "The deficiencies in the petition led to deficiencies in the notice to the township[,] state Transportation Department, and [the DNR]."

In addition, Iwanicki stated in his affidavit that the resolution that was passed did not contain a "best interests of the public" statement and that after the hearing, he signed a resolution containing that statement "in an attempt to comply with MCL 224.18(3)."

But, stated Iwanicki, the Road Commission never adopted or recorded the resolution. Regarding the requirement of subsection 3, the court found as follows:

> The minutes of the February 16, 2009 meeting of the Road Commission fail to contain or identify the terms of the resolution later drafted by Iwanicki after the public meeting. At best, the motion passed at the February 16, 2009 meeting represented a statement of intent to abandon the roadway without actually adopting the necessary resolution language. The minutes contain no finding by the Road Commission, during the public meeting, that abandonment was "in the best interests of the public" as required by the statute.

The trial court determined that because the petition was not signed by seven freeholders, the notice required under subsections 5 and 6 was not given, and the resolution passed at the February meeting failed to include the statutorily mandated "best interests of the public" language, "the attempted abandonment failed by reason of substantial non-compliance with the statute."

The trial court granted summary disposition to the Road Commission, declaring that its abandonment was ineffective. It concluded that, given that the Road Commission did not comply with the statutory requirements, it did not abandon the road and title never passed to the HMC. Because title did not pass, the court dismissed the HMC's quiet title, takings, and due process claims. The court also granted intervening defendant Collins' summary disposition motion, but only to the extent that his arguments matched the Road Commission's regarding the ineffectiveness of the proposed abandonment.[1]

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[1] Collins had raised other issues relating to his easement that were pertinent only if the court had upheld the abandonment, and so were moot at that time.

In its motion for summary disposition, the HMC also argued that it was entitled to reimbursement for funds it had expended in reliance on the abandonment, and the trial court agreed. It ordered that if the parties could not agree on the amount of the reimbursement, on the motion of either party, it would set an evidentiary hearing to determine the proper amount.

The trial court subsequently entered a final judgment, which provided, in relevant part:

> The Plaintiff and the Defendant Road Commission have entered into a settlement agreement which sets forth the resolution of their remaining claims and defenses for damages, while preserving their respective rights to appeal the [Decision and Order on Summary Disposition Motions].

The HMC now appeals as of right.[2]

II. STANDARDS OF REVIEW

Issues concerning the interpretation and application of statutes are questions of law that this Court reviews de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

This Court reviews de novo a trial court's determination on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Although the Road Commission moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), the lower court granted the Road Commission's motion under(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews the motion

[2] At oral argument on appeal, counsel informed the panel that the HMC was reimbursed for its expenditures.

by considering "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012) (quotation marks and citation omitted). This Court "considers only the evidence that was properly presented to the trial court in deciding the motion." *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). "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." *Douglas*, 492 Mich at 256 (quotation marks and citation omitted). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Lakeview Commons*, 290 Mich App at 506 (quotation marks and citation omitted).

III. ANALYSIS

The HMC contends that the trial court erred by concluding that MCL 224.18(4) requires seven or more freeholders to sign an abandonment petition, even though the HMC was the sole owner of land abutting the road. We disagree.

MCL 224.18(4) and (5) provide, in relevant part:

> (4) The board of county road commissioners shall not absolutely abandon and discontinue any highway, or part of a highway, except as provided in this section, upon the written petition of 7 or more freeholders of the township in which the road is sought to be absolutely abandoned and discontinued. The petition for absolutely abandoning and discontinuing a highway shall describe the road in general terms or by any name by which it is known, and if the absolute abandonment and discontinuance of only a portion of a road is asked for, that portion shall be specified.

> The petition shall be accompanied by a true and correct list of the names and mailing addresses of the occupants of each parcel of land abutting the highway, or portion of the highway, sought to be absolutely abandoned and discontinued, which list shall be certified to under oath by 1 of the persons making or presenting the petition.
>
> (5) If a petition for absolute abandonment and discontinuance of a road or portion of a road contains the signatures of all of the owners of record and occupants of land abutting the road, as ascertained from the records in the office of the register of deeds and the certified list provided for in subsection (4), the board of county road commissioners shall, within 20 days after receiving the petition, subject to subsection (8), determine the advisability of the abandonment and discontinuance and either grant or deny the petition without further proceedings. In all other cases the board shall, within 20 days after receiving a petition, issue a written notice stating the object of the petition and appointing a time and place of hearing, which notice shall be served on the township board of the township in which the road is situated and on the owners of record and occupants of lands through or adjoining which it is proposed to absolutely abandon and discontinue the road, by mailing a copy of the notice by first-class mail to the township board of the township in which the road is situated and to the residence of each owner of record or occupant at his or her last known address at least 30 days before the time of hearing. The township board of the township in which the road is situated shall have first priority to retain the property or portion of the property. The board shall also notify the township or municipality within which the road is situated, the state transportation department, and the department of natural resources if the action concerns any county road or portion of a county road that borders on, crosses, is adjacent to, or ends at a lake or the general course of a stream and the proposed action would result in the loss of public access.

In construing a statute, a court must give effect to the Legislature's intent. *Tellin v Forsyth Twp*, 291 Mich

App 692, 700; 806 NW2d 359 (2011). This Court first looks at the language of the statute itself in determining the Legislature's intent. *Id*. at 701. "The Court gives the words of the statutes their plain and ordinary meaning and will look outside the statutory language only if it is ambiguous." *Id*. "[W]here that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005) (quotation marks and citation omitted).

The first sentence of MCL 224.18(4) is clear and unambiguous: a road commission may abandon a highway only when a petition has been submitted by at least seven freeholders of the township. Furthermore, when the first sentence is compared with the last sentence, it is clear that the Legislature intended to distinguish the seven freeholders "of the township" who must bring the petition from the "occupants of each parcel of land abutting the highway, or portion of the highway," whose names and addresses must be on a list that accompanies the petition.

The HMC does not contend that the meaning of the first sentence in subsection 4 is ambiguous or that it means anything other than its clear language. Instead, the HMC argues that MCL 224.18 creates more than one method for commencing an abandonment proceeding. "[A]pparently plain statutory language can be rendered ambiguous by its interaction with other statutes." *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 562; 710 NW2d 59 (2005). The HMC maintains that because § 18(4) of the statute authorizes abandonment proceedings "as provided in this section," and that "section" refers to § 18 in its entirety, subsection 4 is necessarily

subject to subsection 5 and subsection 5 provides an exception to subsection 4. The Road Commission disagrees that subsection 5 provides an exception to subsection 4. It argues that by its clear language, subsection 5 does not purport to address who must bring a petition; it addresses when the abbreviated procedure shall be used as opposed to when a public hearing is required. We agree with the Road Commission's position. Subsection 5 provides that if all the owners and occupants of abutting land signed the petition, the abbreviated procedure is to be used, but "[i]n all other cases," a hearing and notice of it is required.

Reading subsection 4 together with subsection 5 leads to the following: At least seven freeholders (landowners) in the township must sign a petition for abandonment of a road or portion of a road, and, when those seven signers also constitute all the owners and occupants of land abutting the road or portion of a road, the abbreviated procedure may be used. On the other hand, if there are owners or occupants of abutting land besides the seven freeholders who signed the petition, a public hearing with appropriate notice is required. In other words, the statute protects all those with a direct interest in the abandonment of a road so that they have an opportunity to be heard regarding whether they believe the road should be abandoned. That is, if all the owners and occupants of abutting land have signed the petition, it is clear that all directly affected persons are in favor of the abandonment. However, if only some of the owners and occupants of abutting land have signed the petition, the position of all of the directly affected persons on whether to abandon the road will be unknown without a public hearing.

In *Thompson-McCully Quarry Co v Berlin Charter Twp*, 259 Mich App 483; 674 NW2d 720 (2003), this

Court addressed the question whether the portion of the road being abandoned would revert to the abutting landowner or to the township upon abandonment. In that case, the plaintiff petitioned the road commission to abandon the portion of the road that traveled between the plaintiff's properties. *Id*. at 485. The plaintiff owned all the property adjoining the portion of the road to be abandoned. *Id*. This Court examined MCL 224.18(5) and held:

> We conclude that the Legislature intended within the first sentence of MCL 224.18(5) to permit the road commission to simply make a determination, without providing notice or a hearing, regarding abandonment or discontinuance of (1) an entire county road when all landowners and occupants along the entire road sign a petition, or (2) a portion of a county road when all landowners and occupants along that portion sign a petition. [*Id*. at 494.]

We reasoned that, given that the plaintiff owned all the parcels of property along the portion of the road proposed to be abandon, and that the plaintiff signed the petition for abandonment, the circuit court erred by failing to grant the plaintiff's motion for summary disposition under MCR 2.116(C)(10). *Id*. Here, the HMC contends that "[t]he opinion does not reference any other petitioners, which suggests that only the plaintiff signed the petition." The HMC does not argue that this Court should extrapolate any rule from the failure to mention any other petitioners; it only offers that language to show that its interpretation "is consistent with how the statute has been interpreted by other counties." However, the proper procedure for abandonment must be derived from the statutory language, not the practices of any particular road commission or road commissions.

The HMC argues that, "[e]ven if the statute is interpreted to require seven freeholder's signatures

on the Petition, the absence of those signatures is not a material defect that renders the entire abandonment proceeding void—particularly because the Road Commission had already accepted the petition, conducted a public hearing, and approved abandonment." However, in *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 646; 662 NW2d 424 (2003), this Court responded to the plaintiffs' argument that a road commission could not abandon a road under the common-law theory of abandonment by nonuse because MCL 224.18 provides the exclusive means for abandonment. Regarding the plaintiffs' reliance on *Village of Bangor v Bangor Twp*, 324 Mich 665; 37 NW2d 666 (1949), this Court stated:

> In *Bangor*, *supra*, relying on the defendant board of county road commissioners' acknowledgement that the proceedings used in attempting to relinquish its jurisdiction over a bridge located in the Village of Bangor "were not sufficient for the purpose intended," our Supreme Court held that because the "mandatory" requirements of MCL 224.18 were not met by the board, the board retained sole responsibility for maintenance and control of the bridge. *Bangor*, [324 Mich] at 669. In so holding, however, the Court did not determine that a board of county road commissioners is required to follow the procedures set forth in MCL 224.18 in order to affirmatively abandon a roadway under its jurisdiction. Rather, the Court merely determined that *once a board of county road commissioners undertakes to abandon a county road (or bridge) by resolution, compliance with the remaining requirements of MCL 224.18 is mandatory*. [*Ambs*, 255 Mich App at 645-646 (emphasis added).]

Nonetheless, the HMC argues that there is no caselaw stating what defects in an abandonment petition render it effective or ineffective. The HMC contends that *Ambs* and *Bangor* inform us that compliance is mandatory, but neither mentions that it must be "strictly followed,"

and thus, do not indicate what acts of noncompliance might be excusable. We again disagree and hold that once an abandonment petition is initiated pursuant to MCL 224.18(4), compliance with the statute is mandatory and, thus, the abandonment petition must be signed by seven or more freeholders. Given that the petition in this case was not signed by seven freeholders, the petition was fatally defective because the HMC failed to comply with a fundamental requirement of MCL 224.18(4).

The HMC further challenges the trial court's ruling that the Road Commission also failed to give notice to the township, the DNR, and the DOT as required by MCL 224.18(5). Specifically, the HMC argues that notice of the public hearing was unnecessary because the hearing itself was not required. The HMC's argument is dependent upon the validity of its assertion that, as the sole abutting landowner, it was the only freeholder required to sign the abandonment petition. In *Thompson-McCully Quarry*, 259 Mich App at 490-491, this Court stated:

> Subsection 18(5) plainly appears divided in subject matter between (a) the first sentence, standing alone, which addresses petitions for abandonment or discontinuance by all affected landowners and occupants of land, and (b) the entire, lengthy remainder of subsection 18(5), which prescribes the notice and other procedural requirements that must be addressed "[i]n all other cases" involving a petition for abandonment or discontinuance; for example, when fewer than all of the affected landowners and occupants sign a petition to abandon or discontinue a road or a portion of a road, or "the action concerns any county road or portion of a county road that borders on, crosses, is adjacent to, or ends at a lake or the general course of a stream and the proposed action would result in the loss of public access."

It is within the "lengthy remainder of subsection 18(5)" that notice to the township, the DNR, and the DOT is required. In other words, it was the Road Commission's acceptance of the petition with only the signature of the HMC's president, thus implicitly placing the petition in the category described in the first sentence of MCL 224.18(5), that resulted in the notice required "[i]n all other cases" not being provided. However, this argument is without merit because, as previously set forth, the HMC proceeded with a fatally defective abandonment petition under MCL 224.18(4).

In light of our resolution of the dispositive issues, we decline to address the remaining issues raised by the parties on appeal.

Affirmed.

RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

PEOPLE v HERSHEY

Docket No. 309183. Submitted November 5, 2013, at Lansing. Decided December 5, 2013, at 9:05 a.m. Leave to appeal sought.

Joseph F. Hershey pleaded guilty in the Muskegon Circuit Court of violating the terms of the probation imposed for his failure to pay child support, MCL 750.165, and was sentenced as a fourth-offense habitual offender to 3½ to 15 years' imprisonment. Defendant moved for resentencing and to correct the Sentencing Information Report on the grounds that Offense Variable (OV) 16, MCL 777.46, had been incorrectly scored at 5 points given that the child-support arrearage did not constitute property that was obtained, damaged, lost, or destroyed, and that OV 19, MCL 777.49, had been incorrectly scored at 10 points because his failure to pay child support did not constitute interference with the administration of justice, resulting in a sentence that was outside the appropriate guidelines range. The court, James M. Graves, Jr., J., denied the motion, and the Court of Appeals denied defendant's delayed application for leave to appeal. Unpublished order of the Court of Appeals, entered September 14, 2012 (Docket No. 309183). The Supreme Court, in lieu of granting defendant's application for leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted of whether the offense variables were properly scored and whether defendant had forfeited or waived any scoring errors. 493 Mich 937 (2013).

The Court of Appeals *held*:

1. The trial court erred by assessing 5 points for OV 16. MCL 777.46 requires the court to assess points if property was obtained, damaged, lost or destroyed under the circumstances set forth in that provision. Defendant's failure to pay his child-support arrearage did not constitute obtaining property unlawfully under MCL 777.46(2)(b) because defendant had no income or significant assets, and a legal obligation to pay money does not translate to possession of the money owed. Further, the child-support arrearage was not lost to the original owner under MCL 777.46(2)(b) because, in order for a person to lose something or suffer loss, the person must either possess that thing or have an expectation or right in it. Defendant did not possess the money, and the definition

of "loss" or "lost" does not encompass the children's loss of the right to the money or the expectation of it. Accordingly, a preponderance of the evidence did not support the trial court's scoring decision with respect to OV 16.

2. The trial court erred by assessing 10 points for OV 19. The phrase "interfere with the administration of justice" for purposes of OV 19 means to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process. Neither defendant's failure to pay child support nor his violation of the terms of his probation constituted interference with the administration of justice under this definition.

3. Defendant did not waive his right to contest the scoring of OV 16 and OV 19 by failing to object at sentencing. Although defendant and his counsel stated that they had no additions or corrections to the presentence report, that statement came in response to a question from the court that was broad, not specific to the scoring of the offense variables; and the record did not show a clear expression of satisfaction with the trial court's scoring decisions with respect to OV 16 and OV 19. Because defendant raised the scoring errors in a motion for resentencing before the trial court, he did not forfeit the issue.

Sentence vacated; case remanded for resentencing under properly scored sentencing guidelines.

1. SENTENCES — OFFENSE VARIABLE 16 — PROPERTY OBTAINED, DAMAGED, LOST, OR DESTROYED — FAILURE TO PAY CHILD SUPPORT — UNLAWFUL OBTAINING OF PROPERTY.

A defendant's failure to pay child support does not constitute the unlawful obtaining of property for purposes of scoring Offense Variable 16 if the preponderance of the evidence indicates that the defendant had no income or significant assets (MCL 777.46).

2. SENTENCES — OFFENSE VARIABLE 16 — PROPERTY OBTAINED, DAMAGED, LOST, OR DESTROYED — FAILURE TO PAY CHILD SUPPORT — LOSS OF PROPERTY.

A defendant's failure to pay child support does not constitute a loss of property to the original owner for purposes of scoring Offense Variable 16 because the term "loss" or "lost" as used in MCL 777.46 does not encompass a person's loss of a right or expectation.

3. SENTENCES — OFFENSE VARIABLE 19 — INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE — FAILURE TO PAY CHILD SUPPORT.

A failure to pay child support does not constitute interference with the administration of justice for purposes of Offense Variable 19 (MCL 777.49).

4. SENTENCES — OFFENSE VARIABLE 19 — INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE — PROBATION VIOLATIONS.

The phrase "interfere with the administration of justice" for purposes of Offense Variable 19 means to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process; violating the terms of one's probation does not constitute interference with the administration of justice for purposes of Offense Variable 19 (MCL 777.49).

5. APPEALS — SENTENCES — SCORING OF SENTENCING GUIDELINES — WAIVER.

A general statement at sentencing that a defendant has no additions or corrections to a presentence investigation report does not waive the defendant's right to appellate review of scoring errors that result in a sentence outside the appropriate guidelines sentence range (MCL 769.34(10)).

Dale J. Hilson, Muskegon County Prosecutor; *Terrence E. Dean*, Assistant Prosecutor; and *Charles F. Justian*, Senior Assistant Prosecutor, for the people.

Ronald D. Ambrose for defendant.

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

PER CURIAM. In this criminal case involving the failure to pay child support, MCL 750.165, we consider the appeal of defendant, Joseph Frank Hershey, as on leave granted pursuant to a remand order from our Supreme Court. Defendant seeks resentencing, claiming that the trial court incorrectly scored Offense Variables (OVs) 16 and 19. In its order, the Supreme Court directed this Court to consider "whether [OV] 16 (property obtained, damaged, lost, or destroyed) and OV 19 (interference with the administration of justice) were correctly scored and whether the defendant, by failing to object to the scoring of these offense variables at sentencing, forfeited or waived any scoring errors."[1] For the reasons set forth below, we conclude that OVs 16

[1] *People v Hershey*, 493 Mich 937 (2013).

and 19 were incorrectly scored, resulting in a sentence that is outside the appropriate guidelines sentence range. Furthermore, having reviewed the entire record, we conclude that defendant did not waive these scoring errors; and because he raised the errors in a motion for resentencing before the trial court, he did not forfeit the issue, and the matter is preserved. We vacate defendant's sentence and remand for resentencing under properly scored sentencing guidelines.

I. BASIC FACTS AND PROCEDURAL HISTORY

On July 8, 2010, defendant pleaded guilty of failing to pay child support from approximately September 26, 2006, until approximately December 2009. Pursuant to a *Cobbs*[2] commitment, if defendant was able to pay $1,604.67 by the time of sentencing, the trial court would impose a period of probation, not incarceration, for defendant's offense. The trial court agreed to delay sentencing for three months in order to give defendant the opportunity to pay the money. At the subsequent sentencing hearing on October 25, 2010, defendant admitted that he had not paid the $1,604.67; therefore, the trial court sentenced him to 5 months in jail and 24 months' probation. As part of his probation, defendant was ordered to pay restitution, which included his child support arrearages. The Presentence Investigation Report (PSIR) indicates that on April 7, 2010, the amount of defendant's arrearage was $6,418.68. On July 28, 2011, after defendant was released from jail, a bench warrant was filed because defendant had violated the terms of his probation by failing to report to his supervising agent and by contacting his daughter. On August 29, 2011, defendant pleaded guilty of the probation violation.

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[2] *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

On September 13, 2011, the trial court held a sentencing hearing. At the beginning of the hearing, the trial court asked defense counsel whether he had had an opportunity to read the two presentence reports,[3] to which defense counsel responded that he had, and that he had no additions or corrections. The trial court confirmed with defendant that he had also had an opportunity to read the two presentence reports and discuss them with his attorney, and that he had no additions or corrections. In the Sentencing Information Report (SIR), which was attached to the PSIR, the probation department recommended assessing 5 points for OV 16, MCL 777.46, and 10 points for OV 19, MCL 777.49. At no point during the sentencing, however, did anyone discuss the proposed scoring of the OV factors or the trial court's intentions with regard to scoring. The trial court then sentenced defendant as an habitual offender, fourth offense, to 3 years and 6 months to 15 years' imprisonment for failing to pay court-ordered child support. The SIR reveals that the trial court scored 5 points for OV 16 and 10 points for OV 19, which was consistent with the probation department's recommendation.

On January 25, 2012, defendant moved the trial court to correct the SIR and for resentencing. Defendant argued that OV 16 was improperly scored because it did not apply to the facts of his case. According to defendant, the failure to pay child support did not constitute property "obtained, damaged, lost, or destroyed." He also argued that OV 19 was improperly scored because, although the phrase "interfered with or

[3] At this hearing, the trial court also sentenced defendant for an unrelated resisting-and-obstructing offense to which he had previously pleaded guilty. Defendant has not appealed his sentence relating to that offense.

attempted to interfere with the administration of justice" in MCL 777.49(c) is broad, there was no evidence in the record that he did so. Defendant insisted that the mere act of failing to pay child support was not enough; otherwise, every offense would constitute interference with the administration of justice in MCL 777.49(c). Because a change in the scoring of OVs 16 and 19 would affect the minimum sentence guidelines range, defendant sought resentencing.[4] The prosecution opposed defendant's motion, contending that defendant had expressly waived his challenges to OVs 16 and 19 and that, regardless, they were correctly scored. The trial court denied defendant's motion for resentencing, adopting the prosecution's reasoning. Although this Court denied defendant's delayed application for leave to appeal,[5] the Supreme Court has ordered this Court to address both the waiver issue and the scoring of OVs 16 and 19.

II. SCORING OF OFFENSE VARIABLES

Recently in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), our Supreme Court clarified both the quantum of evidence necessary to support a scoring decision and the standard of review to be used by this Court:

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and

[4] With the trial court's scoring of OV 16 at 5 points and OV 19 at 10 points, defendant's minimum sentence guideline range was 5 months to 46 months. If zero points were assessed for OVs 16 and 19, defendant's minimum sentence guidelines range would be 2 months to 34 months. It should be noted that if OV 19 was correctly scored, any change in the scoring of OV 16 would not affect the guidelines range. However, the Supreme Court has ordered us to address the scoring of both OVs at issue.

[5] *People v Hershey*, unpublished order of the Court of Appeals, entered September 14, 2012 (Docket No. 309183).

> must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.

Defendant's arguments require this Court to interpret OV 16, MCL 777.46; and OV 19, MCL 777.49. Statutory interpretation is a question of law that we review de novo on appeal. *People v Gibbs*, 299 Mich App 473, 484; 830 NW2d 821 (2013). "This Court interprets sentencing guidelines in accordance with the rules of statutory construction." *People v Light*, 290 Mich App 717, 722; 803 NW2d 720 (2010). When this Court interprets a statute, its primary goal

> is to give effect to the intent of the Legislature. If the language of the statute is unambiguous, judicial construction is not permitted because the Legislature is presumed to have intended the meaning it plainly expressed. Judicial construction is appropriate, however, if reasonable minds can differ concerning the meaning of a statute. Where ambiguity exists, this Court seeks to effectuate the Legislature's intent by applying a reasonable construction based on the purpose of the statute and the object sought to be accomplished. The court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. In construing a statute, the statutory provisions must be read in the context of the entire statute in order to produce a harmonious whole; courts must avoid a construction that would render statutory language nugatory. [*Id.* (citation and quotation marks omitted).]

If a term in a statute is defined by statute, the definition contained therein controls. *People v Williams*, 288 Mich App 67, 74; 792 NW2d 384 (2010). However, if a term is not defined by statute, a reviewing court may look to dictionary definitions for guidance. *People v Laidler*, 491 Mich 339, 347; 817 NW2d 517 (2012).

A. OV 16

Defendant argues that the trial court erred by scoring OV 16 at 5 points. We agree.

MCL 777.46(1)(c) requires the trial court to score 5 points when property that "had a value of $1,000.00 or more but not more than $20,000.00" is "obtained, damaged, lost, or destroyed." "In cases in which the property was obtained unlawfully, lost to the lawful owner, or destroyed," the trial court is to use the value of the property in scoring OV 16. MCL 777.46(2)(b).

Defendant argues that OV 16 does not apply to the facts of this case because there was no property "obtained, damaged, lost, or destroyed." Specifically, defendant points out that, as set forth in the PSIR, he had no ability to pay his court-ordered assessments because he was unemployed.[6] The prosecution argues that defendant "obtained" money by retaining it, instead of providing it for his children as ordered by the family court. The prosecution also argues that the money is "lost" to the children because it was not available to them to pay their support at the critical time that the payment was due.

Neither defendant nor the prosecution cites any caselaw in support of their arguments, nor do they provide any further analysis, for that matter. In fact, there is no published caselaw addressing whether failing to pay child support can be scored under OV 16.[7]

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[6] The PSIR noted defendant's admitted substance abuse problem as well as his mental health issues, inability to refrain from being involved in criminal activity, and the fact that he may be "currently living in the local parks."

[7] Two unpublished decisions have declined to address the issue. First, in *People v Matthews*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2009 (Docket No. 286178), the trial court scored 10 points under OV 16 for loss of property when the sentencing

Because neither party argues that property was "damaged" or "destroyed" by defendant's failure to pay child support, the only issues are whether property was "obtained unlawfully" or "lost to the lawful owner."[8] MCL 777.46(2)(b).

With respect to whether defendant unlawfully obtained property, the PSIR reveals that defendant was unemployed, possibly living in a park, and unable to pay child support. It also reveals that defendant did not receive any income or have any significant assets. The record is void of any evidence, let alone a preponderance of the evidence, to refute that defendant was unemployed and unable to pay. If defendant did not have money, he cannot be said to have retained or obtained money; a legal obligation to pay money does not translate to possession of the money owed. Scoring 5 points on the basis that defendant unlawfully obtained between $1,000 and $20,000 was erroneous because a preponderance of evidence in the record did not support that conclusion.[9] See MCL 777.46; *Hardy*, 494 Mich at 438.

With respect to whether property was lost to the lawful owner, the terms "lost" and "loss" are not

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offense was failure to pay child support. This Court did not decide whether this score was appropriate in *Matthews* but, rather, simply noted the trial court's scoring decision under OV 16. *Matthews*, unpub op at 7. Subsequently, in *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket No. 297770), this Court declined to address the issue because even assuming error in the scoring of OV 16, the defendant's sentence was within the appropriate guidelines range; therefore, the defendant was not entitled to resentencing.

[8] Defendant does not dispute that the amount he failed to pay in child support was between $1,000 and $20,000.

[9] We need not address, and thus save for another day, the issue of whether a defendant who actually possesses the money or means needed to pay child support and who simply elects not to do so can be considered to have "unlawfully obtained" property under MCL 777.46.

defined by MCL 777.46, so we may consult a dictionary in order to obtain the plain and ordinary meaning of the terms. See *Laidler*, 491 Mich at 347. In pertinent part, the verb "to lose"—and, by extension, the terms "loss" and "lost"—is defined as: "1. to come to be without, as through accident . . . . 2. to fail inadvertently to retain . . . . 3. to suffer the deprivation of: *to lose one's job*. . . . 22. to suffer loss: *to lose on a contract.*" *Random House Webster's College Dictionary* (2005) (emphasis in original). Each of these definitions implies that in order for someone to lose something or suffer loss, the person must either possess the thing that is lost or have an expectation or right in the thing that is lost, e.g., losing on a contract. In this case, neither party argues that defendant took something that his children already possessed when he failed to pay child support. Indeed, if they never had money through support payments, defendant could not have taken child support payments from them.

Nonetheless, the prosecutor contends that defendant's children suffered loss because they were deprived of support money to which they were entitled. It is undisputed that children have a right to receive financial support from their parents, *Borowsky v Borowsky*, 273 Mich App 666, 672-673; 733 NW2d 71 (2007), and that the circuit court ordered defendant to pay child support. Thus, defendant's children were entitled to receive financial support from defendant. As noted, there are different dictionary definitions for the terms "loss" and "lost." It is well known that a term can be defined in a number of different ways; therefore, when interpreting a statute, this Court is to "determine the most pertinent definition of a word in light of its context." See *Feyz v Mercy Mem Hosp*, 475 Mich 663, 684 n 62; 719 NW2d 1 (2006). Further, this Court must

determine the definition that most appropriately furthers legislative intent. *Id*.

MCL 777.46 directs the trial court to assess points for "[t]he property" that was lost, damaged, or destroyed. When interpreting a statute, this Court is to interpret terms in their context. *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012). The term "property" is defined, in pertinent part, as "that which a person owns; the possession or possessions of a particular owner." *Random House Webster's College Dictionary* (2005). The Legislature's selection of the term "the property" is more consistent with the conclusion that the Legislature intended for OV 16 to be scored when tangible property that was already possessed by a particular owner was unlawfully obtained, damaged, lost, or destroyed. See *Feyz*, 475 Mich at 684 n 62 (when interpreting a statute and defining terms contained therein, a reviewing court is, considering the context of the terms employed, to adopt definitions for terms that are consistent with the Legislature's intent). Therefore, we conclude that the definition of the term "loss" or "lost" does not encompass a person's loss of a right or expectation.

This interpretation is consistent with the manner in which this Court has already applied OV 16. Indeed, scoring 5 points for OV 16 under the circumstances of this case would stand in contrast with other cases in which OV 16 has been scored. Specifically, OV 16 typically applies when the defendant either takes or destroys property that belongs to the victim. See, e.g., *People v Leversee*, 243 Mich App 337, 349-350; 622 NW2d 325 (2000) (upholding the trial court's scoring of OV 16 where the defendant stole guns from the victims but later returned them); *People v Key*, unpublished opinion per curiam of the Court of Appeals, issued

January 22, 2013 (Docket No. 307801) (upholding the scoring of OV 16 where the defendant stole property from a store); *People v McKenzie*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2012 (Docket No. 308114) (upholding the trial court's scoring of OV 16 where the defendant stole money from the victim); *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2011 (Docket Nos. 296211 and 300294) (upholding the trial court's scoring of OV 16 where the defendant fraudulently obtained $20,000); *People v Timbs*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2010 (Docket No. 290546) (upholding the trial court's scoring of OV 16 where the defendant stole jewelry from the victim); *People v Redmond*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 2006 (Docket No. 261458) (affirming the trial court's scoring decision where the victim's employer lost more than $20,000 because of defendant's misconduct).

Because this Court has interpreted and applied OV 16 in a way that requires the loss of something already possessed, because OV 16 requires scoring for "the property" lost, which implies something that was possessed or owned, and because the definition of "lost" or "loss" can require a possessory interest in order for a loss to occur, we interpret OV 16 to require the loss of something that was already possessed in order for the scoring conditions of OV 16 to be satisfied. In this case, defendant did not take anything that his children possessed; rather, he simply failed to fulfill their legal expectation of receiving child support because he was unable to make the payments. Accordingly, the preponderance of the evidence did not support the trial court's scoring decision. The trial court erred by scoring 5 points for OV 16. See *Hardy*, 494 Mich at 438.

B. OV 19

Defendant also argues that the trial court erred by assessing 10 points for OV 19. The prosecution contends that the trial court properly scored OV 19 because defendant interfered with the administration of justice by failing to comply with a court order that required him to pay child support and by violating the terms of his probation. Defendant contends that neither action amounts to interference with the administration of justice under OV 19. We agree with defendant.

OV 19 applies if there was a "threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services." MCL 777.49. The trial court must assess 10 points for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c).

There is no published decision addressing whether a probation violation or a failure to pay child support can constitute interference with the administration of justice under OV 19. To decide this issue, interpretation of MCL 777.49 is required to determine the plain and ordinary meaning of the phrase "interfere[] with the administration of justice," which MCL 777.49 does not define. Therefore, to determine the plain and ordinary meaning of the phrase, "we may consider dictionary definitions to discern the Legislature's intent." *People v Kowalski*, 489 Mich 488, 500 n 13; 803 NW2d 200 (2011); see also *Laidler*, 491 Mich at 347. As previously discussed, although a dictionary may define a term in a number of different ways, this Court is to "determine the most pertinent definition of a word in light of its context" when interpreting a statute. See *Feyz*, 475 Mich at 684 n 62. The plain and ordinary meaning of "interfere" is "to come into opposition or collision so as

to hamper, hinder, or obstruct someone or something[.]" *Random House Webster's College Dictionary* (2005). The plain and ordinary meaning of "administration" is "the act or process of administering." *Id*. And "justice" is defined as "judgment of individuals or causes by judicial process: *to administer justice*." *Id*. Therefore, the plain and ordinary meaning of "interfere with the administration of justice" for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process.[10] See *id*.; *Laidler*, 491 Mich at 347.

This plain and ordinary meaning of the phrase "interfere with the administration of justice" is consistent with the published caselaw addressing OV 19. Opposing so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process has broad application, just as "interfered with or attempted to interfere with the administration of justice" is "a broad phrase." *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). It "encompasses more than just the actual judicial process" and can include "[c]onduct that occurs before criminal charges are filed," acts that constitute obstruction of justice, and acts that do not "necessarily rise to the level of a chargeable offense . . . ." *Id*. at 286-288. Decisions of both this Court and our Supreme

[10] Our Supreme Court has stated that " '[t]he administration of justice' process, including the 'actual judicial process,' is not commenced until an underlying crime has occurred, which invokes the process." *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). Although the *Smith* Court spoke of the commencement of the administration-of-justice process in the context of the criminal justice system, the Court neither identified when the administration-of-justice process begins in a civil context nor limited the administration-of-justice process for purposes of OV 19 to the criminal justice system. In the instant case, we need not and do not decide whether the administration-of-justice process for purposes of OV 19 is limited to the criminal justice system.

Court have held the following conduct to constitute an interference or attempted interference with the administration of justice: providing a false name to the police, threatening or intimidating a victim or witness, telling a victim or witness not to disclose the defendant's conduct, fleeing from police contrary to an order to freeze, attempting to deceive the police during an investigation, interfering with the efforts of store personnel to prevent a thief from leaving the premises without paying for store property, and committing perjury in a court proceeding. See *id*. at 288; *People v Ratcliff*, 299 Mich App 625, 633; 831 NW2d 474 (2013), vacated in part on other grounds 495 Mich 876; *People v McDonald*, 293 Mich App 292, 299; 811 NW2d 507 (2011); *People v Smith*, 488 Mich 193, 196-197; 793 NW2d 666 (2010); *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010); *People v Steele*, 283 Mich App 472, 492; 769 NW2d 256 (2009); *People v Underwood*, 278 Mich App 334, 339; 750 NW2d 612 (2008); *People v Passage*, 277 Mich App 175, 179-181; 743 NW2d 746 (2007); *People v Endres*, 269 Mich App 414, 420-421; 711 NW2d 398 (2006). Each of these acts hampers, hinders, or obstructs the process of administering judgment of individuals or causes by judicial process. For instance, the acts of witness intimidation and deceiving police investigators seek to prevent incriminating evidence from being used throughout the process of administering judgment of individuals by judicial process, including during the pretrial and, potentially, trial stages.

Applying this plain and ordinary meaning of "interfere with the administration of justice" to the facts of the instant case, we conclude that defendant did not interfere with the administration of justice by failing to pay child support. The record illustrates that defendant and the mother of his two children divorced in 2006 and that defendant was obligated by order of the Muskegon

Circuit Court in Case No. 2006-033357-DM to pay a certain amount of monthly child support. From September 26, 2006, through December 16, 2009, defendant paid less than the minimum amount of child support required by court order. However, defendant's failure to comply with this court-ordered obligation did not hinder the process or act of administering judgment by judicial process of the cause in Case No. 2006-033357-DM, i.e., the divorce and child-support matters; defendant's failure to pay child support occurred after the circuit court ordered defendant responsible for child support in that case. Thus, although defendant failed to comply with the circuit court's child-support order, he did not hamper, hinder, or obstruct the act or process of the circuit court's administering judgment in Case No. 2006-033357-DM.

We also conclude that defendant did not interfere with the administration of justice by violating the terms of his probation. On July 8, 2010, defendant pleaded guilty in Case No. 10-059331-FH of failure to pay child support. In October 2010, the trial court entered a judgment of sentence in the case, sentencing defendant to 5 months in jail and 24 months' probation. After defendant was released from jail, he violated his probation by failing to report to his supervising agent and by contacting his daughter. However, defendant's probation violation did not hinder the process or act of administering judgment by judicial process of defendant in Case No. 10-059331-FH. When defendant violated the terms of his probation, the trial court had already entered the October 2010 judgment of sentence, and the court's probation order was already effective. Thus, although defendant violated the trial court's probation order, he did not hinder the process or act of the trial court administering judgment in Case No. 10-059331-FH. This Court regularly encounters cases

in which individuals have violated the terms of their probation and been resentenced, and we find it notable that there is no caselaw indicating that an offender's probation violation itself (as compared to the underlying conduct) constitutes interference with the administration of justice under OV 19.[11]

Accordingly, because the preponderance of the evidence did not support a finding that defendant "interfered with the administration of justice," we conclude that the trial court erred by scoring OV 19 at 10 points. See MCL 777.49; *Hardy*, 494 Mich at 438.

III. WAIVER OR FORFEITURE

Because we conclude that both OV 16 and OV 19 were improperly scored, which affected the minimum sentencing guidelines range, and in keeping with the Supreme Court's remand order, we must determine "whether the defendant, by failing to object to the scoring of these offense variables at sentencing, forfeited or waived any scoring errors." *Hershey*, 493 Mich at 937. For the following reasons, we conclude that defendant did not waive the scoring errors. Further, because he raised them in a motion for resentencing before the trial court, he did not forfeit the issue, and the matter is preserved.

MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate

[11] In fact, an offender's probation violation itself is deemed to constitute an objective and verifiable fact worthy of independent consideration when a trial court is considering an upward departure, *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005), which implies that it is not adequately or otherwise accounted for in the sentencing guidelines.

> information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

In *People v Kimble*, 470 Mich 305, 310-312; 684 NW2d 669 (2004), the defendant appealed his sentence, arguing that OV 16 had been improperly scored. In the trial court, the defendant had argued that OV 16 should be scored at 1 point instead of 5 points; on appeal, he argued—for a different reason—that OV 16 should not have been scored at all. *Id*. at 308. The Supreme Court agreed with the defendant's argument on appeal that the trial court clearly erred in scoring OV 16 because OV 16 would only have been applicable had the defendant's conviction been for a crime related to home invasion, which the defendant's conviction was not. *Id*. at 309, 312. The Court noted, however, that "[a]n objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *Id*. at 309. The Supreme Court held that although the defendant did not raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand, because his sentence was deemed to be outside the appropriate guidelines range, his sentence was appealable under MCL 769.34(10):

> [P]ursuant to [MCL 769.34(10)], a sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. However, if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence

> and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.
>
> * * *
>
> The second sentence of [MCL 769.34(10)] provides that, even though a sentence that is within the appropriate guidelines sentence range can be appealed if there was a scoring error or inaccurate information was relied upon, it can only be appealed if the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. In other words, the second sentence simply describes *how* a party must preserve a challenge to a sentence that is within the appropriate guidelines sentence range; *it says nothing about a challenge to a sentence that is outside the appropriate guidelines sentence range*.
>
> Because defendant's sentence is outside the appropriate guidelines sentence range, his sentence is appealable under [MCL 769.34(10)], even though his attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand. [*Id*. at 310-312 (emphasis added).]

The Court held that because the defendant failed to raise his argument about the inapplicability of OV 16 until he filed an application for leave to appeal in the Court of Appeals, he had to satisfy the plain-error standard set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). *Kimble*, 470 Mich at 312.

In this case, defendant did not raise at sentencing an issue regarding the scoring of OVs 16 and 19, but he did file a motion for resentencing in the trial court. Defendant is correct in alleging that the trial court erred in scoring OVs 16 and 19. As noted earlier, with the trial court's scoring of OV 16 at 5 points and OV 19 at 10 points, defendant's minimum sentence guideline range was 5 months to 46 months. If no points were assessed for OVs 16 and 19, defendant's minimum sentence guidelines range would be 2 months to 34 months. His

minimum sentence of 3 years and 6 months is outside the appropriate guidelines range. Thus, pursuant to MCL 769.34(10) and *Kimble*, 470 Mich at 310-312, defendant is entitled to appeal the matter unless he is deemed to have waived the error at sentencing. As noted, defendant and his counsel both indicated to the trial court that they had no additions or corrections to the presentence report.

In *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), our Supreme Court noted the soundness of the principle that, in order to discourage counsel from harboring error as an appellate parachute, issues for appeal must be preserved in the record by notation of one's objection. The *Carter* Court distinguished the principles of waiver and forfeiture as follows:

> Waiver has been defined as the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which has been explained as the failure to make the timely assertion of a right. One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. Mere forfeiture, on the other hand, does not extinguish an error. [*Id*. at 215 (quotations and citations omitted).]

When counsel affirmatively approves a jury instruction, for example, he or she waives any error. *Id*. at 215-216. The failure to object, on the other hand, qualifies as forfeiture and is reviewable for plain error. *Id*. at 216.

More recently, our Supreme Court in *Kowalski*, 489 Mich at 503, held that "[w]hen defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." In *Kowalski*, the trial court asked defense counsel multiple times whether he had any objections to the

proposed jury instruction regarding accosting a minor, to which defense counsel responded each time that he did not. *Id*. at 503-504. The Supreme Court deemed defense counsel's responses a waiver, leaving no error to review. *Id*. at 504. The Court based its decision on "the entire record," which revealed that defense counsel "(1) discussed the instructions with the court, (2) affirmatively approved the instructions because he thought they were identical to his own proposed instructions, and (3) then reaffirmed his approval three more times." *Id*. at 504 n 26. The Court held that such conduct "clearly demonstrates waiver—an intentional relinquishment of a known right—because counsel's affirmative statements were repeated, express, and unequivocal and concerned instructions that counsel had more than ample time to fully review and consider." *Id*. Given defense counsel's express and unequivocal indications that he approved of the instructions, the Court rejected defendant's attempts to distinguish between "counsel stating, 'I approve of the instructions,' and counsel stating, 'I have no objections[.]' " *Id*. at 504-505. This analysis in *Kowalski* illustrates that there are no "magic words" that constitute a waiver and that a waiver analysis should consider the entire context of a defendant's conduct concerning a purportedly waived issue to determine whether the defendant, in fact, intentionally relinquished a known right. See *id*. at 503-505 & n 26.

At the outset, we emphasize that the instant case is factually distinguishable from *Kowalski* in terms of both the specific conduct subject to a waiver analysis and the context. This case does not involve jury instructions, a context in which this Court has held that a response by counsel of "no objections" after instructions are given constitutes a waiver. *Id*. at 505 n 28. This distinction is significant. As *Kowalski* aptly illus-

trates, jury instructions are typically discussed in detail by the parties and the trial court several times before the jury is ultimately instructed, including before trial; thus, a response on the record by a defendant of "no objection" to a court's inquiry regarding the propriety of the instructions it has read to a jury is, when viewed in its context, indicative of a manifestation of approval of the instructions given. For this reason, this Court "has consistently held that an affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions, thereby waiving review of any error on appeal." *Id*., citing *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Sentencing variables, however, do not always undergo the same degree of scrutiny by the parties and the trial court as do jury instructions. Indeed, the sentencing variables were not even mentioned during sentencing in the instant case. At sentencing, the trial court asked defendant and his counsel if they had any "additions or corrections" to the presentence report. Both defendant and his counsel responded that they did not. Although either defendant or his counsel should have objected had they realized there was a scoring error at that time, at no point during the hearing was there any actual discussion about the scoring of the variables. Unlike in *Kowalski*, it is not clear from the entire record that defendant "clearly express[ed] satisfaction with a trial court's decision[.]" *Kowalski*, 489 Mich at 503.

We conclude that in light of *Kowalski*, *Kimble*, and MCL 769.34(10), defendant did not waive his right to contest the scoring of OVs 16 and 19. Several reasons support this conclusion. First, the record as a whole does not show a clear expression of satisfaction with the

trial court's decision to score OV 16 at 5 points and OV 19 at 10 points. See *Kowalski*, 489 Mich at 503 ("When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver."). When defendant and his counsel responded that they did not have any additions or corrections to the presentence report, the court had not made any decision regarding the scoring of OV 16 and OV 19; indeed, it cannot be said from the record that the court was even considering the scoring of the sentencing variables at the time. Compare with, e.g., *id*. at 504 & n 26 (challenge to jury instructions waived where counsel stated that he had no objection to instructions that he had discussed with the trial court and that the trial court had provided to the jury); *McDonald*, 293 Mich App at 295 (challenge to admission of evidence waived where counsel stated that he had no objection to its admission); *People v Tate*, 244 Mich App 553, 557-559; 624 NW2d 524 (2001) (challenge to the trial court's decision to excuse a juror from deliberations waived where defense counsel both expressly approved the court's jury instruction regarding the function of an alternate juror and responded "No" when the court asked whether counsel had anything further to add for the record after the court questioned and excused the juror); *People v Fetterley*, 229 Mich App 511, 518-520; 583 NW2d 199 (1998) (challenge to trial court's denial of a jury's request for a transcript waived where defense counsel stated that he had no objection to the trial court's proposal of denying the jury's request). The trial court's question to defendant and his counsel was broad, not specific. In contrast, the trial court in *Kowalski* specifically and repeatedly asked defense counsel whether he had a problem with the proposed jury instruction at issue; the record, as a whole, manifested defense counsel's "clear[] expres-

s[ion of] satisfaction with [the] trial court's decision" to read a particular jury instruction. *Kowalski*, 489 Mich at 503. In this case, the record, at most, represents a failure to recognize a scoring error and lodge an objection.

Second, MCL 769.34(10) provides a defendant with three separate opportunities to raise a scoring error: at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. The statute's provision of multiple opportunities to raise the issue implicitly assumes that the defendant might miss a scoring error at the first opportunity: sentencing. Furthermore, if the scoring error results in a sentence that is outside the appropriate guidelines range, a defendant has a fourth opportunity to raise the issue, given that it may be appealed "regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand," albeit under a plain-error analysis. *Kimble*, 470 Mich at 310, 312. Unlike the situation presented by a jury instruction, in which an error could require the drastic remedy of requiring a new trial, the failure to timely recognize a sentencing error would merely require resentencing, which is not a drastic remedy. Defendant presumably moved for resentencing as soon as he realized that there was a scoring error, and there is no basis to think that he was harboring an appellate parachute at sentencing, given that there would be no advantage in doing so. In context, and on the record as a whole, the remarks at sentencing did not rise to the level of a waiver.

Third, the defendant's conduct in *Kimble* is not much different than defendant's conduct in this case: both defendants completely missed the actual scoring error at sentencing. In *Kimble*, the defendant took the additional step of advocating for assessing 1 point for OV 16—a

position that directly contradicted his later argument that zero points should be assessed. If the act of taking a position that is directly contradictory to one's later position does not cause a waiver, neither should the failure to raise a contradictory position.

Finally, the Supreme Court's order in *People v Greene*, 477 Mich 1129 (2007), supports a conclusion that defendant did not waive his right to appeal the incorrect scoring of OVs 16 and 19. Citing *Kimble*, the Supreme Court vacated the defendant's sentence and remanded for resentencing "under properly scored sentencing guidelines," *id*. at 1129-1130, despite the fact that defense counsel had explicitly stipulated to the scoring of OV 1 and stated his "on-the-record expression of satisfaction" with the scores, *People v Greene*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 263126), p 2, rev'd 477 Mich 1129 (2007). In the instant case, defense counsel's conduct was even less reflective of a potential waiver: he did not stipulate to the scoring of OVs 16 and 19 or express his on-the-record satisfaction with the scoring; he merely indicated that he did not have any additions or corrections when asked about the presentence report in general.

Having considered the whole record, we conclude that defendant did not waive his right to appellate review of the scoring errors in this case. And because he raised his challenge to the improper scoring of OVs 16 and 19 in a motion for resentencing before the trial court, his argument is preserved, and he is entitled to resentencing. See MCL 769.34(10); *Kimble*, 470 Mich at 312.

Because defendant did not waive or forfeit the scoring errors at issue, we need not address his claim of ineffective assistance of counsel.

We vacate defendant's sentence and remand for resentencing under properly scored guidelines. We do not retain jurisdiction.

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

ADAMO DEMOLITION COMPANY v DEPARTMENT OF TREASURY

Docket No. 312667. Submitted November 14, 2013, at Lansing. Decided December 10, 2013, at 9:00 a.m.

Adamo Demolition Company filed a petition in the Tax Tribunal, seeking to set aside an assessment against it issued by the Department of Treasury. The assessment required an addition to the Single Business Tax Act (SBTA) tax base of petitioner in the amount of the compensation paid to employees working for petitioner during the 2005, 2006, and 2007 tax years. Petitioner had entered into professional-employer-organization agreements with Mancorp, Inc., in 2005, and with E-Connect, Inc., in 2006 and 2007. Pursuant to the companies' agreements, petitioner's employees became the employees of the professional employer organizations, which then leased the employees back to petitioner. The professional employer organizations paid all the employees' salaries, including the salary of Richard Adamo, the sole owner, director, and president of petitioner. The tribunal concluded that respondent should not have attributed the employees' compensation to petitioner, and imposed $721.60 in costs on respondent, holding that its position was devoid of arguable legal merit. Respondent appealed.

The Court of Appeals *held*:

1. Under the SBTA, employers were required to include their employees' compensation in their tax base. MCL 208.4(4) of the SBTA defined a professional employer organization as an organization that provided the management and administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that established an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following (a) maintaining the right of direction and control of employees' work, although this responsibility could be shared with the other entity, (b) paying wages and employment taxes of the employees out of its own accounts, (c) reporting, collecting, and depositing state and federal employment taxes for the employees, and (d) retaining the right to hire and fire employees. An employee paid by a profes-

sional employer organization under a contract comporting with the requirements of former MCL 208.4(4) was an employee of the professional employer organization for purposes of the SBTA. Accordingly, the employee's compensation was attributable to the professional employer organization. An officer or director of a company could be employed by a professional employer organization under the SBTA. In this case, respondent asserted that Mancorp and E-Connect did not qualify as professional employer organizations under MCL 208.4(4)(a) and (d). Specifically, respondent contended in part that because Adamo was the sole owner, director, and president of petitioner, he could not have been an employee of Mancorp and E-Connect. But contrary to respondent's assertions, there was no evidence that the professional employer organizations compensated Adamo because of his status as an owner of petitioner. Rather, he was compensated for his managerial and administrative duties, and the professional employer organizations retained the right to direct and control Adamo's work and to fire him as an employee providing administrative and managerial services. Further, while E-Connect disclaimed responsibility for the day-to-day supervision and control of the employees under its contract with petitioner, E-Connect did not disclaim the right to control and direct employees' nondaily activities, and E-Connect specifically had the right to participate in major employment decisions including hiring, firing, discipline, and grievance handling. Therefore, the tribunal did not err when it concluded that E-Connect and petitioner permissibly shared the right to direct and control employees' work under the contract. Accordingly, the professional employer organizations' contracts with petitioner complied with MCL 208.4(4), and the tribunal correctly determined that Mancorp and E-Connect qualified as professional employer organizations such that the employees' compensation was not attributable to petitioner.

2. A court may find that a party's action is frivolous and award costs under MCR 2.625(A)(2) when (1) the party initiated the suit for purposes of harassment, (2) the party's legal position was devoid of arguable legal merit, or (3) the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true. In this case, the evidence did not support the tribunal's finding that respondent's action was frivolous. Contrary to the finding of the tribunal, there was no evidence in the record that respondent repeatedly attempted to challenge the ability of companies to use professional employer organizations after the Legislature permitted their use in MCL 208.4(4). Further, the question whether employees' compensation is properly attributable to a professional employer organization or a leasing company under the SBTA has

been a contentious and unstable area of the law. The tribunal erred when concluded that respondent's position was devoid of arguable legal merit, and its award of costs had to be reversed.

Decision of the Tax Tribunal affirmed with regard to the service providers' status as professional employer organizations, but decision of the tribunal reversed with regard to petitioner's entitlement to an award of costs; remanded to the tribunal for correction of the judgment.

Maurice S. Reisman, PC (by *Maurice S. Reisman*), for petitioner.

Bill Schuette, Attorney General, *Aaron Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Kevin T. Smith*, Assistant Attorney General, for respondent.

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

PER CURIAM. Respondent, Department of Treasury (the Department), appeals as of right the Tax Tribunal's (the Tribunal) decision that the Department incorrectly attributed compensation that Mancorp Inc. and E-Connect, Inc. (the service providers) paid to the employees of petitioner, Adamo Demolition Company (Adamo Demolition) during tax years 2005, 2006, and 2007. The Department determined that the service providers were professional employer organizations under MCL 208.4(4) and attributed the compensation on that basis.[1] We affirm the Tribunal's decision regarding the service providers' status as professional employer organizations. But we reverse the Tribunal's finding that the Department's legal position was frivolous and its related award of costs to Adamo Demolition, and we remand to the Tribunal for correction of the judgment.

[1] Repealed by 2006 PA 325.

I. FACTUAL BACKGROUND

The parties stipulated the facts in this case. Richard Adamo is Adamo Demolition's sole owner, sole director, and president. Adamo Demolition entered into professional employer organization agreements with Mancorp in 2005 and with E-Connect in 2006 and 2007, outsourcing its human resource operations to them. Pursuant to these agreements, Adamo Demolition's employees became the service providers' employees, which they then leased back to Adamo Demolition. Adamo provided management and administrative services to Adamo Demolition. The service providers paid all the employees' salaries, including Adamo's salary, and withheld federal income taxes from those salaries.

Pursuant to Mancorp's agreement with Adamo Demolition, Mancorp had the right to (1) "exercise direction and control" over the employees' daily activities or delegate that right to Adamo Demolition, and (2) "hire, promote, reassign, discipline and terminate" employees. Adamo Demolition's agreement with E-Connect provided that E-Connect had the right to consult with Adamo Demolition concerning "all employment and unemployment decisions," including hiring and firing employees, and that Adamo Demolition agreed to use E-Connect's policies and procedures regarding those decisions. It also provided that "the Parties shall share the responsibilities of being the employer of the Covered Employees," and that E-Connect "assigns and delegates to [Adamo Demolition], the responsibility for the day-to-day supervision and control of the Co-Employees. [E-Connect] does not and shall not have any liability, obligation or responsibility therefore whatsoever."

Following an audit, the Department adjusted Adamo Demolition's single business tax base to include the compensation that the service providers paid the employees,

resulting in an increased assessment of $72,362, with interest. Adamo Demolition appealed in the Tribunal.

In its written opinion, the Tribunal relied on the legislative history of MCL 208.4(4) and this Court's decision in *Herald Wholesale, Inc v Dep't of Treasury*.[2] The Tribunal concluded that the disclaimer in Adamo Demolition's contract with E-Connect did not invalidate its status as a professional employer organization. The Tribunal noted that MCL 208.4(4)(a) expressly permitted a professional employer organization to share responsibility for the direction and control of employees' work. The Tribunal also found that Adamo's status as Adamo Demolition's sole shareholder, director, and president did not distinguish this case from *Herald Wholesale*.

Thus, the Tribunal concluded that the service providers were professional employer organizations and the Department should not have attributed the employees' compensation to Adamo Demolition. The Tribunal imposed $721.60 in costs on the Department, holding that its position was devoid of arguable legal merit because of (1) its repeated challenges concerning professional employer organizations, and (2) its attempt to purposefully avoid the precedent established in *Herald Wholesale*.

II. INTERPRETATION OF MCL 208.4(4)

A. STANDARD OF REVIEW

This Court's review of the Tribunal's decision is limited.[3] When a party does not dispute the facts or allege fraud, we review whether the Tribunal "made an

[2] *Herald Wholesale, Inc v Dep't of Treasury*, 262 Mich App 688; 687 NW2d 172 (2004).

[3] *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012).

error of law or adopted a wrong principle."[4] This Court reviews de novo the interpretation and application of tax statutes.[5]

B. LEGAL STANDARDS

"The primary goal of statutory interpretation is to give effect to the Legislature's intent."[6] If the statute's language is not ambiguous, this Court will enforce the statute as written.[7] This Court gives statutory language its plain and ordinary meaning.[8] This Court applies the same principles to contractual interpretation, with the purpose of determining and enforcing the parties' intent.[9]

C. PROFESSIONAL EMPLOYER ORGANIZATIONS UNDER MCL 208.4(4)

Under the Single Business Tax Act, now repealed,[10] employers were required to include their employees' compensation in their tax base.[11] Compensation included all fees paid to employees, officers, and directors.[12]

In MCL 208.4(4), the Legislature provided that an organization is a professional employer organization if it is

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[4] *Id*. at 527-528.

[5] *Id*. at 528; *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

[6] *Ford Motor Co*, 475 Mich at 438.

[7] *Id*. at 438-439.

[8] *Id*. at 439.

[9] See *Klapp v United Ins Group Agency Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003); *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130-131; 743 NW2d 585 (2007).

[10] Repealed by 2006 PA 325. Unless otherwise noted, all references in this opinion are to the former version of the Single Business Tax Act.

[11] MCL 208.9(5).

[12] MCL 208.4(3).

> an organization that provides the management and administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that establishes an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following:
>
> (a) Maintaining the right of direction and control of employees' work, although this responsibility may be shared with the other entity.
>
> (b) Paying wages and employment taxes of the employees out of its own accounts.
>
> (c) Reporting, collecting, and depositing state and federal employment taxes for the employees.
>
> (d) Retaining the right to hire and fire employees.

In *Herald Wholesale*, this Court held that an employee paid by a professional employer organization under a contract comporting with the requirements of MCL 208.4(4) is an employee of the professional employer organization, not of the company that leases the employees. Thus, the employee's compensation is attributable to the professional employer organization, not the leasing company.[13] This Court also held that an officer or director of a company can be employed by a professional employer organization.[14]

D. ADAMO'S STATUS AS ADAMO DEMOLITION'S OWNER

The Department asserts that the service providers did not qualify as professional employer organizations under MCL 208.4(4)(a) or (d), and, therefore, the employees' compensation was attributable to Adamo Demolition.

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[13] *Herald Wholesale, Inc*, 262 Mich App at 695.

[14] *Id*. at 697; MCL 208.4(4).

First, the Department asserts that this Court's decision in *Herald Wholesale* is distinguishable because the employees in that case were not the company's owners. We conclude that *Herald Wholesale* is not distinguishable.

In *Herald Wholesale*, this Court held that the Single Business Tax Act did not require the plaintiffs to include in their tax base compensation that a professional employer organization paid to the plaintiff's corporate officers when those officers were compensated solely for their management responsibilities.[15] The plaintiffs in that case were Herald Wholesale's corporate officers, whom Amstaff—the professional employer organization in that case—hired to perform managerial, administrative, and executive duties.[16] The plaintiffs' agreement with Amstaff provided that Amstaff retained the right to fully control all personnel decisions.[17] Asserting that the plaintiffs were not Amstaff's employees, the Department attributed to Herald Wholesale the compensation that Amstaff paid to the plaintiffs.[18]

This Court rejected the Department's assertion that the plaintiffs were not Amstaff's employees.[19] This Court concluded in part that the language of MCL 208.4(4) clearly contemplated that a professional employer organization could pay compensation to leased employees *and* officers.[20] This Court reached the same conclusion under the language of MCL 208.5.[21] This

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[15] *Herald Wholesale, Inc*, 262 Mich App at 691.

[16] *Id*. at 692.

[17] *Id*.

[18] *Id*.

[19] *Id*. at 691.

[20] *Id*. at 695, 697.

[21] *Id*. at 697-698.

Court reasoned that the Single Business Tax Act relied on the federal definition of employee, 26 USC 3401(c), which separately included officers in the definition of employees and thus indicated that an officer is an employee for tax purposes.[22]

We conclude that *Herald Wholesale* is not distinguishable from the facts in this case. This Court's decision in *Herald Wholesale* heavily relied on the fact that the professional employer organization paid the corporation's officers solely for their management responsibilities, not for their actions in another capacity. In this case, the parties stipulated that Adamo's duties as officer and director of Adamo Demolition were minimal. At the hearing before the Tribunal, Adamo testified that his responsibilities primarily included managing projects, maintaining customer relationships, coordinating with other managers, inspecting projects, and maintaining financial records.

The Tribunal found that the service providers did not compensate Adamo as an officer or director of Adamo Demolition. There is no indication that Adamo's compensation was in any way related to his status as the owner of Adamo Demolition. Thus, we conclude that the facts in *Herald Wholesale* are analogous to the facts in this case because there is no evidence in the record that the service providers compensated Adamo for anything other than his managerial and administrative duties.

Second, the Department asserts that the professional employer organization here did not meet MCL 208.4(4)(d) because the service providers could not fire Adamo as the owner of Adamo Demolition. We conclude that the service providers' ability to fire Adamo *as an*

[22] *Id*. at 698.

owner has no effect on the application of MCL 208.4(4), because the service providers could still fire Adamo *as an employee*.

The service providers compensated Adamo for his management and administrative services—not services as an owner—to Adamo Demolition. Nothing in the service providers' agreements indicates that they required Adamo Demolition's consent to hire or fire employees, including Adamo, or provided that they could not replace Adamo with someone else who would provide the same services. Similarly, the service providers' contracts did not exclude Adamo from the employees over whom they had the right to direct or control. Thus, the service providers complied with MCL 208.4(4) because they retained the right to fire Adamo, or the right to direct and control his work, *as an employee* providing administrative and management services.

The Department asserts that the service providers did not retain the right to fire Adamo because such an action would have no practical effect. According to the Department, even if fired, Adamo could continue his activities on behalf of Adamo Demolition. However, if the service providers fired Adamo, the practical effect would be that he would no longer be the employee of the service providers. They would no longer pay his compensation and withhold his federal income taxes. Thus, any compensation for his performance of the same activities would have to come from Adamo Demolition, not the service providers. In that circumstance, we would agree that Adamo's compensation would be properly attributable to Adamo Demolition. But that is not the circumstance of this case. Here, Adamo provided management and administrative services, and the service providers paid his compensation for providing those services.

We conclude that the service providers' retention of the right to direct, control, hire, and fire employees, including Adamo, complied with MCL 208.4(4)(a) and (d).

E. THE EFFECT OF E-CONNECT'S DISCLAIMER

The Department contends that Adamo Demolition's agreement with E-Connect failed to comply with MCL 208.4(4)(a) because E-Connect disclaimed responsibility for employees' day-to-day supervision and control. We disagree.

MCL 208.4(4)(a) allows a professional employer organization to share "the right of direction and control of employees' work . . . ." The question here is whether E-Connect's contractual language entirely disclaimed the right to direct and control employees' work or whether it shared that right with Adamo Demolition. The Tribunal concluded that E-Connect's disclaimer effectively shared the right to direct and control employees' work. We agree with the Tribunal's conclusion.

Under the plain language of the contract, E-Connect disclaimed only responsibility "for the *day-to-day* supervision and control" of the employees. [Emphasis added.] E-Connect did not disclaim the right to direct and control employees' nondaily activities, and specifically held rights concerning major employment decisions that did not concern daily activities, such as hiring, firing, discipline, and grievance handling. As a result of the contracts, the service providers were responsible for several significant employment responsibilities, including employees' payroll, tax withholding, benefits, records, insurance, and employment policies. These responsibilities come with significant potential liabilities. We conclude that the Tribunal did not err when it concluded that E-Connect's disclaimer indi-

cated that it and Adamo Demolition *shared* rights to direct and control employees' work, with Adamo Demolition supervising and controlling the employees' daily activities and E-Connect supervising and controlling the employees' nondaily activities.

III. TAXATION OF COSTS

A. STANDARD OF REVIEW

Whether an action or claim is frivolous is a factual finding.[23] This Court must accept the Tribunal's factual findings if "competent, material, and substantial evidence on the whole record" supports them.[24] Substantial evidence supports the Tribunal's findings if a reasonable person would accept the evidence as sufficient to support the conclusion.[25] Substantial evidence "may be substantially less than a preponderance."[26]

B. LEGAL STANDARDS

> A court may find that a party's action is frivolous under MCR 2.625(A)(2) when (1) the party initiated the suit for purposes of harassment, (2) "[t]he party's legal position was devoid of arguable legal merit," or (3) "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true."[27]

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[23] *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 439; 830 NW2d 785 (2013).

[24] *Mich Props*, 491 Mich at 527. See also *Pontiac Country Club*, 299 Mich App at 439.

[25] *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994) (opinion by BOYLE, J.); *Wayne Co v Michigan State Tax Comm*, 261 Mich App 174, 186-187; 682 NW2d 100 (2004).

[26] *In re Payne*, 444 Mich at 692 (opinion by BOYLE, J.). See also *Wayne Co*, 261 Mich App at 186-187.

[27] *Pontiac Country Club*, 299 Mich App at 439, quoting MCL 600.2591(3)(a).

A claim is not frivolous merely because the party advancing the claim does not prevail on it.[28]

C. APPLYING THE STANDARDS

The Department contends that the Tribunal erred by finding that it was attempting to purposefully avoid the application of clearly established precedent. We conclude that evidence on the record did not support the Tribunal's finding that the Department's action was frivolous.

The Tribunal found that the Department's action was frivolous for two reasons: (1) it continued to challenge the ability of operating companies to use professional employer organizations after the Legislature specifically permitted their use in MCL 208.4(4), and (2) it was attempting to purposefully avoid this Court's decision in *Herald Wholesale*, which provided "clear guidance" under the facts in this case.

There is no evidence in the record supporting the Tribunal's finding that the Department continued to challenge the ability of companies to use professional employer organizations for officers and employees given that the record contains no evidence of *repeated* challenges by the Department on this issue. The only challenge contained in this record is the Department's challenge in this case. Adamo Demolition did not provide any evidence that the Department had challenged the use of professional employer organizations in other cases. We conclude that competent, material, and substantial evidence did not support the Tribunal's finding.

There is also no evidence in the record supporting the Tribunal's finding that this Court's decision in *Herald Wholesale* provided clear guidance that the Department

[28] *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

was attempting to purposefully avoid. To the extent that the Tribunal relied on its finding that the Department repeatedly attempted to challenge professional employment organizations to support its determination that the Department was purposefully avoiding application of *Herald Wholesale*, as previously noted, the record does not support this finding.

Further, a claim is devoid of arguable legal merit if it is not sufficiently grounded in law or fact,[29] such as when it violates "basic, longstanding, and unmistakably evident" precedent.[30] Whether employees' compensation is properly attributable to the professional employer organization or the leasing company under the Single Business Tax Act has been an area of unstable law: the decision of the Court of Claims in *Bandit Indus, Inc v Dep't of Treasury*,[31] the Legislature's subsequent amendment of MCL 208.4(4), this Court's decision in *Herald Wholesale*, and the Tribunal's decision in *McCartney Enterprises, Inc v Dep't of Treasury* that *Herald Wholesale* should be limited to the facts in that case.[32] This shifting legal framework does not provide longstanding and unmistakably evident precedent.

Further, the Department's position in this case was substantially similar to its position in *McCartney Enterprises*, a 2006 decision in which the Tribunal concluded that *Herald Wholesale* did not control the outcome of the case, when the case involved an employee of

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[29] *Id*.

[30] *DeWald v Isola*, 180 Mich App 129, 136; 446 NW2d 620 (1989).

[31] *Bandit Indus, Inc v Dep't of Treasury*, unpublished opinion of the Court of Claims, issued September 7, 2000 (Docket No. 99-17260-CM). See *Herald Wholesale*, 262 Mich App at 690-693.

[32] *McCartney Enterprises, Inc v Dep't of Treasury*, 16 MTTR 443 (Docket No. 321164), issued July 20, 2006.

a professional employer organization who was also the company's owner.[33] In *McCartney Enterprises*, the Tribunal determined that, because the owner in that case could terminate the contractual relationship, he was not an employee of the professional employer organization.[34] Below, the Department contended that the Tribunal should apply its precedent in *McCartney Enterprises* to this case. While both the Tribunal and this Court disagree with the Department's assertion as it applies to Adamo Demolition, the Tribunal's decision in *McCartney Enterprises* undermines the Tribunal's conclusion that this Court's decision in *Herald Wholesale* provided clear guidance on the issue presented in this case.

Therefore, we conclude that substantial evidence on the record did not support the Tribunal's findings in support of its determination that the Department's position was devoid of arguable legal merit, and we reverse the trial court's award of costs to Adamo Demolition.

IV. CONCLUSION

We conclude that the Tribunal did not make an error of law when it determined that the employees' compensation was properly attributable to the service providers because the contracts gave them the power to hire, fire, direct, and control employees, including Adamo. But we conclude that substantial evidence in the record did not support the Tribunal's finding that the Department's position in this case was devoid of arguable legal merit.

We affirm the Tribunal's decision regarding the service providers' status as professional employer organi-

[33] *Id.*

[34] *Id.*

zations, but reverse the Tribunal's award of costs and remand to the Tax Tribunal for correction of the judgment. We do not retain jurisdiction.

WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ., concurred.

PEOPLE v DILLARD

Docket No. 313396. Submitted November 14, 2013, at Lansing. Decided December 10, 2013, at 9:10 a.m. Leave to appeal sought.

An Ingham Circuit Court jury convicted Shylon L. Dillard of assault with intent to do great bodily harm less than murder, MCL 750.84, resisting and obstructing a police officer, MCL 750.81d, and falsely reporting a felony, MCL 750.411a(1)(b). The court, Rosemarie E. Aquilina, J., sentenced defendant as a third-offense habitual offender to concurrent terms of imprisonment of 114 months to 20 years for the assault conviction, 32 months to 4 years for the conviction of resisting and obstructing, and 36 months to 8 years for the false-reporting conviction. Defendant appealed, challenging only his assault conviction and the corresponding sentence.

The Court of Appeals *held*:

1. Defendant contended that the evidence only proved an aggravated assault, MCL 750.81a(1), without any intent to commit murder or inflict great bodily harm less than murder. Circumstantial evidence and reasonable inferences arising from that evidence may be sufficient to prove the elements of a crime, and intent may be inferred from a defendant's use of physical violence. Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault) and (2) an intent to do great bodily harm less than murder. The assault element need only fit the traditional definition of an assault, which is an attempt or offer with force and violence to do a corporal hurt to another. Consequently, it is not necessary that any actual injury occur. Any injury that a defendant does inflict is not necessarily proof of any intent beyond that necessary to inflict the particular injury, but the extent of any injury and the presumption that one intends the natural consequences of one's acts are both proper considerations for the jury. In fact, the injury actually inflicted need not be an injury specifically intended, but it can nevertheless be strongly probative of the intent to cause the requisite quantum of harm.

2. The evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant acted with the requisite specific intent to support a conviction of assault with intent to do great

bodily harm less than murder. During the confrontation between defendant and the victim, he choked the victim in an attempt to retrieve her phone, chased her, pulled her to the ground many times, dragged her across his driveway, choked her again, and covered her mouth to prevent her screams from being heard. The jury could have properly viewed all of this as circumstantial evidence sufficient to find that defendant had the specific intent to inflict great bodily harm. The fact that the victim suffered extensive injuries and the evidence that defendant apparently ceased his assault only because he feared that it had been detected by someone else amply supported the jury's finding.

3. The trial court did not err when it assessed 15 points for Offense Variable (OV) 8 of the sentencing guidelines. MCL 777.38(1)(a) requires that score for OV 8 (asportation of victim) if a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. To establish asportation, the movement of the victim cannot be incidental to committing an underlying offense. Asportation does not require force. In fact, asportation for purposes of OV 8 can occur even when the victim voluntarily accompanies the defendant to a place or situation of greater danger. A place of greater danger includes an isolated location where criminal activities might avoid detection. The victim agreed to go into defendant's apartment following a series of assaults. She initially played along with defendant's story that they had been mugged, but requested an ambulance specifically to escape from defendant. When the police arrived, the victim was relieved that defendant wasn't going to be able to hurt her any more, and she told the police what had really happened when she got to the ambulance because only then did she feel safe. Furthermore, under the circumstances of the immediately preceding assault, the strong implication was that the victim was not free to go anywhere other than into the apartment with defendant, a place that would have been more isolated from the possibility of further assaults being detected. That no additional assaults occurred in the apartment was irrelevant.

4. The trial court did not err when it assessed 10 points for OV 10. MCL 777.40(1)(b) requires that score for OV 10 (exploitation of a vulnerable victim) if the defendant exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the defendant abused his or her authority status. Under MCL 777.40(2)(b), "exploit" means to manipulate a victim for selfish or unethical purposes. In addition, exploitation requires that the victim actually have been vulnerable. The victim in this

case was clearly vulnerable in light of defendant's greater strength, her intoxication, and the domestic relationship between the two, including the fact that she and defendant had a child together. Defendant unambiguously exploited his greater strength and the relationship. Both circumstances ensured that the victim had no meaningful way to escape from him until the police intervened.

Affirmed.

1. CRIMINAL LAW — ASSAULT WITH INTENT TO COMMIT GREAT BODILY HARM LESS THAN MURDER — INJURIES TO VICTIMS.

Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault) and (2) an intent to do great bodily harm less than murder; the assault element need only fit the traditional definition of an assault, which is an attempt or offer with force and violence to do a corporal hurt to another, and intent may be inferred from the defendant's use of physical violence; it is not necessary that any actual injury occur; an injury that the defendant inflicts is not necessarily proof of any intent beyond that necessary to inflict the particular injury, but the extent of any injury and the presumption that one intends the natural consequences of one's acts are both proper considerations for the jury; the injury actually inflicted need not be an injury specifically intended, but it can be strongly probative of the intent to cause the requisite quantum of harm (MCL 750.84).

2. SENTENCING GUIDELINES — OFFENSE VARIABLE 8 — ASPORTATION OF THE VICTIM.

Offense Variable (OV) 8 (asportation of victim) requires that the sentencing court assess 15 points when scoring the sentencing guidelines if a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense; to establish asportation, the movement of the victim cannot be incidental to committing an underlying offense; asportation does not require force and can occur even when the victim voluntarily accompanies the defendant to a place or situation of greater danger; a place of greater danger includes an isolated location where criminal activities might avoid detection (MCL 777.38(1)(a)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Stuart J. Dunnings III*, Prosecuting

Attorney, and *Joseph B. Finnerty*, Assistant Prosecuting Attorney, for the people.

Michael A. Faraone, P.C. (by *Michael A. Faraone*) for defendant.

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

RONAYNE KRAUSE, J. A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, resisting and obstructing a police officer, MCL 750.81d, and falsely reporting a felony, MCL 750.411a(1)(b). He was sentenced as a third-offense habitual offender, MCL 769.11, to serve concurrent terms of imprisonment of 114 months to 20 years for the assault conviction, 32 months to 4 years for the resisting-or-obstructing conviction, and 36 months to 8 years for the false-reporting conviction. He appeals by right his assault conviction and sentence only.[1] We affirm.

The victim in this case was defendant's girlfriend at the time. On the night these crimes occurred, the two spent some time at a strip club, drinking alcohol and using drugs. Defendant drove them to his apartment in the victim's car. During the trip, they had an argument concerning the victim's phone. According to the victim, defendant was angry and wanted to check which male friends the victim had on a social networking Internet site. According to defendant, he grabbed the victim's phone because the victim first took his phone. They agreed that defendant held the victim down by her neck, although defendant characterized this as "restraining" rather than strangulation.

[1] Defendant does not appeal his convictions of resisting and obstructing a police officer and falsely reporting a felony.

The victim testified that defendant initially would not allow her out of the car until she gave him her phone, but he eventually let her out, at which time the victim attempted to run away. The victim testified that defendant grabbed her by her hair, pulled her down, and put his hand over her mouth to keep her from screaming for help. Defendant contended that the victim fell on her own and was "acting real hysterical" when he tried to help her up. The victim testified that she was able to free herself, but defendant pulled her back to the ground and placed his hands over her mouth, preventing her from breathing, and punched her in the face. She was able to free herself a third time and tried to run, but defendant again caught her and knocked her down, then began dragging her into his apartment. She testified that the assault ended only because defendant feared that someone had heard her screaming, at which point she agreed to go into his apartment with defendant so he would "leave me alone and stop hurting me." Defendant agreed that the victim managed to get up and run, but stated that he tried to help her and covered her mouth because it was four in the morning and the neighbors were trying to sleep. Defendant admitted that he hit her in the nose after she bit his finger and that the third time the victim ran away, he grabbed her by her hair and pulled her down, but he asserted that it was in an attempt to stop her before she hurt herself.

A neighbor called 911. Police officers who responded to the area saw women's boots and a change purse strewn about. The victim answered the door when they knocked; they described her as disheveled, crying, and having abrasions and visible blood on her body and messy hair. Defendant told police that he and the victim had been mugged by two men, one carrying a handgun. The victim later testified that defendant had told her that they needed to tell the police that they had been robbed. She

initially went along with the robbery story, but she requested an ambulance to get away from defendant. At the ambulance, she began crying and said that defendant had inflicted her injuries and that they had not been robbed. She later testified that she was relieved to be able to escape. Defendant was arrested, and the victim was taken to a hospital. The victim's injuries included "multiple abrasions, especially to the face," bruising, swelling, and blood around the nose, a nasal bone fracture, and minor closed head injury; she was also observed by the police to have popped blood vessels in her left eye, which would be consistent with strangulation.

Defendant first argues that his conviction of assault with intent to do great bodily harm less than murder is not supported by sufficient evidence because the evidence did not prove beyond a reasonable doubt that he acted with the requisite specific intent. We disagree.

We review de novo a claim of insufficient evidence, viewing the evidence in the light most favorable to the prosecution to determine whether the essential elements of the charged offense could have been found proved beyond a reasonable doubt. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). "Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime." *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Intent may be inferred from a defendant's use of physical violence. See, e.g., *People v James*, 267 Mich App 675, 677-678; 705 NW2d 724 (2005); *People v Peña*, 224 Mich App 650, 659-660; 569 NW2d 871 (1997), mod in part on other grounds, 457 Mich 885 (1998).

"Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat

with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Notably, the "assault" element of assault with intent to commit great bodily harm less than murder need only fit the traditional definition of an assault, which "is usually defined as an attempt or offer with force and violence to do a corporal hurt to another." *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922). Consequently, it is not necessary for any actual injury to occur. Furthermore, any injury that a defendant does inflict is not *necessarily* proof of any intent beyond that necessary to inflict the particular injury. *Id*. at 674. However, the extent of any injury and the presumption that one intends the natural consequences of one's acts are both proper considerations for the jury. *People v Resh*, 107 Mich 251, 253-254; 65 NW 99 (1895). Indeed, the injury actually inflicted need not be an injury specifically intended, but it can nevertheless be strongly probative of the intent to cause the requisite quantum of harm. See *People v Miller*, 91 Mich 639, 642-645; 52 NW 65 (1892).

Defendant contends that the evidence only proved an aggravated assault, MCL 750.81a(1), without any intent to commit murder or inflict great bodily harm less than murder. The jury would, of course, have been within its rights to choose to believe defendant's version of the events. However, defendant initially choked the victim in an attempt to retrieve her phone. There was evidence that after this confrontation, defendant chased the victim, pulled her to the ground multiple times, dragged her across his driveway, choked her, and covered her mouth to prevent her screams from being heard. The jury could properly have viewed this as circumstantial evidence sufficient to find that defendant had the specific intent to inflict great bodily harm.

The fact that the victim did not suffer more or greater injuries than she did disproves nothing, and it is the role of the jury, not this Court, to weigh the evidence. The fact that the victim suffered extensive injuries and evidence that defendant apparently ceased his assault only because he feared that it had been detected by someone else amply support the jury's finding that defendant intended to cause the victim great bodily harm less than murder.

Defendant also challenges the scoring of two offense variables (OVs). This Court reviews de novo questions of statutory interpretation and whether facts satisfy the legal requirements of any statute governing the scoring of the sentencing guidelines, and this Court reviews for clear error a trial court's factual determinations that those requirements are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

OV 8 requires the trial court to assess 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense[.]" MCL 777.38(1)(a). To establish asportation, the movement of the victim must "not be incidental to committing an underlying offense." *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Asportation does not require force; asportation for the purpose of OV 8 may occur even when the victim voluntarily accompanied the defendant to a place or situation of greater danger. *Id.* at 647-648. A place of greater danger includes an isolated location where criminal activities might avoid detection. *Id.* at 648.

Defendant argues that the victim was not held captive for any time beyond the minimum necessary to commit the charged offense and that captivity occurred

in a driveway, which is a less isolated place than the interior of a car. He further argues that the victim accompanied him to his apartment afterwards of her own volition. In the trial court, defendant argued that the apartment was not a place of greater danger because there was no testimony that any further violence took place in the apartment. In fact, when the police arrived, the victim was relieved that defendant "wasn't going to be able to hurt me anymore," but initially played along with defendant's story that they had been mugged. She requested an ambulance specifically to escape from defendant, and she told the police what had really happened when she got to the ambulance because only then did she feel safe. Furthermore, under the circumstances of the immediately preceding assault, the strong implication would have been that the victim was not free to go anywhere other than into the apartment with defendant, a place that would have been more isolated from the possibility of further assaults being detected. That no such additional assaults apparently occurred is not relevant.

OV 10 requires the trial court to assess 10 points if the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]" MCL 777.40(1)(b). "Exploit" is defined as "manipulat[ing] a victim for selfish or unethical purposes." MCL 777.40(2)(b). Further, to be exploited the victim must actually have been vulnerable. *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). The victim was clearly vulnerable in light of defendant's greater strength, her intoxication, and the domestic relationship between the two, including the fact that she and defendant had a child together. See *id*. at 158-159. Defendant unambiguously exploited his greater strength and his relationship with the victim;

both facts ensured that she had no meaningful way to escape from him until outside intervention by the police occurred. We find no clear error in the trial court's scoring of either OV 8 or OV 10.

Affirmed.

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

STEIN v HOME-OWNERS INSURANCE COMPANY

Docket No. 310257. Submitted July 10, 2013, at Detroit. Decided October 17, 2013. Approved for publication December 10, 2013, at 9:05 a.m.

Ginger Stein brought an action in the Wayne Circuit Court against Home-Owners Insurance Company, alleging breach of contract after defendant, the insurer of plaintiff's home, denied plaintiff's claim related to the destruction of the home by fire. The claim had been denied after defendant determined that the fire occurred as a result of arson with plaintiff's knowledge or consent and that plaintiff had made material misrepresentations during defendant's investigation of the claim. Defendant filed affirmative defenses, alleging that plaintiff had committed acts of fraud and material misrepresentation, the loss was the result of arson committed by or at the direction of plaintiff, and plaintiff misrepresented material facts and concealed information. The court, Michael F. Sapala, J., granted defendant's motion for summary disposition on the basis that plaintiff had made false statements related to the loss. The Court of Appeals reversed the trial court's order and remanded the matter to the trial court for further proceedings, concluding that whether plaintiff had made any misrepresentations was a question of fact for the jury. *Stein v Home-Owners Ins Co*, unpublished opinion per curiam, issued April 12, 2011 (Docket No. 295876). On remand, the trial court instructed the jury, over defendant's objections, that defendant had the burden of proving its affirmative defenses by clear and convincing evidence. In addition, the trial court stated that, in order to establish fraud, defendant had to prove by clear and convincing evidence that plaintiff made a representation of material fact that was false when made, that plaintiff knew the representation was false when she made it, and that she made the representation with the intent that defendant rely on it. The trial court also instructed the jury that defendant had the burden of proving the application of the intentional-act exclusion in the policy by clear and convincing evidence. The jury returned a verdict in favor of plaintiff. Defendant appealed.

The Court of Appeals *held*:

1. The insurance contract's exclusion relating to fraud by an insured does not implicate whether the policy was obtained under fraudulent circumstances. The fact that a contractual provision contains aspects of fraud is no reason, in and of itself, to place a higher burden of proof on the defense than on any other affirmative defense.

2. Defendant had to establish its affirmative defenses by a preponderance of the evidence, not by clear and convincing evidence as stated by the trial court.

3. Even though an assertion relates to the alleged commission of a criminal act by a plaintiff, such as defendant's assertion that plaintiff was responsible for the intentional fire, an insurer defendant is only required to prove by a preponderance of the evidence that the plaintiff insured committed the act. The judgment of the trial court is reversed and the matter is remanded to the trial court for a new trial.

Reversed and remanded.

INSURANCE — AFFIRMATIVE DEFENSES — BURDEN OF PROOF.

An insurer that asserts affirmative defenses in response to its insured's action alleging breach of the parties' insurance contract has the burden of proving its affirmative defenses by a preponderance of the evidence; when an assertion relates to the alleged commission of a criminal act by the insured, such as the insured's alleged intentional burning of the insured property, and the applicability of the policy's exclusions relating to fraud and intentional acts, the insurer is only required to prove by a preponderance of the evidence that the insured committed the act.

Bonita S. Hoffman for plaintiff.

Gregory and Meyer, PC (by *Glen Howard Pickover*), and *James G. Gross, PLC* (by *James G. Gross*), for defendant.

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

WILDER, J. Defendant appeals as of right a judgment awarding plaintiff $199,399.79 for her claim for insurance proceeds related to the loss of her home because of a fire. We reverse and remand for a new trial.

I. BASIC FACTS

Plaintiff owned a modular home located in Sumpter Township, Michigan. Plaintiff's property was covered for fire loss under an insurance policy issued by defendant. The policy, however, contained a provision that excluded any losses that were caused by "[a]n action by or at the direction of any insured committed with the intent to cause a loss." The policy further provided:

> This entire policy is void if, whether before, during or after a loss, any insured has:
>
> a. intentionally concealed or misrepresented any material fact or circumstance;
>
> b. engaged in fraudulent conduct; or
>
> c. made false statements;
>
> relating to this insurance.

On December 23, 2007, while plaintiff was not home, a neighbor saw a car pull into plaintiff's driveway and leave after approximately 10 minutes. Shortly thereafter, the neighbor saw that the home was on fire and called the fire department. A fire investigator testified that it was his opinion that the fire was intentionally set by an amateur. Defendant formally denied the claim in a letter on August 26, 2008. Defendant explained in the letter that it had determined that the fire occurred as a result of arson with plaintiff's knowledge or consent and that plaintiff made material misrepresentations during defendant's investigation of her claim.

Plaintiff thereafter filed a complaint against defendant, alleging breach of contract. Defendant filed affirmative defenses, which included the following: plaintiff had committed acts of fraud and material misrepresentation, the loss was the result of arson committed by or at the direction of plaintiff, and plaintiff misrepresented material facts and concealed information.

In October 2009, defendant filed a motion for summary disposition, which was granted.[1] However, this Court reversed the trial court's order and remanded the matter to the trial court for further proceedings, concluding that whether plaintiff had made any misrepresentations was a question of fact for the trier of fact. *Stein v Home-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2011 (Docket No. 295876), p 2.

At trial, the trial court, despite defendant's objections, repeatedly instructed the jury that defendant had the burden of proving its affirmative defenses by clear and convincing evidence. During the preliminary instructions, the trial court stated:

> On the following propositions defendant has the burden of proof:
>
> One, that the fire was intentionally set.
>
> Two, that the plaintiff made misrepresentations with the intent to defraud.
>
> And [three], that plaintiff failed to mitigate her damages.
>
> On these listed propositions, the defendant must prove them by clear and convincing evidence.
>
> This means that the defendant must do more than merely persuade you that the proposition is properly [sic] true. To be clear and convincing[,] the evidence must be strong enough to cause you to have a clear and firm belief that the proposition is true.

This instruction was also repeated to the jury after the proofs were concluded and before the jury began its

[1] Defendant argued that plaintiff had made material misrepresentations in the course of her claim and that she was judicially estopped from claiming more than $1,800 in personal property loss because that is the amount she claimed in her bankruptcy filing. The trial court granted the motion on the ground that plaintiff had made false statements related to the loss.

deliberations. Additionally, the trial court stated the following:

> The defendant Home-Owners claims that the plaintiff attempted to defraud it. To establish fraud the defendant has the burden of proving each of the following elements by clear and convincing evidence.
>
> A, plaintiff made a representation of material facts.
>
> B, the representation of material facts that plaintiff made was false when made.
>
> C, plaintiff knew that the representations were false when she made them.
>
> D, plaintiff made the representations with the intent that the defendant rely upon the representations.
>
> Your verdict will be for the defendant on the defense of fraud if you decide that defendant has proved each of these elements by clear and convincing evidence.

The trial court provided a similar instruction for the intentional-act exclusion: "Defendant Home-Owners has the burden of proving the application of [the intentional-act] exclusion by clear and convincing evidence."

After deliberating, the jury returned a verdict in favor of plaintiff, and defendant's appeal followed.

II. ANALYSIS

Defendant argues that the trial court instructed the jury on an incorrect burden of proof with regard to defendant's position that the contract precluded plaintiff from recovering any benefits. We agree.

Defendant preserved this issue by objecting to the jury instruction in the trial court. *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008). Whether the trial court's instruction on the applicable burden of proof was proper is a question law that this Court

reviews de novo. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 694-695; 630 NW2d 356 (2001).

At issue is the provision in the insurance contract that would exempt plaintiff's loss from coverage and the provision that would void the contract in its entirety. The provisions are as follows:

> We do not cover loss to covered property caused directly or indirectly by any of the following, whether or not any other cause or event contributes concurrently or in any sequence to the loss:
>
> * * *
>
> (9) An action by or at the direction of any insured committed with the intent to cause a loss.
>
> * * *
>
> This entire policy is void if, whether before, during or after a loss, any insured has:
>
> a. intentionally concealed or misrepresented any material fact or circumstance;
>
> b. engaged in fraudulent conduct; or
>
> c. made false statements;
>
> relating to this insurance.

When it instructed the jury, the trial court required that, in order for defendant to prevail on the basis of any of these contractual provisions, defendant had to establish the presence of such a defense through clear and convincing evidence. This was erroneous.

This case involves the application of express provisions of a contract. The fact that one of the contract's provisions contains aspects of fraud is no reason, in and of itself, to place a higher burden of proof on the defense

than on any other affirmative defense. While "fraud" is one of the traditional defenses to a contract, *Majestic Golf, LLC v Lake Walden Country Club, Inc*, 297 Mich App 305, 326; 823 NW2d 610 (2012), this avoidance defense is typically used when "a contract is *obtained* as a result of fraud or misrepresentation," *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012) (emphasis added). The fraud at issue in this case does not implicate whether the contract was obtained under fraudulent circumstances; as such, the traditional defense of fraud simply is not applicable. To be clear, fraud is only relevant in this case because the contract *itself* contains an exclusion related to fraud.

This Court in *Mina v Gen Star Indemnity Co*, 218 Mich App 678; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997), was confronted with this same issue. In *Mina*, the plaintiff's business, which was covered under an insurance policy issued by the defendant, was destroyed by fire. *Mina*, 218 Mich App at 680. But, while relying on the fact that the resulting investigation concluded that the fire was intentionally set, the defendant denied the claim for benefits on the bases of fraud, false swearing, and arson. *Id*. The plaintiff filed suit against the defendant, and the defendant raised the affirmative defenses of arson, fraud, and false swearing. *Id*. At trial, the court instructed the jury that the defendant had the burden of proving its affirmative defenses by a preponderance of the evidence. *Id*. at 681. After discussing the history surrounding the somewhat confusing caselaw, the *Mina* Court concluded that the trial court correctly instructed the jury. *Id*. at 681-685. The *Mina* Court, *id*. at 685, noted that the trial court properly relied on *Campbell v Great Lakes Ins Co*, 228 Mich 636, 640-641; 200 NW 457 (1924), which "addressed th[is] identical issue" and

held that a preponderance of the evidence standard was appropriate.

Plaintiff claims that *Mina* has no precedential value and, thus, should not be followed. However, this is incorrect. The Court of Appeals' judgment in *Mina* was reversed *in part* on other grounds by our Supreme Court, *Mina*, 455 Mich 866, leaving this Court's discussion related to the present issue intact. See *People v Carson*, 220 Mich App 662, 672; 560 NW2d 657 (1996) ("[A]n overruled proposition in a case is no reason to ignore all other holdings in the case."). Therefore, *Mina* is binding precedent on this issue. Plaintiff relies on *Horace v City of Pontiac*, 456 Mich 744, 754-755; 575 NW2d 762 (1998), and *Dunn v DAIIE*, 254 Mich App 256; 657 NW2d 153 (2002), for the proposition that *Mina* has no precedential value. However, both *Horace* and *Dunn* involved the citation of Court of Appeals cases that were reversed in their entirety—not *partially* reversed. *Horace*, 456 Mich at 747 n 2; *Dunn*, 254 Mich App at 259. Thus, *Horace* and *Dunn* are not pertinent.

Plaintiff also claims that our Supreme Court's decision in *Campbell* is not binding because more recent Supreme Court opinions have stated conflicting views. Specifically, plaintiff relies on *Grimshaw v Aske*, 332 Mich 146; 50 NW2d 866 (1952), *Modern Displays, Inc v Hennecke*, 350 Mich 67; 85 NW2d 80 (1957), and *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330; 247 NW2d 813 (1976). However, no case has ever overruled *Campbell*. Plus, these relied-on cases involved actions for fraud—not the application of a forfeiture or exclusion clause contained in a contract that the parties assented to. See *Hi-Way Motor*, 398 Mich at 335 (the plaintiffs instituted the action for "fraud and misrepresentation"); *Modern Displays*, 350 Mich at 69 (the plaintiff alleged in its bill of complaint that the defendants "had

been guilty of fraud"); *Grimshaw*, 332 Mich at 148 (the plaintiff sought "damages for fraud").

Moreover, our review of the caselaw demonstrates that the only contract cases involving the burden of proving some element by clear and convincing evidence have dealt with oral contracts, avoiding contracts, modifying existing contracts, waiving an existing contractual term, and reforming contracts. See, e.g., *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003) (clear and convincing evidence of a waiver or modification of an existing contract is needed); *Barclae v Zarb*, 300 Mich App 455, 475; 834 NW2d 100 (2013) (oral contract must be established by clear and convincing evidence when one party has, in reliance on the contract, acted on the contract and the statute of frauds would normally act to bar the contract); *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006) (clear and convincing evidence needed to establish a basis for reforming the contract); *Zander v Ogihara Corp*, 213 Mich App 438, 444; 540 NW2d 702 (1995) (clear and convincing evidence needed to establish proof of lost contract's contents). None of the circumstances considered in these cases applies to a circumstance such as the one involved in this case, where a party endeavors to prove only that some express condition contained in a written contract actually occurred.

In addition, while the trial court articulated reasons, albeit erroneous ones, for requiring defendant to prove fraud by clear and convincing evidence, the trial court provided no rationale for requiring this elevated evidentiary burden on *all* of defendant's affirmative defenses. As discussed already, the insurance policy also precluded coverage for any loss if the arson was at the direction of plaintiff. In this case, defendant asserted

that plaintiff was responsible for the intentional fire. Our Supreme Court has held that, even though an assertion relates to the alleged commission of a criminal act by a plaintiff, an insurer defendant is only required to prove by a preponderance of the evidence that the plaintiff committed the act. *Sacred Heart Aid Society v Aetna Cas & Surety Co*, 355 Mich 480, 485-486; 94 NW2d 850 (1959); *Monaghan v Agricultural Fire Ins Co*, 53 Mich 238, 254-255; 18 NW 797 (1884).

For all of the foregoing reasons, we hold that the trial court erred by requiring defendant to prove its affirmative defenses by clear and convincing evidence.[2]

Reversed and remanded for a new trial. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

STEPHENS, P.J., and OWENS, J.J., concurred with WILDER, J.

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[2] We further note that plaintiff and the trial court placed too much reliance on SJI2d 128.01, which states, in part, "To establish fraud, plaintiff has the burden of proving each of the following elements by clear and convincing evidence[.]" As noted already, this evidentiary requirement is for actions for fraud. The usage note for this instruction reinforces this premise by stating: "This instruction is intended to be used in a tort action for damages for fraud. *It is not designed for use in other types of cases*." (Emphasis added.)

PEOPLE v HERRON

Docket No. 309320. Submitted October 1, 2013, at Marquette. Decided December 12, 2013, at 9:00 a.m. Leave to appeal sought.

A Menominee Circuit Court jury convicted Paul A. Herron of breaking and entering a building with intent to commit a larceny, MCL 750.110, and possession of burglary tools, MCL 750.116. The court, Richard J. Celello, J., sentenced defendant to a prison term of 6 years and 4 months to 20 years. Defendant appealed, alleging ineffective assistance of counsel. He also filed a motion to remand, which the Court of Appeals granted. Following an evidentiary hearing, the trial court denied defendant's motion for a new trial.

The Court of Appeals *held*:

1. Defendant claimed that he did not have the necessary intent to commit a larceny and that the break-in was a cry for help so he could be arrested and receive assistance for his mental health problems. Defendant argued that defense counsel's failure to investigate and call witnesses who would have corroborated defendant's claim that he did not intend to commit larceny when he broke into the building deprived him of his right under the Sixth Amendment and Const 1963, art 1, § 20 to effective assistance of counsel. To establish that defense counsel did not render effective assistance and therefore that the defendant is entitled to a new trial, he or she must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there was a reasonable probability that the outcome would have been different. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. With respect to whether defense counsel's performance fell below an objective standard of reasonableness, counsel is given wide discretion to decide questions of trial strategy. Whether to call witnesses is presumed to be a matter of trial strategy, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. The failure to adequately investigate is ineffective assistance of counsel if it undermines confidence in the trial's outcome. Defense counsel's trial strategy in this case centered on negating the element of intent. In light of

the evidence at the hearing on remand, defense counsel's actions were objectively reasonable. Defendant failed to establish that there was a reasonable probability that the trial's outcome would have been different had his counsel tried the case differently. None of defendant's proffered witnesses would have corroborated his claim that he did not intend to commit a larceny, and some of their testimony would have conflicted with defendant's own testimony.

2. Judicial fact-finding to score Michigan's sentencing guidelines does not violate the Sixth Amendment. Defendant argued that under *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), judicial fact-finding using Michigan's sentencing guidelines as a guide to determine the minimum term of an indeterminate sentence from a recommended range violated the Sixth and Fourteenth Amendments. In *Apprendi v New Jersey*, 530 US 466 (2000), the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *People v Drohan*, 475 Mich 140 (2006), the Michigan Supreme Court held that *Apprendi* and its progeny did not affect Michigan's sentencing guidelines because under Michigan's sentencing scheme, MCL 769.8(1), the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. As long as the defendant receives a sentence within that statutory maximum, the trial court may use judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict or the defendant's guilty or no-contest plea. Defendant argued that *Alleyne* eviscerated *Drohan*'s underpinnings. *Alleyne*, however, distinguished judicial fact-finding to establish a mandatory minimum floor of a sentencing range from the traditional wide discretion accorded trial courts to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant's plea, noting that broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment. In this case, judicial fact-finding within the context of Michigan's sentencing guidelines was not used to establish a mandatory minimum floor of a sentencing range. Rather, judicial fact-finding and the sentencing guidelines were used to inform the trial court's sentencing discretion within the maximum sentence. The statutes defendant was convicted of violating do not provide for a mandatory minimum sentence on the basis of any judicial fact-finding. While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for the minimum sentence of an indeterminate sentence, it does not establish a mandatory minimum.

Affirmed.

CONSTITUTIONAL LAW — RIGHT TO TRIAL BY JURY — SENTENCING GUIDELINES — FACT-FINDING TO SCORE.

Judicial fact-finding used in scoring the Michigan sentencing guidelines does not violate the Sixth Amendment under the decision in *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Daniel E. Hass*, Prosecuting Attorney, and *Mark G. Sands*, Assistant Attorney General, for the people.

State Appellate Defender (by *Christine A. Pagac*) for defendant.

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM. Defendant was convicted by a jury of breaking and entering with intent to commit a larceny, MCL 750.110, and possession of burglary tools, MCL 750.116. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 6 years and 4 months to 20 years' imprisonment. He appeals by right. We affirm.

On January 3, 2011, police responded to a call about a possible break-in of a Menominee beauty salon. Upon arriving, a police officer shined a spotlight on the building and saw defendant inside. Defendant fled, discarding a tire iron as he ran. He was apprehended soon thereafter. At trial, defendant did not dispute that he had broken into the salon using the tire iron; however, he claimed that he did not have the necessary intent to commit a larceny to convict him of the breaking and entering charge.[1] Instead, defendant

[1] Although defendant does not specifically state that he is conceding that the alleged error would not have affected his conviction of possession of burglary tools, it can be inferred from his sole emphasis on the intent to commit a larceny that he is doing so. See *People v Wilson*, 180 Mich App 12,

claimed the break-in was a "cry for help" because he wanted to be arrested so he could receive help for mental health problems he had long suffered from. He testified that he was at a friend's house on the night of the break-in and "told everyone there, 'I can't deal with this, and I'm going to go get arrested.' "

For his sole issue on appeal, defendant asserted a claim of ineffective assistance of counsel and filed a motion to remand to the trial court under MCR 7.211(C)(1) in order to develop a factual record. He named three persons as potential witnesses that his trial counsel never contacted who could, he asserted, have provided information relevant to his defense theory. The three are Natasha Fuller (defendant's girlfriend at the time of the break-in), Shane Sullivan, and Lisa Christensen (Sullivan's ex-wife). We granted the motion. All three identified witnesses were called to testify, along with defendant's trial counsel and defendant's brother, William Herron. The trial court denied defendant's motion for a new trial.

Defendant argues he was deprived of his right to effective assistance of counsel by trial counsel's failure to investigate and call witnesses who would have corroborated his claim that he did not intend to commit larceny when he broke into the salon. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id*.

The Sixth Amendment of the United States Constitution and Article 1, § 20 of the Michigan Constitution

16; 446 NW2d 571 (1989) (instructing that the intent element for possession of burglary tools is "the intent to use them for breaking and entering").

guarantee the right to effective assistance of counsel for criminal defendants. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish that his counsel did not render effective assistance and therefore that he is entitled to a new trial, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

When determining whether counsel's performance fell below an objective standard of reasonableness, defense counsel is given "wide discretion" to decide questions of "trial strategy." *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). Thus, whether to call witnesses is presumed to be a matter of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Nevertheless, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 US at 690-691. "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Defense counsel testified that his trial strategy centered on negating the element of intent. Of the identified witnesses, defendant's trial counsel said that he sent a letter to Fuller. Although counsel stated that he also sent a letter to defendant's brother, William, both

denied receiving the letters. Neither Christensen nor Sullivan was sent a letter because defendant did not provide counsel a mailing address. There is no indication that counsel followed up with either William or Fuller, and he took no steps to locate either Christensen or Sullivan.

Presiding as fact-finder at the evidentiary hearing, the trial court was positioned to assess the credibility of the witnesses. See *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003); MCR 2.613(C). Thus, the court could have rejected the testimony of William Herron and Fuller that they did not receive the letters counsel sent. And counsel's office apparently received a communication from Fuller that she did not want to become involved in the trial. Defendant does not explain how counsel could have located Christensen and Sullivan without defendant's providing further information about their whereabouts. In any event, Sullivan was apparently living with William Herron at the time of trial, and assuming that the letter to William arrived, Sullivan would likely have been put on notice that defendant was looking for people who could testify about his mental state before the break-in.

As for Christensen, she testified that trial counsel frequented the restaurant where she worked; however, there is no evidence that defense counsel was aware that she worked there, or even knew who she was. Christensen testified that her last name was Sullivan when she and Shane were married. Defense counsel testified that he knew Sullivan had a wife named Lisa, but he did not know her last name was Christensen. In fact, counsel testified that he had never heard the name Lisa Christensen until the day before the evidentiary hearing. He also testified that he did not see her name in any of the correspondence he had received from

defendant. And if Christensen did know who defense counsel was and desired to testify, she could have approached counsel in the restaurant.

Under these circumstances, defense counsel's actions were objectively reasonable.

Further, defendant has failed to establish that there is a reasonable probability that the outcome of the trial would have been different had counsel tried the case differently. None of defendant's proffered witnesses would have corroborated his claim that he did not have the intent to commit a larceny. While they testified that defendant seemed to have mental health problems and had commented in the past that he was more comfortable and coped better in jail, none of the witnesses testified that defendant told them he planned to be arrested. Hence, their testimony would have conflicted with defendant's own testimony that he claimed he had told several people that night "I can't deal with this, and I'm going to go get arrested." Thus, the missing witnesses' testimony would have discredited defendant's defense.

Defendant testified that he approached the salon from behind and parked his bike behind the store. He was dressed in black. He removed and discarded a screen behind the salon and used a tire iron to pry open a window. It is reasonable to infer from this evidence that defendant planned the break-in and had taken steps to avoid detection. As he was fleeing the police, he tossed the tire iron. Then later, when asked if he were trying "to conceal evidence," he responded, "Yes." So, again, it is unlikely that the proposed testimony would have negated the effect of this evidence and the reasonable inferences that arise from it. See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003) (observing that evidence of flight supports an inference of

"consciousness of guilt" and that the term "flight" includes fleeing the scene of the crime). Consequently, counsel's actions in trying the case do not create doubt about the outcome of the trial. *Grant*, 470 Mich at 493.

Defendant also argues in a supplemental brief that in light of *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), judicial fact-finding using Michigan's sentencing guidelines, see MCL 769.34(2) and MCL 777.1 *et seq*., as a guide to determine a minimum term of an indeterminate sentence from a recommended range violates the Sixth and Fourteenth Amendments of the United States Constitution. We disagree. "We review de novo questions of constitutional law." *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007).

In *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the Supreme Court held that the Sixth and Fourteenth Amendments of the United States Constitution limited the ability of judges to increase the maximum punishment of individuals convicted of crimes on the basis of judicial fact-finding. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490. Subsequently, in *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the Supreme Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Thus, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id*. at 303-304. Our Supreme Court summarized

the applicability of these rulings to Michigan's sentencing scheme in *Harper*, 479 Mich at 610:

> Under the Due Process Clause of the Fifth Amendment and the jury trial guarantees of the Sixth Amendment, any fact that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. The Fourteenth Amendment requires that the states' criminal sentencing schemes conform to this rule. The rule includes exceptions for the fact of prior convictions and any facts admitted by the defendant.

Apprendi and its progeny engendered challenges to Michigan's sentencing guidelines, especially after *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), which applied the *Apprendi* rule to the federal sentencing guidelines used to establish a determinate sentence for federal criminal violations. In two opinions, *Booker* held that the federal guidelines were unconstitutional because they used judicial fact-finding and were mandatory. *Id*. at 232-233 (opinion by Stevens, J.); *id*. at 245 (opinion by Breyer, J.). "If the [federal] Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id*. at 233 (opinion by Stevens, J.). So the remedy the Court imposed was to sever the statutory provisions making the federal guidelines mandatory. See *id*. at 245 (opinion by Breyer, J.). *Booker* reaffirmed the *Apprendi* holding: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id*. at 244 (opinion by Stevens, J.).

In *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), our Supreme Court held that *Apprendi* and its progeny do not affect Michigan's sentencing guidelines, primarily because the maximum sentence imposed on being convicted of a crime in Michigan by a jury verdict or a defendant's plea of guilty or no contest is the statutory maximum.

> Under Michigan's sentencing scheme, the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. MCL 769.8(1). . . . As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. [*Id*.]

The *Drohan* Court also relied on the Supreme Court's decision in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), which held that the rule of *Apprendi* did not apply to judicial fact-finding for the purpose of establishing the minimum term of a sentence within a prescribed statutory maximum. *Drohan*, 475 Mich at 151-152.

Defendant argues that the underpinnings of *Drohan* have been eviscerated by the Supreme Court's decision in *Alleyne*, which overruled *Harris* and held that "any fact that increases the mandatory minimum is an 'element' [of a crime] that must be submitted to the jury." *Alleyne*, 570 US at ___; 133 S Ct at 2155. Essentially, the Court reasoned that a mandatory minimum sentence established the floor of a sentencing range and found it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id*. at ___; 133 S Ct at 2160. The Court restricted its reasoning to judicial fact-finding establishing a *mandatory minimum* sentence. "It is indisputable that a fact triggering a *mandatory minimum* alters the

prescribed range of sentences to which a criminal defendant is exposed." *Id*. at ___; 133 S Ct at 2160 (emphasis added.) Thus, "the core crime and the fact triggering the *mandatory minimum* sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Id*. at ___; 133 S Ct at 2161 (emphasis added.) But in applying the *Apprendi* rule to facts that establish the mandatory minimum of a sentencing range, the *Alleyne* Court distinguished judicial fact-finding "used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' " *Id*. at ___ n 2; 133 S Ct at 2161 n 2, quoting *Williams v New York*, 337 U S 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Writing for the Court in Part III(C) of *Alleyne*, Justice Thomas expounded on this point:

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e.g., Dillon* v. *United States*, 560 U. S. [817, 828-829; 130 S Ct 2683; 177 L Ed 2d 271 (2010)] ("[W]ithin established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi*, 530 U. S., at 481 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute").[6] This position has firm historical roots as well. As Bishop explained:
>
> > "[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the

> judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment." [1] Bishop [Criminal Procedure (2d ed)] § 85, at 54.
>
> "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Apprendi*, [530 US] at 519 (THOMAS, J., concurring). Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized bylaw.

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[6] See also *United States* v. *Tucker*, 404 U. S. 443, 446 [92 S Ct 589; 30 L Ed 2d 592] (1972) (judges may exercise sentencing discretion through "an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come"); *Williams* v. *New York*, 337 U. S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law").

[*Alleyne*, 570 US at ___; 133 S Ct at 2163 (alterations in original except those related to citations).]

In this case, judicial fact-finding within the context of Michigan's sentencing guidelines was not used to establish the mandatory minimum floor of a sentencing range. Rather, judicial fact-finding and the sentencing guidelines were used to inform the trial court's sentencing discretion within the maximum determined by statute and the jury's verdict. The statutes defendant was convicted of violating do not provide for a *mandatory minimum* sentence on the basis of any judicial fact-finding. While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for the minimum sentence of an indeterminate sen-

tence, the maximum of which is set by law, *Drohan*, 475 Mich at 164, it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment right to a jury trial. *Alleyne*, 570 US at ___; 133 S Ct at 2163 & n 6.

We reject defendant's argument to the contrary. Defendant contends that although a court may depart from a guidelines recommended minimum sentence range on finding a substantial and compelling reason to do so, MCL 769.34(3), the presumptive minimum sentencing range is the equivalent of a mandatory minimum sentence. But defendant relies in support of his argument on *Booker*, *Blakely*, *Cunningham v California*, 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007), and the Supreme Court's recent decision in *Alleyne*. As for *Booker* and *Blakely*, we conclude that nothing in those decisions affects Michigan's sentencing guidelines. *Drohan*, 475 Mich at 152-156. With respect to *Cunningham*, our Supreme Court has specifically examined, on remand from the United States Supreme Court, whether that decision—involving a California determinate sentencing law (DSL) using judicial fact-finding—rendered Michigan's sentencing guidelines a violation of the *Apprendi* rule. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007). The Court distinguished the California DSL from Michigan's sentencing guidelines, in particular Michigan's use of a presumptive intermediate sanction if the guidelines score falls within a straddle cell, MCL 769.34(4)(a). *McCuller*, 479 Mich at 686-691. The Court reaffirmed that Michigan's sentencing scheme does not violate *Apprendi* and its progeny because, except for the application of habitual-offender statutes, " 'the *maximum* portion of a defendant's indeterminate sentence is prescribed by MCL 769.8, which requires a sentencing judge to impose no less

than the prescribed statutory maximum sentence as the maximum sentence for every felony conviction.' " *McCuller*, 479 Mich at 694, quoting *Harper*, 479 Mich at 603. The possibility of an intermediate sanction under MCL 769.34(4)(a) " 'is a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period of time that is *less* than that authorized by the jury's verdict or guilty plea, a circumstance that does not implicate *Blakely*.' " *McCuller*, 479 Mich at 694, quoting *Harper*, 479 Mich at 603-604.

In essence, then, defendant's *Apprendi* argument is reduced to reliance on *Alleyne* alone. We conclude that defendant's argument fails in light of the pains the United States Supreme Court took in Part III(C) of its opinion to distinguish judicial fact-finding that establishes a mandatory minimum floor of a sentencing range from the traditional wide discretion accorded trial courts to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant's plea. We hold that judicial fact-finding to score Michigan's sentencing guidelines falls within the " 'wide discretion' " accorded a sentencing court " 'in the sources and types of evidence used to assist [the court] in determining the kind and extent of punishment to be imposed within limits fixed by law[.]' " *Alleyne*, 570 US at ___ n 6; 133 S Ct at 2163 n 6, quoting *Williams*, 337 US at 246. Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [that] does not violate the Sixth Amendment." *Alleyne*, 570 US at ___; 133 S Ct at 2163.

We affirm.

RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

SOUDEN v SOUDEN

Docket No. 309606. Submitted December 11, 2013, at Detroit. Decided December 17, 2013, at 9:00 a.m.

Gwenda J. Souden brought an action in the Oakland Circuit Court, Family Division, against Dean F. Souden seeking a judgment of divorce. The court, Linda S. Hallmark, J., granted the judgment. The judgment contained a provision stating that each party was responsible for their own attorney fees and costs and that each attorney retained a lien on his or her client's share of the marital assets to ensure payment of the attorney fees. The judgment further provided that if either party failed to pay his or her attorney, the attorney would be entitled to proceed by virtue of the judgment of divorce as a judgment creditor to collect the sums with such remedies as are available to a judgment creditor in Michigan. A. Lawrence Russell, the attorney who represented Gwenda Souden (hereafter plaintiff) in the divorce proceedings, thereafter filed a petition seeking the payment of $26,291.47 allegedly owed as a result of his efforts. Following a hearing, the trial court granted Russell's request for attorney fees, although it ordered that a $2,500 credit claimed by plaintiff be reflected in the judgment. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court had the jurisdiction to enforce Russell's attorney's charging lien that was secured by the judgment of divorce. The jurisdiction of the trial court was established by the fact that it had jurisdiction over the divorce. The ability to enforce an attorney's charging lien is ancillary to a trial court's exercise of jurisdiction over the cases before it.

2. Plaintiff received adequate due process protections.

3. The trial court did not properly review Russell's claimed fees for reasonableness, did not address on the record any of plaintiff's contentions regarding the fees, and did not analyze the reasonableness of the "finance charge" charged by Russell. The trial court's order is vacated and the case is remanded to the trial court for an evidentiary hearing regarding the reasonableness of the claimed fees.

4. The trial court, if Russell seeks payment of his "finances charge" on remand, should determine whether Russell's finance charge is in the nature of interest on a debt or a late fee.

5. To the extent that the order of the trial court can be interpreted as attaching a lien to the real property of plaintiff, such a lien would be invalid under the circumstances as they currently exist. Absent Russell following the proper procedures to collect on a judgment, his charging lien may not attach to plaintiff's real property.

Vacated and remanded.

1. ATTORNEY AND CLIENT — ATTORNEY'S LIENS — GENERAL LIENS — CHARGING LIENS.

There are two types of attorney's liens; a general, retaining, or possessory lien and a special or charging lien; a general, retaining, or possessory lien grants an attorney the right to retain possession of a client's property, including money and documents, until the fee for services is paid; a special or charging lien is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit; a charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services.

2. ATTORNEY AND CLIENT — ATTORNEY'S LIENS — CHARGING LIENS.

A trial court's ability to enforce a charging lien of an attorney for a party in an action before the court is ancillary to the court's exercise of jurisdiction over the case involving the party.

3. ATTORNEY AND CLIENT — ATTORNEY FEES.

It is incumbent on a trial court to conduct a hearing to determine what services were actually rendered and the reasonableness of those services when requested attorney fees are contested; a trial court should endeavor to briefly discuss the eight factors listed in MRPC 1.5(a) in order to aid appellate review of its decision, but is not required to consider every factor in detail.

4. ATTORNEY AND CLIENT — ATTORNEY FEES — CONTRACTS.

An attorney-client relationship must be established by contract before an attorney is entitled to payment for services rendered.

5. ATTORNEY AND CLIENT — ATTORNEY'S LIENS — CHARGING LIENS — REAL PROPERTY.

An attorney's charging lien may not be imposed on the real estate of the attorney's client, even if title to the real estate was established or recovered by the attorney's efforts, unless the parties have an express agreement providing for a lien, the attorney obtains a judgment for the fees and follows the proper procedure for

enforcing a judgment, or special equitable circumstances exist to warrant the imposition of a lien.

Allan Falk, PC (by *Allan Falk*), for Gwenda Souden.

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

BOONSTRA, P.J. Plaintiff appeals as of right the order of the trial court granting the petition of attorney A. Lawrence Russell (Russell) for payment of attorney fees. We affirm the trial court's jurisdiction over this matter and reject plaintiff's due process claims; nonetheless, we vacate the trial court's order and remand for an evidentiary hearing on the reasonableness of Russell's claimed fees.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a divorce following domestic relations arbitration. The divorce judgment entered after the arbitration was the subject of a prior appeal in this Court.[1] The issues involved in the arbitration and the entry of the judgment of divorce are for the most part not relevant to the current appeal.

Russell represented plaintiff in the divorce proceedings. The judgment of divorce entered by the trial court contained the following provision:

ATTORNEY FEES

IT IS FURTHER ORDERED AND ADJUDGED that each party shall be responsible for their own attorney fees and costs. Each attorney, A. Lawrence Russell, [sic] & Associates P.C., and, [sic] John P. Williams, Esq., shall retain a lien on

[1] See *Souden v Souden*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2011 (Docket Nos. 297676, 297677, and 297678).

> his/her client's share of the marital assets to insure payment of the attorney fees. Should either party fail to pay his/her attorney, the attorney shall be entitled to proceed by virtue of the Judgment of Divorce, as a Judgment Creditor, to collect said sums with such remedies as are available to a Judgment Creditor in the State of Michigan. Further, each attorney lien claimed and held is not dischargeable through bankruptcy.

In 2012, Russell filed a "Petition for Payment of Attorney Fees Pursuant to Attorney Fees Provision as Set Forth in the Judgment of Divorce after Binding Arbitration." Russell alleged that he had represented plaintiff before, during, and after the arbitration proceedings and the entry of the judgment of divorce. Russell further recited the passage from the judgment of divorce quoted above and attached copies of invoices showing the alleged unpaid balance owed. Russell alleged the existence of an attorney's lien and alleged that notice of the lien was served on all parties and their counsel as well as on holders of the parties' investment accounts. The petition requested relief in the amount of $26,291.47 and requested that payment be made "first from any and all proceeds awarded to [plaintiff] from the marital estate" including real property in Michigan and Florida as well as investment accounts.

The trial court held a hearing on Russell's motion. At the hearing, Russell variously referred to his claim for attorney fees as "an account stated," an "open account," and an "attorney's charging lien." He also referred the trial court to MCL 600.2145, which governs the proofs of the amount due on open accounts or accounts stated. Russell also requested that the amount he alleged was owed be paid first from all proceeds awarded to plaintiff from the marital estate.

Plaintiff responded that Russell was not a party to the divorce case and had failed to file a lawsuit with

proper service of process in the correct forum. Plaintiff also alleged that Russell had failed to provide a detailed billing of his charges. Plaintiff further alleged that the billing did not reflect a $2,500 credit. Finally, plaintiff stated that the billing did not state the interest rates being charged and inquired regarding how Russell had calculated the "finance charge" added to the final bill.

The trial court determined that the billing was sufficiently detailed because the entries included time spent, a description of the service, and a rate. The trial court granted Russell's request for attorney fees, although it ordered that the $2,500 credit be reflected in the judgment amount. This appeal followed.

II. SUBJECT-MATTER JURISDICTION

Plaintiff first argues that the trial court lacked subject-matter jurisdiction over Russell's claim. We disagree. "[W]hether a trial court had subject-matter jurisdiction over a claim is a question of law that is reviewed de novo." *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

In general, "the jurisdiction of a divorce court is strictly statutory and limited to determining the rights and obligations between the husband and wife, to the exclusion of third parties . . . ." *Estes v Titus*, 481 Mich 573, 582-583; 751 NW2d 493 (2008) (quotation marks and citation omitted); see also MCL 552.6. Third parties can be joined in a divorce action only if they are alleged to have conspired with one spouse to defraud the other spouse. *Estes*, 481 Mich at 583.

Specifically, a divorce court lacks jurisdiction to adjudicate the rights of third-party creditors. *Yedinak v Yedinak*, 383 Mich 409, 414-415; 175 NW2d 706 (1970). Plaintiff argues that *Estes* and *Yedinak* indicate that the divorce court lacked jurisdiction to adjudicate the

rights of Russell, as a creditor of plaintiff. Plaintiff makes a correct general statement of the law regarding third parties to a divorce. However, Russell's claim was premised on his contractual relationship with plaintiff as her attorney and on a resulting attorney's charging lien.

There are two types of attorney's liens. A general, retaining, or possessory lien grants the attorney the right to retain possession of property of the client, including money and documents, until the fee for services is paid. *George v Sandor M Gelman, PC*, 201 Mich App 474, 476; 506 NW2d 583 (1993). A special or charging lien is "an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit." *Id*. The charging lien "creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services." *Id*. Attorney charging liens are not recognized by statute but exist in the common law. *Id*. at 477.

> The [attorney's charging] lien exists as part of the court's inherent power to oversee the relationship of attorneys, as officers of the court, with their clients. It does provide a means of securing the legitimate interest of the attorney in payment for his services and expenses on behalf of the client, but it is subject to the control of the court for the protection of the client and third parties as well . . . . [*Kysor Indus Corp v DM Liquidating Co*, 11 Mich App 438, 445; 161 NW2d 452 (1968) (quotation marks and citations omitted).]

This Court has recognized a divorce court's power to enforce charging liens secured by a judgment of divorce. See *George*, 201 Mich App 474; *Munro v Munro*, 168 Mich App 138, 143; 424 NW2d 16 (1988). Thus, there is no support for plaintiff's argument that the trial court lacked jurisdiction to enforce an attorney's charging lien resulting from a divorce action.

Plaintiff further makes the cursory statement that the trial court lacked jurisdiction because the amount in controversy was less than $25,000. The jurisdiction of the trial court was established by the fact that it had jurisdiction over the divorce. The family division of the circuit court possesses exclusive jurisdiction over divorce actions. MCL 600.1021(1)(a). The ability to enforce an attorney's charging lien is ancillary to a trial court's exercise of jurisdiction over the cases before it. See *Kysor Indus*, 11 Mich App at 444-446.

Further, the amount-in-controversy requirement is based on the damages claimed. See *Szyszlo v Akowitz*, 296 Mich App 40, 51; 818 NW2d 424 (2012). Here, Russell's petition claimed that he was owed $26,291.47. The fact that Russell ultimately recovered less than $25,000 does not deprive the circuit court of jurisdiction, even assuming arguendo that the amount-in-controversy requirement applied to Russell's claim. See *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 474-475; 628 NW2d 577 (2001).

We therefore find that the trial court did not lack jurisdiction over Russell's claim for attorney fees.[2]

III. DUE PROCESS

Plaintiff next alleges that she was denied procedural due process as a result of the trial court's conducting of the hearing on Russell's claim and was further denied due process by Russell's failure to file a complaint, obtain a summons, or serve process on plaintiff before pursuing his claim. We disagree. The determination

[2] We note that plaintiff is correct that MCR 8.122 does not provide the trial court with jurisdiction to enforce an attorney's charging lien. See *Steinway v Bolden*, 185 Mich App 234, 237; 460 NW2d 306 (1990). However, because neither Russell nor the trial court referred to this rule, plaintiff's argument is irrelevant.

whether a party has been afforded due process of law is a question of law this Court reviews de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).

The United States and Michigan Constitutions guarantee that no person may be deprived of life, liberty, or property without due process of law. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. Due-process guarantees apply to any adjudication of important rights. *Thomas v Deputy Warden, State Prison of Southern Mich*, 249 Mich App 718, 724; 644 NW2d 59 (2002). These protections apply to vested property interests. *Sherwin v State Hwy Comm'r*, 364 Mich 188, 200; 111 NW2d 56 (1961).

Generally, due process requires notice and an opportunity to be heard, including some type of hearing before deprivation of a property interest. *Dusenbery v United States*, 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002); *Republic Bank v Genesee Co Treasurer*, 471 Mich 732, 742; 690 NW2d 917 (2005); *Brandon Twp v Tomkow*, 211 Mich App 275, 281-283; 535 NW2d 268 (1995). Additionally, due process generally requires an opportunity to be heard before an impartial decision-maker. *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). Notice must be reasonably calculated to apprise interested parties of the action and allow them the opportunity to present objections. *Elba Twp*, 493 Mich at 287-288. The opportunity to be heard need not encompass a full trial in all situations, but generally requires a hearing that allows a party the chance to know and respond to the evidence. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004).

In this case, the record reveals that plaintiff signed the judgment of divorce, which included the passage related to Russell's charging lien. Thus, plaintiff not

only had notice, but actually consented to Russell's seeking enforcement of the judgment from the trial court. The trial court was not only able, but was actually bound, to enforce the judgment. See *Franko v Olszewski*, 316 Mich 485, 491; 25 NW2d 593 (1947); *In re Draves Trust*, 298 Mich App 745, 768; 828 NW2d 83 (2012).

Additionally, the record reveals that plaintiff was properly served with Russell's petition and answered that petition. She was also served with notice of the hearing, attended the hearing, and voiced her objections to the petition. The trial court issued its decision by a written order. We hold that plaintiff received adequate due process protections. Although plaintiff argues that Russell was required to begin a separate lawsuit in a different court and serve her with a summons and complaint, this argument ignores the trial court's power to enforce attorney's charging liens. See *George*, 201 Mich App 474; *Munro*, 168 Mich App at 143.

IV. REASONABLENESS OF ATTORNEY FEES

Plaintiff next argues that Russell's claimed attorney fees were unreasonable and inflated. We hold that the trial court did not properly review Russell's claimed fees for reasonableness. This Court reviews a trial court's award of attorney fees and costs for an abuse of discretion. See *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

"An attorney-client relationship must be established by contract before an attorney is entitled to payment for services rendered." *Plunkett & Cooney, PC v Capitol Bancorp Ltd*, 212 Mich App 325, 329; 536 NW2d 886

(1995). An attorney is entitled to recover fees for services rendered under the agreement, even if the agreement is later terminated. *Id*. at 330. However, such fees must be reasonable.

Generally, a party requesting a postjudgment award of attorney fees must show both that the attorney fees were incurred and that they were reasonable. *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009). "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005).

Russell's claim for attorney fees was premised on his contractual relationship with plaintiff as her attorney. The Michigan Rules of Professional Conduct (MRPC), which govern all attorneys in Michigan, provide:

> A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. [MRPC 1.5(a).]

Our Supreme Court has noted, although in the context of an award of attorney fees as part of case-evaluation sanctions, that trial courts have also relied on the eight factors listed in MRPC 1.5(a), which are:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> "(3) the fee customarily charged in the locality for similar legal services;

> "(4) the amount involved and the results obtained;
>
> "(5) the time limitations imposed by the client or by the circumstances;
>
> "(6) the nature and length of the professional relationship with the client;
>
> "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> "(8) whether the fee is fixed or contingent." [*Smith*, 481 Mich at 530, quoting MRPC 1.5(a)(1) to (8).]

Although a trial court is not required to consider every factor in detail, the trial court should endeavor to briefly discuss the above factors "in order to aid appellate review . . . ." *Smith*, 481 Mich at 531.

A fee agreement between an attorney and a client is a contract. See *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 392; 837 NW2d 439 (2013). In a fee dispute, the trial court should consider the language of the fee agreement to determine if the charged fees comport with the agreement. *Id*. However, the trial court, in interpreting the fee agreement and analyzing the disputed fees, should keep in mind the requirement of reasonableness as expressed in the MRPC rule and Michigan law. *Id*. ("Longstanding principles of Michigan law supply a general rule predicating the amount of [an attorney's] fee on the reasonable value of his services.").

Here, the trial court did not examine the fee agreement, if any, between Russell and plaintiff. No evidence of a written fee agreement appears in the record before this Court. Further, the trial court did not conduct a detailed inquiry into the reasonableness of the attorney fees charged by Russell. The trial court merely noted that the billing was "a very detailed billing" and that it "appears to be appropriate." The trial court further

stated that the billing was detailed because it contained an hourly rate, dates, and descriptions of the service.

The trial court also did not address on the record any of plaintiff's contentions, including plaintiff's contention that a lump sum of 67.5 hours billed by Russell was insufficiently detailed and unreasonable or that Russell impermissibly billed her separately for legal-assistant services. The trial court also did not analyze the reasonableness of the "finance charge" of over $3,000 charged by Russell. We therefore vacate the trial court's order and remand for an evidentiary hearing on the issue of the reasonableness of Russell's claimed attorney fees. On remand, the trial court should at least briefly consider the relevant factors enumerated earlier in this opinion. The trial court should also consider our following discussion of the "finance charge."

V. "FINANCE CHARGE"

Plaintiff also argues that the "finance charge" added by Russell resulted from a usurious interest rate in violation of both state and federal law. Plaintiff's claims under the Truth in Lending Act, 15 USC 1601 *et seq*. (TILA), and Regulation Z of the Board of Governors of the Federal Reserve System, 12 CFR 226 *et seq*. (Reg Z), are utterly meritless. However, this Court lacks sufficient information to determine whether the "finance charge" is interest on a debt or a late fee, and thus cannot determine if the charge is in violation of MCL 438.31. The issue whether state or federal usury laws apply to Russell's claimed attorney fees is an issue of statutory interpretation, which this Court reviews de novo. *Elba Twp*, 493 Mich at 278.

With regard to plaintiff's claims under the TILA, Russell plainly is not a "creditor" who is subject to federal disclosure requirements. See 15 USC 1602(g),

15 USC 1631(b), 15 USC 1632(a), and 12 CFR 226.2(a)(17). Even cursory research into the statutory definition of this term and the applicability of the federal statutory scheme would have revealed that these laws, designed for the protection of consumers in consumer-credit transactions, do not apply to the instant case. Plaintiff's argument is utterly without merit.

Plaintiff also alleges that the finance charge charged by Russell violates Michigan's usury law, MCL 438.31. This statute provides for a rate of 5% yearly interest, except that parties may stipulate a larger amount of interest, not to exceed 7%. This statute applies to interest charged on a debt arising from the sale of goods or services. *Attorney General v Contract Purchase Corp*, 327 Mich 636, 642-643; 42 NW2d 768 (1950). However, "late payment charges ordinarily do not constitute interest." *Barbour v Handlos Real Estate & Bldg Corp*, 152 Mich App 174, 188; 393 NW2d 581 (1986).

It is not clear to this Court whether Russell's claimed "finance charge" is a late fee or interest owed on a debt. The invoices provided show regular payments and credits, with no finance charges, until June 10, 2010, at which point the invoices show a stated balance of $23,068.75. Five months later, on November 23, 2010, a "finance charge" of $686.02 was charged—approximately 3% of the total balance. No further charges were made until March 9, 2012, almost 16 months after the last charge, at which point a finance charge of $2,536.70 was charged on a balance of $23,754.77, approximately 11% of the total balance. The inference could be made that the "finance charge" was roughly 3% every four months; however the haphazard timing of the charges, combined with a small number of data points, makes this a shaky conclusion at best.

Additionally, at no point did the invoices show any amounts in the "1-30 Days Past Due," "31-60 Days Past Due," "61-90 Days Past Due," or "Over 90 Days Past Due" columns of the invoices.

Interest is "a charge for the loan or forbearance of money." *Balch v Detroit Trust Co*, 312 Mich 146, 152; 20 NW2d 138 (1945) (quotation marks and citation omitted). On the other hand, late fees are similar to liquidated damages, in that they are contractual obligations designed to cover expenses engendered by a breach of contract. See *E F Solomon v Dep't of State Hwys & Transp*, 131 Mich App 479, 483-484; 345 NW2d 717 (1984), see also *Nat'l Can Co v Fellows*, 290 F 201, 202 (CA 6, 1923) ("Where a contract does not call for compensation for the use of money, but only exacts a payment, which the promisor may wholly avoid by keeping his contract, such stipulated payment is not interest, but is in the nature of a penalty, valid if within the proper limits of liquidated damages . . . .").

This Court simply lacks sufficient information, such as evidence of the billing arrangement between Russell and plaintiff, to determine if the finance charge is in the nature of interest on a debt (which, at the calculated rate, may be usurious under MCL 438.31), or a permissible late fee. The trial court should consider this issue on remand, should Russell still seek payment of this "finance charge."

VI. ATTACHMENT OF RUSSELL'S CHARGING LIEN TO PLAINTIFF'S REAL PROPERTY

Next, plaintiff argues that the trial court erred by ordering that attorney fees be paid from assets and accounts specified by Russell. Although it does not appear that the trial court ordered payment of Russell's fees through a lien on plaintiff's real property, we

remind the trial court that, under the existing circumstances, it should not attach an attorney's charging lien to plaintiff's real property. However, the trial court possessed the authority to order the charging lien be paid out of other assets obtained from the divorce.

Plaintiff mischaracterizes the trial court's order as requiring that the payment to Russell be made from "assets or financial accounts specified by Russell." In fact, the order merely states that the judgment *may* be satisfied from assets of the divorce:

> Petitioner A. Lawrence Russell is awarded the sum of twenty three thousand, seven hundred ninety one ($23,971.00[3]) and zero cents in jugement [sic] against Gwenda Souden. Judgment is subject but not limited to all marital property, Ameriprise accounts, John Henry annuity, real property located in Michigan and in Florida and all spousal support as ordered herein.

Thus, although plaintiff claims that the trial court in effect ordered her to liquidate certain assets, regardless of taxation or other consequences, to pay Russell's bill, the order does not support such a claim. The order merely states that the judgment is "subject" to various proceeds of the divorce. As stated already, the trial court does possess the power to order that the fees and costs due for services be secured out of the judgment or recovery in a particular suit. *George*, 201 Mich App at 476. We find no error in the trial court's order with respect to any property other than real property.

However, with regard to real property, this Court has stated generally that "[n]o Michigan authority . . . permits an attorney's charging lien to attach to real property." *Id*. at 477-478. Moreover, "[a] judgment, by itself, does not create a lien against a debtor's property."

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[3] See Part VII of this opinion.

Id. at 477. In *George*, this Court concluded that no attorney's charging lien may be imposed on a client's real estate, even if title to the real estate was established or recovered by the attorney's efforts, unless "(1) the parties have an express agreement providing for a lien, (2) the attorney obtains a judgment for the fees and follows the proper procedure for enforcing a judgment, or (3) special equitable circumstances exist to warrant imposition of a lien." *Id*. at 478.

Here, the express agreement (as set forth in the stipulated divorce judgment) providing for the lien does not provide that the lien will be paid out of real property, but only that each attorney retains "a lien on his/her client's share of the marital assets . . . ." This does not constitute an express agreement that the lien may attach to real property. Even if the divorce judgment generally constitutes an "express agreement providing for a lien," *George* instructs that "attorney liens upon real property" are disallowed absent "an express written contract . . . *providing for such a lien* . . . ." *Id*. at 478 (emphasis added). The divorce judgment in this case does not satisfy that test. Additionally, in order to proceed against a debtor's real property under the second prong of *George*'s analysis, a creditor must obtain a judgment and execute it against the debtor's property; furthermore:

> A creditor may execute against real property owned by a debtor only after attempting to execute against the debtor's personalty and determining that the personal property is insufficient to meet the judgment amount. MCL 600.6004; MSA 27A.6004. To place a lien against a debtor's real property, the creditor must deliver the writ of execution and a notice of levy against the property to the sheriff, who then records the notice of levy with the register of deeds to perfect the lien. [*Id*. at 477.]

Here, Russell has obtained a judgment; however he has not attempted to execute on that judgment or determined that plaintiff's personalty is insufficient to satisfy the amount. No evidence exists that plaintiff has attempted to avoid paying for Russell's services; instead, as in *George*, a current dispute exists about the total fee charged by Russell. *Id*. at 479.[4]

Thus, to the extent that the order of the trial court can be interpreted as attaching a lien to the real property of plaintiff, such a lien would be invalid under the circumstances as they currently exist. On remand, the trial court should be cognizant that, absent Russell's following the proper procedures to collect on a judgment, his charging lien may not attach to plaintiff's real property.

VII. OTHER ISSUES

Because we vacate the trial court's order and remand for an evidentiary hearing, we need not address plaintiff's other issues. We note briefly, for plaintiff's edification and in an effort to reduce the number of issues on any subsequent appeal, that there is no evidence that the trial court viewed Russell's claim as one on an account stated; furthermore, Russell's claim cannot be maintained under MCL 600.2145. See *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 557; 837 NW2d 244 (2013); see also *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 357-358; 771 NW2d 411 (2009). Further, if a handwritten judgment contains a simple numerical transposition error, plaintiff may simply ask either the trial court, pursuant to MCR 2.612(A)(1), or this Court, pursuant to

[4] Additionally, no special equitable circumstance exists warranting the imposition of a lien on real property.

MCR 7.216(A)(1), to correct the error; invective and hyperbole are not necessary. Additionally, we decline to address plaintiff's claims regarding the dischargeability of this debt in bankruptcy as unripe. *LaFontaine Saline Inc v Chrysler Group LLC*, 298 Mich App 576, 589-591; 828 NW2d 446 (2012), lv granted 495 Mich 870 (2013).

For the foregoing reasons, we vacate the trial court's order and remand for an evidentiary hearing. We deny plaintiff's request to have this matter heard before a different trial judge, because we find that plaintiff has utterly failed to establish the necessary prerequisites to overcome the presumption of judicial impartiality. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992).

Vacated and remanded. We do not retain jurisdiction.

DONOFRIO and BECKERING, JJ., concurred with BOONSTRA, P.J.

PEOPLE v McDONALD

Docket No. 311412. Submitted December 3, 2013, at Lansing. Decided December 17, 2013, at 9:05 a.m. Leave to appeal sought.

Gerald D. McDonald was convicted by a jury in the Calhoun Circuit Court of first-degree home invasion, armed robbery, carrying a concealed weapon, felon in possession of a firearm, three counts of possession of a firearm during the commission of a felony, and five counts of resisting arrest. The court, James C. Kingsley, J., sentenced defendant as a fourth-offense habitual offender to 25 to 50 years' imprisonment for the home invasion conviction, 40 to 60 years' imprisonment for the armed robbery conviction, 6 to 15 years' imprisonment for the concealed weapon and felon-in-possession convictions, 2 years' imprisonment for each of the felony-firearm convictions, and $3\frac{1}{2}$ to 15 years' imprisonment for each of the resisting arrest convictions. Defendant appealed.

The Court of Appeals *held*:

1. MRE 609 governs the admission of evidence of prior convictions for impeachment purposes. A defendant, however, must testify in order to preserve for review the issue of improper impeachment by prior convictions. The failure to testify and preserve the issue results in waiver of any review of the issue given that meaningful appellate review cannot be undertaken unless a defendant actually takes the stand and testifies and the evidence of a prior conviction is admitted. Further, the plain-error test announced in *People v Carines*, 460 Mich 750 (1999), is inapplicable because that test is only applied when an error exists, and a defendant's decision not to testify prevents the appellate court from being able to determine whether the trial court's ruling was erroneous. In this case, the trial court ruled that if defendant were to testify, the prosecution could impeach him with a prior first-degree home invasion conviction. Defendant waived review of the trial court's decision by choosing not to testify.

2. A trial court is not compelled to provide funds for the appointment of an expert on demand. An indigent defendant must show that there exists a nexus between the facts in the case and the need for an expert witness. Without an indication that expert testimony would likely benefit the defense, a trial court does not

abuse its discretion by denying a defendant's motion for appointment of an expert witness. In this case, the trial court denied defendant's motion for funds to cover the fees of his DNA expert that would have been incurred for her time testifying as a witness in court and traveling to and from court. Defendant asserted that his expert would testify that there was a major DNA donor on a gun, which was identified by the victim as having been used during the crime and that was later found near the spot where defendant was arrested, and that the major donor was not defendant. In denying the motion, the court noted that the prosecution's expert witness had already testified that her DNA testing was inconclusive. Under the facts of the case, the trial court did not abuse its discretion by denying the motion because the testimony of defendant's proposed expert would not have been sufficiently beneficial to defendant given that the prosecution's expert witness could not establish a DNA link between defendant and the gun, and defendant's proposed exert witness could not altogether exclude him as having a DNA link to the gun.

3. The danger in revealing a defendant's parolee status is that a jury will recognize that the defendant has previously been convicted of a crime. In this case, defendant could not establish plain error affecting his substantial rights stemming from references during trial to his parolee status because the jury already knew that defendant was a felon because he was charged with felon in possession of a firearm. Therefore, defendant could not establish prejudice.

4. Under MRE 614(b), the court may interrogate witnesses. The interrogation, however, may not pierce the veil of judicial impartiality. In this case, the trial court permissibly questioned witnesses in order to clarify testimony or elicit additional relevant information. At no point did the court pierce the veil of judicial impartiality.

5. Voluntarily given confessions that are not the result of impermissible custodial interrogations are admissible under *Miranda v Arizona*, 384 US 436 (1966). With respect to whether statements or questions posed by police officers to a defendant constitute interrogation, the dispositive question is whether the suspect's incriminating response was the product of words or actions on the part of the officers that they should have known were reasonably likely to elicit an incriminating response. In this case, the trial court permitted an officer to testify that, while defendant was being transported to jail, defendant admitted that he had touched the gun with his elbow while wrestling with the officers. The statement came after the officer asked defendant if he

would be willing to submit a DNA sample. Defendant's statement, which came after a period of silence, was essentially volunteered and followed a question of the type that is normally attendant to arrest and custody. Thus, the question was not interrogational and reversal was not warranted.

Affirmed.

CRIMINAL LAW — IMPEACHMENT — EVIDENCE OF PRIOR CONVICTIONS — APPEAL — PRESERVATION OF ISSUE.

A defendant must testify at trial in order to preserve for appellate review a challenge to a trial court's ruling in limine allowing the impeachment of the defendant with a prior conviction; the failure to testify and preserve the issue results in waiver of any review of the issue and the plain-error test is inapplicable.

Bill Schuette, Attorney General, *Aaron Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Brandon S. Hutlink*, Assistant Prosecuting Attorney, for the people.

Daniel D. Bremer for defendant.

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

MURPHY, C.J. A jury convicted defendant of first-degree home invasion, MCL 750.110a(2), armed robbery, MCL 750.529, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and five counts of resisting arrest, MCL 750.81d. He was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the home invasion conviction, 40 to 60 years' imprisonment for the armed robbery conviction, 6 to 15 years' imprisonment for the concealed weapon and felon-in-possession convictions, 2 years' imprisonment for each of the felony-firearm convictions, and 3½ to 15 years'

imprisonment for each of the resisting arrest convictions. The felony-firearm sentences are to be served concurrently to each other but consecutively to and preceding the sentences for all of the other convictions, with those remaining sentences being served concurrently to each other. Defendant appeals as of right, and we affirm.

I. FACTS

Sometime between 4:30 and 4:45 a.m. on November 2, 2011, the victim walked into her dining room and saw defendant pointing a silver handgun at her. Defendant demanded money, and the victim responded that she did not have any cash. After several minutes, defendant walked through the kitchen and left the victim's home through a back door. Thereafter, the victim realized that her purse, which had been in the kitchen, was missing. The police were contacted, and the victim provided them with a description of the perpetrator. Defendant was located outside an apartment building two blocks away from the victim's home. Two officers approached defendant and attempted to detain him. Defendant resisted, and it took five uniformed officers to subdue him. After defendant was arrested, a silver handgun was found on the ground near where the struggle between defendant and the officers took place. The victim's purse was located in one of the apartment building's window wells. Defendant provided various false names to the police. The victim identified defendant less than one hour after she saw him in her home, and she stated that she was 99 percent sure that defendant was the perpetrator. The victim identified defendant for a second time in a lineup on November 16, 2011, specifically stating that she recognized defen-

dant's eyes and ears. Defendant was identified by the victim as her assailant for a third time at trial.

At trial, defendant disputed that he was the perpetrator and that the gun found by police belonged to him. Defendant's supposed girlfriend testified that defendant, along with others, lived with her in November 2011 in the apartment building outside of which the police located the gun, purse, and defendant shortly after the criminal episode.[1] She further testified that defendant had been smoking methamphetamines with her in their apartment beginning on the evening of November 1 and running through the morning of November 2, 2011. According to the girlfriend, defendant went outside for the first time that morning only minutes before he was arrested by police. The jury convicted defendant of the charged crimes.

II. ANALYSIS

A. DEFENDANT'S RIGHT TO TESTIFY AND PRESENT A DEFENSE AND PROSPECTIVE IMPEACHMENT WITH A PRIOR CONVICTION

Defendant first argues on appeal that the trial court improperly ruled that, in the event defendant testified on his own behalf, a prior first-degree home invasion conviction would be admissible pursuant to MRE 609, which sets forth rules governing the admission of prior convictions for impeachment purposes. Defendant contends that he did not take the stand as a result of the trial court's ruling, which was in error, thereby unlawfully depriving him of an opportunity to present a defense by way of his own testimony. We hold that,

[1] The "girlfriend" testified that she and defendant were in a dating relationship at the time of the crime; however, a police officer testified that defendant provided the name of his girlfriend after being arrested and it was not the same name of the female witness claiming to be defendant's girlfriend at trial.

under *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988), and *People v Boyd*, 470 Mich 363; 682 NW2d 459 (2004), defendant waived this argument for appellate review given his failure to actually testify on his own behalf; the plain-error test is not applicable. Generally speaking, a defendant who waives a right under a rule cannot then seek appellate review of a claimed deprivation of that right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

In *Finley*, our Supreme Court held "that a defendant must testify in order to preserve for review the issue of improper impeachment by prior convictions," adopting the rule established by the United States Supreme Court in *Luce v United States*, 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984). *Finley*, 431 Mich at 521 (opinion by RILEY, C.J.).[2] The lead opinion in *Finley* indicated that the failure to testify and preserve the issue results in a waiver of any review of the issue. *Id*. at 526. The lead opinion explained, and ultimately agreed with, the reasoning and rationale behind the *Luce* rule:

> The purpose of the *Luce* rule is to provide a mechanism for meaningful appellate review of the impeachment decision. In fact, the straightforward logic of *Luce* not grasped by either dissent is that as to evidentiary rulings, error does not occur until error occurs; that is, until the evidence is admitted. Obviously, in other contexts, if an offer of proof is made and the court erroneously permits the introduction of hearsay, character evidence, similar acts, or the myriad of evidence objectionable under the MRE, there is no error requiring reversal unless the evidence actually is introduced. Unless the defendant actually testifies, a number of questions remain open to speculation:

[2] The lead opinion in *Finley*, which was joined by Justices BOYLE and GRIFFIN, was authored by Chief Justice RILEY. Justice BRICKLEY authored a partial concurrence that agreed with the adoption of the rule announced in *Luce*. *Finley*, 431 Mich at 526 (BRICKLEY, J., concurring in part).

> Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling. On a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction. [*Luce*, *supra* at 41-42.]

The *Luce* Court also noted that the prosecutor may not have attempted to impeach the defendant with the prior conviction. Where the case against the defendant is strong, or other avenues of impeachment are available, it is possible that the defendant's prior record would not have been used. *Luce*, *supra* at 42.

In addition, a defendant's decision not to testify generally is based on many factors, no one of which is determinative. A reviewing court cannot assume that the defendant decided not to testify out of fear of impeachment by a prior conviction. *Id*. The Court rejected the suggestion that a defendant may state an intention to testify if the court grants the motion in limine because such a commitment is difficult to enforce. *Id*.

In the event that the trial judge incorrectly allows impeachment by prior conviction, the *Luce* rule enhances review of the harmless error issue:

> Were in limine rulings under Rule 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; the appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a

> whole; it will also tend to discourage making such motions solely to "plant" reversible error in the event of conviction. [*Luce*, *supra* at 42.] [*Finley*, 431 Mich at 512-513 (opinion by RILEY, C.J.) (citations of *Luce* in original).]

The main points emanating from the lead opinion in *Finley* are that (1) there can be no error until a defendant testifies and the prior-conviction impeachment evidence is actually introduced, (2) absent application of the *Luce* rule, appellate review relative to issues of harm and prejudice is burdened by the need to resort to speculation, and (3) in a similar vein, the analysis necessary to determine admissibility under the rules of evidence is made inherently difficult, if not impossible, given the absence of a factual context.[3] In sum, meaningful appellate review cannot be undertaken unless a defendant actually takes the stand and testifies and the evidence of a prior conviction is admitted.

The language in *Finley* regarding preservation and the failure to preserve might suggest the possibility of applying the plain-error test, but that is not the correct analysis. In *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), the Supreme Court outlined the plain-error test:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement

[3] We note that Justice BRICKLEY did not agree with the lead opinion's assessment that there can be no error until evidence is admitted, stating that "the notion that reviewable error does not occur until admission of the challenged evidence does not square with actual practice." *Finley*, 431 Mich at 531 (BRICKLEY, J., concurring in part). Regardless, as discussed later in this opinion, the subsequent decision in *Boyd*, 470 Mich 363, applied the ruling and reasoning employed by the lead opinion in *Finley*.

> generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." [Citations and quotation marks omitted; alteration in original.]

Finley does not support application of the plain-error test in a situation in which a trial court prospectively rules that a prior conviction will be admitted should a defendant take the stand, the defendant does not take the stand—ostensibly because of the court's evidentiary ruling—and the defendant proceeds to appeal the trial court's evidentiary ruling. Under those circumstances, *Finley* does not support employing the plain-error test because (1) *Finley* ultimately stated that the issue is waived, (2) *Finley* did not apply the plain-error analysis, and (3) *Finley* made clear that identifying error and determining harm and prejudice, which are part of the plain-error test, are effectively rendered impossible given the need for speculation.

In *Boyd*, our Supreme Court extended the rule from *Luce* and *Finley*. *Boyd*, 470 Mich at 365. The Court held that the defendant "was required to testify to preserve for review his challenge to the trial court's ruling in limine allowing the prosecutor to admit evidence of defendant's exercise of his *Miranda*[4] right to remain silent." *Id*. The *Boyd* Court observed:

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

> Because the admissibility of post-*Miranda* silence depends on the factual setting in which the prosecutor seeks to admit it, we are faced with the same problem encountered in *Luce* and *Finley*, i.e., that defendant's claim of error is wholly speculative. Not only could the statement have been admitted to contradict a defendant who testified about an exculpatory version of events and claims to have told the police that version upon his arrest, but, as *Luce* suggests, it might not have been admitted at all, even if defendant had testified. As the *Luce* Court recognized, the trial court could have ultimately concluded that the statement was inadmissible, or the prosecution could have changed its trial strategy and not sought to admit the statement.
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> . . . Thus, to preserve for appellate review a challenge to a trial court's ruling in limine allowing into evidence a defendant's exercise of his Fifth Amendment privilege, the defendant must testify at trial. Because the statement at issue in this case would have been properly admissible in one context, it is impossible to determine whether the trial court's ruling was erroneous. Accordingly, we are *unable to review* defendant's allegation of error. [*Boyd*, 470 Mich at 376-378 (emphasis added).]

The *Boyd* Court, acknowledging the plain-error test and expressly ruling against its application, stated:

> Although we review claims of error under the standard announced in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), that standard applies only when an error exists. Because defendant's decision not to testify prevents us from being able to determine whether the trial court's ruling was erroneous, the *Carines* plain error standard is inapplicable. [*Boyd*, 470 Mich at 378 n 11.]

Accordingly, in the case at bar, defendant waived his right to appellate review and the plain-error test is not applicable. Therefore, defendant's claim of error is rejected.

B. COURT FUNDING FOR DNA EXPERT

Defendant next argues that the trial court abused its discretion by denying his motion for funds to cover the fees of his deoxyribonucleic acid (DNA) expert that would be incurred for her time testifying as a witness in court and traveling to and from court.[5] DNA swabs had been taken from the gun and defendant for testing. The trial court had previously authorized the payment of $500 so that defense counsel could consult with the DNA expert, but the court refused to authorize any additional monies, noting that the prosecution's DNA expert had already opined in court that her DNA testing was inconclusive. "This Court reviews for abuse of discretion a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness." *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006), citing MCL 775.15. A court abuses its discretion when a decision by the court results in an outcome that falls outside the range of reasonable and principled outcomes. *Carnicom*, 272 Mich App at 616-617. "A trial court is not compelled to provide funds for the appointment of an expert on demand." *Id*. at 617. An indigent defendant must show that there exists a nexus between the facts in the case and the need for an expert witness. *Id*. A defendant has the burden of demonstrating " 'that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial . . . .' " *Id*., quoting MCL 775.15. "It is not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a

[5] The trial court indicated that the expert's fee was $250 an hour.

defendant's motion for appointment of an expert witness." *Carnicom*, 272 Mich App at 617 (citation omitted).

Defendant asserted at trial that his DNA expert was prepared to testify that there was a "major" DNA donor relative to the gun and that this major donor was not defendant. Defense counsel did not proffer any supporting documentation from his DNA expert. The prosecution's DNA expert testified that the DNA evidence was "inconclusive" with respect to whether defendant had touched the gun. The expert explained that she could neither include nor exclude defendant as a DNA donor. The prosecution's expert further testified that there were, at minimum, three different DNA donors. She additionally indicated, "There's not what I would call out a major donor."

Giving defendant the benefit of assuming the accuracy of his claims at trial absent any supporting proof such as an affidavit,[6] the record does not reflect that the testimony of defendant's DNA expert would have likely benefited the defense. First, the prosecution's own expert could not establish a DNA link between defendant and the gun. And it is worth noting that defendant asserted that his expert could only exclude defendant as the major donor in connection with the DNA found on the gun, thereby indicating that his own expert could not altogether exclude him as a donor. Additionally, the prosecution's expert provided evidentiary ammunition favorable to defendant by stating that there were at least three DNA donors. Under these circumstances, we

[6] We recognize that an offer of proof in the form of testimony placed on a separate record was not possible, considering that the whole point of defendant's request in the first place was to procure funds to pay for the DNA expert's charges with respect to coming to and testifying at the trial.

cannot conclude that the trial court's ruling constituted an abuse of discretion. Moreover, assuming an error, we cannot conclude that the presumed error was prejudicial to defendant, given the questionable beneficial impact of the expert's prospective testimony and considering the overwhelming direct and circumstantial evidence of guilt. See MCL 769.26 (statutory harmless-error rule); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The trial court's ruling, assuming it was flawed, did not result in a miscarriage of justice, nor did it undermine the jury's verdict. See MCL 769.26; *Lukity*, 460 Mich at 495. Reversal is unwarranted.

C. DEFENDANT'S PAROLEE STATUS

Defendant next argues that "repeated" references to his parolee status during trial amounted to improper character evidence. With respect to this unpreserved claim of error, defendant simply cannot establish plain error affecting his substantial rights, let alone that he is actually innocent or that any error seriously affected the integrity, public reputation, or fairness of the judicial proceedings independent of his innocence. See *Carines*, 460 Mich at 763. The jury knew that defendant had a prior felony conviction because he was charged with felon in possession of a firearm and because the parties stipulated that defendant had a prior felony conviction. The danger in revealing a defendant's parolee status is that a jury will recognize that the defendant had previously been convicted of a crime, but that was already known here, so the requisite prejudice allegedly stemming from the parole references has not been shown. The trial court also cautioned the jurors not to consider the stipulation and defendant's status as a felon for any purpose other than establishment of the

"felon" element for felon in possession. Jurors are presumed to follow a trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Reversal is unwarranted.

D. STANDARD 4 ARGUMENTS

In a brief submitted by defendant pursuant to Standard 4 of Administrative Order No. 2004-6, 471 Mich cii, he raises a number of arguments, none of which have merit. Defendant first contends that he was deprived of a neutral, unbiased, and detached decision-maker, asserting that the trial court questioned the victim and other witnesses during the trial in a manner favorable to the prosecution. Under MRE 614(b), "[t]he court may interrogate witnesses, whether called by itself or by a party." But the trial court's examination of witnesses may not "pierce the veil of judicial impartiality," *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996), because a defendant in a criminal trial has a right to a neutral and detached judge, *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). On review of the challenged inquiries made by the trial court, it is evident that the court was permissibly "question[ing] witnesses in order to clarify testimony or elicit additional relevant information." *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). At no point did the trial court pierce the veil of judicial impartiality.

Defendant next argues that the trial court erred by permitting an officer to testify about a statement that defendant made after he was arrested and was in the process of being transported to jail. Defendant maintains that the statement was obtained in violation of his *Miranda* rights. The officer had asked defendant if he would be willing to submit a DNA sample. And in

response to a question from defendant as to why a DNA sample was being requested, the officer explained that it would be used to determine if defendant's DNA was on the gun. Defendant then agreed to submit a DNA sample. According to the officer, after three or four minutes passed, defendant admitted that he had touched the gun with his elbow while "wrestling" with the officers.

"[V]oluntarily given confessions that are not the result of impermissible *custodial interrogations* [are] admissible" under *Miranda*. *People v White*, 493 Mich 187, 194; 828 NW2d 329 (2013) (emphasis added). There is no dispute that defendant was in custody when he acknowledged touching the gun; however, the statement was not the result of an interrogation. With respect to whether statements or questions posed by police to a defendant constitute an interrogation, "the dispositive question is whether the 'suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.' " *Id*. at 208, quoting *Rhode Island v Innis*, 446 US 291, 303; 100 S Ct 1682; 64 L Ed 2d 297 (1980). In this case, the officer's request for a DNA sample and his explanation in regard to why a DNA sample was being requested—which the officer provided only because of defendant's inquiry—were not words that the officer knew or should have known were reasonably likely to elicit the somewhat incriminating response given by defendant. Indeed, defendant's statement, which came after a period of silence with no commentary by the officer, was essentially volunteered by defendant. And statements that are entirely volunteered, lacking any compelling influences, are not constitutionally barred from admission into evidence. *Innis*, 446 US at 299-300. Further, the DNA question posed by the officer can also

be viewed as the type of question " 'normally attendant to arrest and custody' " and thus not interrogational. *South Dakota v Neville*, 459 US 553, 564 n 15; 103 S Ct 916; 74 L Ed 2d 748 (1983), quoting *Innis*, 446 US at 301. Reversal is unwarranted.

Finally, defendant argues that the trial court erred by allowing an officer to testify regarding a statement made by a person in the apartment unit in which defendant was allegedly residing at the time of the crime. The officer simply indicated in cursory, vague terms that the individual provided a statement that was inconsistent with defendant's story relative to where defendant was living. Defendant asserts that this testimony concerned hearsay and that its admission violated the Confrontation Clause. Defendant, however, fails to engage in any meaningful legal analysis regarding hearsay and the Confrontation Clause; therefore, we deem the argument abandoned. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Moreover, assuming error, given the quantum of evidence establishing guilt, any error was harmless beyond a reasonable doubt. See *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005).

III. CONCLUSION

By choosing not to testify defendant waived his argument that the trial court erred when it ruled that a prior conviction would be admissible for impeachment purposes should he take the stand and testify. The plain-error test is inapplicable. Further, the trial court did not abuse its discretion by denying defendant's request for funds to pay for defendant's DNA expert to testify at trial, considering that the testimony, as outlined by defendant, would not be sufficiently beneficial and the prosecution's DNA expert had already provided

testimony somewhat favorable to defendant. Moreover, any presumed error was harmless, because there was an overwhelming amount of direct and circumstantial evidence establishing defendant's guilt. Next, defendant is unable to show the requisite prejudice flowing from references to his status as a parolee, because the jury was already fully aware, and properly so, that defendant was a convicted felon. Additionally, the trial court did not pierce the veil of impartiality in questioning witnesses, given that the questions properly sought to clarify testimony or elicit additional relevant information without showing favoritism to the prosecution. Further, defendant's *Miranda* rights were not violated, considering that the statement at issue was not the result of police interrogation. Finally, defendant fails to adequately brief his claim that the admission of hearsay violated the Confrontation Clause relative to police testimony concerning an interview of an individual who lived in an apartment, supposedly shared with defendant. And, regardless, assuming any error, it was harmless beyond a reasonable doubt in light of the strong evidence of defendant's guilt.

Affirmed.

FITZGERALD and BORRELLO, JJ., concurred with MURPHY, C.J.

AROMA WINES & EQUIPMENT, INC v COLUMBIAN DISTRIBUTION SERVICES, INC

Docket No. 311145. Submitted December 10, 2013, at Grand Rapids. Decided December 17, 2013, at 9:10 a.m.

Aroma Wines and Equipment, Inc., brought an action in the Kent Circuit Court against Columbian Distribution Services, Inc., alleging that defendant's refusal to release several thousand cases of wine that plaintiff had hired it to store constituted a violation of the Michigan Uniform Commercial Code (UCC), MCL 440.7209 and MCL 440.7204; a breach of contract; common-law conversion; and statutory conversion, MCL 600.2919a. Defendant brought a counterclaim for breach of contract and account stated for the several thousand dollars in storage fees that plaintiff had not paid. The court, Dennis B. Leiber, J., granted defendant's motion for a directed verdict on the statutory conversion claim, but the jury returned a verdict for plaintiff with respect to common-law conversion and breach of contract and rejected defendant's counterclaims. The court initially granted plaintiff's motion to tax costs and attorney fees pursuant to *Larson v Van Horn*, 110 Mich App 369 (1981), but, on reconsideration, concluded that awarding attorney fees in common-law conversion cases was improper. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by granting defendant's motion for a directed verdict on plaintiff's statutory conversion claim. MCL 600.2919a allows a plaintiff to recover treble damages against a defendant who converted plaintiff's property to the defendant's own use. The plain meaning of the term "use" requires only that a person employed the property for some purpose, and there was evidence that defendant had moved plaintiff's wine out of temperature-controlled storage contrary to the parties' contract. Viewing this evidence in the light most favorable to plaintiff, there were factual questions regarding whether defendant had converted plaintiff's wine to its own use. A new trial to determine defendant's liability for statutory conversion is necessary, despite the jury's determination that defendant was liable for common-law conversion, because common-law conver-

sion does not require a determination of whether the property was converted to defendant's own use and the award of treble damages under MCL 600.2919a is a discretionary matter for the trier of fact.

2. The trial court did not abuse its discretion by ruling on reconsideration that plaintiff was not entitled to attorney fees and costs. *Larson* did not support an award of attorney fees in this case because no exemplary damages were awarded and no fraud or other specific misconduct necessitating another lawsuit arising from the same action was alleged, and common-law conversion on its own did not provide a basis for the award of attorney fees. Further, plaintiff did not have a right to attorney fees for its UCC claims under *Scott v Hurd-Corrigan Moving & Storage Co, Inc.*, 103 Mich App 322 (1981), because plaintiff did not request exemplary damages or allege that defendant engaged in conduct that would have justified their award.

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

1. ACTIONS — STATUTORY CONVERSION — WORDS AND PHRASES — "PERSON'S OWN USE."

To recover damages for statutory conversion, a plaintiff must show that a person converted plaintiff's property to that person's own use; to "use" in this context means to employ the property for some purpose (MCL 600.2919a).

2. DAMAGES — ATTORNEY FEES — COMMON-LAW CONVERSION.

Attorney fees for claims of common-law conversion are not recoverable absent a basis for awarding exemplary damages such as fraud or other specific misconduct necessitating another lawsuit against a third party.

Visser and Associates, PLLC (by *Donald R. Visser*), for Aroma Wines and Equipment, Inc.

Kuiper Orlebeke PC (by *Thomas A. Kuiper*) and *Varnum, LLP* (by *Jon M. Bylsma*), for Columbian Distribution Services, Inc.

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

PER CURIAM. In this conversion and breach-of-contract case, plaintiff Aroma Wines and Equipment, Inc., appeals as of right the trial court's order granting a directed verdict in favor of defendant Columbian Distribution Services, Inc., regarding plaintiff's statutory conversion claim. Plaintiff also appeals the trial court's order denying its motion for attorney fees and costs. Because we conclude that a directed verdict was not warranted in this case and that the trial court properly denied plaintiff's request for attorney fees and costs, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Plaintiff's claims stem from its storage of wine in defendant's warehouse. Plaintiff was in the business of importing and distributing fine wine, and defendant ran a warehousing and transportation business. Plaintiff and defendant entered into a contract for receiving and warehousing wine in a temperature-controlled environment. At first plaintiff made regular monthly payments to defendant; however, it eventually became delinquent in its monthly storage fees. In response to plaintiff's failure to timely pay the storage fees, defendant asserted a warehouse's lien on the 8,374 cases of wine that were being stored by plaintiff. Defendant allowed plaintiff to access small portions of its wine for several months, after which plaintiff paid defendant $1,000 toward making its account current. However, defendant eventually denied plaintiff access to the wine and demanded payment of $6,109, which would have made plaintiff's account current, before it would release any more of the wine to plaintiff. While the specific date and duration of the removal are disputed, defendant admits that plaintiff's wine was removed from its temperature-controlled storage area contrary to the terms of the parties' contract.

In response to defendant's refusal to release any of the wine, plaintiff filed a complaint against defendant. Plaintiff amended its complaint twice, with the final version alleging breach of contract, violation of Michigan's Uniform Commercial Code (UCC), MCL 440.7209 and MCL 440.7204, common-law conversion, and statutory conversion, MCL 600.2919a. Defendant answered plaintiff's complaints and filed a counterclaim for breach of contract and account stated. Eventually, a jury trial was held regarding the parties' claims.

Relevant to the issues raised on appeal, defendant moved for a directed verdict at the close of plaintiff's proofs. Defendant's directed verdict motion addressed both the statutory conversion claim and the issue of damages. The damages argument was rejected by the trial court and is not an issue on appeal. Regarding the statutory conversion claim, defendant argued that plaintiff failed to demonstrate that defendant had converted the wine to its own use. Moreover, defendant disputed that it had benefited from the movement of the wine and argued that, in any event, "benefit" is not the same thing as "use," which is what must be established to prove statutory conversion. Plaintiff responded by arguing that the definition of "use" is much broader than defendant maintained, and that because the term is not defined by the statute it must be given its common meaning, which raises a question for the jury. Plaintiff argued that defendant used the wine for its own purposes by withholding it and using it as leverage against plaintiff, and by moving it out of temperature-controlled storage and then filling that storage with different products from other customers.

Following the parties' arguments, the trial court issued its opinion on the record, stating in pertinent part:

> First, according to Black's Law Dictionary, the 9th edition, the word "use" means the application or employment of a thing for the purpose for which it is adapted. Therefore, to use a wine, one would have to drink it or perhaps sell it. This position is strengthened by analogy to *J&W Transportation, LLC v Frazier*, [unpublished opinion per curiam of the Court of Appeals, issued June 1, 2010 (Docket No. 289711)], where statutory conversion damages were appropriate for converted trucks that were driven to generate income. Defendants [sic] are correct that the use of the wines must be for the purpose for which the wines are adapted for statutory conversion to apply.
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> In sum, the defendant's motion for directed verdict is granted as to statutory conversion . . . .

Accordingly, the jury was not instructed on statutory conversion. On the twelfth day of trial the jury returned its verdict, finding that defendant had converted plaintiff's wine and that the value of that wine was $275,000. The jury also found that defendant had breached its contract with plaintiff and that the amount of damage was $275,000. Finally, the jury rejected defendant's counterclaims, finding that plaintiff had not breached the contract.

After trial, plaintiff moved to enter judgment and to tax costs and attorney fees. Initially, the trial court granted plaintiff's motion for attorney fees, citing *Larson v Van Horn*, 110 Mich App 369, 383; 313 NW2d 288 (1981), for the proposition that "attorney fees are available for a litigant who has suffered damage due to common law conversion." Defendant moved for reconsideration, arguing that *Larson* upheld the award of attorney fees as exemplary damages, which were specifically sought in that case. Moreover, defendant maintained that subsequent cases had narrowly construed

the ruling of *Larson*, noting that a later unpublished decision explicitly refused to award attorney fees to a plaintiff who was successful in a common-law conversion action. The trial court granted defendant's motion for reconsideration, reversing its award of attorney fees to plaintiff. The trial court explained that while *Larson* is a published decision from 1981, subsequent unpublished decisions indicated that an award of attorney fees in common-law conversion cases is improper.

On appeal, plaintiff first argues that defendant's motion for a directed verdict in regard to the statutory conversion claim should have been denied. Specifically, plaintiff argues that the trial court improperly interpreted the "to the other person's own use" requirement of MCL 600.2919a and that there was sufficient evidence to allow the statutory conversion issue to go to the jury.

We review de novo the trial court's grant or denial of a directed verdict. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011). "When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Id*. (quotation marks and citation omitted). Conflicts in the evidence must be decided in the nonmoving party's favor to decide whether a question of fact existed. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; 645 NW2d 287 (2001). "A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ." *Id*. at 679-680.

MCL 600.2919a(1) provides in part, "A person damaged as a result of . . . the following may recover 3 times the amount of actual damages sustained, plus costs and

reasonable attorney fees: (a) Another person's stealing or embezzling property or converting property to the other person's own use." Conversion, both at common law and under the statute, is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (quotation marks and citation omitted). The jury determined that defendant was liable for common-law conversion, and defendant does not dispute the verdict on appeal. Thus, whether conversion occurred is not an issue on appeal. At issue in this case is whether plaintiff presented evidence that the conversion was to defendant's "own use" as required by MCL 600.2919a(1)(a).

This Court has never addressed the precise meaning of the phrase "own use" in the context of the conversion statute. Accordingly, we must consider the language of the statute itself. The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id*. at 247. Absent an alternative definition set forth in the statute, "every word or phrase of a statute will be ascribed its plain and ordinary meaning." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). Dictionary definitions may be consulted to determine the plain and ordinary meaning of a term. *Alken-Ziegler, Inc v Hague*, 283 Mich App 99, 102; 767 NW2d 668 (2009).

Random House Webster's College Dictionary (1992) offers 22 definitions of use; most relevant in the context of conversion, "use" is defined as "to employ for some

purpose[.]" Black's Law Dictionary (8th ed) defines "use" as "[t]he application or employment of something[.]"

In light of the dictionary definitions of "use," we conclude that plaintiff submitted sufficient evidence that defendant converted the wine to its own use to survive defendant's motion for a directed verdict. Contrary to the trial court's conclusion that "to use a wine, one would have to drink it or perhaps sell it," we hold that the definition of "use" encompasses a much broader meaning. The term "use" requires only that a person "employ for some purpose," *Random House Webster's College Dictionary* (1992), and clearly, drinking or selling the wine are not the only ways that defendant could have employed plaintiff's wine to its own purposes.[1] For example, in this case, it is not disputed that exhibits and testimony presented during trial established that the wine was moved from the temperature-controlled storage area or that defendant refused to allow plaintiff to access any of its wine until plaintiff brought its account up to date. Moreover, plaintiff presented some evidence to support its theory that defendant filled the temperature-controlled storage space that plaintiff's wine was moved out of with other customers' products. While this fact was disputed by defendant, there was enough evidence to submit the question to the jury. Although defendant maintains the wine was only moved to complete a reracking project in the storage area, even the act of moving plaintiff's wine

[1] We observe that construing the conversion statute's "use" element to mean only consumption or sale would essentially require proof of larceny, which is characterized by an intent to permanently deprive the owner of possession rather than a mere use that is inconsistent with the owner's rights. See, e.g., *People v Pratt*, 254 Mich App 425, 427-428; 656 NW2d 866 (2002) (holding that larceny requires proof that property was taken with the intent to permanently deprive the owner of possession).

contrary to the contract in order to undertake an expansion project to benefit itself could be considered an act of employing the wine to defendant's own purposes constituting "use" of the wine. If a jury believed the evidence showing that defendant moved plaintiff's wine for its own purposes—whether it be to sell the space to other customers or complete a construction project—or that it used the wine as leverage against plaintiff, it could have determined that defendant converted the wine to its own use. Accordingly, defendant was not entitled to a directed verdict on the issue of statutory conversion because, viewing the evidence in the light most favorable to plaintiff, there were factual questions regarding whether defendant converted plaintiff's wine to its own use.

Plaintiff further argues that remanding for a new trial is unnecessary if this Court agrees that the trial court erred by refusing to allow the issue of statutory conversion to go to the jury. Rather, plaintiff argues that because the jury specifically found defendant liable for common-law conversion, this Court should simply remand to the trial court for entry of treble damages and assessment of attorney fees under MCL 600.2919a. We disagree.

MCL 600.2919a(1) provides that a person damaged under the statute "*may* recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees[.]" (Emphasis added.) The term "may" is permissive and indicates discretionary activity. *Haring Charter Twp v Cadillac*, 290 Mich App 728, 749; 811 NW2d 74 (2010). Thus, under the language in MCL 600.2912a(1), treble damages and attorney fees are discretionary. Accordingly, whether to award treble damages is a question for the trier of fact, and we cannot simply order treble damages upon a finding of

conversion. This Court has come to this conclusion previously in its unpublished decisions. See *LMT Corp v Colonel, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2011 (Docket No. 294063) (rejecting the plaintiff's argument that this Court should simply award treble damages for the defendant's statutory conversion and holding that treble damages are permissive under the statute and are accordingly a question for the trier of fact); *Poly Bond, Inc v Jen-Tech Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2010 (Docket No. 290429) (holding that treble damages under the statutory conversion statute are permissive).[2] Moreover, whether defendant converted the wine to its own use is similarly a factual question that must be addressed by the finder of fact because common-law conversion does not necessarily require a determination regarding conversion to one's own use. See, e.g., *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 13-14; 779 NW2d 237 (2010) (explaining that common-law conversion "consists of any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein" and "may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party") (quotation marks and citations omitted).

Next, plaintiff argues that it was entitled to attorney fees despite the fact that the trial court directed a verdict in favor of defendant on its statutory conversion claim. In particular, plaintiff maintains that attorney

[2] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be instructive or persuasive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

fees are allowable for conversion claims under the common law and the UCC. Thus, plaintiff argues that the trial court abused its discretion by granting defendant's motion for reconsideration and ruling that plaintiff was not entitled to attorney fees and costs.

The relevant standards of review regarding attorney fees were recently articulated by this Court in *Brown v Home-Owners Ins Co*, 298 Mich App 678, 689-690; 828 NW2d 400 (2012):

> A trial court's decision to grant or deny a motion for attorney fees presents a mixed question of fact and law. *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 693, 760 NW2d 574 (2008). This Court reviews the trial court's findings of fact for clear error, and questions of law de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009) (citation and quotation marks omitted). However, this Court reviews for an abuse of discretion a trial court's ultimate decision whether to award attorney fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

Further, a trial court's grant or denial of a motion for reconsideration is reviewed for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable

> error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

"The general American rule is that attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Khouri*, 481 Mich at 526 (quotation marks and citation omitted).[3]

Plaintiff first argues that *Larson*, 110 Mich App at 383-384, is applicable in this case and provides a common-law exception to the general rule that attorney fees are not recoverable. In *Larson*, the defendant argued that the trial court's award of exemplary damages approximating the amount of attorney fees was improper. *Id*. at 382-383. The trial court specifically found that the plaintiff suffered actual damages in the amount of the attorney fees he was required to pay, and awarded plaintiff exemplary damages meant to compensate him for his attorney fees. *Id*. at 382. This Court stated it was not prepared to declare that caselaw supported the "general proposition that attorney fees may be awarded as a measurable element of exemplary damages." *Id*. at 383. It noted that previous cases awarding attorney fees as exemplary damages dealt with defendants that had committed an intentional fraud or caused the party to have to prosecute or defend against a third person. *Id*. This Court went on to state that it was

> not aware of any Michigan case law which would prevent this Court from ruling that attorney fees may be awarded as exemplary damages in cases such as this where the court

[3] We note that statutory conversion specifically provides for the award of attorney fees, MCL 600.2919a; therefore, if on remand and retrial a jury determines that defendant is liable for statutory conversion, there would be a statutory basis for a discretionary award of attorney fees.

> finds that a party guilty of wrongdoing acted intentionally, requiring a less culpable defendant to defend itself in a suit arising from the same action and necessitating the plaintiff's bringing of such a suit. [*Id*. at 384.]

The *Larson* Court further stated that "the intentional tort of conversion, found here, is not unlike actions for false imprisonment and malicious prosecution, where the recovery of attorney fees has been allowed." *Id*. Therefore, this Court upheld the trial court's award of exemplary damages.

We conclude that *Larson* does not mandate reversal of the trial court's decision denying plaintiff's request for attorney fees. Unlike the facts of *Larson*, no exemplary damages were requested or awarded in this case. Further, no allegations of fraud or actions requiring a lawsuit against a third party were made by plaintiff. Thus, this case is distinguishable from *Larson*. Moreover, the *Larson* decision was issued in October 1981 and is accordingly not binding on this Court. MCR 7.215(J)(1); *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).[4] Finally, this Court has declined to award attorney fees in actions for common-law conversion. In *Anthony v Delagrange Remodeling, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2005 (Docket No. 252644), this Court vacated an award of attorney fees upon concluding that the plaintiffs had failed to prove statutory conversion, despite concluding that the plaintiffs had proved common-law conversion. This Court noted that attorney fees could not be awarded on the basis of equitable principles and were improper without a spe-

[4] While cases decided before November 1, 1990 are not binding precedent pursuant to MCR 7.215(J)(1), they nevertheless can be considered persuasive authority. *In re Stillwell Trust*, 299 Mich App at 299 n 1.

cific statute, court rule, or common-law exception to support the award. *Id*. at 12.

Therefore, we conclude that the trial court correctly determined on reconsideration that *Larson* does not support an award of attorney fees in this case because no exemplary damages were awarded and no fraud or other specific misconduct necessitating another lawsuit arising from the same action was alleged. Moreover, common-law conversion on its own, without the facts present in *Larson*, does not provide a basis for the award of attorney fees.

Plaintiff next argues that *Scott v Hurd-Corrigan Moving & Storage Co, Inc*, 103 Mich App 322, 347-349; 302 NW2d 867 (1981), recognized the right to attorney fees when there was evidence of conversion in the context of the UCC. In *Scott*, the Court considered whether the question of exemplary damages, in which attorney fees could be included, should have been submitted to the jury. *Scott*, 103 Mich App at 348. This Court concluded that the trial court did not err by refusing to submit the issue of exemplary damages to the jury because there was no allegation of fraud and no evidence of malice. *Id*. Moreover, it held that because there was no "finding of proof of a wilful breach" as required to prove conversion under the UCC, no award of exemplary damages would be proper. *Id*. at 349.

We conclude that *Scott* does not mandate the award of attorney fees in this case. Again, plaintiff made no request for exemplary damages in its complaint, nor did plaintiff allege that defendant engaged in conduct such as fraud or malice that would give rise to exemplary damages. Moreover, in *Scott*, the plaintiff's complaint specifically pleaded willful breach of the bailment contract amounting to conversion under § 7-210(9) of the UCC as codified in Michigan, MCL 440.7210(9). In this

case, plaintiff's complaint did not allege conversion under the UCC specifically. Thus, the facts of *Scott* are distinguishable from this case, and they do not support reversing the trial court's determination that plaintiff is not entitled to attorney fees and costs in this case.

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

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

In re THEODORA NICKELS HERBERT TRUST

Docket No. 309863. Submitted June 11, 2013, at Detroit. Decided December 17, 2013, at 9:15 a.m.

Barbara Ann Williams petitioned the Washtenaw Circuit Court, Family Division, to name her the successor to William James Herbert's interest in the Theodora Nickels Herbert Trust in accordance with Herbert's will, which made her the sole recipient of his estate. Respondent, trustee Frederick A. Herbert, opposed the petition, arguing that William Herbert's interest could not be transferred by will because it was not part of his probate estate and because its transfer was prohibited by a spendthrift provision in the trust that restrained the transfer of the beneficiaries' interests. The court, Darlene A. O'Brien, agreed with petitioner and entered an order naming her the successor beneficiary. Respondent filed a motion for reconsideration, which the court denied. Respondent appealed.

The Court of Appeals *held*:

1. The court correctly concluded that William Herbert's interest in the trust passed to petitioner in accordance with his will. The trust agreement indicated that the trust would become inoperative or terminate if any of the settlor's children died before the trust estate or any part thereof was delivered over to him or her as provided in the trust, in which case the trustee would be required to deliver the share of property constituting the trust estate to the child's then living issue. This contingency did not occur because William Herbert had received a part of the trust estate in the form of income earned by the trust assets before his death. Further, because William Herbert's beneficial interest in the trust was reducible to a sum in gross, it was subject to disposition by will.

2. The trial court correctly concluded that the trust's spendthrift provision was not intended to preclude a beneficiary such as the decedent, who had a present interest in both the income and the principal of the trust, from making a testamentary disposition of his trust interest. Spendthrift provisions are intended to protect beneficiaries from their own improvident spending, and this purpose ends when the beneficiary dies.

Affirmed.

TRUSTS — SPENDTHRIFT PROVISIONS — DISPOSITION OF TRUST INTERESTS BY WILL.

A trust provision that restrains the transfer of a trust beneficiary's interest does not preclude a trust beneficiary with a present interest in both the income and the principal of the trust from making a testamentary disposition of his or her interest in the trust.

Fessler Law, PC (by *Paul C. Fessler*), and *Fraser Legal, PC* (by *James W. Fraser*), for petitioner.

Jacobs and Diemer, PC (by *John P. Jacobs* and *Nathan S. Scherbarth*), for respondent.

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

MARKEY, J. Respondent, Frederick A. Herbert, appeals by right the trial court's order naming petitioner, Barbara Ann Williams, the successor beneficiary to William James Herbert's interest in the Theodora Nickels Herbert Trust. We affirm.

Theodora Nickels Herbert created the trust for the benefit of herself and her three children. Upon her death, the trust became irrevocable and the trust estate was divided into equal shares for the benefit of her children—William James Herbert (William), Elizabeth Ellis Sherman, and respondent, the trustee. Article V, § 1 of the trust agreement provides that "[t]he Trustee shall distribute to each child the entire net income from his or her share at least annually." It is undisputed that the children received these income distributions.

The trust agreement also provides in Article V, § 1, in addition to an income distribution, that the trustee "shall distribute to each child all or any part of the principal of his or her share upon the request of such child in writing, except as provided in Section 2." Section 2 of Article V of the trust agreement provides that the property known as the Nickels Arcade shall

"not be withdrawn or distributed from the trust without the consent of a majority in interest of the beneficiaries then entitled to the income of the trust." Nevertheless, Article V, § 2 also provides a procedure for the valuation of a "selling beneficiary['s]" interest, through arbitration if necessary, and providing the other beneficiaries the opportunity to purchase the selling beneficiary's "pro rata share of the value," paying for it in "ten (10) equal annual installments with interest at the then prime rate . . . ." It is undisputed that the Nickels Arcade was the only property in the trust and that none of the beneficiaries ever sought to sell their interest in it.

William died on September 9, 2010. Shortly after his death, the petitioner commenced the present action, asserting that she succeeded to William's interest in the trust pursuant to his last will and testament, which named petitioner as the sole recipient of his estate. The trial court agreed and entered an order naming petitioner the successor to William's interest in the trust. Respondent now appeals.

We review the trial court's interpretation of the trust agreement de novo, as a question of law. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). A court must ascertain and give effect to the settlor's intent when resolving a dispute concerning the meaning of a trust. *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). The settlor's intent is determined "from the trust document itself, unless there is ambiguity." *Id*. If a trust document is ambiguous, a court "may consider the circumstances surrounding the creation of the document and the general rules of construction." *Id*.

The dispute in this case centers on Article V, § 3 of the trust agreement, which provides in relevant part:

> In the event any of the Settlor's children do not survive her or die before the establishment of the separate trust estate for his or her benefit or before said trust estate or any part thereof is delivered over to him or her as herein provided, the trust for such child shall be inoperative or shall terminate, as the case may be, and in any such event, the share of the property then constituting the trust estate or being held by the Trustee for the benefit of such child shall descend and be delivered over to his or her then-living issue by right of representation.

Section 3 contains three contingencies under which the trust for the settlor's children will become inoperative: (1) in the event any of the settlor's children do not survive her, (2) in the event any of the settlor's children die before the establishment of the separate trust estate for his or her benefit, or (3) in the event any of the settlor's children die before said trust estate or any part thereof is delivered over to him or her as provided in the trust. If any of these contingencies occurs, the trust for that child becomes inoperative or terminates. The trustee must then deliver the share of property constituting the trust estate to the child's then living issue.

The parties do not dispute that neither of the first two contingencies applies: the decedent survived the settlor, and a trust estate was created for his benefit upon the settlor's death. The dispute centers on the third contingency, which is whether the decedent died "before said trust estate or any part thereof [was] delivered over to him" as provided under the terms of the trust. Petitioner argues, and the trial court agreed, that the trust estate included annual income distributions to the decedent. The trial court concluded that the third contingency did not occur; consequently, the decedent's interest passed according to his will. We agree.

The trust agreement provides that "[t]he Settlor has deposited with the Trustee certain property described

in Schedule A . . . . The said property*, together with any other property that may later become subject to this trust*, shall constitute the *trust estate* and shall be held, administered and distributed by the Trustee as provided herein." (Emphasis added.) Thus, the "trust estate" means the property described in Schedule A (which the parties agree includes the trust's interest in the Nickels Arcade, the trust's sole income-producing asset) and any other property that later becomes subject to the trust. It cannot be disputed that income earned by trust assets such as the Nickels Arcade, once received by the trustee, became "subject to" the trust and to distribution according to its terms. Consequently, the trial court did not err by concluding that income earned by the trust assets that became "subject to this trust" was part of the "trust estate." This interpretation of the trust implements its plain terms and is consistent with the current statutory definition of "estate" as being "the property of the . . . trust . . . as the property is originally constituted and as it exists throughout administration." MCL 700.1104(b).[1] It follows that the trial court also correctly determined that part of the trust estate was "delivered over" to William before he died in the form of annual income distributions as provided by Article V, § 1 of the trust agreement. Hence, the trial court correctly determined that none of the three contingencies in Article V, § 3 of the trust agreement precluded William from devising his vested interest in the trust to petitioner.

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[1] This definition is similar to that in the former Revised Probate Code, MCL 700.1 *et seq*. " 'Estate' means the property of the decedent or other person whose affairs are subject to this act as the property is originally constituted and as it exists during administration." MCL 700.4(6), repealed by 1998 PA 386, effective April 1, 2000, enacting the Estates and Protected Individuals Code (EPIC). In general, EPIC governs all proceedings commenced after its effective date. *In re Temple Marital Trust*, 278 Mich App 122, 127-128; 748 NW2d 265 (2008).

The trial court also correctly ruled that no other provision of the trust precluded William from passing his beneficial interest in the trust by testamentary devise. "A vested beneficial interest in a trust may be devised by will." 34 Michigan Law & Practice 2d, Wills & Estate Admin, § 2, citing *In re Allen's Estate*, 240 Mich 661, 664; 216 NW 446 (1927). " 'A vested property interest is one that is capable of becoming possessory immediately upon the expiration of the preceding estate.' " *In re Bem Estate*, 247 Mich App 427, 447; 637 NW2d 506 (2001), quoting *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 483; 578 NW2d 701 (1998); see also *In re Childress Trust*, 194 Mich App 319, 322; 486 NW2d 141 (1992). William clearly had a vested interest in both his pro rata share of income and a right to payment of the value of his pro rata share of the principal of the trust. Because William's beneficial interest in the trust was reducible to a "sum in gross," MCL 555.19,[2] it was subject to testamentary disposition. *In re Allen's Estate*, 240 Mich at 664-665.

Respondent's argument would have merit only if William's interest in the trust were that of a lifetime income beneficiary. See 34 Michigan Law & Practice 2d, Wills & Estate Admin, § 2, p 18, citing *Quarton v Barton*, 249 Mich 474, 480; 229 NW 465 (1930) (stating that a life estate with remainder in others cannot be disposed of "by will or by a deed operating as a testamentary disposition"). But William enjoyed both the right to an annual income distribution and also to the distribution of his share of the principal of the trust on written request, Article V, § 1, subject only to the right

[2] MCL 555.19 provides: "No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable."

of the other beneficiaries to exercise their right of first refusal to purchase William's interest in the Nickels Arcade. Indeed, the trust provides that the right to withdraw principal could be exercised by "any of the Settlor's children or the successors of any deceased child . . . ." Article V, § 2.

For the same reasons, respondent's argument that William could not devise his beneficial interest in the trust because the trust instrument does not grant him a power of appointment also fails. After his mother's death and the establishment of his separate one-third share of the trust corpus, William enjoyed the right to its income and the present right to the payment in gross of its value. Because William's interest was not a mere life estate, it was unnecessary that the trust instrument grant him a power of appointment. During his lifetime, William could have withdrawn the value of his share of the trust corpus or made a testamentary disposition of his interest, as he did.

Respondent's final contention—that the spendthrift provisions in the trust precluded William from making a testamentary disposition of his beneficial interest in the trust—also fails. Article VI of the trust is a spendthrift provision, which provides:

> Neither the principal of the trusts created hereunder, nor the income resulting therefrom while in the hands of the Trustee, shall be subject to any conveyance, transfer, assignment or pledge as security for any debt of any beneficiary, and the same shall not be subject to any claims by any creditor of any beneficiary, through legal process or otherwise. It is the Settlor's intention to place the absolute title to the property held in trust and the income therefrom in the Trustee with power and authority to pay out the same only as authorized hereby. Except as herein provided, any attempted sale, anticipation, assignment or pledge of any of the funds or property held in trust or any part

> thereof, or the income therefrom by the beneficiaries or any of them, shall be null and void, and shall not be recognized by the Trustee.

The first sentence of Article VI has no application to the facts of this case. There was no "conveyance, transfer, assignment or pledge as security for any debt" of the principal or income of the trust. Likewise, there is no creditor claim. "Creditor" means "[o]ne to whom a debt is owed; one who gives credit for money or goods." Black's Law Dictionary (9th ed). Petitioner is not a creditor; she is a "devisee," i.e., "a person designated in a will to receive a devise." MCL 700.1103(m). Consequently, the first sentence of Article VI is inapplicable.

The second sentence of Article VI also has no bearing on William's devise to petitioner of his interest in the trust. There is no claim that the trustee's legal title to the trust assets is affected, nor is there any assertion of a right to a distribution other than as authorized by the trust instrument. The only claim is that petitioner has succeeded to William's beneficial interest in the trust. This sentence of Article VI does not preclude William's devise to petitioner.

The last sentence is the heart of the spendthrift provision, precluding "any attempted sale, anticipation, assignment or pledge of any of the funds or property held in trust or any part thereof, or the income therefrom by the beneficiaries . . . ." Spendthrift provisions in trusts are lawful in Michigan. MCL 700.7502; *In re Edgar Estate*, 425 Mich 364, 366; 389 NW2d 696 (1986). A spendthrift provision in a trust "restrains both voluntary and involuntary transfer of the trust beneficiary's interest." MCL 700.7502(2). But respondent concedes that there is no Michigan authority holding that a spendthrift trust provision precludes a trust beneficiary with a present interest in both the income and the

principal of a trust from making a testamentary disposition of the beneficiary's interest in the trust. Rather, respondent relies on authority from other jurisdictions. In particular, respondent primarily relies on *Cowdery v Northern Trust Co*, 321 Ill App 243; 53 NE2d 43 (1944). Legal authority from other jurisdictions is not binding in Michigan, but we may review and rely on it if we find its reasoning persuasive. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 494 n 5; 686 NW2d 770 (2004), overruled in part on other grounds *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4; 817 NW2d 562 (2012).

The trial court rejected respondent's argument regarding the spendthrift provision, reasoning:

> Trustee argues that the spendthrift provision found in Article VI prohibited assignment and creditors of a beneficiary could not receive any income or principal of the trust. It is not disputed that title to the trust property remains with the trustee. The purpose of the restraint on alienation that a spendthrift provision affords is to protect the beneficiary against his creditors; once the beneficiary dies, the need for this protection no longer exists.

We agree with the trial court's reasoning. The spendthrift provision was intended to protect beneficiaries from their improvident, spendthrift ways and from creditors that might thereby arise. Respondent does not argue that petitioner is a creditor, and as noted already, a devisee is by definition not a creditor. Any spendthrift ways of a beneficiary end, of course, at his death and so then does the purpose of the spendthrift provision with respect to the deceased beneficiary. Furthermore, the *Cowdery* court, quoting Scott on Trusts, § 158.1, opined that a lifetime income beneficiary of a spendthrift trust could make a testamentary disposition of accrued trust income:

> "Even though it is provided by the terms of the trust or by statute that the interest of the beneficiary shall not be transferable by him or subject to the claims of his creditors, the beneficiary's interest in such accrued income passes on his death to his personal representatives, if it would so pass in the absence of such a restraint on alienation. *The purpose of the restraint on alienation is to protect the beneficiary, and when he dies he no longer needs such protection*. The purpose is not to deprive the beneficiary's estate of the income which was payable to him but which had not been paid at the time of his death. Whatever is thus received by the personal representatives is a part of his estate and is subject to the claims of his creditors. Unless the claims of creditors preclude it, *the beneficiary can dispose by will of his right to the income accruing up to the time of his death*." [*Cowdery*, 321 Ill App at 262-263 (emphasis added).]

We hold that the spendthrift provision of the trust in this case was not intended to preclude a beneficiary such as William, who had a present interest in both the income and the principal of the trust, from making a testamentary disposition of his beneficial interest in the trust.

We affirm. We do not retain jurisdiction. Petitioner, as the prevailing party, may tax costs pursuant to MCR 7.219.

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

PEOPLE v NORWOOD

PEOPLE V HAGAR

Docket Nos. 310312 and 310424. Submitted October 1, 2013, at Detroit. Decided October 10, 2013. Approved for publication December 17, 2013, at 9:20 a.m.

The 36th District Court, Willie G. Lipscomb, Jr., J., denied a prosecution motion to bind over John J. Norwood and Nicole M. Hagar on a charge of pandering, MCL 750.455. The Wayne Circuit Court, Annette J. Berry, J., affirmed the denial of the motion. The prosecution appealed separately by leave granted in the Court of Appeals with regard to each defendant. The Court of Appeals consolidated the appeals

The Court of Appeals *held*:

MCL 750.445 delineates eight activities for which a defendant could be charged. The eight activities are separated by the term "or," indicating alternative choices, and each offense does not require the elements of any other offense. MCL 750.445 prohibits an individual "who shall inveigle, entice, persuade, encourage, or procure any female person to come into this state or to leave this state for the purpose of prostitution." There is no requirement that for a conviction under that part of the statute the prosecution demonstrate that defendants caused the undercover officer to "become a prostitute." Defendants' conduct of offering to further entice the officer into prostitution by engaging her in an interstate practice, sending her to Florida with promises of clothing, shoes, a residence, and cosmetic enhancement surgery was prohibited by the statute. The district court erred by failing to order defendants bound over. The order of the circuit court is reversed and the matter is remanded to the circuit court for reinstatement of the charge against each defendant and for proceedings consistent with the opinion of the Court of Appeals.

Reversed and remanded.

CRIMINAL LAW — PANDERING.

The statute prohibiting pandering delineates eight activities for which a defendant can be charged under the statute; the eight

> activities are separated by the term "or," indicating alternative choices with each offense not requiring the elements of any other offense (MCL 750.455).

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

Valerie R. Newman for John Norwood.

Neil J. Leithauser for Nicole Hagar.

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

PER CURIAM. The prosecution appeals by leave granted the circuit court order affirming the district court's denial of the prosecution's motion to bind over defendants on a charge of pandering, MCL 750.455.[1] We reverse and remand to the circuit court for reinstatement of the charge against each defendant and for proceedings consistent with this opinion.

On April 8, 2011, an officer with the special operations unit of the Wayne County Sheriff's Office was working as an undercover decoy in the city of Detroit in response to complaints of prostitution. A Lincoln Navigator was driven nearby and the vehicle's passenger, defendant Nicole Marie Hagar, motioned for the officer to approach the vehicle. The vehicle's driver, defendant John Julius Norwood, spoke first and asked the officer how old she was. Defendants conversed with the officer

[1] On April 10, 2013, we consolidated the appeals to "advance the efficient administration of the appellate process." *People v Norwood*, unpublished order of the Court of Appeals, entered April 10, 2013 (Docket Nos. 310312; 310424).

and exchanged information regarding what they wanted her to do. Specifically, defendant Norwood offered to buy the officer new clothes, new shoes, a new residence, and cosmetic enhancement surgery in exchange for her work as a prostitute. The couple indicated that the officer could earn more money working for Norwood as a prostitute in Florida and that she would leave with defendant Hagar that night. Defendants also represented that defendant Norwood was good to work for and that defendant Hagar earned $1,000 a night. They also stated that the officer could earn extra money by engaging in the production of pornography with defendant Hagar. Defendants were arrested by other sheriff's officers. Following these proofs, the district court denied the prosecution's motion to bind defendants over on the charge of pandering, MCL 750.455, and the circuit court subsequently affirmed. We granted the prosecution's applications for leave to appeal.[2]

A district court's bindover decision that is contingent on the factual sufficiency of the evidence is reviewed for an abuse of discretion. *People v Redden*, 290 Mich App 65, 83; 799 NW2d 184 (2010). A circuit court's review of the bindover decision involves examination of the entire preliminary examination record, and it may not substitute its judgment for that of the lower court. *People v Beydoun*, 283 Mich App 314, 322; 770 NW2d 54 (2009). However, "[t]his Court reviews de novo the bindover decision to determine whether the district court abused its discretion, giving no deference to the circuit court's decision." *Redden*, 290 Mich App at 83. When the district court decision addresses "whether the alleged

[2] *People v Norwood*, unpublished order of the Court of Appeals, entered March 6, 2013 (Docket No. 310312); *People v Hagar*, unpublished order of the Court of Appeals, entered March 6, 2013 (Docket No. 310424).

conduct falls within the scope of a penal statute, the issue presents a question of law that we review de novo." *People v Armisted*, 295 Mich App 32, 37; 811 NW2d 47 (2011).

The interpretation and application of a statute presents a question of law that an 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 a statute's plain language. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). When statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. *Id*. The use of the alternative term "or" indicates a choice between two or more things. *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997).

In *People v Morey*, 461 Mich 325, 328; 603 NW2d 250 (1999), our Supreme Court held that the pandering statute delineated eight activities for which a defendant could be charged. The *Morey* Court quoted MCL 750.455 and inserted numerals to delineate the eight different activities:

> "Any person [1] who shall procure a female inmate for a house of prostitution; or [2] who shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute; or [3] who by promises, threats, violence or by any device or scheme, shall cause, induce, persuade, encourage, take, place, harbor, inveigle or entice a female person to become an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged or allowed; or [4] any person who shall, by promises, threats, violence or by any device or scheme, cause, induce, persuade, encourage, inveigle or entice an

> inmate of a house of prostitution or place of assignation to remain therein as such inmate; or [5] any person who by promises, threats, violence, by any device or scheme, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, shall take, place, harbor, inveigle, entice, persuade, encourage or procure any female person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution; or [6] who shall inveigle, entice, persuade, encourage, or procure any female person to come into this state or to leave this state for the purpose of prostitution; or [7] who upon the pretense of marriage takes or detains a female person for the purpose of sexual intercourse; or [8] who shall receive or give or agree to receive or give any money or thing of value for procuring or attempting to procure any female person to become a prostitute or to come into this state or leave this state for the purpose of prostitution, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 20 years." [*Morey*, 461 Mich at 328.]

In *Morey*, a jury convicted the defendant of pandering, MCL 750.455, and accepting the earnings of a prostitute, MCL 750.457. *Morey*, 461 Mich at 326. On appeal in the Supreme Court, the Court held that there was insufficient evidence to support the pandering conviction. *Id*. at 326-327. In *Morey*, an undercover police officer had called the defendant's massage service from a motel room. Ultimately, a female arrived and performed massage services, but also negotiated to perform sexual services. After she was arrested, she agreed to cooperate with the police and telephoned the defendant, indicating that the client had requested a second masseuse. A second woman arrived and gave the officer a massage, but also offered to perform sexual services. After the second woman was arrested, she also agreed to cooperate with the police. The police drove the

women to a restaurant where they provided a portion of their earnings to the defendant, who was then arrested. *Id*. at 327-328.

The defendant was charged pursuant to the second clause of the pandering statute; it was alleged that he acted to " 'induce, persuade, encourage, inveigle or entice a female person to become a prostitute[.]' " *Id*. at 329. The Court of Appeals held that this section of the statute penalized defendants who induce females who had not already engaged in prostitution to engage in prostitution. *Id*. Our Supreme Court analyzed the phrase "become a prostitute" and concluded that "to become a prostitute" was distinguishable from performing an act of prostitution. *Id*. at 329-333. Because the prosecution had failed to present evidence that the women were not prostitutes before the defendant employed them and failed to present evidence that the defendant "induced, persuaded, inveigled, or enticed them to become prostitutes," the Supreme Court held that the pandering conviction was properly reversed by the Court of Appeals. *Id*. at 338.

However, our Supreme Court further acknowledged that the pandering statute, compared with other criminal offenses, was designed to punish individuals who prey on innocent females by punishing the conduct with up to 20 years' imprisonment:

> It is reasonable to presume that the Legislature intended to punish separately and more severely those individuals who persuade or attempt to persuade a female to begin performing acts of prostitution. This conduct goes beyond mere facilitation of prostitution—these individuals prey on innocent females, attempting to induce them into a criminal livelihood. Certainly society has a greater interest in protecting innocent victims from taking the first step toward a career of prostitution than it has in preventing further acts of prostitution by those who have already

> succumbed to that lifestyle. In light of the degree of harm to society, it is not unreasonable to impose a more severe penalty on the predators of innocent females.
>
> Indeed, each of the eight activities proscribed by the pandering statute describes activities that go beyond similar, but arguably less harmful, activities proscribed elsewhere, suggesting a legislative intent to punish more severely the more harmful activities. For example, procuring females to reside in a house of prostitution, or causing them to remain there, are felonies under the first, third, and fourth clauses of the pandering statute, and are punishable by up to twenty years imprisonment. MCL 750.455; MSA 28.710. This is far more severe than the misdemeanor imposed for merely letting a house, knowing that the lessee intends to use the house for purposes of prostitution, MCL 750.454; MSA 28.709, which carries a penalty of six months in the county jail or a $250 fine. It is reasonable to conclude that those who deal directly with females—bringing them into and causing them to remain in an environment devoted to prostitution—create a greater harm than the person who merely owns the house. Similarly, under the sixth clause of the pandering statute, facilitating *interstate* prostitution activities carries a separate and more severe penalty of up to twenty years imprisonment, MCL 750.455; MSA 28.710, than the misdemeanor imposed for aiding and abetting a single act of prostitution, MCL 750.450; MSA 28.705, MCL 750.451; MSA 28.706, which carries a penalty of up to ninety days in jail or a $100 fine. Each clause of the pandering statute evidences a legislative intent to punish more severely those who make more harmful contributions to prostitution activities. Consequently, it is reasonable to conclude that the Legislature intended to punish more severely those who recruit females into the practice of prostitution than those who merely facilitate a female's existing decision to engage in additional acts of prostitution. [*Morey*, 461 Mich at 335-337.]

The *Morey* Court also noted that the defendant's conduct may have fallen within other provisions of the

prostitution section of the Penal Code as well as activity five of the pandering statute, MCL 750.455 (" 'to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution.' "). *Morey*, 461 Mich at 335 n 6. However, the Court acknowledged that charging decisions are not the prerogative of the Court, but are within the sole discretion of the prosecutor. *Id*.

In the present case, the plain language of MCL 750.455 reveals that the district court erred by refusing to bind over defendants on the charge of pandering. MCL 750.455[6] prohibits an individual "who shall inveigle, entice, persuade, encourage, or procure any female person to come into this state or to leave this statute for the purpose of prostitution[.]" The commission of this act constitutes a felony punishable by up to 20 years' imprisonment. MCL 750.455. The eight activities delineated in MCL 750.455, are separated by the term "or," indicating alternative choices, and each offense does not require the elements of any other offense. *Auto-Owners Ins Co*, 227 Mich App at 50. Therefore, there was no requirement that the prosecution demonstrate that defendants caused the undercover decoy to "become a prostitute." Rather, the Legislature intended to more severely punish those who recruit females into a prostitution practice rather "than those who merely facilitate a female's existing decision to engage in additional acts of prostitution." *Morey*, 461 Mich at 337. The undisputed evidence elicited during the preliminary examination indicated that defendants did not intend to merely send additional clients to the undercover officer and, therefore, facilitate an existing decision to engage in the profession of prostitution. Rather, the evidence indicated that defendants offered to further entice the officer into prostitution by engaging her in an interstate practice, sending her to the

state of Florida with promises of clothing, shoes, a residence, and cosmetic enhancement surgery. This interstate conduct was prohibited by the pandering statute. MCL 750.455[6]. Accordingly, the district court erred by failing to order defendants bound over on the charge of pandering.

Reversed and remanded to the circuit court for reinstatement of the charge against each defendant and for proceedings consistent with this opinion. We do not retain jurisdiction.

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

SPEICHER v COLUMBIA TOWNSHIP BOARD OF TRUSTEES
(ON RECONSIDERATION)

Docket No. 306684. Submitted September 5, 2013, at Grand Rapids. Decided December 19, 2013, at 9:00 a.m. Order declining to convene special panel under MCR 7.215(J) entered January 14, 2014. Leave to appeal sought.

Plaintiff Kenneth J. Speicher brought an action against the Columbia Township Board of Trustees and the Columbia Township Planning Commission in the Van Buren Circuit Court, seeking declaratory and injunctive relief for defendants' alleged violations of the Open Meetings Act (OMA), MCL 15.261 *et seq*. The trial court, Paul E. Hamre, J., granted summary disposition in favor of defendants, and the plaintiff appealed. The Court of Appeals, WILDER, P.J., and O'CONNELL and K. F. KELLY, JJ., affirmed the trial court's denial of injunctive relief but reversed its denial of declaratory relief and remanded for further proceedings, specifying that because the technical nature of the OMA violation did not warrant injunctive relief, plaintiff was not entitled to attorney fees or costs under MCL 15.271(4) on remand. Plaintiff filed a motion for reconsideration and the Court of Appeals granted it, vacating the portion of the previous opinion that denied plaintiff attorney fees and costs.

The Court of Appeals *held*:

Plaintiff was entitled to costs and attorney fees under previous Court of Appeals cases interpreting MCL 15.271(4) because plaintiff succeeded in obtaining relief. Although the plain language of the OMA does not support an award of costs and fees when the relief granted was declaratory rather than injunctive, the caselaw that does is binding and must be followed. Absent this caselaw, the panel would have held that attorney fees and costs are available under MCL 15.271(4) only for plaintiffs who requested and obtained injunctive relief.

Remanded for further proceedings.

STATUTES — OPEN MEETINGS ACT — ATTORNEY FEES AND COSTS — DECLARATORY RELIEF.

A plaintiff who succeeds in obtaining relief under MCL 15.271(4), whether declaratory or injunctive, is entitled to costs and attorney fees.

Silverman, Smith & Rice, PC (by *Robert W. Smith*), for plaintiff.

Plunkett Cooney (by *Mary Massaron Ross*, *Christine C. Oldani*, and *Robert A. Callahan*) for defendants.

ON RECONSIDERATION

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

WILDER, P.J. Plaintiff Kenneth J. Speicher moves for reconsideration of the portion of this Court's opinion in *Speicher v Columbia Twp Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2013 (Docket No. 306684), which held, despite the violation of the Open Meetings Act (OMA), MCL 15.261 *et seq.*, by defendants Columbia Township Board of Trustees and Columbia Township Planning Commission, that "given that the technical nature of this OMA violation resulted in no injunctive relief being warranted, plaintiff is not entitled to any attorney fees or costs under MCL 15.271(4) on remand." Because we concluded that plaintiff was entitled to declaratory relief, by virtue of a long line of cases issued by this Court—*Craig v Detroit Pub Sch Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005), *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78; 669 NW2d 862 (2003), *Morrison v East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003), *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000), *Manning v East Tawas*, 234 Mich App 244; 593 NW2d 649 (1999), and *Schmiedicke v Clare Sch Bd*, 228 Mich App 259; 577 NW2d 706 (1998)—he is also entitled to attorney fees. Accordingly, as we are required to do under MCR 7.215(J)(1), we follow these cases and

remand to the trial court to award costs and attorney fees to plaintiff under MCL 15.271(4).

However, we disagree that, under the plain language of the OMA, plaintiff is entitled to attorney fees under the facts of this case. In accordance with MCR 7.215(J)(2), we note our disagreement with these cases and call for the convening of a special panel of this Court pursuant to MCR 7.215(J)(3).

I

We first note that plaintiff did not request attorney fees at the trial court or in his claim of appeal. Plaintiff's first request for attorney fees was prompted by this Court's holding that, because plaintiff was entitled to declaratory relief but not injunctive relief, he would not be entitled to an award of attorney fees. Upon reconsideration, we concede that existing caselaw requires an award of attorney fees in such instances, apparently even when plaintiff has not requested attorney fees. However, because we disagree with this caselaw, this issue having been squarely raised on reconsideration, we now address it directly. We observe that this issue is one of law and the record is factually sufficient to review it, and therefore, despite the fact that this issue was not properly presented to us in the classic sense, this Court may review it in the interest of judicial efficiency. See *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237-238; 713 NW2d 269 (2005); *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004).

II

This Court reviews issues of statutory interpretation de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The

primary goal when interpreting a statute is to ascertain and give effect to the Legislature's intent. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). "The words contained in a statute provide us with the most reliable evidence of the Legislature's intent." *Green v Ziegelman*, 282 Mich App 292, 301; 767 NW2d 660 (2009). In interpreting a statute, this Court considers both the plain meaning of the critical word or phrase "as well as [its] placement and purpose in the statutory scheme." *Id*. at 302.

The pertinent section of the OMA, MCL 15.271(4), provides:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

This Court in *Leemreis v Sherman Twp*, 273 Mich App 691, 704; 731 NW2d 787 (2007), identified the three elements a plaintiff must satisfy in order to obtain attorney fees under the statute: "(1) a public body must not be complying with the act, (2) a person must commence a civil action against the public body 'for injunctive relief to compel compliance or to enjoin further noncompliance with the act,' and (3) the person must succeed in 'obtaining relief in the action.' " As discussed earlier, plaintiff has satisfied the first two elements. The central question at issue is whether, when plaintiff obtained declaratory relief but not injunctive relief, he succeeded in "obtaining relief in the action."

A

There are three distinct types of relief in the OMA. *Id*. at 700.

MCL 15.270(1) permits a person to file a civil action to invalidate a decision of a public body made in violation of the act. There is no provision for costs or attorney fees in this section.

MCL 15.271(1) allows a person to seek injunctive relief "to compel compliance or to enjoin further noncompliance with [the] act." MCL 15.271(4) commands the recovery of costs and attorney fees when the person seeking injunctive relief succeeds "in obtaining relief in the action."

MCL 15.273 permits a plaintiff to file suit against a public official for intentional violations of the OMA. And if the public official did intentionally violate the OMA, he or she is liable for actual and exemplary damages of not more than $500 total "plus court costs and actual attorney fees." MCL 15.273(1).

"None of these sections refers to either of the other sections. Reading the OMA as a whole, it appears that these sections, and the distinct kinds of relief that they provide, stand alone." *Leemreis*, 273 Mich App at 701. Accordingly, we conclude that the phrase "obtaining relief in the action" contained in MCL 15.271(4) refers not to a plaintiff's success in obtaining *any* relief, including declaratory relief, but instead commands the award of costs and attorney fees only when the plaintiff has obtained *injunctive* relief. Therefore, we would conclude that according to the plain meaning of the statute, a plaintiff can recover attorney fees and costs under MCL 15.271(4) only when a public body violates the OMA, the plaintiff requests injunctive relief, and the plaintiff receives injunctive relief.

B

Despite our plain-meaning interpretation, we are compelled to follow to this Court's prior determinations

that the third element of MCL 15.271(4) is satisfied as long as *any* relief is granted. The following is a comprehensive review and roadmap of the prior opinions stating this premise.

This Court in *Craig*, 265 Mich App at 581, did not award attorney fees because it found no violation of the OMA, but, without any analysis, it did supply the rule that "[t]he imposition of attorney fees is mandatory upon a finding of a violation of the OMA." The *Craig* Court cited *Herald Co*, 258 Mich App 78, as authority for its position.

In *Herald Co*, the Court stated that "[t]he OMA provides that if relief is obtained in an action against a public body for violating the OMA, that relief shall include 'court costs and actual attorney fees.' " *Id*. at 91-92, quoting MCL 15.271(4). The Court further explained that "neither proof of injury nor issuance of an injunction is a prerequisite for the recovery of attorney fees under the OMA." *Herald Co*, 258 Mich App at 92, citing *Nicholas*, 239 Mich App at 534-535.

Also relying on *Nicholas* is *Morrison*, 255 Mich App 505. The *Morrison* Court stated in a footnote, "Where a trial court declares that the defendants violated the OMA, but finds it unnecessary to grant injunctive relief, the plaintiffs are entitled to actual attorney fees and costs." *Id*. at 521 n 11, citing *Nicholas*, 239 Mich App at 535. Even though this rule was provided, the issue in *Morrison* was not whether the plaintiff was entitled to costs; it was whether the plaintiff was entitled to specific costs associated with certain deposition transcripts. *Morrison*, 255 Mich App at 521-522.

In *Nicholas*, 239 Mich App at 535, this Court, without providing any analysis, stated in perhaps the most direct language thus far:

> Here, the trial court declared that defendants violated the OMA. This constitutes declaratory relief, thus entitling plaintiffs to actual attorney fees and costs despite the fact that the trial court found it unnecessary to grant an injunction given defendants' decision to amend the notice provision after plaintiffs filed the present suit.

The *Nicholas* Court then cited several cases as authority for this proposition: *Schmiedicke*, 228 Mich App at 266-267, *Menominee Co Taxpayers Alliance*, 139 Mich App 814, and *Ridenour v Dearborn Sch Dist Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981). The *Nicholas* Court also relied on *Manning*, 234 Mich App 244.

The *Manning* Court stated that "declaratory relief under the OMA . . . is sufficient to entitle plaintiffs to an award of costs and attorney fees." *Id*. at 254. And like the *Nicholas* Court, the *Manning* Court also relied on and cited *Schmiedicke* and *Menominee Co Taxpayers Alliance* for this position. *Id*.

The *Schmiedicke* Court, in turn, without any analysis concisely stated that "[t]he legal remedy of declaratory relief is adequate" to award attorney fees under the statute. *Schmiedicke*, 228 Mich App at 267, citing *Menominee Co Taxpayers Alliance*, 139 Mich App at 820. The *Schmiedicke* Court, 228 Mich App at 267, also relied on *Peninsula Sanitation, Inc v Manistique*, 208 Mich App 34; 526 NW2d 607 (1994), but this reliance is puzzling given that *Peninsula Sanitation* did not involve the OMA, let alone the award of attorney fees under the OMA.

In *Menominee Co Taxpayers Alliance*, this Court awarded attorney fees, even though the trial court did not issue an injunction. *Menominee Co Taxpayers Alliance*, 139 Mich App at 820. The Court exclusively relied on *Ridenour*, 111 Mich App 798.

This finally takes us to *Ridenour*, which, as we have determined, is the genesis of this entire line of cases. In *Ridenour*, the plaintiff sought an injunction to prevent the defendant school district from holding closed sessions at which it would evaluate the performance of its officials and employees. *Id*. at 801. The trial court entered a declaratory judgment in favor of the plaintiff and indicated that a permanent injunction would issue. *Id*. But, after defense counsel stated that an injunction would not be necessary "since the defendant would comply with the court's interpretation," the trial court did not issue an injunction. Nevertheless, the trial court did award attorney fees because the plaintiff had obtained "the equivalent of an injunction." *Id*. This Court agreed with the trial court's result, and the sum total of its analysis on this point is as follows:

> No matter how it is viewed, plaintiff received the relief he sought. The judge agreed with plaintiff's position and gave a judgment in his favor. The record is clear. But for defense counsel's promise to comply with the decision, the court would have granted a permanent injunction. The award of attorney fees and costs was proper. [*Id*. at 806.]

C

From this comprehensive review, it is clear that the existing caselaw has morphed from the initial *Ridenour* opinion in 1981, in which attorney fees were warranted only because plaintiff received the equivalent of an injunction (and where the trial court stated it *would* have issued an injunction but for the promise of defendant to comply in the future), to current day opinions, in which attorney fees have been awarded on the mere showing of a violation of the OMA (and without the necessity of obtaining the equivalent of injunctive relief). We conclude that the evolution of this particular

aspect of the law is unfortunate, as it appears that the rationale for the *Ridenour* decision and the decision itself (to allow for the recovery of attorney fees if the relief granted is the equivalent of injunctive relief) has been diluted or ignored in subsequent cases. In our present case, we need not consider whether *Ridenour*'s concept of relief "equivalent" to an injunction is adequate for the recovery of attorney fees and costs. But what is clear is that we would overrule this Court's prior interpretations of MCL 15.271(4) that allow for the recovery of attorney fees when injunctive relief was not obtained, equivalent or otherwise, on the basis that this now common interpretation of MCL 15.271(4) is contrary to the plain and express language of the statute.

We note that this Court has already managed to distinguish this body of caselaw that gave an expansive reading to MCL 15.271(4). In *Leemreis*, 273 Mich App at 704-709, this Court reviewed and analyzed many of these cases. After identifying the three requirements for awarding court costs and attorney fees under MCL 15.271(4), *id*. at 704, the Court held that the plaintiffs could not obtain attorney fees under the OMA because, even though there was caselaw awarding attorney fees on the mere finding of an OMA violation, the plaintiffs failed to satisfy the plain-language requirements of MCL 15.271(4). Specifically, they did not meet the second requirement because they had never sought injunctive relief. Rather, they only sought to invalidate some actions by the defendant township. *Id*. at 707-708.

III

In summary, while we would hold that, because plaintiff did not succeed in obtaining injunctive relief, he cannot recover attorney fees and court costs under

MCL 15.271(4), cases like *Craig*, *Herald Co*, and *Nicholas* are controlling, and we must follow them under MCR 7.215(J)(1), which compels a different outcome. Therefore, the trial court is to award attorney fees and costs to plaintiff on remand.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

O'CONNELL and K. F. KELLY, JJ., concurred with WILDER, P.J.

In re LASTER

Docket Nos. 315028 and 315521. Submitted November 6, 2013, at Detroit. Decided December 26, 2013, at 9:00 a.m.

The Department of Human Services (DHS) petitioned the Wayne Circuit Court, Family Division, for the termination of the parental rights of L. Olds and R. Laster to their two minor children. The court, Christopher D. Dingell, J., found that there was clear and convincing evidence to terminate respondents' parental rights under MCL 712A.19b(3)(a)(*ii*), (b)(*i*), (c)(*i*), (g), and (j), and that termination would be in the best interests of the children. Respondents appealed separately. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. There is no court rule governing parenting time between adjudication and the filing of a termination petition. The only statutory provisions that address parenting time between adjudication and the filing of a termination petition are MCL 712A.18f(3)(e) and (f), which only address the required contents of an agency's case service plan. Accordingly, the issue of the amount, if any, and conditions of parenting time following adjudication and before the filing of a petition to terminate parental rights is left to the sound discretion of the trial court and is to be decided in the best interests of the child. No finding of harm is required. In this case, respondent-mother's parenting time was not suspended until after adjudication but before the termination petition was filed. Accordingly, the trial court did not err when it suspended respondent-mother's parenting time without a finding of harm.

2. To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established. In this case, the trial court found that there was clear and convincing evidence to terminate respondents' parental rights under MCL 712A.19b(3)(a)(*ii*), (b)(*i*), (c)(*i*), (g), and (j). Although the trial court clearly erred by finding that some of the statutory grounds supporting termination of respondents' parental rights were proven by clear and convincing evidence, because only one statutory ground for termination must be established for each parent, the trial court did not clearly err by

finding that at least one statutory ground as to each parent was proven by clear and convincing evidence.

3. While the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered. In this case, the DHS offered respondent-mother various services, including parenting classes and individual, group, and family therapy. The evidence demonstrates that reasonable efforts were made to reunify respondent-mother with her children, but respondent-mother failed to demonstrate sufficient compliance with those services.

4. Whether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence. In this case, respondent-father had very minimal involvement in the children's lives. He did not provide support for the children, and he had little or no contact with them for several years. There was also no evidence that he was able to provide suitable housing for the children. Accordingly, the trial court did not clearly err by finding that termination of respondent-father's parental rights was in the children's best interests.

Affirmed.

TERMINATION OF PARENTAL RIGHTS — PARENTING TIME — PERIOD BETWEEN ADJUDICATION AND BEFORE THE FILING OF A PETITION TO TERMINATE.

The issue of the amount, if any, and conditions of parenting time following adjudication and before the filing of a petition to terminate parental rights is left to the sound discretion of the trial court and is to be decided in the best interests of the child; no finding of harm is required.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jennifer L. Gordon*, Assistant Attorney General, for the Department of Human Services.

Julie E. Gilfix for L. Olds.

Anthony J. Scotta for R. Laster.

Michigan Children's Law Center (by *Michael Rintz*) for the children.

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

OWENS, P.J. This matter involves a consolidated appeal regarding termination of respondents' parental rights. In Docket No. 315028, respondent-mother appeals as of right the trial court's order terminating her parental rights to her two minor children under MCL 712A.19b(3)(a)(*ii*) (desertion), (b)(*i*) (parent's act caused physical injury or abuse), (c)(*i*) (failure to rectify conditions of adjudication), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if children return to parent's home). In Docket No. 315521, respondent-father appeals as of right that same order, which also terminated his parental rights to the two minor children on the same statutory grounds. We affirm.

First, respondent-mother argues that she was improperly denied mandatory parenting time before the filing of the termination petition contrary to MCR 3.965(C)(6)(a)[1] and MCL 712A.13a(11),[2] which interfered with her ability to reunify with her children. We disagree. This issue involves the interpretation and application of statutes and court rules, which we review de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

MCR 3.965(C)(7)(a) provides:

> Unless the court suspends parenting time pursuant to MCL 712A.19b(4),[3] or unless the child has a guardian or legal

[1] Now renumbered as MCR 3.965(C)(7)(a).

[2] Now codified at MCL 712A.13a(13). MCL 712A.13a was amended by 2012 PA 115, effective May 1, 2012, and 2012 PA 163, effective June 12, 2012, which redesignated the numbering of the statutory subsections, but did not make any substantive changes to the subsection in question. Respondent-mother actually cites MCL 712.13a(11) in her appellate brief. However, no such statute exists, and it appears she meant to refer to MCL 712A.13a(11).

[3] This exception applies when the petition for jurisdiction includes a request to terminate parental rights at the initial disposition.

> custodian, the court must permit each parent frequent parenting time with a child in placement unless parenting time, even if supervised, may be harmful to the child.

MCL 712A.13a(13) provides:

> If a juvenile is removed from his or her home, the court shall permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted.

Although these provisions require a trial court to make findings of harm before suspending parenting time, it is clear from the language of the court rule and the statute that these provisions only govern parenting time from the preliminary hearing to adjudication. MCR 3.965 is the preliminary-hearing rule and governs the trial court's actions at the preliminary hearing. By its own terms, subrule (C) of MCR 3.965 governs "pretrial placement" and subrule (C)(7) governs "parenting time or visitation" during pretrial placement. Likewise, MCL 712A.13a governs pretrial placement and subsection (13) only concerns parenting time if the child is removed from the home following the authorization of the petition. There is no indication in the language of the court rule or statute that these provisions are applicable once adjudication occurs, nor should they be, given that once adjudication occurs, the court has facts—proven by at least a preponderance of legally admissible evidence—on which to base an even more informed decision regarding parenting time than can be made at a preliminary hearing.

Once a termination petition is filed, parenting time is then governed by MCR 3.977(D) and MCL 712A.19b(4).

MCR 3.977(D) provides, "If a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition." MCL 712A.19b(4) provides in relevant part, "If a petition to terminate parental rights to a child is filed, . . . the court may suspend parenting time for a parent who is a subject of the petition." The suspension of parenting time once a petition to terminate parental rights is filed requires no finding of harm and is presumptively in the child's best interest, because, among other reasons, it protects infants or young children from the greatly increased risk—brought about by a parent facing termination of parental rights—of being kidnapped during parenting time and removed from the state;[4] it also protects older children from being told to run away and where and when to meet the parent so that they can leave the state together.

There is, however, no court rule governing parenting time between adjudication and the filing of a termination petition. The only statutory provisions that concern parenting time between adjudication and the filing of a termination petition are MCL 712A.18f(3)(e) and (f), which only address the required contents of an agency's case service plan that is created following adjudication for use at the initial dispositional hearing. These provisions state:

> The case service plan shall provide for placing the child in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's best interests and special needs. The case service plan shall include, but is not limited to, the following:
>
> * * *

[4] Armed guards supervising parenting time are virtually unheard of, except for jail or prison visits.

> (e) Except as otherwise provided in this subdivision, unless parenting time, even if supervised, would be harmful to the child as determined by the court under section 13a of this chapter or otherwise, a schedule for regular and frequent parenting time between the child and his or her parent, which shall not be less than once every 7 days.
>
> (f) Conditions that would limit or preclude placement or parenting time with a parent who is required by court order to register under the sex offenders registration act.

It is clear from the statutory language that these provisions only govern the agency and what parenting time recommendations the case service plan must include following adjudication; they do not govern the trial court's authority to enter orders regarding parenting time following adjudication. In the absence of a court rule or statute, the issue of the amount, if any, and conditions of parenting time following adjudication and before the filing of a petition to terminate parental rights is left to the sound discretion of the trial court and is to be decided in the best interests of the child. No finding of harm is required, although such a finding is usually implicit in the court's decision.[5] Subsection (3)(e) simply directs the agency to include a recommended parenting time schedule in the case service plan, unless (1) the trial court had, before adjudication, determined under section 13a that parenting time, even if supervised, would be harmful to the child or (2) that the trial court had "otherwise" determined that parenting time, even if supervised, would be harmful to the child.

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[5] We note that although the "Order of Disposition" form for child protective proceedings created by the State Court Administrative Office provides a box for the trial court to check indicating that parenting time with the parent may be harmful to the children, forms, whether drafted by a court or approved by the SCAO, do not have the force of law. See, e.g., MCL 24.207(h); *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 46; 703 NW2d 822 (2005).

The preliminary hearing in this case occurred on April 26, 2011, one day after the children were removed from the home. Adjudication occurred on August 25, 2011, at which time the trial court determined that there were statutory grounds to exercise jurisdiction over the children. Respondent-mother's parenting time was not suspended until June 26, 2012, which was after adjudication but before the termination petition was filed. Up until that time, she had been granted supervised parenting time. As discussed, there is no court rule or statutory provision that governs the trial court's authority concerning parenting time between adjudication and the filing of a termination petition, much less requiring the trial court to make a finding of harm before suspending parenting time. Accordingly, the trial court did not err when it suspended respondent-mother's parenting time without a finding of harm.

Next, both respondents argue that the trial court clearly erred by finding that there were statutory grounds for termination. We disagree.

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013), citing *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). We review a trial court's findings for clear error. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App at 296-297.

The trial court terminated respondents' parental rights under MCL 712A.19b(3)(a)(*ii*), (b)(*i*), (c)(*i*), (g), and (j).

With regard to subdivision (a)(*ii*), there was not clear and convincing evidence that respondent-mother had deserted the children for 91 days and had not sought custody during that period. Although respondent-mother had previously left the children with their maternal grandmother for an extended period of time, that occurred approximately one and a half years before the filing of the termination petition. And after that time, respondent-mother did have contact with the children and did participate in some, although very few, of the court hearings and required services.

However, there was clear and convincing evidence to terminate respondent-father's parental rights on this statutory ground. Evidence showed that respondent-father had moved to Ohio in 2010, and he did not provide support for the children. Although he had some phone contact with the children, he had not visited them since they were removed in April 2011. The only court-ordered service respondent-father had to comply with was to make himself available for an assessment of the suitability of his home, which he twice failed to do, despite ample notification.

With regard to subdivision (b)(*i*), there was not clear and convincing evidence that there was a reasonable likelihood that the children would suffer abuse in the foreseeable future if placed in the parents' home. There was testimony that before the removal of the children, one of the children was sexually abused by the daughter of respondent-mother's girlfriend. However, respondent-mother ended that relationship and moved out of the house before adjudication occurred, which was approximately 18 months before the termination hearing, and there was no evidence that respondent-mother associated with other known abusers. Likewise, there was no evidence that the children incurred abuse while in the care of respondent-father.

With regard to subdivision (c)(*i*), more than 182 days had passed since the issuance of the initial disposition order, and there was clear and convincing evidence that the conditions that led to the adjudication, specifically the lack of safe and suitable housing, continued to exist at the time of the termination hearing and there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's ages. In the approximately two years that the children were in the court's temporary custody, respondent-mother failed to obtain suitable housing. During this time, she provided multiple false addresses to the agency. At the termination hearing, there was evidence that respondent-mother was living in a shelter. Although she testified that she would be obtaining a three-bedroom home once she received an income tax refund, given her inability to obtain suitable housing during the duration of the reunification plan, there is no indication that this would occur within a reasonable time. Likewise, respondent-father had not provided for the children and there was no evidence that he had obtained suitable housing, considering he twice failed to participate in an assessment of the suitability of his home.

With regard to subdivision (g), there was clear and convincing evidence that respondents failed to provide proper care or custody for the children and that there was no reasonable expectation that they would be able to provide proper care or custody within a reasonable time considering the children's ages. The court took jurisdiction of the children because respondent-mother failed to provide a safe and suitable home for her children. She left them with their maternal grandmother, whose parental rights had been previously terminated and whose home had no running water. As discussed, by the time of the termination hearing

respondent-mother had still failed to obtain suitable housing. In addition, she was unable to provide legal documentation of her income, despite two requests made by the agency. She also failed to attend the majority of her court hearings, parenting classes, weekly therapy sessions, and parenting time visits. She lived across the state from her children, and although she testified that she had phone contact with her son every weekend, there was evidence that she had not had phone contact with her daughter since December 2012. Further, respondent-mother did not participate in weekly drug screens, and of the two drug screens she did participate in after October 2012, one tested positive for alcohol. With regard to respondent-father, he did not provide support for the children, he failed to make himself available for a home assessment, he did not participate in other voluntary services, such as therapy and parenting classes, and he had not visited the children while this case was pending.

Finally, with regard to subdivision (j), there was clear and convincing evidence of a reasonable likelihood, based on the conduct or capacity of the respondent-mother, that the children would be harmed if they were returned to respondent-mother's home, but the same is not true for respondent-father. Respondent-mother left the children in the care of their maternal grandmother, who previously had her parental rights terminated and whose home did not have running water. During the approximately two years that the children were in the court's temporary custody, respondent-mother failed to maintain employment and obtain suitable housing, often living with others, and most recently, in a shelter. She also neglected to contact the police after her daughter informed her that she had suffered sexual abuse. Respondent-mother's conduct indicates, by clear and convincing evidence, that there is a reasonable likeli-

hood that the children would be harmed if returned to her custody. Although respondent-father was not involved in the children's lives and did not provide support for them, that is not, by itself, sufficient evidence that the children would be harmed if placed in his home.

Although the trial court clearly erred by finding that some of the statutory grounds supporting termination of respondents' parental rights were proven by clear and convincing evidence, because only one statutory ground for termination must be established for each parent, see *Moss*, 301 Mich App at 80, we conclude that the trial court did not clearly err by finding that at least one statutory ground as to each parent was proven by clear and convincing evidence.

Next, respondent-mother argues that the trial court erred by terminating her parental rights because the Department of Human Services (DHS) did not make reasonable efforts to reunify her and her children. We disagree.

"While the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). In this case, the DHS offered respondent-mother various services, including parenting classes and individual, group, and family therapy. However, respondent-mother cancelled a majority of her therapy sessions and failed to complete parenting classes. Although she was living in Grand Rapids, she was provided with referrals for the services offered. She was also provided with information to assist her in getting weekly drug screens in Grand Rapids, but she failed to do so. Further, there was testimony that she

was provided with a bus ticket to get to Detroit, but she failed to take advantage of it. Accordingly, we conclude that reasonable efforts were made to reunify respondent-mother with her children, but she failed to demonstrate sufficient compliance with those services. See *id*.

Finally, respondent-father argues that termination of his parental rights was not in the children's best interests. We disagree.

We review a trial court's decision regarding a child's best interests for clear error. *Trejo*, 462 Mich at 356-357. "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *Moss*, 301 Mich App at 90.

In this case, as discussed, respondent-father had very minimal involvement in the children's lives. He did not provide support for the children, and he had little or no contact with them for several years. There was also no evidence that he was able to provide suitable housing for the children, as he did not comply with the required home assessment. Accordingly, the trial court did not clearly err by finding that termination of respondent-father's parental rights was in the children's best interests.

Affirmed.

JANSEN and HOEKSTRA, JJ., concurred with OWENS, P.J.

AFP SPECIALTIES, INC v VEREYKEN

Docket Nos. 306215 and 307540. Submitted October 3, 2013, at Petoskey. Decided January 2, 2014, at 9:00 a.m.

In Docket No. 306215, plaintiff AFP Specialties, Inc., brought an action in the Kalkaska Circuit Court against Greg Vereyken, Northtowne Development Company, and various lienholders of the property at issue, after Vereyken failed to pay for a fire suppression system he had hired AFP to install in a building he was purchasing from Northtowne on a land contract. Vereyken had the fire suppression system installed in order to meet the code requirements for converting the building into a restaurant, but after he did so he was unable to pay the balance of the land contract, and Northtowne brought a successful action to forfeit the land contract and obtain a judgment of possession. AFP sought a money judgment for breach of contract, to foreclose AFP's lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq*., and to determine AFP's lien superior in interest to those of the lienholding defendants. One of these defendants, AFP subcontractor Etna Supply Company, brought a counterclaim against AFP, seeking payment for the materials it had supplied for the fire suppression system plus a time-price differential. Etna, AFP, and Northtowne moved for summary disposition. After initially ruling that AFP had at least a valid construction lien on the fire suppression system itself, the court, Janet M. Allen, J., ultimately ruled that AFP's construction lien attached to Northtowne's entire interest in the property under the CLA both on a theory of implied agency and because the land contract required Vereyken to keep the property in accordance with government regulations. The court also granted partial summary disposition to Etna, ruling that AFP was liable to Etna for $8,361.58 plus costs and judgment interest and granting Etna a foreclosure judgment against Vereyken in that amount, but that whether AFP was liable to Etna for Etna's claimed time-price differential was a question of fact. After a bench trial, the court ruled that Etna was entitled to the time-price differential amount it sought. The court entered monetary judgments for AFP against Vereyken and for Etna against AFP, and granted construction lien judgments for AFP and Etna against Vereyken and Northtowne. Northtowne appealed, and a cross-appeal by Etna was dismissed by stipulation.

In Docket No. 307540, AFP appealed the trial court's award of reasonable attorney fees to Etna under MCR 2.405(A)(6) as a sanction for AFP's having rejected Etna's offer of judgment. The appeals were consolidated.

The Court of Appeals *held*:

1. The trial court erred by ruling as a matter of law that Vereyken was the implied agent of Northtowne when he hired AFP to install the fire suppression system. Resolution of this issue did not require interpretation of the CLA because the existence of an implied agency is a factual question governed by the common law. The facts and circumstances giving rise to an implied agency must be known to and acquiesced in by the alleged principal before the action of the alleged agent may bind the alleged principal, and the implied agency must be based on facts for which the principal is responsible. Without other considerations, mere possession with authority to alter or improve is by itself insufficient to create an agency by which the lessor's interest can be bound. In this case, because Northtowne had no control over what improvements Vereyken contracted to have made to the property, no implied agency arose. Further, Northtowne had no duty to inform AFP of Vereyken's financial health or business prospects or to initiate land contract forfeiture proceedings at the earliest possible time.

2. The trial court's consideration of whether Vereyken was required to install the fire suppression system pursuant to the land contract provision obligating him to keep the premises in accordance with governmental regulations was not a procedural error and did not deny Northtowne due process of law. However, the trial court erred by concluding that this provision did require the installation of the system, given that the government regulation at issue applied only because Vereyken chose to operate the building as a restaurant.

3. The trial court did not clearly err by determining that the attorney fees it awarded Etna were necessitated by AFP's rejection of Etna's offer of judgment and did not abuse its discretion by choosing not to award them under the interests-of-justice exception of MCR 2.405(A)(6).

Docket No. 306215 reversed and remanded for modification of the judgment; Docket No. 307540 affirmed.

STATUTES — CONSTRUCTION LIEN ACT — IMPLIED AGENCY.

Whether a land contract vendee has become the implied agent of the land contract vendor when entering into contracts for improvements to the property is a question of fact governed by the

common law rather than a question of law requiring interpretation of the Construction Lien Act, MCL 570.1101 *et seq*.

Rex O. Graff, Jr., for AFP Specialties, Inc.

Mark A. Hullman for Northtowne Development Company.

Rhoades McKee PC (by *Gregory G. Timmer*) for Etna Supply Company.

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

MARKEY, J. In Docket No. 306215, defendant Northtowne Development Company appeals by right the trial court's August 29, 2011 judgment granting plaintiff AFP Specialties, Inc., a construction lien foreclosure judgment against the interest of Northtowne and also granting defendant/cross-plaintiff Etna Supply Company a construction lien foreclosure judgment against the interest of Northtowne. For the reasons discussed herein, we hold that the trial court erred by finding that defendant Gregory Vereyken was the implied agent of Northtowne when Vereyken "contracted for the improvement to the real property." MCL 570.1107(1). The trial court also erred by ruling that the land contract between Northtowne and Vereyken "required the improvement." *Id*. Therefore, we reverse in Docket No. 306215 and remand for modification of the judgment.

Docket No. 307540 involves an attorney-fee claim by Etna, one of AFP's subcontractors. Etna filed a counterclaim against AFP for its contract price plus a time-price differential. AFP disputed only the added amount for the time-price differential. After Etna prevailed at trial and further hearings were held, the trial court awarded it reasonable attorney fees as an offer-of-judgment sanction. MCR 2.405. We conclude that the

trial court did not clearly err by finding that the attorney fees it assessed against AFP were necessitated by AFP's rejection of Etna's offer of judgment. MCR 2.405(A)(6). Furthermore, AFP has not established that the trial court abused its discretion by declining to invoke the "interests of justice" exception of MCR 2.405(D)(3). Therefore, we affirm in Docket No. 307540.

I. DOCKET NO. 306215

A. FACTUAL BACKGROUND

Vereyken entered into a land contract on October 12, 2006, to purchase property Northtowne owned in Kalkaska County that included a vacant building that had formerly been used as a hardware store. Vereyken intended to convert the building into a restaurant. The terms of sale were payment of $360,000, with a $36,000 down payment, monthly installments of $2,610.12, and a balloon payment for the balance on November 12, 2008. Although the principals of Northtowne knew that Vereyken intended to operate a restaurant, the land contract did not require the property to be used for that purpose.

On April 10, 2007, Vereyken contracted with AFP to install a fire suppression system in the building. Michigan's construction code requires that a fire suppression system be installed if a building is to be used as a restaurant. Vereyken hoped to open his restaurant for business by the summer of 2007, but AFP did not begin installing the fire suppression system until June 29, 2007. By September 12, 2007, the work was sufficiently completed for Kalkaska County to issue a temporary certificate of occupancy. Between September 12, 2007, and November 2, 2007, when AFP replaced a part in the system, AFP did not provide any labor or materials for

the improvement of the property. After AFP replaced the part, Kalkaska County determined that the system did not meet the construction code's requirements and revoked the temporary certificate of occupancy. This forced the restaurant to close from mid-November 2007 until June 2008 and resulted in Vereyken's missing payments on the land contract during the closure.

Vereyken also suffered additional financial setbacks when in the same month that he reopened the Kalkaska restaurant, another restaurant he owned, in Bellaire, burned. A dispute with his insurance company contributed to Vereyken's being unable to refinance the Kalkaska restaurant when the balloon payment came due in November 2008. Northtowne agreed to extend the due date for the land contract balance for an additional year, but Vereyken was still unable to pay the balance by the extended maturity date. Northtowne brought an action to forfeit the land contract and obtained a judgment of possession on November 9, 2009.

When Vereyken failed to pay AFP as required, AFP filed a complaint against him for breaching their contract. AFP sought a money judgment and to foreclose AFP's construction lien on the property. On September 10, 2009, AFP obtained partial summary disposition against Vereyken for $54,650.95, which included $41,180 for breach of contract and attorney fees and costs of $11,582.82 through July 14, 2009.

AFP sought to foreclose its construction lien on the property and alleged that an implied agency existed between Vereyken and Northtowne as the fee owner and land contract vendor. Northtowne denied that Vereyken was acting as its agent when he contracted for the installation of a fire suppression system in the building. After discovery, AFP and Northtowne both

moved for summary disposition. AFP contended that an implied agency existed between Vereyken and Northtowne because Northtowne had approved of, or at least tacitly permitted the construction improvements to continue, thus enhancing the value of the property, while Vereyken was in default on his land contract obligations. Northtowne contended that indicia of an implied agency were not present and that no implied agency arose between it and Vereyken. Also, Northtowne argued that Vereyken was current in his land contract obligations when he contracted with AFP and that *Norcross Co v Turner-Fisher Assoc*, 165 Mich App 170; 418 NW2d 418 (1987), on which AFP relied, was distinguishable.

In an opinion and order, the trial court concluded that AFP's construction lien attached to Northtowne's entire interest in the subject property because Northtowne both contracted for and required the improvement for purposes of the Construction Lien Act (CLA), MCL 570.1101 *et seq*. As to implied agency, the trial court reasoned that holding a fee owner responsible for improvements that its implied agent contracted for is consistent with construing the CLA liberally. See MCL 570.1302(1); *Norcross*, 165 Mich App at 178-179. The court found that Northtowne was aware of and acquiesced in Vereyken's making the improvements while in default on the land contract. The court further reasoned that a contractor had "no way of knowing when a vendee is in default" and should not have "[a] duty to investigate." Instead, the trial court believed that "the burden [should be placed] on the titleholder (who is in the best position to determine default and who stands to benefit from any improvement) to either limit or cease the improvements or expressly disclaim or restrict a potential agency relationship . . . ." The trial court concluded that "Northtowne's failure to limit or cease

the improvements being made on its property, despite Vereyken's constant state of default, created an implied agency relationship."

The trial court also concluded that Northtowne's land contract with Vereyken required the installation of the fire suppression system. The court observed that "[t]he relevant provision of the land contract provides that the purchaser (i.e. Vereyken) agrees '[t]o keep the permission[1] [sic] accordance with all police, sanitary and other regulations imposed by any governmental authority.' " On the basis of this provision, the court ruled that because the building was to be used as a restaurant and the construction code required that a restaurant be equipped with a fire suppression system, "the land contract required that the building be improved with a fire suppression system, [and] AFP's lien attaches to Northtowne's interest pursuant to MCL 570.1107(1)."

B. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *DLF Trucking Inc v Bach*, 268 Mich App 306, 309; 707 NW2d 606 (2005). We also review de novo the proper interpretation of a statute as a question of law. *Jeddo Drywall, Inc v Cambridge Investment Group, Inc*, 293 Mich App 446, 451; 810 NW2d 633 (2011). The trial court rendered its ruling in this case under MCR 2.116(C)(10), which tests the factual sufficiency of a party's claim. *C D Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 407; 834 NW2d 878 (2013). The trial court must consider all substantively admissible evidence submitted by the

[1] All parties agree that "permission" is a typographical error that should read "premises in . . . ."

parties in the light most favorable to the nonmoving party. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When the submitted evidence fails to establish a genuine issue regarding any material fact, and the undisputed facts establish that the moving party is entitled to judgment as a matter of law, summary disposition is appropriately granted. *Id.*; MCR 2.116(C)(10), (G)(4). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ." *C D Barnes Assoc*, 300 Mich App at 407.

This case also presents questions regarding the interpretation of the court rules, which are also reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). The principles of statutory construction apply when interpreting a Michigan court rule. *Id.* Furthermore, "the proper interpretation of a contract is also a question of law that we review de novo." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Last, whether a party has been denied due process of law presents a legal question that is reviewed de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

C. DISCUSSION

1. DID AN IMPLIED AGENCY EXIST?

The trial court erred by ruling that the undisputed facts presented on the parties' motions for summary disposition under MCR 2.116(C)(10) established as a matter of law that Vereyken was acting as Northtowne's implied agent when Vereyken contracted with AFP for the installation of a fire suppression system in a building of which Vereyken was the equitable owner

as the land contract vendee. Consequently, the trial court erred by ruling as a matter of law that AFP's construction lien attached to Northtowne's entire interest in the property because Northtowne was "the owner . . . who contracted for the improvement to the real property . . . ." MCL 570.1107(1).

Initially, we conclude that the trial court erred by applying the liberal rule of construction for interpreting the CLA, set forth in MCL 570.1302(1), when considering whether an implied agency existed between Vereyken and Northtowne. This provision further states that a contractor need only "substantial[ly] compl[y]" with the CLA's provisions to create a valid lien. See *C D Barnes Assoc*, 300 Mich App at 415-418 (applying substantial-compliance standard to determine that contractor had met CLA affidavit requirement). The statute also provides a rule of construction for the CLA, when construction is necessary. See *Norcross*, 165 Mich App at 180 (liberally construing MCL 570.1107(4) and holding that the right of subrogation was "merely one type of right provided in the act").

There are two problems with applying the liberal-construction rule to the question whether an implied agency arose under the undisputed facts of this case. First, the pertinent statutory provision at issue is not ambiguous; therefore, it needs no construction, liberal or otherwise, to determine its meaning. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Jeddo Drywall*, 293 Mich App at 451 (holding that when statutory language is clear and unambiguous, judicial construction is neither necessary nor permitted). Second, whether an implied agency arises is not a question of statutory interpretation but a matter of fact, dependent on common-law principles. See *Rowen & Blair Electric Co v Flushing Operating Corp*, 399

Mich 593, 600-602; 250 NW2d 481 (1977); *Sewell v Nu Markets, Inc*, 353 Mich 553, 559-561; 91 NW2d 861 (1958); and *Norcross*, 165 Mich App at 181 ("The existence and scope of an agency relationship are questions of fact for the trier of fact.").

The pertinent provision of MCL 570.1107(1) provides that "[e]ach contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property[.]" It is undisputed that Vereyken was an "owner" of the property under MCL 570.1105(3)[2] and that he contracted with AFP to install the fire suppression system. Because the meaning of the quoted portion of MCL 570.1107(1) is clear and unambiguous, under the principles of statutory construction, no further construction is needed and it must be enforced as written. *Sun Valley Foods*, 460 Mich at 236; *Jeddo Drywall*, 293 Mich App at 451.

Given that the undisputed facts of this case establish that Vereyken was the "owner" who contracted with AFP for the improvement, the only question is whether Vereyken was Northtowne's implied agent when he contracted with AFP. This is a factual question, *Norcross*, 165 Mich App at 181, governed not by the principles of statutory construction but by principles of the common law. Although the Legislature may alter the common law, it is well settled that the principles of the common law will not be abolished by implication. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652; 513 NW2d 799 (1994) (stating that "well-settled common-law principles are not to be abolished by implication in the guise of

[2] MCL 570.1105(3) defines "owner" as "a person holding a fee interest in real property or an equitable interest arising out of a land contract."

statutory construction"). Our Supreme Court recently addressed the interplay between statutes and the common law by noting that the Court would "not lightly presume that the Legislature has abrogated the common law," of which the courts are "stewards," and would not "extend a statute by implication to abrogate established rules of common law." *Velez v Tuma*, 492 Mich 1, 11, 16; 821 NW2d 432 (2012). In this case, the trial court erred by conflating a rule of statutory construction, when construction of the statute was unnecessary, with the determination of a factual issue governed by principles of the common law.

"An implied agency must be *an agency in fact*; found to be so by reasonable deductions, drawn from *disclosed facts or circumstances*." *Weller v Speet*, 275 Mich 655, 659; 267 NW 758 (1936) (emphasis added). An agency cannot arise by implication if the alleged principal expressly denies its existence, but it may arise "from acts and circumstances within [the alleged principal's] control and permitted over a course of time by acquiescence or in recognition thereof." *Id*. Thus, *Weller* establishes that the facts and circumstances giving rise to an implied agency must be (1) known to the alleged principal, (2) within the control of the alleged principal, and (3) either explicitly acknowledged or at least acquiesced in by the alleged principal. These factors were reiterated by the Court in *Shinabarger v Phillips*, 370 Mich 135, 139; 121 NW2d 693 (1963). Specifically, an implied agency "must rest upon acts and conduct of the alleged agent known to and acquiesced in by the alleged principal prior to the incident at bar." *Id*. In sum, the facts and circumstances giving rise to an implied agency must be known to and acquiesced in by the alleged principal before the action of the alleged agent may bind the alleged principal. Moreover, the " 'implied agency must be based upon facts . . . for which the principal is

responsible . . . .' " *Id*., quoting *Weller*, 275 Mich at 659 (citation and quotation marks omitted).

Here, the trial court found an implied agency between Vereyken and Northtowne on the basis that Northtowne "was aware of and acquiesced to" Vereyken's making improvements to the building when Vereyken was in default on his land contract. Specifically, the trial court found that Northtowne was

> aware that Vereyken was behind in the land contract payments and failed to pay the property taxes *during the time* AFP was installing the system. Thus, the fact that Northtowne permitted improvements to continue on the building, knowing that it could potentially get the property back, gave rise to an implied agency relationship. [Emphasis added.]

But Vereyken's not timely paying a portion of the winter 2006 property taxes by February 14, 2007[3] was the only fact on which the court relied that occurred *before* the April 10, 2007 Vereyken-AFP contract. The land contract between Vereyken and Northtowne in § 2(d) required Vereyken to pay any property taxes "before any penalty for non-payment attaches" and that under §§ 3(f), (g), and (i), 45 days after the failure to comply with a term of the contract, Northtowne could declare Vereyken in default, accelerate the balance due on the contract, and initiate forfeiture proceedings. Northtowne would also have had the option under § 3(c) of the contract to pay the property taxes that were due and add that amount to the balance due. See, e.g., *Bishop v Brown*, 118 Mich App 819, 827-828; 325 NW2d 594 (1982).

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[3] Vereyken's failure to pay the winter 2006 taxes by February 14, 2007, would result in the assessment of a collection fee and interest charges. See MCL 211.44.

Although Vereyken's failure to timely pay the winter 2006 property taxes could have resulted in an action for forfeiture 45 days after February 14, 2007, there is nothing in the land contract that gave Northtowne any control over what improvements Vereyken made to the property. Hence, a critical element for finding an implied agency—control by the alleged principal—is missing. *Shinabarger*, 370 Mich at 139; *Weller*, 275 Mich at 659. To the extent that Vereyken's failure to timely pay the property taxes reflected on Vereyken's creditworthiness, that fact would have been equally available to AFP had it checked with the appropriate tax-collecting agency. Neither the CLA nor the common law as applied in *Norcross* imposes a duty on a land contract vendor to apprise potential contract parties of the financial strength or business prospects of its land contract vendee. Nor does a land contract vendor have a duty to foreclose on the land contract at the earliest possible time, i.e, at the first potential breach. As we will discuss, the land contract at issue permitted but certainly did not require the improvements Vereyken desired to make to the property. And Vereyken did not become Northtowne's implied agent by contracting for them with a third party. See *Rowen & Blair Electric Co*, 399 Mich at 602 (noting that if improvements are merely permitted there is no implied agency). Without "other considerations, mere possession with authority to alter or improve is by itself insufficient to create an agency by which the lessor's interest can be bound." *Id*. at 604. Moreover, no implied agency arises to contractually bind the landlord even when the landlord (vendor) retains architectural design control of improvements but the lease otherwise permits the improvements that the lessee desires to make. See *Sewell*, 353 Mich at 560. Consequently, the trial court erred by concluding that an implied agency arose in this

case because Northtowne had no control over Vereyken's ability to contract for improvements. *Shinabarger*, 370 Mich at 139; *Weller*, 275 Mich at 659. And because the improvements here were permitted but not required, no implied agency arose. *Rowen & Blair Electric Co*, 399 Mich at 602, 604; *Sewell*, 353 Mich at 560. The trial court also erred by finding that Northtowne had a duty to inform AFP of Vereyken's financial health or business prospects, thereby essentially imposing a duty on Northtowne to initiate land contract forfeiture proceedings at the earliest possible time.

The trial court also misapplied *Norcross* to the facts of this case. First, in *Norcross*, there was a bench trial, and the issue on appeal concerned whether the trial court had clearly erred by finding as matter of fact that an implied agency existed. *Norcross*, 165 Mich App at 176, 182. In this case, the trial court improperly engaged in fact-finding on a motion for summary disposition. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). Second, unlike the instant case, in which Northtowne had no control over Vereyken's decisions to make improvements, the vendor in *Norcross* retained control over what improvements the vendee could make to the property in a separately executed option agreement. *Norcross*, 165 Mich App at 173-174. Indeed, the contract in *Norcross* prohibited any improvements without the written approval of the vendor until the option price was paid, which it never was. *Id*. at 173, 182. Third, unlike the instant case, in *Norcross* the vendor specifically approved both past and future improvements in writing while the improvements were being made to the property. *Id*. at 174-175. Thus, the critical differences between *Norcross* and the present case were that the *Norcross* vendor retained control over improvements and not only did not stop

the contractors from making the improvements when the vendee was in default but also specifically approved them.

We conclude that the trial court misread *Norcross* to impose a duty on a land contract vendor to apprise other potential contracting parties of its vendee of the vendee's financial status. Nothing in *Norcross* alters the general rule that each contracting party is responsible for performing its own due diligence. There is no basis in *Norcross* for altering the common-law rule of *caveat emptor* in real estate transactions. See *Roberts v Saffell*, 280 Mich App 397, 402-403; 760 NW2d 715 (2008) (discussing the doctrine of *caveat emptor* and various exceptions for fraud). Indeed, *Norcross* holds merely that where the facts establish that a vendor maintains control over the making of improvements and explicitly or implicitly authorizes them, an implied agency may arise. These are not the facts in this case.

In sum, the trial court erred by ruling that undisputed facts established as a matter of law that Vereyken was acting as Northtowne's implied agent when Vereyken contracted with AFP for the installation of a fire suppression system. Consequently, the trial court erred by ruling on that basis that AFP's construction lien attached to Northtowne's entire interest in the property as "the owner . . . who contracted for the improvement to the real property . . . ." MCL 570.1107(1).

2. DID THE CONTRACT REQUIRE THE IMPROVEMENT?

a. PRELIMINARY ARGUMENTS

Before discussing the merits of the trial court's ruling on this issue, we first consider and reject Northtowne's arguments that (1) the trial court erred proce-

durally by ruling in AFP's favor on this basis because AFP did not allege in its complaint or in its motion and brief for summary disposition that the contract required the improvement, and (2) Northtowne was denied due process—that is, notice and a meaningful opportunity to be heard—when AFP raised this issue for the first time at oral arguments on the parties' motions for summary disposition.

Northtowne first argues that the trial court erred by granting summary disposition to AFP after finding that § 2(c) of the land contract required Vereyken to install the fire suppression system because AFP did not plead that theory of liability under MCL 570.1107(1). AFP essentially concedes that it did not specifically plead § 2(c) of the land contract as a theory of liability but maintains that the trial court correctly ruled that provision required Vereyken to install the fire suppression system to operate his restaurant. Northtowne accepts that a trial court may sua sponte grant summary disposition if the pleadings show that a party is entitled to judgment as a matter of law, MCR 2.116(I)(1), but it argues that the trial court erred by doing so because the land contract was not part of the pleadings, MCR 2.110(A), even though it was attached to AFP's complaint as an exhibit. Northtowne contends that the land contract did not become part of the pleadings under MCR 2.113(F)(2) because it was not the basis of AFP's claim under MCR 2.113(F)(1).

We reject Northtowne's procedural argument based on the court rules. First, establishing the land contract vendor-vendee relationship between Northtowne and Vereyken with respect to the property was an essential element of AFP's claims. That is, it was necessary for AFP to establish that both Northtowne and Vereyken

were "owners" under the CLA. MCL 570.1105(3).[4] Consequently, "a claim or defense [was] based on a written instrument," the land contract, MCR 2.113(F)(1), and therefore the land contract attached as an exhibit to AFP's complaint was "a part of the pleading for all purposes," MCR 2.113(F)(2). Because the land contract was part of the pleadings in this case, the trial court could grant summary disposition under MCR 2.116(I)(1), which provides: "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."

Second, even if the land contract had not been part of the pleadings, it was attached to other documents submitted to the trial court for the purpose of deciding the parties' motions for summary disposition. Specifically, Northtowne submitted the land contract as an exhibit by itself and as an attachment to the affidavit of Northtowne partner Randall Atwood. Under MCR 2.116(I)(1), a trial court may grant summary disposition to a party entitled to judgment as a matter of law in two ways: (1) if "the pleadings show" that a party is entitled to it, and (2) "if the affidavits or other proofs show that there is no genuine issue of material fact . . . ." See *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006).

Additionally, MCR 2.116(I)(2) provides: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." Northtowne submitted the land contract between it and Vereyken to the trial court in support of its own motion for summary disposition and argued that the contract

[4] See note 2 of this opinion.

did not require Vereyken to make improvements to the property. At the hearing on the parties' summary disposition motions, AFP argued that § 2(c) required Vereyken to install the fire suppression system because it was required by the building code to operate a restaurant. Northtowne argued that § 2(c) merely required the vendee to "keep" and maintain the premises in good repair. Thus, the meaning of § 2(c) of the land contract was properly before the trial court on the parties' motions for summary disposition either because the contract was part of the pleadings or because it had been submitted to the court as part of the documentary evidence to consider. Furthermore, the trial court properly concluded that although the parties differed about the meaning of § 2(c), it was still subject to interpretation by the court as a matter of law. See *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 355 n 3; 596 NW2d 190 (1999). Therefore, if § 2(c) of the land contract and the pertinent provision of MCL 570.1107(1) established that AFP was entitled to judgment as a matter of law, the trial court could properly grant AFP summary disposition under either MCR 2.116(I)(1) or MCR 2.116(I)(2).

The trial court's ruling granting summary disposition to AFP on the theory that § 2(c) of the land contract rendered Northtowne an "owner who has required the improvement," MCL 570.1107(1), did not deny Northtowne due process of law. Due process is a flexible concept requiring fundamental fairness by providing notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision-maker. *Reed*, 265 Mich App at 159. When invoking MCR 2.116(I)(1), a trial court must comply with the requirements of due process. *Al-Maliki v LaGrant*, 286 Mich App 483, 485-486; 781 NW2d 853 (2009). In this case, Northtowne had notice of and an

opportunity to be heard on the issue of whether the land contract required Vereyken to install a fire suppression system. Indeed, Northtowne raised the issue by submitting the contract to the court with its motion for summary disposition and arguing that the contract did not require Vereyken to install the fire suppression system. That the trial court decided otherwise did not deny Northtowne due process of law.

b. THE MERITS

Whether the trial court correctly decided the issue on the merits is another matter. While the trial court correctly ruled that § 2(c) of the land contract required Vereyken in his use of the building to comply "with all police, sanitary and other regulations imposed by any governmental authority," this provision did not by itself require Vereyken to install a fire suppression system. Rather, the land contract permitted Vereyken to use the property in any way he desired. Nothing in the land contract compelled the property to be used as a restaurant. It was Vereyken's decision to convert the building into a restaurant that triggered the building code requirement for the installation of the fire suppression system. And it was the building inspector who compelled Vereyken's restaurant to close after it determined that AFP's sprinkler system did not comply with the building code. Northtowne took no action to enforce § 2(c) of the land contract to require that certain improvements be made after it learned that Vereyken intended to use the building as a restaurant. Although we recognize that this issue is a bit of a conundrum, we conclude that the trial court erred by determining that the land contract required Vereyken to install a fire suppression system. Rather, Vereyken decided to open a restaurant, and to do so, the building code and building

inspector required Vereyken to install a fire suppression system. In other words, for Vereyken to open a restaurant, he would have been required to install a fire suppression system regardless of whether § 2(c) was included in the land contract. Consequently, the trial court erred by ruling that under § 2(c) of the land contract, Northtowne was an "owner who has required the improvement" under MCL 570.1107(1).

In sum, the court rules permitted the trial court to consider this issue on the parties' motions for summary disposition, and the trial court did not deny Northtowne due process of law by doing so. But the trial court erred by concluding that the land contract between Northtowne and Vereyken "required the improvement." MCL 570.1107(1). Consequently, the trial court erred by ruling on this basis that AFP's construction lien attached to Northtowne's entire interest in the property.

II. DOCKET NO. 307504

A. STANDARD OF REVIEW

In general, the interpretation and application of the offer-of-judgment rule is reviewed de novo. *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007). But the trial court's findings of fact underlying an award of attorney fees are reviewed for clear error. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). A finding of the trial court is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Id*. This Court reviews for an abuse of discretion the trial court's decision regarding whether to refuse to award attorney fees under the interest-of-justice exception, MCR 2.405(D)(3). *Derderian v Genesys*

Health Care Sys, 263 Mich App 364, 374; 689 NW2d 145 (2004); *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472; 624 NW2d 427 (2000).

The trial court's determination of the reasonableness of an attorney fee is reviewed on appeal for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 428; 552 NW2d 466 (1996). An abuse of discretion occurs "when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith*, 481 Mich at 526.

B. DISCUSSION

AFP's argument that the trial court awarded attorney fees that were not "necessitated by [its] failure to stipulate to the entry of judgment," MCR 2.405(A)(6), is without merit. AFP has not established that the trial court clearly erred in determining that the attorney fees it awarded Etna were necessitated by AFP's rejection of Etna's offer of judgment. *Froling Trust*, 283 Mich App at 296. Nor has AFP presented any argument that the trial court abused its discretion regarding the amount of the attorney fee it assessed. *Smith*, 481 Mich at 526; *J C Bldg Corp*, 217 Mich App at 428.

There is no dispute in this case that the adjusted verdict[5] that Etna obtained against AFP was more favorable than the offer of judgment that AFP rejected by failing to respond to the offer within 21 days. MCR 2.405(C). Consequently, under MCR 2.405(D)(1), AFP was required to pay Etna's "actual costs incurred in the prosecution or defense of the action." See *Kopf v Bolser*,

[5] " 'Adjusted verdict' means the verdict plus interest and costs from the filing of the complaint through the date of the offer." MCR 2.405(A)(5).

286 Mich App 425, 429; 780 NW2d 315 (2009). The trial court was thus required to determine the actual costs that Etna incurred in the prosecution or defense of the action. MCR 2.405(D)(3); *Luidens v 63rd Dist Court*, 219 Mich App 24, 30; 555 NW2d 709 (1996). " 'Actual costs' means the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6). There must be a causal nexus between the attorney fees awarded and the rejection of the offer of judgment to qualify as "necessitated by" the rejection. *Castillo*, 273 Mich App at 493.

In this case, the record supports the trial court's ruling finding a nexus between the attorney fees it awarded and the rejected offer. AFP presents no meaningful argument that the trial court clearly erred in finding that the attorney fees it awarded were "necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6); see also *Froling Trust*, 283 Mich App at 296; *Castillo*, 273 Mich App at 493. And AFP presents no argument at all that the trial court abused its discretion in determining a reasonable attorney fee. *J C Bldg Corp*, 217 Mich App at 428.

Moreover, AFP has failed to establish that the trial court abused its discretion by refusing to award attorney fees by applying the interest-of-justice exception of MCR 2.405(D)(3). *Derderian*, 263 Mich App at 374; *Stitt*, 243 Mich App at 472. MCR 2.405(D)(3) provides: "The court shall determine the actual costs incurred. *The court may, in the interest of justice, refuse to award an attorney fee under this rule*." (Emphasis added). The purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation. *Luidens*, 219 Mich App at 31. Viewed in light of this purpose, the "interest of justice" provision is the exception to a general rule, and

it should not be applied " 'absent unusual circumstances.' " *Id*. at 32 (citation omitted). "Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous 'are too common' to constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Derderian*, 263 Mich App at 391, quoting *Luidens*, 219 Mich App at 34-35. But the exception may be applied when an offer is made for the purpose of "gamesmanship" and not a sincere effort at negotiation. *Id*., quoting *Luidens*, 219 Mich App at 35-36. In this case, AFP has failed to set forth unusual circumstances that would warrant a conclusion that the trial court abused its discretion.

First, AFP argues that it did the "heavy lifting" in prosecuting the construction lien claims against Vereyken and Northtowne, and that Etna merely "piggybacked" on AFP's efforts. This argument fails to establish an "unusual circumstance" because the trial court considered this fact in limiting its award of attorney fees to those actually necessitated by AFP's refusal to accept the offer of judgment, i.e., matters related to the time-price differential dispute.

Second, whatever merit there is to AFP's claim that Etna owes it an unrelated credit is irrelevant to this case because that claim is not part of this case. Hence, like a party's ability to pay, AFP's unrelated claim does not present an "unusual circumstance" requisite to invoke the "interest of justice" exception.

Last, AFP claims that Etna's offer of judgment was "gamesmanship" justifying invocation of the "interest of justice" exception because it was not much of a compromise and did too little to encourage settlement. But there was no case evaluation award to compare with Etna's offer of judgment to conclude that it was a

"gamesmanship" or *de minimis* offer. Rather, Etna's offer of judgment was only slightly more than what AFP admitted that it clearly owed to Etna. Moreover, AFP did not make a counteroffer in an effort to resolve the dispute between it and Etna. MCR 2.405(A)(2). The record also suggests that AFP was simply unwilling to compromise at all regarding paying any time-price differential to Etna. At best, AFP's rejection of the offer was reasonable. But the reasonableness of AFP's refusal of the offer does not "constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Derderian*, 263 Mich App at 391; see also *Luidens*, 219 Mich App at 34-35.

The trial court ruled "that the interest of justice exception should [not] apply here. This time price differential claim by Etna has still not been paid years after entering into the contract that supplied materials to AFP. Plaintiff's argument in that regard is rejected." AFP's arguments on appeal do not establish that the trial court abused its discretion. *Derderian*, 263 Mich App at 374. Consequently, we affirm the trial court.

III. CONCLUSION

In Docket No. 306215, we reverse the trial court's August 29, 2011 judgment to the extent it imposes a construction lien foreclosure judgment against Northtowne's interest in the subject property on the bases that Vereyken was the implied agent of Northtowne when Vereyken "contracted for the improvement to the real property" and that Northtowne was "an owner who has required the improvement." MCL 570.1107(1). We remand for modification of the judgment consistent with this opinion. We do not retain jurisdiction. Defendant Northtowne may tax costs pursuant to MCR 7.219 as the prevailing party.

In Docket No. 307540, we affirm the trial court because it did not clearly err in concluding that the attorney fees it assessed against AFP were necessitated by AFP's rejection of Etna's offer of judgment. MCR 2.405(A)(6). Further, AFP has not established that the trial court abused its discretion by not invoking the "interests of justice" exception. MCR 2.405(D)(3). Defendant Etna may tax costs pursuant to MCR 7.219 as the prevailing party.

RIORDAN, P.J., and K. F. KELLY, J., concurred with MARKEY, J.

GHANAM v JOHN DOES

Docket No. 312201. Submitted January 8, 2013, at Detroit. Decided January 2, 2014, at 9:05 a.m. Leave to appeal sought.

Gus Ghanam, deputy superintendent of the department of public works for the city of Warren, brought an action in the Macomb Circuit Court against several unknown defendants, alleging defamation per se based on statements about plaintiff posted on an Internet message board called The Warren Forum. Plaintiff sought an ex parte order to depose Joseph Munem, whom plaintiff believed was affiliated with The Warren Forum, seeking to determine the identity of the individuals who posted the allegedly defamatory statements. The court, John C. Foster, J., granted the request and issued an order permitting plaintiff to depose Munem. Munem moved for a protective order, which the court denied. The Court of Appeals granted Munem's interlocutory application for leave to appeal.

The Court of Appeals *held*:

1. The right to freedom of speech includes the right to publish and distribute writings while remaining anonymous, but the right to anonymous expression does not extend to defamatory expression. The basic elements of defamation are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. With regard to the defendant's fault, if the plaintiff is a public figure, the plaintiff must prove that the statement was made with actual malice. Michigan's rules of civil procedure adequately protect a defendant's interests in anonymous speech when that defendant is aware of and involved in a pending defamation lawsuit. However, when a plaintiff seeks disclosure of the identity of an anonymous defendant who might not be aware of the pending defamation lawsuit, the plaintiff is first required to make reasonable efforts to notify the defendant of the lawsuit, and, in addition, the trial court is required to analyze the complaint under MCR 2.116(C)(8) to ensure that the plaintiff has stated a claim on which relief can be

granted. In this case, plaintiff failed to make reasonable attempts to inform the anonymous defendants of the lawsuit and his efforts to discover their identities. Further, plaintiff's claims were facially deficient given that plaintiff failed to specify the allegedly defamatory statements in his complaint. Accordingly, defendants were entitled to summary disposition, and it was improper for the trial court to issue an order permitting plaintiff to depose Munem.

2. Under MCR 2.116(I)(5), if summary disposition is appropriate under MCR 2.116(C)(8), a plaintiff must be given the opportunity to amend his or her pleadings unless amendment would be futile. Accusations of criminal activity are considered defamation per se and do not require proof of damage to the plaintiff's reputation. However, not all statements that could be read as accusations of a crime or misconduct should be considered assertions of fact. If a reasonable reader would understand the statements as mere rhetorical hyperbole meant to express strong disapproval rather than as an accusation of criminal activity, the statements cannot be regarded as defamatory. The context and forum in which the statements appear affects whether a reasonable reader would interpret the statements as asserting provable facts. Read in context, the statements at issue in this case could not be regarded as assertions of fact. Instead, the statements—which were sarcastic in tone, posted on an Internet message board, concerned facts that were already public knowledge, and involved far-fetched allegations—were rhetorical hyperbole and not defamatory as a matter of law. Therefore, permitting plaintiff to amend his complaint would have been futile.

Reversed and remanded for entry of judgment in favor of defendants.

STEPHENS, J., concurring, wrote separately to address with specificity her belief that Michigan should adopt the analysis of the Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451 (Del, 2005). That Court held that while a plaintiff who is a public figure needs to prove actual malice to prevail on a defamation claim, proving malice when the identity of the defendant is unknown is unduly burdensome and, therefore, the plaintiff need not plead facts in support of the element of actual malice in order to ascertain the identity of the person or persons who authored the defamatory statements.

1. ACTIONS — DEFAMATION — ANONYMOUS DEFENDANTS.

When a defamation plaintiff seeks disclosure of the identity of an anonymous defendant who might not be aware of the pending defamation lawsuit, the plaintiff is first required to make reason-

able efforts to notify the defendant of the lawsuit, and, in addition, the trial court is required to analyze the complaint under MCR 2.116(C)(8) to ensure that the plaintiff has stated a claim on which relief can be granted.

2. ACTIONS — DEFAMATION — ACCUSATIONS OF CRIMINAL ACTIVITY — RHETORICAL HYPERBOLE.

In analyzing a claim of defamation, not all statements that might be read as accusations of a crime or misconduct should be considered assertions of fact; if a reasonable reader would understand the statements as mere rhetorical hyperbole meant to express strong disapproval rather than as an accusation of criminal activity, the statements cannot be regarded as defamatory; the context and forum in which the statements appear affects whether a reasonable reader would interpret the statements as asserting provable facts.

Boyle Burdett (by *Eugene H. Boyle, Jr.*, and *H. William Burdett, Jr.*) for Joseph Munem.

York, Dolan & Tomlinson, PC (by *John A. Dolan*), for Gus Ghanam.

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

WILDER, J. Appellant, Joseph Munem, appeals by leave granted from the circuit court's order denying his motion for a protective order barring discovery. Plaintiff seeks to depose Munem to discover the identities of persons who allegedly made defamatory statements about him on an Internet message board. Munem seeks to keep the identities of those people anonymous. We reverse and remand for the trial court to enter judgment in favor of defendants.

I

Plaintiff is the deputy superintendent of the department of public works for the city of Warren. He filed a complaint alleging a single count of defamation per se

against several unknown "John Doe" defendants. According to the complaint, defendants posted false and malicious statements about plaintiff on an Internet message board called The Warren Forum. Defendants posted these statements anonymously under fictitious user names. Plaintiff's complaint did not provide the specific text of those statements but alleged that they "prejudiced and caused harm to the Plaintiff in his reputation and office and held Plaintiff up to disgrace, ridicule, and contempt." Plaintiff alleged that the statements were false, not privileged, and "were made with the knowledge that they were false, or with reckless disregard for their falsity." Plaintiff maintains that the anonymous statements accused him of being involved in the disappearance and theft of approximately 3,647 tons of road salt from city storage facilities and of stealing tires from city garbage trucks and selling them. Plaintiff finally presented a verbatim text of the alleged defamatory statements in his response to Munem's motion for a protective order. The statements at issue were posted to The Warren Forum message board in January and February 2012 by people using the pseudonyms "northend," "yogi," "hatersrlosers," and "pstigerfan."

The first set of statements at issue concerned reports that 3,647 tons of rock salt was missing from the city's storage dome and that nobody could account for how it had disappeared. The local news media reported on the missing road salt after an audit revealed a discrepancy between the city's inventory and records.[1] The statements were replies posted to a topic thread titled,

[1] The audit that brought the salt shortage to light was part of the yearly audit conducted for the city. The audit was for the fiscal year ending June 30, 2011, and the report was issued on December 16, 2011. In the report, the auditor noted that there was a discrepancy of 3,647 tons of salt ($178,725 value) between the inventory and the city's records. The

"Where did our road salt go?" Northend commented as follows[2] on the road salt thread:

> I wouldn't be surprised if the salt is close to city hall and the storage area for the city. IMO[3] the salt is somewhere around the sports complex on Van Dyke, just south of 14 mile, where Gus hangs out and drinks most days, or at least the days I am in there hitting golf balls. Hmm maybe I need to call the investigators?

Yogi commented on the road salt thread that "the pizza box maker sold it! him an Gus probably split the money."

The second set of statements at issue were replies to an initial posting titled "MORE sanitation trucks? Yep," which concerned the city's decision to buy additional new garbage trucks. The city's decision to buy additional new garbage trucks was controversial and reported in the local news media because it came after the city had denied other city departments' requests for new equipment. Haterslosers commented that the city was "only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P"[4] And pstigerfan stated, in relevant part, as follows:

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report also made recommendations for the city to implement so that it could "minimize the misappropriation of the inventory" in the future.

[2] The comments are quoted verbatim with all spelling and grammatical errors.

[3] The Internet is rife with shorthand acronyms and symbols to represent longer words or phrases. IMO means "in my opinion."

[4] The colon followed by capital P appears in the original and is an emoticon. An "emoticon" is an icon formed by grouping keyboard characters together into a representation of a facial expression. Emoticons are used to suggest an attitude or emotion in computerized communications. See *Random House Webster's College Dictionary* (2003). A ":P" emoticon represents a face with a tongue sticking out, indicating a joke, sarcasm, or disgust.

> Since Warren is the only community in Macomb County to have city employees pick up trash, then [Mayor James] Fouts must have a better idea of what is going on compared to the other communities. Oh wait, his buddies Gus and Dick[5] run the department, and in turn make money off of it (selling tires, selling road salt, etc). If we didn't have a Sanitation Department with new trucks (and old tires), then Gus would have to take tires off of other vehicles in other departments in order to make his money.

Plaintiff filed a petition for an ex parte order to depose Munem, a former city employee, to determine the identity of the anonymous John Does who left the allegedly defamatory statements on The Warren Forum. In light of past conversations with Munem, plaintiff believed that Munem was affiliated with the website. The circuit court granted plaintiff's petition and issued an order permitting plaintiff to depose Munem "for the purpose of identifying ownership of the Warren Forum and bloggers on the Warren Forum website who have made entries relating to Plaintiff, Gus Ghanam."

Munem then moved for a protective order against his deposition, arguing that the First Amendment protects a critic's right to anonymously comment about the actions of a public official and that the identities of the anonymous writers were subject to a qualified privilege. Munem argued that before plaintiff could seek to compel the identification of the anonymous posters, he must produce sufficient evidence supporting each element of a cause of action for defamation against a public figure. The circuit court did not consider or acknowledge the First Amendment aspects involved and, instead, merely relied on the open and liberal discovery rules of Michigan. The trial court provided the following explanation from the bench:

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[5] We presume this is a reference to Richard Sabaugh, Director of Warren's Public Service Department.

> Well, I'm of the opinion that this lawsuit alleges certain things that, if proven, are compensable. If proven. They have to be proven.
>
> The second step is in litigation we have a whole process that involves discovery and many aspects of it and, indeed, liberal discovery in Michigan. I believe also, from looking at the cases that you both cited, that the trend on this, as well as in any of the other areas of law, is more towards transparency, not hiding things in this country. The more we hide, the less we have democracy, the less we have freedom, the less we have opportunity for people to succeed and to move forward. It would be a terrible thing on both sides to stop speech, but it would also say to people don't ever take a public job because on anonymous forums they can lie about whether you are a thief or not and accuse you of crimes and things of outrageous behavior. So both those things have to be weighed, one against the other.
>
> We are at the discovery phase in this matter and, as I said, I believe the trend is to open things up. The ownership with forums, the knowledge of the ownership of the forum and the names of the posters doesn't subject them to any liability whatsoever of any sort. Simply, they are a part of the process for the courts to determine whether there is an appropriate cause of action involved in the matter. And so, I believe that the factors that have to be shown are laid out, as you both stated in the Michigan Supreme Court case of [*Smith v Anonymous Joint Enterprise*, 487 Mich 102; 793 NW2d 533 (2010)]. Discovery here is clearly intended to lead to admissible evidence or the ability to obtain admissible evidence and is, therefore, acceptable at this stage of the process. So Mr. Munem will be subject to plaintiff's discovery methods. Thank you.

II

Munem raises three main arguments on appeal. First, he argues that Michigan courts must require some showing of merit to the defamation action before the court will allow a plaintiff to conduct discovery

regarding the identity of an anonymous critic. Munem urges this Court to adopt the standards articulated in *Dendrite Int'l, Inc v Doe No 3*, 342 NJ Super 134; 775 A2d 756 (App Div, 2001). Second, Munem argues that since plaintiff made no showing that complied with *Dendrite*, he should be barred from using discovery methods to obtain the identity of the anonymous defendants. Third, Munem argues that the statements at issue that were posted on The Warren Forum are nothing more than rhetorical hyperbole that cannot provide the basis for a defamation action.

We agree with Munem that the use of the discovery process by public officials seeking to identify anonymous Internet critics raises First Amendment concerns about the use of defamation actions to identify current critics and discourage others from exercising their rights to free speech. In *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 266-267; 833 NW2d 331 (2013), another panel of this Court held that the Michigan rules of civil procedure adequately protect a defendant's interests in anonymous speech when that defendant is aware of and involved in a pending defamation lawsuit. The *Cooley* Court declined, however, to address what it described as the extreme case—one in which the plaintiff in a defamation case sues an anonymous defendant solely to subpoena the defendant's Internet provider for identifying information in order to retaliate against the defendant in some fashion outside the court action. *Id*. at 269-271. While acknowledging that *Dendrite* and *Doe v Cahill*, 884 A2d 451, 457 (Del, 2005), offer protection to anonymous defendants in this category that the Michigan rules of civil procedure do not, the *Cooley* Court declined to adopt the *Dendrite* standard or any other similar standard because it was not necessary under the facts of that case. See *Cooley*, 300 Mich App at 270 (declining to extend its holding

"beyond the facts" that were before the Court, which included the facts that the anonymous defendant knew "relatively early on" that there was a pending defamation lawsuit and that, through his actions, he had been successful in preventing a public disclosure of his name).

In the instant case, however, there is no evidence that any of the anonymous defendants were aware of the pending matter or involved in any aspect of the legal proceedings. Therefore, the instant case is distinguishable from *Cooley*, and while its analysis is applicable here, *Cooley's* holding is not controlling of the outcome in this case. We hold that when a plaintiff seeks disclosure of the identity of an anonymous defendant who might not be aware of the pending defamation lawsuit, the plaintiff is first required to make reasonable efforts to notify the defendant of the lawsuit, and, in addition, the trial court is required to analyze the complaint under MCR 2.116(C)(8) to ensure that the plaintiff has stated a claim on which relief can be granted. Applying these requirements to the facts in the instant case, we reverse the trial court's ruling denying Munem's request for a protective order and further hold that defendants are entitled to judgment as a matter of law because the statements at issue were not defamatory.

A

A trial court's decision on whether to compel discovery is ordinarily reviewed for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). However, because of the importance of protecting the right to freedom of expression under the First Amendment, in cases in which public officials or public figures sue for defamation, courts must conduct an independent review of the record and "analyze the

alleged defamatory statements at issue and their surrounding circumstances to determine whether those statements are protected under the First Amendment." *Smith*, 487 Mich at 111-112.

The First Amendment provides strong protections to those who use their freedom of speech to criticize public officials over public issues. "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc v Falwell*, 485 US 46, 50; 108 S Ct 876; 99 L Ed 2d 41 (1988). The United States Supreme Court explained:

> The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office . . . . "[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks[.]" "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." [*Id*. at 51-52 (citations omitted; third alteration in original).]

Given the need to protect uninhibited, robust, and wide-open debate, the law recognizes that freedom of expression requires "breathing space," which "is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability." *Id*. at 52. And the requisite level of culpability a plaintiff who is a public official must prove is that the false statements were made "with actual malice." *New*

York Times Co v Sullivan, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964); *Smith*, 487 Mich at 114-115. "Actual malice" does not require a showing of ill will, but instead "exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth." *Smith*, 487 Mich at 114, citing *New York Times*, 376 US at 280. Similarly, reckless disregard does not mean that the speaker merely failed to act with reasonably prudent conduct, but instead requires "sufficient evidence to justify a conclusion that the defendant made the allegedly defamatory publication with a 'high degree of awareness' of the publication's probable falsity, or that the defendant 'entertained serious doubts as to the truth' of the publication made." *Smith*, 487 Mich at 116 (citations omitted). This requirement is codified in Michigan by MCL 600.2911(6):

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

Without the actual malice requirement, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times*, 376 US at 279. Whether the statements are defamatory and whether the evidence presented is sufficient to show actual malice on the part of the defendant present questions of law to be decided by the courts. *Smith*, 487 Mich at 111. When a plaintiff who is a public official cannot show actual malice by clear and convincing evidence, the defendant is entitled

to summary disposition of the defamation claim. *Ireland v Edwards*, 230 Mich App 607, 622-624; 584 NW2d 632 (1998).

Further, the United States Supreme Court has recognized that a writer's First Amendment right to freedom of speech includes the right to publish and distribute writings while remaining anonymous. *McIntyre v Ohio Elections Comm*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995); *Talley v California*, 362 US 60, 64-65; 80 S Ct 536; 4 L Ed 2d 559 (1960).

> [T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment. [*McIntyre*, 514 US at 342.]

Because of the interest in protecting freedom of expression, "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." *Talley*, 362 US at 65. This right to speak anonymously applies to those expressing views on the Internet. *SaleHoo Group, Ltd v ABC Co*, 722 F Supp 2d 1210, 1213 (WD Wash, 2010). " 'Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas,' and individuals 'who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court.' " *Id*. at 1213-1214, quoting *Doe v 2TheMart.com Inc*, 140 F Supp 2d 1088, 1092 (WD Wash, 2001). However, the right to anonymous speech is not absolute; the First Amendment protects the right to speak rather than the right to remain anonymous or to avoid

the consequences of one's statements. *Doe v Reed*, 561 US 186, ___; 130 S Ct 2811, 2831 n 4; 177 L Ed 2d 493 (2010) (Stevens, J., concurring in part). The right to anonymous expression over the Internet does not extend to defamatory speech, which is not protected by the First Amendment. *SaleHoo Group*, 722 F Supp 2d at 1214.

B

In order to balance these competing interests, there is an entire spectrum of "standards" that courts have used when they are faced with a plaintiff who is a public figure seeking to identify an anonymous defendant who has posted allegedly defamatory material regarding the plaintiff. These standards, ranging from least stringent to most stringent, include a good-faith basis to assert a claim, pleading sufficient facts to survive a motion to dismiss, showing of prima facie evidence sufficient to withstand a motion for summary disposition, and "hurdles even more stringent." *Cahill*, 884 A2d at 457.

Munem urges this Court to adopt the approach from *Dendrite*, in which the court required, *inter alia*, that a plaintiff show evidence sufficient to withstand "summary judgment" before forcing the identification of anonymous posters. In *Dendrite*, the plaintiff sued anonymous defendants for postings on an Internet message board. The plaintiff sought to compel the Internet service provider (ISP) to disclose the defendants' identities, and the defendants moved to bar the discovery. The court noted that it needed a procedure to ensure that plaintiffs "do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Dendrite*, 342 NJ Super at 156.

The *Dendrite* court held that a plaintiff seeking the identity of an anonymous Internet critic in a defamation action must meet four requirements. First, the plaintiff must undertake efforts to notify the anonymous posters that they are the subject of a subpoena or other legal proceedings to reveal their identities and give them a reasonable opportunity to respond. "These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board." *Id*. at 141. Second, the plaintiff must identify the exact statements made by each anonymous poster that the plaintiff alleges constitute defamation. *Id*. Third, the plaintiff's complaint must set forth a prima facie cause of action, i.e., the complaint must be able to withstand a motion to dismiss for failure to state a claim upon which relief can be granted. *Id*. Fourth, the plaintiff must produce sufficient evidence supporting each element of its cause of action on a prima facie basis before the court may order disclosure of the identity of the unknown defendant. *Id*. Once the plaintiff has met these requirements, then "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Id*. at 142.

The Delaware Supreme Court in *Cahill*, 884 A2d at 457, addressed this same issue. Consistently with *Dendrite*, *Cahill* rejected the idea that a plaintiff must merely allege a good-faith cause of action for defamation before seeking to identify an unknown defendant. The *Cahill* court explained that such a standard is too lenient because "even silly or trivial libel claims can easily survive" this threshold test. *Id*. at 459. Instead, the *Cahill* court adopted a modified version of the

Dendrite test, under which a "summary judgment" standard is the appropriate standard to use.

The *Cahill* court adopted *Dendrite*'s notice provision, holding that "to the extent reasonably practicable under the circumstances, the plaintiff must undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure." *Id*. at 460. Furthermore, if the case arises from anonymous statements on the Internet, the plaintiff must post a message notifying the anonymous defendant of the plaintiff's discovery request on the same ISP message board where the statements appeared. *Id*. at 461. The *Cahill* court explained:

> The notification provision imposes very little burden on a defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond. When First Amendment interests are at stake we disfavor *ex parte* discovery requests that afford the plaintiff the important form of relief that comes from unmasking an anonymous defendant. [*Id*.]

But the *Cahill* court determined that *Dendrite*'s requirement that a plaintiff provide the exact defamatory statements was subsumed in its summary-judgment standard and, therefore, unnecessary. *Id*. Additionally, it found that the balancing requirement was also unnecessary because "[t]he summary judgment test is itself the balance." *Id*.

Cahill further found that a plaintiff must present sufficient evidence to satisfy a summary-judgment standard, showing genuine issues of material fact, before obtaining the identity of an anonymous informant. *Id*. at 457, 462-463. However, *Cahill* rejected the idea that a plaintiff should be required to produce evidence of *all* elements of a defamation claim as required by *Dendrite*. *Cahill* noted that while a public figure ultimately must

prove that the defamatory statements were made with actual malice in order to prevail on his or her claim, presenting evidence showing that element would be unduly burdensome, if not impossible, without knowing the true identity of the defendant. *Id*. at 464. Accordingly, *Cahill* held that a plaintiff who is a public figure must only plead and prove facts with regard to elements of the claim that are *within his or her control*, leaving proof of actual malice until after the defendant is identified and further discovery conducted. *Id*. at 463-464. The *Cahill* court reasoned:

> [U]nder the summary judgment standard, scrutiny is likely to reveal a silly or trivial claim, but a plaintiff with a legitimate claim should be able to obtain the identity of an anonymous defendant and proceed with his lawsuit. . . . [T]rial judges will then still provide a potentially wronged plaintiff with an adequate means of protecting his reputation thereby assuring that our courts remain open to afford redress of injury to reputation caused by the person responsible for abuse of the right to free speech. [*Id*. at 464.]

Courts from other jurisdictions that have addressed these issues have mainly followed *Dendrite*,[6] *Cahill*,[7] or a modified version of those standards.[8] But in *Maxon v Ottawa Publishing Co*, 402 Ill App 3d 704; 341 Ill Dec

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[6] See, e.g., *Mortgage Specialists, Inc v Implode-Explode Heavy Indus, Inc*, 160 NH 227; 999 A2d 184 (2010).

[7] See, e.g., *Solers, Inc v Doe*, 977 A2d 941 (DC App, 2009); *In re Does 1-10*, 242 SW3d 805 (Tex App, 2007); *Krinsky v Doe 6*, 72 Cal Rptr 3d 231; 159 Cal App 4th 1154 (2008).

[8] Some jurisdictions have applied a modified version of the *Cahill* standard with the balancing test from *Dendrite*. See, e.g., *Pilchesky v Gatelli*, 2011 PA Super 3; 12 A3d 430 (2011); *Indep Newspapers v Brodie*, 407 Md 415; 966 A2d 432 (2009); *Mobilisa Inc v Doe*, 217 Ariz 103; 170 P3d 712 (Ariz App, 2007). And one court applied the *Cahill* test, but found that the *Dendrite* balancing test should be applied when consideration of the *Cahill* factors did not lead to a clear outcome. See *SaleHoo Group Ltd*, 722 F Supp 2d at 1215-1217.

12; 929 NE2d 666 (2010), the Illinois Court of Appeals rejected both the *Dendrite* and *Cahill* tests for public-official plaintiffs seeking the identities of anonymous Internet critics who allegedly defamed them. While noting that certain types of anonymous speech are constitutionally protected, *id*. at 712, the court found no need to apply the tests of *Dendrite* or *Cahill* because the applicable Illinois court rule required that the petition for discovery of anonymous defendants be verified and state with particularity facts that would establish a cause of action for defamation, *id*. at 714-715. Notably, the court concluded that its court rules effectively required the plaintiff to allege and swear to specific facts stating a prima facie case for defamation. *Id*. at 715. Thus, even *Maxon*, while expressly rejecting *Dendrite* and *Cahill*, nonetheless de facto approved the same summary-judgment standard.

As previously noted, this Court in *Cooley* declined to adopt any additional standards and held, similarly to the Illinois court, that Michigan's rules of civil procedure adequately protect an anonymous defendant in a defamation case. The *Cooley* Court concluded that the procedures found in MCR 2.302(C) regarding protective orders coupled with the procedures for summary disposition under MCR 2.116(C)(8) adequately protect a defendant's First Amendment interests in anonymity. *Cooley*, 300 Mich App at 264. The Court explained that a deficient claim can be dismissed before any discovery is accomplished because in order to survive a motion for summary disposition under MCR 2.116(C)(8), a defamation claim must be pleaded "with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Id*. at 262. See also *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 666; 635 NW2d 36 (2001) (noting "that summary disposition is an essential tool

in the protection of First Amendment rights") (quotation marks and citations omitted).

The *Cooley* Court further stated that protective orders are extremely flexible, noting that

> [a] trial court may tailor the scope of its protective order to protect a defendant's First Amendment interests until summary disposition is granted. For instance, a trial court may order (1) that a plaintiff not discover a defendant's identity, or (2) that as a condition of discovering a defendant's identity, a plaintiff not disclose that identity until after the legal sufficiency of the complaint itself is tested. [*Cooley*, 300 Mich App at 265.]

The Court therefore concluded that the standard enunciated in *Cahill* largely overlaps with the protections afforded under MCR 2.302(C) and MCR 2.116(C)(8). *Id*. at 266. But in *Cooley*, the court rules were adequate to protect the anonymous defendant only because he was aware of and involved in the lawsuit. See *id*. at 252, 270. As the partial dissent in *Cooley* noted, "[A]n anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit—which may well be too late . . . ." *Id*. at 274 (BECKERING, J., concurring in part and dissenting in part).

In the present case, no defendant was notified of the lawsuit and no defendant had been involved with any of the proceedings, which means that there was no one to move for summary disposition under MCR 2.116(C)(8). Thus, one of the two protections that *Cooley* relied upon is conspicuously absent.[9] Further,

[9] Similar to the age-old question of whether a tree falling in the woods makes a sound if no one is there to hear it, one might also ask, if no truly interested party is present to invoke the protections available under MCR 2.116(C)(8), do the protections really exist?

when defendants are not aware of and not involved with a lawsuit, any protection to be afforded through the entry of a protective order under MCR 2.302(C) is *contingent* upon a nonparty, e.g., the Internet service provider, asserting the defendants' First Amendment rights. Thus, application of the *Cooley* protection scheme in the instant case, containing circumstances which *Cooley* declined to address, appears inadequate to protect the constitutional rights of an anonymous defendant who is unaware of pending litigation.

Therefore, we conclude that when an anonymous defendant in a defamation suit is not shown to be aware of or involved with the lawsuit, some showing by the plaintiff and review by the trial court are required in order to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights. Although we agree with the dissent in *Cooley* that it would have been preferable to also adopt the *Dendrite*/*Cahill* standard requiring a plaintiff to further produce evidence sufficient to survive a motion under MCR 2.116(C)(10), we nevertheless are bound by this Court's conclusion in *Cooley* that MCR 2.302(C) and MCR 2.116(C)(8) alone are sufficient to protect a participating defendant's First Amendment rights. Therefore, we invite the Legislature or the Supreme Court to consider anew this important question.[10]

Having concluded that we must apply the *Cooley* standards in this case, we reiterate, as *Cooley* itself acknowledged, that *Cooley* does not address a circum-

[10] We recognize that *Cooley* was limited to its narrow set of facts, and therefore, it is possible for us to distinguish *Cooley* and adopt the more stringent *Dendrite* standard for application here and in similar circumstances. We decline, however, to adopt a second standard of law in this complex and emerging area of jurisprudence in an effort to avoid creating unnecessary confusion and inconsistency.

stance, such as is presented in the instant case, in which anonymous defendants are unaware of the pending lawsuit. Accordingly, given the specific facts of this case, we find it necessary to impose two additional requirements in an effort to balance the plaintiff's right to pursue a meritorious defamation claim against an anonymous critic's First Amendment rights.

First, we hold that the notice requirement of *Dendrite*/*Cahill* is properly applicable here: a plaintiff must have made reasonable efforts to provide the anonymous commenter with reasonable notice that he or she is the subject of a subpoena or motion seeking disclosure of the commenter's identity. That means that at a minimum, if possible, the plaintiff must post a message on the same message board or other forum where the alleged defamatory message appeared, notifying the anonymous defendant of the legal proceedings. See *Cahill*, 884 A2d at 460-461; *Dendrite*, 342 NJ Super at 141.

Second, the plaintiff's claims must be evaluated by the court so that a determination is made as to whether the claims are sufficient to survive a motion for summary disposition under MCR 2.116(C)(8). This evaluation is to be performed even if there is no pending motion for summary disposition before the court. The *Cooley* Court explained that summary disposition was a vital tool to protect defendants:

> Because a plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory, (2) the nature of the speaker and the level of constitutional protections afforded the statement, and (3) whether actual malice exists, if the level of fault the plaintiff must show is

actual malice.[11] [*Cooley*, 300 Mich App at 263 (citations omitted).]

MCR 2.116(I)(1) authorizes a court to perform this sua sponte review. *Wilson v King*, 298 Mich App 378, 381 n 4; 827 NW2d 203 (2012).

The imposition of these two additional requirements on a plaintiff when a defendant is not aware of the pending lawsuit will operate to ensure that the protections described in *Cooley* have meaningful effect.

III

A

Under the first of the additional requirements we apply here, a plaintiff seeking the identity of an anonymous Internet critic who is unaware of the pending defamation suit must make reasonable efforts to notify the anonymous commenters of the legal proceedings seeking to uncover their identities in order to give them a reasonable opportunity to respond. While plaintiff in this case made efforts to *discern the identities* of the anonymous defendants, his affidavits and pleadings do not show that he made any effort to *notify* the anonymous defendants of the pending action, either through The Warren Forum Internet site or other means. Because plaintiff did not show that he made reasonable attempts to inform the

[11] Although whether actual malice exists is a question of law, *Ireland*, 230 Mich App at 619, the statement that the question can be answered on the pleadings alone is not accurate in the context of anonymous defendants because actual malice is "a *subjective* inquiry concentrating on the knowledge of a defendant at the time of a publication," which likely is not ascertainable if the defendant is not known. *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296, 305; 680 NW2d 915 (2004).

anonymous defendants of his efforts to discover their identities, he has not met the first requirement. Therefore, on this basis alone, the trial court erred by not granting Munem's motion seeking a protective order.

B

Further, plaintiff's claims are facially deficient and cannot survive a motion for summary disposition under MCR 2.116(C)(8). As noted earlier, "[a] plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Cooley*, 300 Mich App at 262. Here, the alleged defamatory statements were not identified in plaintiff's complaint. Instead, plaintiff only (and for the first time) cited the alleged defamatory statements in his response to Munem's motion for a protective order. Thus, defendants were entitled to summary disposition under MCR 2.116(C)(8), and it was improper to permit plaintiff to depose Munem.

C

MCR 2.116(I)(5) requires that if summary disposition is appropriate under MCR 2.116(C)(8), as is the case here, plaintiffs shall be given the opportunity to amend their pleadings, unless the amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Thus, even though plaintiff's complaint is patently deficient by virtue of his failure to cite the actual complained-of statements in the complaint, we will analyze the alleged defamatory statements to determine whether allowing plaintiff to amend the complaint to contain the contents of these statements would be futile.

In Michigan, the four basic elements of a defamation claim are as follows:

> "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." [*Smith*, 487 Mich at 113, quoting *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

As noted earlier, the First Amendment demands that, related to a defendant's "fault," if the plaintiff is a public official or public figure, then the plaintiff must prove by clear and convincing evidence that the defendant made the statement with actual malice. *Ireland*, 230 Mich App at 622.

When determining whether statements made against public officials amount to unprotected defamation, appellate courts must make an independent examination of the whole record to ensure against forbidden intrusions into the field of free expression. *Smith*, 487 Mich at 112 n 16; *Ireland*, 230 Mich App at 613; *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995). Courts must examine the statements and the circumstances under which they were made to determine whether the statements are subject to First Amendment protection. *New York Times*, 376 US at 285; *Northland Wheels*, 213 Mich App at 322. Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide. *Ireland*, 230 Mich App at 619.

"[I]n general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 US at 357. "A rule compelling

the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' " *New York Times*, 376 US at 279. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id*. "[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id*. at 270. "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error." *Id*. at 279 n 19 (citation and quotation marks omitted).

To be considered defamatory, statements must assert facts that are "provable as false." *Milkovich v Lorain Journal Co*, 497 US 1, 19; 110 S Ct 2695; 111 L Ed 2d 1 (1990). Even statements couched in terms of opinion may often imply an assertion of objective fact and, thus, can be defamatory. *Id*. at 19-20; *Smith*, 487 Mich at 128. "The dispositive question . . . is whether a reasonable fact-finder could conclude that the statement implies a defamatory meaning." *Smith*, 487 Mich at 128.

Accusations of criminal activity are considered "defamation per se" under the law and so do not require proof of damage to the plaintiff's reputation. *Tomkiewicz*, 246 Mich App at 667 n 2; *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 728-729; 613 NW2d 378 (2000). However, not all statements that can be read as accusations of a crime or misconduct should be considered assertions of fact. The First Amendment

protects statements that cannot be interpreted as stating actual facts about an individual from serving as the basis for a defamation action or similar claim under state law. *Milkovich*, 497 US at 20; *Falwell*, 485 US at 50, 53-55; *Ireland*, 230 Mich App 617. Such statements include the usual rhetorical hyperbole and imaginative expression often found in satires, parodies, and cartoons. *Falwell*, 485 US at 53-54; *Ireland*, 230 Mich App at 617-618. This is true even when the statements are designed to be highly offensive to the person criticized, and even if, when read literally, the statements can be interpreted as accusations of criminal activity. Terms such as "blackmailer," "traitor," "crook," "steal," and "criminal activities" must be read in context to determine whether they are merely exaggerations of the type often used in public commentary. *Greenbelt Coop Publishing Ass'n v Bresler*, 398 US 6, 14; 90 S Ct 1537; 26 L Ed 2d 6 (1970); *Kevorkian v American Med Ass'n*, 237 Mich App 1, 7-8; 602 NW2d 233 (1999). Casual use of these terms and similar epithets "is the language of the rough-and-tumble world of politics. It is core political speech. It is consumed by an often skeptical and wary electorate" and is not seriously regarded as asserting factual truth. *In re Chmura (After Remand)*, 464 Mich 58, 82; 626 NW2d 876 (2001). If a reasonable reader would understand these epithets as merely "rhetorical hyperbole" meant to express strong disapproval rather than an accusation of criminal activity or actual misconduct, they cannot be regarded as defamatory. *Greenbelt*, 398 US at 14. See also *Ireland*, 230 Mich App at 618-619.

The context and forum in which statements appear also affect whether a reasonable reader would interpret the statements as asserting provable facts. Courts that have considered the matter have concluded that Internet message boards and similar communication plat-

forms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact. See *Summit Bank v Rogers*, 206 Cal App 4th 669, 696-698; 142 Cal Rptr 3d 40 (2012); *Sandals Resorts Int'l Ltd v Google, Inc*, 925 NYS2d 407, 415-416; 86 AD3d 32 (2011); *Obsidian Fin Group, LLC v Cox*, 812 F Supp 2d 1220, 1223-1224 (D Or, 2011); *Cahill*, 884 A2d at 465. "[A]ny reader familiar with the culture of . . . most electronic bulletin boards . . . would know that board culture encourages discussion participants to play fast and loose with facts. . . . Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly." *Summit Bank*, 206 Cal App 4th at 696-697 (quotation marks and citation omitted).

> Ranked in terms of reliability, there is a spectrum of sources on the internet. For example, chat rooms and blogs are generally not as reliable as the *Wall Street Journal Online*. Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, *they are not a source of facts or data upon which a reasonable person would rely*. [*Cahill*, 884 A2d at 465 (emphasis added; citation omitted).]

The statements at issue in this case were posted on The Warren Forum and were in response to two events that had been covered by the local news media: (1) the discovery that 3,647 tons of road salt was missing from the city's supply and might have been "misappropriate[ed]," and (2) the city's decision to purchase new garbage trucks, which some members of the community had concluded were not really needed.

As noted earlier, two of the statements were responses to a thread entitled, "Where did our road salt go?" The first allegedly defamatory statement was posted by someone using the pseudonym "northend":

> I wouldn't be surprised if the salt is close to city hall and the storage area for the city. IMO the salt is somewhere around the sports complex on Van Dyke, just south of 14 Mile, where Gus hangs out and drinks most days, or at least the days I am in there hitting golf balls. Hmm maybe I need to call the investigators?

This message cannot be construed as asserting as a fact that plaintiff stole or was involved in the theft of the salt. Nowhere does northend state that plaintiff was involved with the salt's disappearance, only that the salt may be near a sports complex where plaintiff purportedly spends time. Thus, this statement is not defamatory as a matter of law.

In the same discussion thread, user "yogi" stated, "[T]he pizza box maker sold it! him an Gus probably split the money." This appears to be someone's attempt at a joke. A reasonable reader would not take the statement literally. First, the introduction of a "pizza box maker" seems to be a non sequitur, which itself suggests a humorous intent. Second, the use of the exclamation point also connotes a humorous intent.[12] Finally, the use of the word "probably" makes the purported asserted fact hardly provable. Thus, when read in context, a reasonable reader would understand

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[12] In ordinary writing, exclamation marks "should not be used . . . to signal the humorous intent of a comment whose humour might otherwise go unrecognized." Allen, ed, *Pocket Fowler's Modern English Usage* (New York: Oxford University Press, 2008), p 242. But as noted earlier, Internet message boards are an extremely informal medium for communication where formalities are rarely followed. See *Cahill*, 884 A2d at 465; *ComputerXpress, Inc v Jackson*, 93 Cal App 4th 993, 1011-1013; 113 Cal Rptr 2d 625 (2001). In fact, the use of exclamation points in electronic communication is rampant and now gives a literal meaning to the quotation attributed to F. Scott Fitzgerald: "An exclamation point is like laughing at your own joke." See Muther, *Confessions of a Serial Exclamation Pointer*, Boston Globe (April 26, 2012), p G16.

these words as being merely rhetorical hyperbole, and they cannot be regarded as defamatory.

The other statements in issue were replies to an initial posting titled "MORE sanitation trucks? Yep," which concerned the city's decision to buy additional new garbage trucks. The third allegedly defamatory statement was posted by hatersrlosers in this thread and stated:

> They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P

This statement on its face cannot be taken seriously as asserting a fact. The use of the ":P" emoticon makes it patently clear that the commenter was making a joke. As noted earlier, a ":P" emoticon is used to represent a face with its tongue sticking out to denote a joke or sarcasm. Thus, a reasonable reader could not view the statement as defamatory.

Later in this discussion regarding the garbage trucks, pstigerfan posted the following:

> Since Warren is the only community in Macomb County to have city employees pick up trash, then [Mayor] Fouts must have a better idea of what is going on compared to the other communities. Oh wait, his buddies Gus and Dick run the department, and in turn make money off of it (selling tires, selling road salt, etc). If we didn't have a Sanitation Department with new trucks (and old tires), then Gus would have to take tires off of other vehicles in other departments in order to make his money.

Again, a reasonable reader would not take this statement literally. The tone of the entire statement is sarcastic and humorous. The writer obviously does not think that Mayor Fouts has a "better idea" of how to run Warren compared with how other community leaders run their communities. And the vision of

plaintiff sneaking into other departments to steal tires off of other city vehicles is so absurd that the vision of it is comical. Thus, when viewed in context, the entire statement cannot be deemed to be an assertion of a provable fact, and it is not defamatory.

In sum, plaintiff maintains that all of the statements constitute actionable statements of fact that accuse him of stealing public property. Review of these statements in context leads us to conclude that they cannot be regarded as assertions of fact but, instead, are only acerbic critical comments directed at plaintiff based on facts that were already public knowledge, namely the apparent misappropriation of a large amount of rock salt and the controversial purchase of additional garbage trucks. The joking, hostile, and sarcastic manner of the comments, the use of an emoticon showing someone sticking their tongue out, and the far-fetched suggestion that plaintiff somehow hid over 3,600 tons of salt near the city sports complex all indicate that these comments were made facetiously and with the intent to ridicule, criticize, and denigrate plaintiff rather than to assert knowledge of actual facts. Examination of the statements and the circumstances under which they were made show them to be mere expressions of rhetorical hyperbole and not defamatory as a matter of law. Therefore, allowing plaintiff to amend his complaint would be futile.

We reverse the trial court's decision to allow discovery of Munem for the purpose of identifying the anonymous defendants, and we remand for the trial court to enter judgment in favor of defendants. Munem, as the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

TALBOT, P.J., concurred with WILDER, J.

STEPHENS, J. (*concurring*). I concur with my colleagues that this matter should be reversed and remanded to the trial court for entry of judgment in favor of defendants. I write separately to address with specificity my belief that Michigan should adopt the analysis of the Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451, 457, 462-464 (Del, 2005), in which that court noted that while a plaintiff who is a public figure needs to prove actual malice to prevail on a claim of defamation, proving malice when the identity of the defendant is unknown is unduly burdensome. Thus, the plaintiff need not plead facts in support of the element of actual malice in order to ascertain the identity of the person or persons who authored the defamatory statements.

The reasoning of the *Cahill* court is compelling that

> under the summary judgment standard, scrutiny is likely to reveal a silly or trivial claim, but a plaintiff with a legitimate claim should be able to obtain the identity of an anonymous defendant and proceed with his lawsuit. . . . [T]rial judges will then still provide a potentially wronged plaintiff with an adequate means of protecting his reputation thereby assuring that our courts remain open to afford redress of injury to reputation caused by the person responsible for abuse of the right to free speech. [*Id*. at 464.]

I understand that there is a significant split of opinion among other jurisdictions on this issue. As the majority has noted, many jurisdictions have followed some blend of *Dendrite Int'l, Inc v Doe No 3*, 342 NJ Super 134; 775 A2d 756 (NJ App, 2001), and *Cahill* with some taking the *Dendrite* approach on actual malice and others adopting the *Cahill* standard. I urge that Michigan follow the analysis and reasoning in *Cahill* given the extreme difficulty of proving the malice of those cloaked in anonymity.

HODGE v PARKS

Docket No. 308726. Submitted December 4, 2013, at Detroit. Decided January 2, 2014, at 9:10 a.m.

Sheila Hodge brought an action in the Genesee Circuit Court, Family Division, against Darrell Parks, seeking a divorce. The court, Duncan M. Beagle, J., entered a judgment of divorce. Plaintiff appealed with regard to issues concerning the division of property, spousal support, and the marital debt. Defendant cross-appealed with regard to the property division.

The Court of Appeals *held*:

1. Plaintiff agreed at the trial that defendant could keep the money remaining in a certain Raymond James account. That consent constituted a waiver that eliminated any alleged error underlying the award of the money in the account to defendant. In any event, plaintiff offered no bases to challenge the trial courts' determination.

2. The trial court erred as a matter of law by holding that the postnuptial agreement between the parties could not be enforced. A postnuptial agreement that seeks to promote a marriage by keeping a husband and wife together may be enforced if it is equitable to do so. The postnuptial agreement in this case was intended to keep the marriage intact, not to encourage a separation or divorce.

3. The trial court erred by holding that a certain sailboat was the separate property of defendant. The enforceable postnuptial agreement provided that the sailboat was marital property. The trial court erroneously invalidated the agreement. The holding that the sailboat is the separate property of defendant is reversed and the case is remanded to the trial court for a determination of the proper equitable distribution of the sailboat.

4. The trial court's property division was fair and equitable. The property division, except with regard to the sailboat, is affirmed.

5. Defendant's claims that the trial court misclassified a monetary transfer from plaintiff to her children as a gift and that the divorce judgment was inequitable in favor of plaintiff lack merit.

Affirmed in part, reversed in part, and remanded.

1. HUSBAND AND WIFE — POSTNUPTIAL AGREEMENTS.

A couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates and encourages their future separation or divorce; postnuptial agreements that are calculated to leave one party in a much more favorable position to abandon the marriage will not be enforced.

2. HUSBAND AND WIFE — POSTNUPTIAL AGREEMENTS.

Postnuptial agreements are not invalid per se; a postnuptial agreement that seeks to promote a marriage by keeping a husband and wife together may be enforced when it is equitable to do so.

Debra F. Donlan for plaintiff.

Xuereb Legal Group PC (by *Joseph M. Xuereb*) for defendant.

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

SAAD, J. In this divorce action, plaintiff appeals the trial court's order with regard to issues concerning property division, spousal support, and marital debt. Defendant cross-appeals the same order with regard to the property division. For the reasons stated hereinafter, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS

Plaintiff and defendant were married in 1998, when plaintiff was 45 and defendant was 61 years old. Defendant has owned a steel business for over 40 years, while plaintiff worked for General Motors Corporation and also served as an officer of defendant's company. Their relationship soured in 2004, when plaintiff filed for divorce, but the parties reconciled after signing a postnuptial agreement that specified certain property divi-

sions and mandated that the parties receive marital counseling. But the reconciliation did not last and plaintiff filed this divorce action five years later.

The trial court entered an order in 2011 on the contested issues of property division, spousal support, and marital debt. Neither party is totally pleased with the order and each appeals some aspect of the property division. Plaintiff claims that the trial court: (1) erred when it found that the balance of defendant's Raymond James account (the "Raymond James account" or the "3177 account") was defendant's premarital asset, (2) erred when it held that a sailboat was the separate property of defendant, and (3) made an inequitable division of property. Defendant asserts that the trial court misclassified a monetary transfer from plaintiff to her children as a gift and that the property distribution was inequitable in plaintiff's favor.

We reverse the trial court's holding that the sailboat was the separate property of defendant. An enforceable postnuptial agreement provided that the sailboat was marital property. The trial court erroneously invalidated the agreement. We remand this issue to the trial court for a determination of the proper equitable distribution of the sailboat. We affirm the trial court's holding in all other respects and dismiss plaintiff's and defendant's remaining claims.

II. ANALYSIS

A. PLAINTIFF'S APPEAL

1. THE RAYMOND JAMES ACCOUNT

In a divorce action, this Court reviews for clear error a trial court's factual findings on the division of marital property and whether a particular asset qualifies as marital or separate property. *Cunningham v Cunning-*

ham, 289 Mich App 195, 200; 795 NW2d 826 (2010); *Woodington v Shokoohi*, 288 Mich App 352, 357; 792 NW2d 63 (2010). "Findings of fact are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made." *Id*. Special deference is afforded to a trial court's factual findings that are based on witness credibility. *Id*. at 358. "This Court further reviews whether a trial court's dispositional rulings are fair and equitable in light of the trial court's findings of fact, but this Court will reverse only if definitely and firmly convinced that the disposition is inequitable." *Id*. at 365 (citations omitted).

Plaintiff asserts that the trial court wrongly classified the Raymond James account as defendant's premarital asset and argues that it should be considered a marital asset. Her theory is one of free association: because plaintiff worked for defendant's business and the Raymond James account was used to fund defendant's business, her labor commingled with defendant's money to convert the Raymond James account into a marital asset. See *Cunningham*, 289 Mich App at 201 ("[m]oreover, separate assets may lose their character as separate property and transform into marital property if they are commingled with marital assets and treated by the parties as marital property") (citations and quotation marks omitted).

As an initial matter, plaintiff waived this argument at trial and therefore cannot assert this claim on appeal. During cross-examination at the trial, plaintiff testified:

> *Q*. So, is it your position this $210,000 [in the 3177 account] is marital or premarital?
>
> *A*. I really don't know. I know we made a lot of money together, but —
>
> *Q*. No. I'm asking you are you asking the Court to divide this money?

A. He can have that money.

Q. He can have the $210,000. Okay.

A. But wasn't it worth $437,000 before this year?

Q. It was, but it's not now.

A. Well, it was $437,000 last year.

Q. Is there anything else you want to tell the Court before I ask you another question?

A. I was just going to say the $437,000 he can have.

Q. Okay, but there's not $437,000 there.

A. I don't know what he has.

* * *

Q. So, you're okay with him keeping what remains as this marital [*sic*] *3177 account, $210,000*, and you're okay with him keeping the $229,000 in his IRA [individual retirement account], right?

A. Yes. [Emphasis added.]

A party cannot stipulate with regard to a matter and then argue on appeal that the resulting action was erroneous. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 532; 695 NW2d 508 (2004). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *Cadle Co v Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). Plaintiff agreed at the trial that defendant could keep the $210,000 remaining in the 3177 account. This consent constitutes a waiver that eliminates any alleged error underlying the award of the $210,000 in the account to defendant.

In any event, were we to address her claims, plaintiff's argument is not convincing. The Raymond James account functioned as a short-term borrowing device for

defendant's business, with defendant borrowing and repaying capital through withdrawals and deposits to the account. Plaintiff fails to show that defendant's actions constitute a commingling of assets—namely, she offers no authority that a properly accounted-for loan from, or repayment to, a premarital account transforms that premarital account into marital property. Nor has she demonstrated that her mere status as defendant's employee suffices to transform a premarital, business-related asset into martial property. A party cannot simply announce a position and expect the court to search for authority to sustain or reject that position. *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009).[1]

Further, the trial court examined defendant's financial records and determined that defendant had fully accounted for all the money located in the Raymond James account at the time of the marriage.[2] Nor did the account's value appreciate during the marriage. Further, the trial court stressed defendant's age (74) and held that it would be inequitable to treat the premarital

[1] Although plaintiff suggests that defendant's Social Security income was commingled with the funds in the Raymond James account, plaintiff fails to develop an argument on this point or to identify evidence to support this contention. She has thus abandoned that issue by failing to brief it. *Id*.

[2] The Raymond James account was initially held with another financial organization that was subsequently purchased by Raymond James. On the date of the marriage, the predecessor account contained approximately $253,000—more than the $210,000 held in the account at the time of trial.

In addition, plaintiff notes that at one point before the trial, defendant was held in contempt for failing to return some funds that had been removed from the 3177 account. However, in its opinion and order issued after the trial, the court, after fully reviewing the financial records, determined that defendant had adequately accounted for all the money at issue. Again, plaintiff identifies no evidence to dispute this finding.

funds in the Raymond James account as marital property when the court awarded plaintiff the premarital funds in her retirement accounts. The trial court made a thorough and sound analysis of this issue and plaintiff, who waived this issue, has offered no basis to challenge its determination.

2. THE SAILBOAT

"This Court reviews de novo a trial court's interpretation of a contract and its resolution of any legal questions that affect a contract's validity, but any factual questions regarding the validity of the contract's formation are reviewed for clear error." *Wright v Wright*, 279 Mich App 291, 297; 761 NW2d 443 (2008). Under Michigan law, "a couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates and encourages a future separation or divorce." *Id*. If the state were to enforce such agreements, it would encourage separation or divorce, which is not an appropriate public policy. *Id*., citing *Randall v Randall*, 37 Mich 563, 571 (1877). As such, postnuptial agreements "calculated to leave [one party] in a much more favorable position to abandon the marriage" will not be enforced. *Wright*, 279 Mich App at 297.[3]

Nonetheless, "[p]ost-nuptial agreements are not in-

[3] The postnuptial agreement at issue in *Wright*, which the trial court and the Court of Appeals found void, was particularly egregious:

> In the case at bar, the trial court correctly determined that the postnuptial agreement at issue was calculated to leave plaintiff in a much more favorable position to abandon the marriage. The contract plainly had, as one of its primary goals, defendant's total divestment of all marital property in the event of a divorce. The couple was not separated at the time and had never separated during the marriage, but plaintiff filed for divorce roughly eight months after defendant signed the agreement. [*Id*.]

valid *per se*," because some postnuptial agreements may be intended to promote harmonious marital relations and keep the marriage together. *Rockwell v Estate of Rockwell*, 24 Mich App 593, 596–597; 180 NW2d 498 (1970). In such situations, "[t]he public policy objection to post-nuptial contracts pointed out by the Court in *Randall* . . . . does not arise . . . ." *Id*. at 597. If a postnuptial agreement seeks to promote marriage by keeping a husband and wife together, Michigan courts may enforce the agreement if it is equitable to do so.

Here, plaintiff seeks to enforce a handwritten agreement that the parties signed in 2005 when they agreed to dismiss their prior divorce action filed in 2004. It states in its entirety:

> Ground Rules (30 days – 60 day [sic]) 5-6-05
>
> 1) Intensive counseling (joint) w/counselor of our mutual choice (David Hall) (Amy Taylor)
>
> 2) Avalanche – joint title. Will be brought back to house.
>
> 3) *Boat – ours equally to be used by both without stating "it is mine, because I pd for it." The boat is <u>our</u> boat owned by both Darrell & Sheila. Should be titled by both.*
>
> 4) Sit together to do a budget – putting on table all assets between both.
>
> 5) Kids not to interfere w/our marriage or relationship – to allow us to grow as a couple.
>
> 6) Treat each other w/love & respect and no rehashing of old issues. No fowl [sic] language directed at each other period.
>
> 7) Both names on house – joint-ownership. Add'l assets to be added later.
>
> By: Darrell Parks [and] Sheila Hodge. [Emphasis added; underlining in original.]

This agreement is thus akin to the one described in *Rockwell*—it is intended to keep the marriage intact,

not to encourage a separation. Nothing in the agreement itself or the record suggests that the parties contemplated a separation in the near future when they signed the agreement. On the contrary, the agreement was made in connection with the dismissal of their prior divorce action. And the agreement reflects the parties' intent to reconcile, by requiring them to engage in intensive counseling, treat one another with love and respect, and not allow their respective children to interfere with their marriage or relationship.

Further, unlike the agreement in *Wright*, nothing in this document encourages a separation by leaving one party in a much more favorable position if the marriage ended. In fact, the agreement is relatively balanced: it effectively treats *both* defendant's premarital sailboat and plaintiff's premarital house as marital assets and requires *both* parties to work together to improve their relationship, marriage, and finances. The trial court thus erred, as a matter of law, when it held that the agreement could not be enforced.

Accordingly, we reverse the award of the sailboat to defendant and remand the case to the trial court to determine an equitable disposition of this marital asset. See *Cunningham*, 289 Mich App at 201 ("[o]nce a court has determined what property is marital, the whole of which constitutes the marital estate, only then may it apportion the marital estate between the parties in a manner that is equitable in light of all the circumstances"); *Woodington*, 288 Mich App at 365 ("[w]hen dividing marital property, a court is not required to award mathematically precise shares").

3. THE PROPERTY DIVISION

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of

property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained." *Berger v Berger*, 277 Mich App 700, 716–717; 747 NW2d 336 (2008) (citations omitted).[4] In making its determination, the trial court may consider "[a] party's attempt to conceal assets . . . but it is only one of many facts that the court must weigh. Further a judge's role is to achieve equity, not to 'punish' one of the parties. An attempt to conceal assets does not give rise to an automatic forfeiture." *Sands v Sands*, 442 Mich 30, 36-37; 497 NW2d 493 (1993). Separate assets may be invaded when a party demonstrates that the property awarded is insufficient for his or her suitable maintenance and support, or when a party significantly assists in acquiring or growing the other party's assets. *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009), citing MCL 552.23 and MCL 552.401.

We are not left with a definite and firm conviction that the trial court's ultimate property division was inequitable. To the contrary, the trial court's property division appears equitable. Though plaintiff suffers from multiple sclerosis (MS), earns income only

[4] *Berger* goes on to list the factors a trial court "may consider . . . in dividing the marital estate":

> (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. When dividing marital property, a trial court may also consider additional factors that are relevant to a particular case. The trial court must consider all relevant factors but not assign disproportionate weight to any one circumstance. [*Berger*, 277 Mich App at 717 (citations and quotation marks omitted).]

from Social Security disability payments, and has debts totaling $217,000, her debt is comprised primarily of her mortgage and home equity loan of $160,000, which she obtained herself. Further, plaintiff has a pension, a 401(k) account, and an IRA, the combined *premarital* portions of which amount to $446,000. Plaintiff is only required to divide with defendant the *marital* portions of those retirement assets, which comprise an additional $449,000. And, as already discussed, plaintiff is also entitled on remand to an equitable distribution of the sailboat, which will further increase the amount of money she receives from the property division.[5]

Defendant is in his mid-70s and testified that the financial condition of his business is the worse that it has been in 40 years. He claimed that his only current income is from Social Security and that he has approximately $44,000 in credit card debt. Although the trial court concluded that defendant's business had minimal or no value—due to the depressed economy and the Internal Revenue Service's claim for $200,000 in back taxes, penalties, and interest for prior tax years—the court nonetheless reserved the issue of spousal support. The court also ordered defendant to thereafter submit his personal and business income tax returns in 2012, 2013, and 2014 to show whether the business improves. And the court awarded plaintiff attorney fees in the amount of $7,500, to be paid by defendant to plaintiff's counsel.

[5] Indeed, to the extent plaintiff's argument on this issue hinges on the fact that the trial court treated the sailboat as defendant's separate asset—plaintiff's brief refers to the sailboat as "the parties' most prized possession"—our conclusion that the sailboat is actually a marital asset to be distributed equitably on remand arguably renders moot plaintiff's argument that the trial court's overall property division is inequitable. See *Skelly*, 286 Mich App at 585.

On balance, far from being inequitable, the overall property division seems quite fair.[6] We accordingly affirm the trial court's overall property division, save for its holding regarding the sailboat.[7]

B. DEFENDANT'S CROSS-APPEAL

Defendant's claims that the trial court misclassified a monetary transfer from plaintiff to her children as a gift and that the divorce judgment was inequitable in plaintiff's favor lack merit. The trial court did not clearly err when it found that the funds contributed by plaintiff to her children constituted a gift. Plaintiff assisted her sons in the 2002 purchase of a Florida condominium, by making the $50,000 down payment. Plaintiff obtained the $50,000 through a loan against her 401(k) account—which existed before the marriage—and repaid the loan with money she earned during the marriage. One of plaintiff's sons testified that he and his brothers formed a corporation to manage the condominium

[6] Our conclusion is not altered by defendant's purported transfer of some assets to his children. The trial court found that both parties had sometimes failed to be entirely honest in the years leading up to and during this divorce action, and the court listed specific examples of each party's conduct that sought to conceal information or assets from the other party. Because both parties engaged in this conduct, and because concealment does not require automatic forfeiture, *Sands*, 442 Mich at 36–37, defendant's asset transfers do not make the trial court's property division inequitable.

[7] Plaintiff fails to establish that defendant's separate assets should be invaded, because she is unable to show that the property awarded is insufficient for her suitable maintenance and support. She receives Social Security disability income, will receive an equitable share of the sailboat on remand, and possesses equity in her home, vacant land in Charlevoix, two boat slips, a classic Corvette, personal property including jewelry, and over one-half million dollars in retirement funds. In addition, it is possible she will receive spousal support. Nor has plaintiff demonstrated that she significantly assisted in the acquisition and growth of defendant's separate assets.

and that they do not intend to pay their mother back. The trial court therefore classified the monetary transfer as a gift (not a loan) and found that plaintiff does not own the condominium.

Defendant's arguments that the trial court's decision on this matter is improper are unconvincing. Again, the trial court thoroughly analyzed this issue, noting that if plaintiff *did* own the condominium, general principles of equity would dictate that it should be awarded to her. Defendant has failed to establish that such a disposition is inequitable—plaintiff suffers from MS and cannot work, has significant debts, and claims Social Security disability benefits are her only income. Her primary assets are retirement funds for which she suffers a penalty for early withdrawals. Under the settlement, defendant retains significant assets, including the $210,000 in his Raymond James account, other accounts containing premarital funds, his equitable share of the sailboat to be determined on remand, and his steel business, which, although currently of minimal value, has the potential to improve as economic conditions change. Although defendant contends that plaintiff attempted to conceal the purchase of the Florida condominium from him, as noted earlier, the court found that defendant engaged in similar deceptive behavior regarding other assets. Therefore, the trial court made an equitable disposition regardless of the Florida condominium.

III. CONCLUSION

The part of the trial court's order holding that the sailboat is the separate property of defendant is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion with

regard to the disposition of the sailboat. In all other respects, the trial court's order is affirmed. We do not retain jurisdiction.

METER, P.J., and CAVANAGH, J., concurred with SAAD, J.

GRANDBERRY-LOVETTE v GARASCIA

Docket No. 311668. Submitted December 11, 2013, at Detroit. Decided January 2, 2014, at 9:15 a.m.

Charlotte Grandberry-Lovette brought an action in the Macomb Circuit Court against Mark Garascia, seeking damages for injuries sustained when she fell while climbing the steps to the front porch of a rental home owned by defendant. The fall occurred when plaintiff, a healthcare aide who assisted residents living in the rental home, stepped on part of the decorative brick border of the concrete steps and the bricks broke loose. Defendant moved for summary disposition on the basis that there was no evidence that he had actual or constructive notice that the steps were defective. The court, Matthew S. Switalski, J., granted the motion and dismissed plaintiff's claims on the basis that plaintiff had failed to establish a question of fact regarding whether defendant had notice of the defective condition. The court determined that there was no evidence that defendant had actual or constructive knowledge that the bricks had come loose and that plaintiff failed to establish that defendant's actual regime to inspect the steps was inadequate. Plaintiff appealed.

The Court of Appeals *held*:

1. Defendant owed plaintiff, an invitee, the highest duty of care. Defendant had duties to warn plaintiff about any known dangers and to inspect the premises for latent defects and, depending on the circumstances, make any necessary repairs or warn of any discovered hazards. Because defendant had a duty to inspect for latent dangers, he could be liable for harm caused by a latent dangerous condition if the dangerous condition was of a kind or sort that he would have discovered by the exercise of reasonable care.

2. The failure to properly inspect may constitute negligence if a reasonable inspection would have revealed the dangerous condition giving rise to an injury. When a premises possessor fails to inspect his or her property, or conducts an inadequate inspection, the law will impute knowledge of the dangerous condition to the premises possessor if the dangerous condition is of such a charac-

ter or has existed for a sufficient time that a reasonable premises possessor would have discovered it.

3. Defendant, as the moving party, had to establish that it was beyond genuine factual dispute that he lacked constructive notice of the defective condition.

4. A premises possessor has no duty to rectify dangerous conditions that are so obvious that an invitee might reasonably be expected to discover them. The open and obvious danger doctrine cuts off a premises possessor's liability if the invitee should have discovered the condition and realized its danger. A dangerous condition is open and obvious if an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection.

5. An invitee does not have a duty to be constantly and vigilantly scanning the premises possessor's land for latent defects.

6. A premises possessor has a duty to be reasonably sure that he or she is not inviting his or her invitees into danger and, to that end, must exercise ordinary care and prudence to render the premises reasonably safe for the visit. A premises possessor must take reasonable care to know the actual condition of the premises and undertake the type of inspection that a reasonably prudent premises possessor would exercise under similar circumstances to protect his or her invitee.

7. For purposes of summary disposition, a premises possessor cannot invariably establish that he or she did not have constructive notice of a dangerous condition by showing that the dangerous condition would not have been discovered during a casual inspection. Rather, the premises possessor must show that the type of inspection that a reasonably prudent premises possessor would have undertaken under the same circumstances would not have revealed the dangerous condition at issue. If, under the totality of the circumstances, a reasonably prudent premises possessor would have employed a more vigorous inspection regime that would have revealed the dangerous condition, the fact that the condition was not observable on casual inspection would not preclude a jury from finding that the premises possessor would have discovered the hazard in the exercise of reasonable care notwithstanding its latent character.

8. Defendant did not meet his burden to demonstrate that the undisputed facts showed that he did not have constructive notice of the defect; this would have entailed presenting evidence that a

reasonably prudent premises possessor operating under similar circumstances would not have discovered that the bricks had come loose. Because defendant failed to properly support his motion, the burden to come forward with evidence to establish a question of fact on this issue did not shift to plaintiff and the trial court should have denied defendant's motion on that basis. Nevertheless, there was evidence that would support a finding that defendant had constructive notice. The evidence was sufficient to allow a reasonable fact-finder to conclude that defendant would have discovered the loose bricks in the exercise of reasonable care. The evidence was sufficient to create a question of fact regarding whether defendant had constructive notice of the defect. A question of fact remained regarding whether defendant would have discovered the danger posed by the steps with a reasonable and timely inspection. The trial court erred by determining that the evidence showed that defendant did not have actual or constructive notice that the steps were defective.

Reversed and remanded.

O'CONNELL, J., dissenting, stated that the majority opinion creates a new doctrine of anticipatory notice that has never been recognized in Michigan and should not be applied. The record contains nothing to create a factual issue about constructive notice. Plaintiff presented no evidence to establish that defendant was aware of a defect in any part of the steps at the time plaintiff fell. Defendant's prior repair of the steps did not give him constructive notice that a future defect might occur or create a continual duty to scrutinize the steps. Summary disposition was proper because no issue of material fact existed regarding whether defendant had constructive notice of the alleged defect.

1. NEGLIGENCE — PREMISES POSSESSORS — DANGEROUS CONDITIONS — IMPUTED KNOWLEDGE.

When a premises possessor fails to inspect his or her property or conducts an inadequate inspection, the law imputes to the premises possessor knowledge of a dangerous condition with regard to the premises if the dangerous condition is of such a character or has existed for a sufficient time that a reasonable premises possessor would have discovered it.

2. NEGLIGENCE — PREMISES POSSESSORS — INVITEES — DUTY TO INSPECT PREMISES.

A premises possessor, in order to protect invitees, must take reasonable care to know the actual condition of the premises and

undertake the type of inspection of the premises that a reasonably prudent premises possessor would exercise under similar circumstances.

3. NEGLIGENCE — PREMISES POSSESSORS — DANGEROUS CONDITIONS — CONSTRUCTIVE NOTICE — INSPECTION OF PREMISES.

A premises possessor, for purposes of a motion for summary disposition, cannot invariably establish that he or she did not have constructive notice of a dangerous condition with regard to the premises by showing that the dangerous condition would not have been discovered during a casual inspection; the premises possessor must show that the type of inspection that a reasonably prudent premises possessor would have undertaken under the same circumstances would not have revealed the dangerous condition; if, under the totality of the circumstances, a reasonably prudent premises possessor would have employed a more vigorous inspection regime that would have revealed the dangerous condition, the fact that the condition was not observable on casual inspection would not preclude a jury from finding that the premises possessor would have discovered the hazard in the exercise of reasonable care notwithstanding its latent character.

Ravid & Associates, PC (by *Jeffrey S. Hayes* and *Keith M. Banka*), for plaintiff.

Lupo & Koczkur, PC (by *Paul S. Koczkur* and *Kenneth L. Lupo*), for defendant.

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

M. J. KELLY, J. In this suit to recover damages resulting from a fall, plaintiff, Charlotte Grandberry-Lovette, appeals by right the trial court's order granting a motion for summary disposition under MCR 2.116(C)(10) by defendant Mark Garascia. We conclude that the trial court erred when it granted Garascia's motion for summary disposition. Specifically, because Garascia failed to establish that there was no genuine factual dispute regarding whether he had constructive notice of the defective condition at issue, he was not

entitled to have Grandberry-Lovette's claim dismissed on the basis that he did not have such notice. Accordingly, we reverse and remand for further proceedings.

I. BASIC FACTS

Garascia owned a single-family home in 2010 that he leased through a county-operated program to several persons with disabilities. Garascia testified that he had been a licensed residential builder for approximately 20 years and had built his own house. He had previously worked for his father's construction company and sometimes worked as a bricklayer.

Grandberry-Lovette testified that the steps leading to the home's porch were concrete with a decorative brick border. Garascia stated that, approximately 9 to 18 months before the fall at issue, he received a call about the need to repair the steps. When he examined the steps, he noticed that some bricks had come out and others were loose. He cleaned off the mortar from the bricks and removed anything that was loose. He then reapplied the mortar to the bricks and put the steps back together. He inspected the remainder of the steps and "everything else was in satisfactory condition."

Garascia testified that it was normal for bricks to come loose after Michigan winters: "We get the thaw and frost, thaw and frost. They do come loose." After he repaired the steps, Garascia did not receive any further complaints regarding the steps. He also visited the property several times and did not "observe" any defects. Garascia stated that he just makes a visual inspection when he visits the property, which is usually during the spring and summer months.

In April 2010, Grandberry-Lovette worked as a healthcare aide and had been assigned to assist the residents living at Grascia's rental home during the

midnight shift. Grandberry-Lovette arrived at the home shortly before her shift; she parked her truck, grabbed her lunch, and walked toward the home's front entrance. She began to climb the steps to the front porch. When she stepped on the second step, "the bricks came loose." She testified: "I walked up and when I put my right foot on the step, it crumbled." She fell forward and suffered various injuries.

Garascia testified that the bricks that he had previously repaired were not the bricks that were involved in Grandberry-Lovette's fall.

Grandberry-Lovette sued Garascia in September 2011. She alleged, in relevant part, that Garascia had a duty to "timely and adequately" inspect the steps and ensure that the steps were in good repair or warn his invitees—including her—about the dangerous condition of the steps, which he did not do. She further alleged that Garascia's breach of these duties proximately caused her injuries.

In May 2012, Garascia moved for summary disposition under MCR 2.116(C)(10). Garascia argued that there was no evidence that he had actual or constructive notice that the steps had any problems. He noted that he had not received any complaints about the steps since he last repaired them and had not himself noticed any problems with the steps during his visits to the property. He also cited Grandberry-Lovette's testimony that she also had not had any problems with the steps before her fall.

In addition, relying on an unpublished opinion per curiam of the Court of Appeals, Garascia argued that he could not be charged with constructive notice of a defective condition that was not visible on casual inspection because, if a condition is of a kind or sort that a plaintiff could not see it, then the defendant cannot be

expected to see it either. Garascia also maintained that, to the extent that the dangerous character of the bricks was visible on casual inspection, he had no duty to repair the condition under the open and obvious danger doctrine.

The trial court issued its opinion and order in July 2012. The trial court agreed that there was no evidence that Garascia had actual or constructive knowledge that the bricks at issue had come loose and posed a danger. The trial court also determined that Grandberry-Lovette failed to establish that Garascia's actual inspection regime was inadequate: "[T]he record is devoid of any evidence suggesting [Garascia] would or should have discovered the allegedly defective condition had he inspected the steps after December 2009 but before April 9, 2010." Because Grandberry-Lovette failed to establish a question of fact regarding whether Garascia had notice of the defective condition, the trial court dismissed her claims.

Grandberry-Lovette now appeals.

II. PREMISES LIABILITY AND NOTICE

A. STANDARDS OF REVIEW

Grandberry-Lovette argues on appeal that the trial court erred when it determined that Garascia established that there was no question of fact that he did not have actual or constructive notice that the steps were defective and granted summary disposition on that basis. 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 the common law, such as the law governing

premises liability. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

B. THE DUTY TO INSPECT AND CONSTRUCTIVE NOTICE

The parties do not dispute that Grandberry-Lovette was an invitee at the time of her visit to Garascia's property. An invitee is a person who enters upon another's land with an "implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000) (quotation marks and citation omitted; alterations in original). Garascia, therefore, owed Grandberry-Lovette the highest duty of care. *Id*. He not only had to warn Grandberry-Lovette about any known dangers, but also had a duty "to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Id*. Because Garascia had a duty to inspect his premises for latent dangers, he could be liable for harm caused by a latent dangerous condition if the dangerous condition was of a kind or sort that "by the exercise of reasonable care" he would have discovered. *Id*.

The duty to inspect one's premises to ensure that the premises are safe for invitees is inextricably linked to the concept of constructive notice. Even if the premises possessor does not have actual knowledge of a dangerous condition—as would be the case for a dangerous condition created by some third party or through gradual deterioration—Michigan courts have long recognized that the law will impute knowledge of the dangerous condition to the premises possessor if the premises possessor should have discovered the dangerous condition in the exercise of reasonable care. See

Siegel v Detroit City Ice & Fuel Co, 324 Mich 205, 211-212; 36 NW2d 719 (1949); *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 68; 299 NW 807 (1941) quoting *Kroger Grocery & Baking Co v Diebold*, 276 Ky 349, 352; 124 SW2d 505 (1939) (explaining that " '[n]egligence may consist either in failure on the part of the store proprietor to discover the dangerous condition, though created by a third person, within a reasonable time, or in the creation of the dangerous condition by himself or his agents or servants' "); *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164, 170; 13 NW 499 (1882) (COOLEY, J.) (stating that a premises possessor has the duty to warn of dangerous conditions about which he or she actually knows "or ought to know" and characterizing that concept as "very just and very familiar"). As our Supreme Court explained more than 80 years ago:

> A good expression of the rule of liability, applicable in such cases, is found in an English case to the effect that the proprietor of such a structure is *not a warrantor or insurer* that it is absolutely safe, but that he impliedly warrants that it is safe for the purpose intended, save only as to those defects which are unseen, unknown, and undiscoverable,—not only unknown to himself, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination. Such being the nature of the obligation, it is obvious that the proprietor of such a building is under a *continuing duty of inspection*, to the end of seeing that it is reasonably safe for the protection of those whom he invites to come into it; and that, if he neglects his duty in this respect, so that it becomes unsafe, the question of his *knowledge* or *ignorance* of the defect which renders it unsafe is immaterial. [*Sullivan v Detroit & Windsor Ferry Co*, 255 Mich 575, 577; 238 NW 221 (1931) (quotation marks and citation omitted).]

Accordingly, the failure to properly inspect may constitute negligence if a reasonable inspection would have revealed the dangerous condition giving rise to an

injury.[1] *Hulett*, 299 Mich at 67 ("If a condition liable to cause personal injury to a customer is occasioned by another customer, then liability of the storekeeper must rest upon failure to exercise reasonable inspection likely to disclose the menace and neglect to make removal thereof.") (quotation marks and citation omitted).

In modern cases, the failure to properly inspect is most often framed as one involving constructive notice. When a premises possessor fails to inspect his or her property, or conducts an inadequate inspection, the law will impute knowledge of the dangerous condition to the premises possessor if the dangerous condition is of such a character or has existed for a sufficient time that a reasonable premises possessor would have discovered it. See *Clark v Kmart Corp*, 465 Mich 416, 419-421; 634 NW2d 347 (2001), citing *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968), and *Hulett*, 299 Mich at 68. Stated another way, a premises possessor cannot avoid liability for the harms caused by a dangerous condition on his or her property by claiming ignorance of its existence if in the exercise of reasonable care the premises possessor should have discovered it.

While seeking summary disposition, Garascia presented evidence that he did not have actual knowledge that the bricks in the steps had become loose. However, as the moving party, Garascia also had to establish that it was beyond genuine factual dispute that he lacked constructive notice of the defective condition. See MCR 2.116(G)(4) (stating that the moving party has the initial burden to identify the issues about which it believes there are no genuine issues of material fact for

[1] It is curious that this duty could be referred to by the dissent as novel, given its long and venerable pedigree.

trial); *Stitt*, 462 Mich at 597 (stating that notice—actual or constructive—is an element of a premises liability claim).

With regard to whether he had constructive notice, Garascia argued in his motion that "[n]o liability could be found" for the defective stairs because, if "the defect was visible and should have been known" to him, "it was . . . visible to [Grandberry-Lovette], as well, and therefore open and obvious." That is, he essentially argued that his duty to inspect his premises was coextensive with Grandberry-Lovette's personal duty to take reasonable steps to avoid open and obvious hazards. Therefore, he maintained, in the absence of evidence that the step's dangerous condition was latent and that he created the condition or that someone told him about it, he would never have a duty to repair the defective steps; either he had no duty because the hazard was so readily observable that he had the right to expect his invitees to avoid it or he had no duty because the hazard was so latent that he could not have had notice of its existence before the incident at issue. Garascia's understanding of constructive notice arising from the duty to inspect, however, is not an accurate statement of Michigan's common law.

A premises possessor has no duty to rectify dangerous conditions that are " 'so obvious that the invitee might reasonably be expected to discover them . . . .' " *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), quoting *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Accordingly, the open and obvious danger doctrine will " 'cut off liability if the invitee should have discovered the condition and realized its danger.' " *Lugo*, 464 Mich at 516, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). A dangerous condition is

open and obvious if "an average user with ordinary intelligence" acting under the same conditions would "have been able to discover the danger and the risk presented" by the condition "upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The duty imposed on invitees to protect themselves while visiting another's property is quite limited: the invitee need only keep a "casual" lookout for dangers that are "obvious." See 2 Restatement Torts, 2d, § 343A, comment 1(*b*), p 219 (" 'Obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment."). Even in ordinary speech, the term "casual"—as applied to an invitee's duty to be aware of his or her surroundings—plainly refers to an informal or haphazard observation or inspection; an invitee does not have a duty to be constantly and vigilantly scanning the premises possessor's land for latent dangers. See, e.g., *The Oxford English Dictionary* (2d ed, 1991) (defining the adjective "casual" to mean "[o]ccurring or brought about without design or premeditation; coming up or presenting itself 'as it chances' "); *The American Heritage Dictionary of the English Language* (1985) (defining "casual" to mean "Occurring by chance," "not planned," "Without ceremony or formality," "Not serious or thorough; superficial").

The premises possessor's duty to inspect, in contrast, is not invariably limited to "casual" observation.[2] As

[2] We are cognizant of only one published authority that has characterized a premises possessor's duty to inspect as a "casual" duty. See *Raatikka v Jones*, 81 Mich App 428, 431; 265 NW2d 360 (1978). That case, however, involved the statutory duty imposed under the Michigan housing law rather than the common law. And, to the extent that the opinion can be read as stating the duty imposed under our common law,

our Supreme Court has explained, a premises possessor has a duty "to be reasonably sure" that he or she "is not inviting" his or her invitees "into danger, and to that end he [or she] must exercise ordinary care and prudence to render the premises reasonably safe for the visit." *Torma v Montgomery Ward & Co*, 336 Mich 468, 476-477; 58 NW2d 149 (1953) (quotation marks and citations omitted). A premises possessor must take "reasonable care to know the actual conditions of the premises . . . ." *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965) (quotation marks and citation omitted); see also *Conerly v Liptzen*, 41 Mich App 238, 241; 199 NW2d 833 (1972) (stating that a premises possessor has a duty to "inspect the premises to discover possible dangerous conditions of which he does not know") (quotation marks and citation omitted). The duty to take reasonable care to know the actual condition of the premises requires the premises possessor to undertake the type of inspection that a "reasonably prudent" premises possessor would exercise under similar circumstances to protect his or her invitees. See *Keech v Clements*, 303 Mich 69, 73; 5 NW2d 570 (1942); *Oppenheim v Pitcairn*, 293 Mich 475, 477-478; 292 NW 374 (1940) (stating that negligence may arise from the premises possessor's "faulty supervision over the premises" such as where a dangerous condition existed for sufficient time "that knowledge of the menace should have come to the reasonably prudent incumbent"); *Hall v Murdock*, 119 Mich 389, 394; 78 NW 329 (1899) (stating that the trial court erred by instructing the jury that the owner had a duty to test the strength of the elevator's cable from "time to time"—as opposed to "inspection and examination"—because there was no

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we decline to follow it as unpersuasive and contrary to long-standing and binding Supreme Court precedent. See MCR 7.215(J)(1).

evidence that "such or any other kinds of tests of the strength of elevator cables are common"); see also 2 Restatement Torts, 2d, § 343, comment *e*, p 217 (noting that the extent of preparation that the premises possessor must make depends on the nature of the land and the purposes for which it is used). Moreover, whether the premises possessor should have discovered the dangerous condition with a proper inspection will often be a question of fact for the jury. *Kroll*, 374 Mich at 371-372; *Torma*, 336 Mich at 477; see also *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977) (stating that whether a defendant's conduct in the particular case fell below the general standard of care will generally be a question of fact for the jury). Consequently, for purposes of summary disposition, a premises possessor cannot invariably establish that he or she did not have constructive notice of a dangerous condition by showing that the dangerous condition would not have been discovered during a casual inspection; rather, the premises possessor must show that the type of inspection that a reasonably prudent premises possessor would have undertaken under the same circumstances would not have revealed the dangerous condition at issue. *Kroll*, 374 Mich at 373 (stating that there is no liability for a dangerous condition about which a premises possessor did not know "and could not have discovered with reasonable care") (quotation marks and citation omitted). Accordingly, if under the totality of the circumstances a reasonably prudent premises possessor would have employed a more vigorous inspection regime that would have revealed the dangerous condition, the fact that the condition was not observable on casual inspection would not preclude a jury from finding that the premises possessor should have discovered the hazard in the exercise of reasonable care notwithstanding its latent character.

With these factors in mind, we shall now examine whether Garascia established that there was no material factual dispute concerning whether he had constructive notice that the bricks at issue had become dangerously loose.

C. SUMMARY DISPOSITION

In his motion for summary disposition, Garascia presented evidence that he did not have actual knowledge that the stairs had fallen into disrepair; specifically, he presented evidence that, if believed, would show that he did not create the defective condition and that no one informed him of the dangerous condition before Grandberry-Lovette's fall.

With regard to constructive notice, Garascia presented evidence that Grandberry-Lovette did not notice that the bricks at issue had become loose. He then argued that this was evidence that he too would not have discovered the danger had he done an inspection. He did not discuss or present any evidence concerning his actual inspection regime and whether that regime would have revealed the dangerous condition. He also did not discuss or present any evidence that the hazard might have developed within such a short time that, even with a reasonable inspection regime, he would not have discovered that the bricks had come loose. He essentially relied on Grandberry-Lovette's inability to discover the hazard on casual inspection to establish that he too, as a reasonably prudent premises possessor, would not have discovered that the bricks had come loose. This evidence, even if left unrebutted, was insufficient to establish that a reasonably prudent premises possessor would not have discovered the step's condition.

As the moving party, Garascia had the initial burden to support his motion with affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(3); MCR 2.116(G)(4).[3] Accordingly, he had the burden to demonstrate that the undisputed facts showed that he did not have constructive notice of the defect at issue; this in turn entailed presenting evidence that a reasonably prudent premises possessor operating under similar circumstances would not have discovered that the bricks had come loose. See *Kroll*, 374 Mich at 373. This he did not do. Because he failed to properly support his motion, the burden to come forward with evidence to establish a question of fact on this issue did not shift to Grandberry-Lovette and the trial court should have denied Garascia's motion on that basis alone. *Barnard Mfg*, 285 Mich App at 370. Nevertheless, even considering the merits of this claim, there was evidence that, if believed, would support a finding that Garascia had constructive notice.

Garascia testified that he had years of experience as a builder and had performed work as a bricklayer. He also testified that the brickwork on the steps at issue had in the past deteriorated and come loose. This, he explained, was normal in Michigan because the freeze-thaw cycle causes brickwork to deteriorate and come loose: "It happens to everybody." Indeed, he repaired

[3] The party bringing a motion under MCR 2.116(C)(10) must identify the issues that he or she believes are not in dispute, MCR 2.116(G)(4), and must support that contention with evidence, MCR 2.116(G)(3). A defendant may not support a motion under MCR 2.116(C)(10) by merely asserting his or her belief that the plaintiff will ultimately be unable to establish an element at trial. In such a situation, the nonmoving party has no obligation to respond and the trial court should deny the motion. *Barnard Mfg*, 285 Mich App at 370.

the brickwork approximately 9 to 18 months before Grandberry-Lovette's fall. After he performed that repair, he noted that the remaining brickwork was "in satisfactory condition." Although he acknowledged that the only way to be certain that the bricks were not loose was to "wiggle them," he nevertheless came to the conclusion that the bricks were not loose after doing nothing more than visually inspecting for cracks. Garascia also testified that, even with a properly performed repair, it is possible for brickwork to become loose after 9 to 18 months. Finally, he testified that the last time he was on the property before Grandberry-Lovette's fall was December 2009. When asked whether he inspected the steps during or after the winter before her fall, he agreed that he had not. This testimony was sufficient to permit a reasonable fact-finder to conclude that Garascia would have discovered the loose bricks in the exercise of reasonable care either at the time of the previous repair or through a proper inspection at a later time.

Garascia acknowledged that he knew that brickwork deteriorated under Michigan's freeze-thaw cycle and that the only way to ensure that the bricks were secure was to physically inspect them. Despite this, when he repaired several loose bricks 9 to 18 months before Grandberry-Lovette fell, he did not physically inspect the remaining bricks; instead, he only performed a visual inspection. Given the evidence that several bricks had already come loose approximately 9 to 18 months before the fall at issue and that it is normal for brickwork to deteriorate gradually over a span of freeze-thaw cycles (that is, during the winter months—the very time that Garascia typically did not visit the property), a reasonable jury could find that the bricks at issue were already loose at that time of the repair, or in the process of coming loose. It could also find that a

reasonably prudent premises possessor in Garascia's position would have physically inspected the brickwork on the steps and discovered the deterioration.

Even assuming that the steps were in satisfactory condition after Garascia's repair, there was evidence from which a reasonable jury could conclude that the bricks at issue must have come loose over the winter before Grandberry-Lovette's fall and could have been discovered during a physical inspection. Garascia testified that even a properly performed repair can deteriorate over 9 to 18 months and that the "normal" cause of deterioration is the freeze-thaw cycle. Although he also stated that breaking ice and applying salt can contribute to the loosening of bricks, those activities are routine during Michigan winters. Hence, a jury could find that a reasonably prudent premises possessor would understand that—in addition to the deterioration caused by the freeze-thaw cycle in a typical Michigan winter—the premises possessor's lessees might further cause deterioration by applying salt and breaking ice. It follows that the jury might find that a reasonably prudent premises possessor would for that reason physically inspect the brickwork during and after every winter. Moreover, Grandberry-Lovette testified that the bricks "crumbled" when she stepped on them. The fact that the bricks crumbled suggests that the mortar had deteriorated from exposure to the freeze-thaw cycle. Accordingly, a reasonable jury could find that the deteriorated condition of the brickwork occurred over time and could for that reason have been discovered long before Grandberry-Lovette's fall. Because Garascia testified that he did not inspect the brickwork during the winter months or in the spring immediately before Grandberry-Lovette's fall, a reasonable jury could find that he breached his duty by failing to inspect the brickwork after the period when it was

most likely to develop flaws and that, had he done so, he would have discovered that the bricks had deteriorated and were in danger of coming loose. Consequently, on this record, there was sufficient evidence to create a question of fact regarding whether Garascia had constructive notice of the defective steps.[4]

III. CONCLUSION

The trial court erred when it determined that the undisputed evidence showed that Garascia did not have actual or constructive notice that the steps at issue were defective. Because Garascia failed to present evidence that a reasonably prudent premises possessor operating under the same conditions as Garascia would not have discovered the dangerous character of the steps, Grandberry-Lovette did not have the burden to come forward with evidence to establish a question of fact on that issue and the trial court should have denied Garascia's motion on that basis. In any event, as Grandberry-Lovette showed in her response to Garascia's motion, given Garascia's testimony, there was at least a question of fact regarding whether he would have discovered the danger posed by the steps with a reasonable and timely inspection. Therefore, the trial court erred when it granted summary disposition in Garascia's favor on the ground that the undisputed facts showed that he did not have constructive notice of the defect.

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[4] To the extent that Garascia's assertion that he lacked constructive knowledge of the defective condition is belied by his own testimony regarding the state of the brickwork and the freeze-thaw cycle, we note that the trial court was required to consider all admissible evidence then filed in the action, and not merely that evidence tending to support Garascia's position. *Barnard Mfg*, 285 Mich App at 377, quoting MCR 2.116(G)(5) ("Accordingly, if a party refers to and relies on an affidavit, pleading, deposition, admission, or other documentary evidence, and that evidence is 'then filed in the action or submitted by the parties,' the trial court must consider it.").

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Grandberry-Lovette may tax her costs. MCR 7.219(A).

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

O'CONNELL, J. (*dissenting*). I respectfully dissent. The majority invents a novel duty that requires premises possessors to predict when and whether Michigan weather might cause decorative bricks to loosen. I am unconvinced that Michigan law requires any premises possessor to be meteorologically clairvoyant about masonry. In my view, the majority opinion creates a new doctrine of anticipatory notice, which has never been recognized in Michigan. I decline to apply this new doctrine. Instead, I accept the trial court's application of the well-recognized doctrine of constructive notice, and I would affirm the grant of summary disposition in favor of defendant.

Plaintiff argues, and the majority holds, that there is a genuine issue of material fact regarding whether defendant had notice of any wobbling in the decorative brick on the porch steps. I find no factual issue. Premises possessors may be liable for injuries that result from a dangerous condition on their premises if they have actual notice of the condition or if the condition is of such a kind or sort that the law ascribes constructive notice of the condition to the premises possessor. See, generally, *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). A premises possessor has constructive notice of a dangerous condition if the condition is "of such a character or has existed a sufficient length of time that he

should have had knowledge of it." *Id*. (quotation marks and citations omitted).[1]

The record contains nothing to create a factual issue about constructive notice. Although the record indicates that defendant had repaired the steps once, there is no indication that the bricks routinely became loose. Plaintiff argues that because defendant once repaired part of the steps, defendant forever had constructive notice that any part of the steps could be defective. However, plaintiff presented no evidence to establish that defendant was aware of a defect in any part of the steps at the time of plaintiff's fall. I cannot find that defendant's prior repair of the steps gave him constructive notice that a future defect might occur. Nor can I find that the prior repair created a continual duty to scrutinize the steps.[2] Thus, I conclude that no genuine issue of material fact existed regarding whether defendant had constructive notice of the alleged defect. Consequently, summary disposition for defendant was proper under MCR 2.116(C)(10), and I would affirm the trial court's decision.

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[1] Plaintiff asserts that a question of fact existed regarding whether defendant had actual notice of the defect in the steps because he previously repaired another section of the steps and, therefore, knew of the bricks' propensity to break free from the concrete steps. However, general knowledge that bricks may become loose does not constitute actual notice of the condition that caused plaintiff's fall. See, generally, *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999). Thus, the evidence, even when viewed in the light most favorable to plaintiff, did not create a genuine issue of material fact with regard to whether defendant had actual notice of the alleged defect in the steps.

[2] The majority's new duty requires defendant to prove a negative, i.e., that an inspection by a reasonably prudent premises possessor "would *not* have revealed the dangerous condition at issue." *Ante* at 579 (emphasis added). If, as the majority seems to suggest, a wobbly brick is not apparent from a visual inspection, I cannot see how premises possessors could possibly prove that they fulfilled the new duty.

BRAVERMAN v GRANGER

Docket No. 309528. Submitted December 11, 2013, at Detroit. Decided January 9, 2014, at 9:00 a.m. Leave to appeal sought.

Eric Braverman, personal representative of the estate of Gwendolyn Rozier, brought a wrongful-death action in the Macomb Circuit Court against Darla Kae Granger, M.D., and others, alleging medical malpractice. Rozier, a Jehovah's Witness, was discharged from the hospital after receiving a kidney transplant. She returned to the hospital several days later complaining of abdominal pain. Rozier's physicians suspected an antibody-mediated rejection of the kidney and conducted a biopsy of the renal graft, which confirmed the presence of antibody-mediated vascular rejection. Rozier's physicians began treatment to try to save the kidney. After subsequent tests indicated the possibility of internal bleeding, Rozier was rushed to the operating room for emergency surgery. Rozier's husband was advised that she needed a blood transfusion, but he refused consent for the transfusion in accordance with Rozier's previously stated desires. Rozier died the following day. Plaintiff alleged various breaches of the standard of care, including improper prescription of various blood-thinning medications and daily plasmapheresis, and a failure to timely diagnose the internal bleeding. According to plaintiff, these breaches of the standard of care caused Rozier's fatal predicament because but for the negligence, a decision concerning the acceptance of a blood transfusion would not have been needed. Defendants moved for summary disposition, arguing that they were not liable for wrongful-death damages under the doctrine of avoidable consequences. In response, plaintiff argued that application of the doctrine would violate the Free Exercise and Establishment Clauses of the First Amendment by hindering the exercise of the tenets of the Jehovah's Witness religion and by allowing a jury to consider the reasonableness of the Jehovah's Witness religion, respectively. The Court, David F. Viviano, J., granted summary disposition in favor of defendants. Plaintiff appealed.

The Court of Appeals *held*:

The doctrine of avoidable consequences, which includes the principle of mitigation of damages, is a common-law doctrine. It

prevents parties from recovering damages that could have been avoided by reasonable effort. Under the First Amendment, although a court or jury may inquire into whether a religious belief is sincere or genuine, it should not decide the truth or reasonableness of the belief. To avoid running afoul of the First Amendment, an objective approach—which eliminates from consideration all subjective reasons for failing to mitigate and, thus, only incidentally burdens religious beliefs—must be used when determining whether the doctrine of avoidable consequences bars recovery. The proper inquiry is whether the medical treatment was an objectively reasonable means to avoid or minimize damages following the person's original injury given the circumstances of the case, circumstances that may include the gravity of the original injury, the intrusiveness of the proposed medical treatment and the risk of complications, the feasibility of alternative medical treatments, the expense of the proposed medical treatment, and the increased likelihood of recovery if the proposed medical treatment had been accepted by the patient. If the medical treatment was an objectively reasonable means of avoiding or minimizing damages, then the refusal to accept the medical treatment means the individual unreasonably failed to mitigate his or her damages. In this case, there was no genuine issue of material fact that the blood transfusion was a reasonable procedure to minimize damages following Rozier's injury. The trial court did not err by concluding that the doctrine of avoidable consequences barred plaintiff from recovering damages for Rozier's death.

Affirmed.

BOONSTRA, P.J., concurring, wrote separately to emphasize that Rozier chose to refuse a blood transfusion that likely would have saved her life, that she bore responsibility for the consequences that flowed from that choice regardless of the reason for her choice, and that the Court's opinion should not be interpreted as reflective of any viewpoint regarding religion generally or any particular religious belief or expression.

TORTS — MEDICAL MALPRACTICE — AVOIDABLE CONSEQUENCES — RELIGIOUS BELIEFS.

To avoid running afoul of the First Amendment in a medical-malpractice case in which the patient refused a recommended treatment because of religious beliefs, an objective approach—which eliminates from consideration all subjective reasons for failing to mitigate—must be used when determining whether the doctrine of avoidable consequences bars recovery; the proper inquiry is whether the medical treatment was an objectively

> reasonable means to avoid or minimize damages following the person's original injury given the circumstances of the case—circumstances that may include the gravity of the original injury, the intrusiveness of the proposed medical treatment and the risk of complications, the feasibility of alternative medical treatments, the expense of the proposed medical treatment, and the increased likelihood of recovery if the proposed medical treatment had been accepted by the patient; if the medical treatment was an objectively reasonable means of avoiding or minimizing damages, then the refusal to accept the medical treatment means the individual unreasonably failed to mitigate his or her damages.

Allan Falk, PC (by *Allan Falk*), for Eric Braverman.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman*, *Anthony G. Arnone*, and *Cheryl A. Cardelli*) for Darla K. Granger, Heung K. Oh, Ivan G. Olarte, St. John Hospital and Medical Center, and St. John Health.

Kerr, Russell & Weber, PLC (by *Joanne Geha Swanson*), for Robert Provenzano, Mohamed A. El-Ghoroury, and St. Clair Specialty Physicians.

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM. This medical-malpractice case ultimately requires an answer to the following question: Who must bear the legal burden for the death of Gwendolyn Rozier when Rozier, because of her religious convictions, refused to accept a blood transfusion that likely would have saved her life, but Rozier's doctors, through their assumed breach of the applicable standard of care and acting with knowledge of her religious convictions, placed Rozier in the position to need the blood transfusion? This is a difficult case because of both the complex legal issues this question presents and the tragic loss incurred by Rozier's family.

The trial court concluded that plaintiff, Eric Braverman, as personal representative of the Estate of Gwendolyn Rozier, is barred as a matter of law by the doctrine of avoidable consequences from recovering damages for Rozier's death. Thus, the court granted summary disposition under MCR 2.116(C)(10) in favor of defendants Darla K. Granger, M.D., Heung K. Oh, M.D., Ivan G. Olarte, M.D., St. John Hospital and Medical Center, and St. John Health (collectively the "St. John defendants"); and defendants Robert Provenzano, M.D., Mohamed A. El-Ghoroury, M.D., and St. Clair Specialty Physicians (collectively the "St. Clair defendants"). Plaintiff now appeals as of right. For reasons discussed further in this opinion, we agree with the trial court that the doctrine of avoidable consequences, when applied in a purely objective manner to comply with the First Amendment's requirement of government neutrality toward religion, precludes plaintiff from recovering damages for Rozier's death. Therefore, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

According to the Jehovah's Witness faith, no blood, blood product, or any derivative of any kind of blood are allowed for medical treatment. Every Jehovah's Witness consciously determines what he or she accepts in blood management. Rozier was a Jehovah's Witness and would not accept whole blood or blood products in medical treatment.

On August 15, 2007, Rozier was suffering from end-stage renal disease and received a kidney transplant at St. John Hospital. Dr. Oh and surgical resident Dr. Olarte performed the surgery. Rozier was discharged on August 18, 2007, but returned to St. John Hospital on August 24, 2007, with complaints of ab-

dominal pain.[1] She was admitted under the care of nephrologist Dr. El-Ghoroury, with transplant surgeons Drs. Granger and Oh consulting. Rozier's doctors suspected an antibody-mediated rejection of the kidney. Rozier received intravenous immune globulin (IVIG) and Solu-Medrol (steroids). A CT-guided needle biopsy of the renal graft was performed to determine whether the transplanted kidney was being rejected. According to Dr. Oh's operative report, the biopsy confirmed the presence of antibody-mediated vascular rejection. As a result, Rozier began plasmapheresis treatment with albumin solution replacement,[2] as well as the IVIG and Solu-Medrol treatment. Plaintiff contends that while plasmapheresis has been shown to be effective for removing antibodies that are presumably causing rejection of the donor organ, it is also known to affect the patient's coagulation parameters and clotting factors. A nephrologist monitors a plasmapheresis patient and decides what the coagulation parameters are and orders coagulation studies; Dr. Provenzano and Dr. El-Ghoroury were the treating nephrologists in this case.

The documentary evidence illustrates that on August 25, Rozier's hematocrit level was 41.6%, and her hemoglobin level was 13.7 grams per deciliter of blood (g/dl).[3] On August 26, Rozier's hematocrit and

[1] Plaintiff is not critical of the actual transplant surgery. Further, plaintiff acknowledges that there was a known risk that Rozier's body might reject the transplanted kidney because it came from her daughter, and her body could have developed antibodies during pregnancy that would cause her system to recognize the transplanted kidney as a foreign body.

[2] Plasmapheresis removes blood from the body, separates blood cells from plasma in order to filter out antibodies, and returns the blood cells to the body's circulation. The patient usually receives replacement plasma, but in a situation such as Rozier's, in which the patient refuses to accept blood products, saline solution is used.

[3] A hematocrit test determines the percentage of the volume of a blood sample taken up by cells. The test indicates whether a person has too

hemoglobin levels decreased to 33.1% and 11 g/dL, respectively. On the morning of August 28, 2007, Rozier was noted to be very pale and confused; her hematocrit level was 16.4%, and her hemoglobin level was 6.4 g/dL, which raised suspicion of internal bleeding from the transplant kidney. Rozier underwent an abdominal CT scan, which, according to Dr. Oh's report, "confirmed the presence of [a] large mass around the kidney and could explain for the drop in hemoglobin." In the report, Dr. Oh noted, "Since she is a Jehovah Witness, we were not able to replace the plasma that was removed by plasmapheresis and was [sic] able to replace only by the albumin solution so her bleeding parameters were prolonged."

Rozier was taken to the operating room immediately after the CT-scan finding. The intended procedure, risks, and complications, including bleeding from the transplant wound and possible death because of Rozier's refusal to accept any blood product, were explained to Rozier's husband, Gregory. Dr. Oh explained to Gregory that Rozier's hemoglobin was unacceptably low and that she needed a blood transfusion. Gregory responded, "Well, that's unacceptable, Dr. Oh, as you well know." The Roziers had previously discussed with Dr. Oh that they were Jehovah's Witnesses and had explained that they would not accept whole blood or whole blood products. Further, Rozier had signed a document stating that she refused to permit "blood

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many or too few red blood cells. The normal range is 34.9% to 44.5% for women. Mayo Clinic, *Hematocrit Test* <http://www.mayoclinic.org/tests-procedures/hematocrit/basics/definition/prc-0015009?p=1>[http://perma.cc/4EDN-HQ3X] (accessed January 8, 2014). Hemoglobin is a protein in red blood cells that carries oxygen; normal results vary, but in general range between 12.1 and 15.1 g/dL for women. MedlinePlus, *Hemoglobin* http://www.nlm.nih.gov/medlineplus/ency/article/003645.htm [http://perma.cc/A2Q3-BV33] (accessed January 8, 2014).

and/or blood components to be administered[.]" Rozier consented to defendants doing anything they thought was appropriate for her, except for the "blood situation."

According to Dr. Oh's operative report, the fascia of the kidney was "found to have a large amount of blood clots, as well as fresh blood." The kidney was completely decapsulated. And the "lower pole of the kidney showed there was a small pumper from what seemed to be a biopsy site." The bleeding site was sutured. However, the fate of the transplant kidney was found to be "doomed because [they] were not able to give [Rozier] anymore treatment for vascular rejection due to her bleeding tendencies, as well as [her] refusal to receive any blood product so it was decided to remove the transplant to give her a chance to survive . . . ." The kidney transplant was removed without incident. Upon inspecting the transplant wound, there were still some clots in Rozier's retroperitoneum. Although the operation was completed and Rozier was taken to recovery, she died on August 29, 2007, at the age of 55.

On November 30, 2009, plaintiff initiated the instant medical-malpractice suit against defendants. Plaintiff alleged various breaches of the standard of care, including improper prescription of various blood-thinning medications and daily plasmapheresis,[4] and also a failure to timely recognize signs of internal bleeding. The St. John defendants moved the trial court for summary

[4] Plaintiff contends that while initial findings were consistent with Rozier experiencing antibody-mediated vascular rejection, the findings were inconclusive and did not rule out cell mediated rejection or a combination of both. Plaintiff argues that even if the rejection is determined to be antibody-mediated vascular rejection, the first line of treatment is IVIG and Solu-Medrol, a corticosteroid treatment, with plasmapheresis to follow only if such treatment efforts prove unsuccessful.

disposition, arguing, among other things, that the doctrine of avoidable consequences barred plaintiff's claim for wrongful-death damages. The St. Clair defendants likewise moved the trial court for summary disposition, arguing that they were not liable for wrongful-death damages arising out of Rozier's failure to mitigate. In response to defendants' mitigation argument, plaintiff argued that application of the doctrine of avoidable consequences would violate the Free Exercise and Establishment Clauses of the First Amendment by incidentally hindering a Jehovah's Witness's exercise of the tenets of her religion and allowing a jury to consider the reasonableness of the Jehovah's Witness religion, respectively. Plaintiff emphasized that defendants caused Rozier's fatal predicament because but for defendants' negligence, a decision concerning the acceptance of a blood transfusion would not have been needed.

After a hearing to address the motions, the trial court issued an opinion and order, granting defendants' motions for summary disposition under MCR 2.116(C)(10). The court opined that after "thorough research," it would use an objective standard—as opposed to a case-by-case approach that would inject religion into the case—when applying the doctrine of avoidable consequences. Relying on caselaw from the United States Court of Appeals for the Fifth Circuit, the trial court was persuaded by and adopted the view that an objective approach did not violate the First Amendment. Applying the doctrine of avoidable consequences using the objective approach, the court opined, in pertinent part, as follows:

> Rozier had a duty to exercise reasonable care to minimize her damages. . . . [I]t is uncontested that the medical procedure, *i.e.*, a blood transfusion, would have saved her life and stood a high probability of being successful had it been accepted by Ms. Rozier. Although the record indicates

> genuine issues of material fact regarding whether defendants breached the standard of care by prescribing various blood thinning medications, daily plasmapheresis, and failing to timely recognize signs of internal bleeding, the record further indicates that after defendants' alleged wrongful conduct Ms. Rozier had the opportunity to mitigate her damages but instead made the decision to refuse the blood transfusion.
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> Under these circumstances, once Ms. Rozier's religious beliefs are removed from the equation, a reasonable trier of fact could not conclude that the refusal to accept a life-saving procedure, *i.e.*, a blood transfusion, was a reasonable choice under the objective person approach. The proposed blood transfusion was reasonable, since there were no remaining alternatives, a high probability of a positive outcome, and the transfusion was not a serious operation or medical procedure. Since it is uncontested that Ms. Rozier would have lived if she had accepted a blood transfusion, under an objective standard it was unreasonable to refuse the life-saving treatment.
>
> The damages which plaintiff seeks to recover did not occur as a result of the personal injuries suffered by Ms. Rozier but as a result of her death, which she could have avoided with reasonable acts. Accordingly, defendants have no legal obligation to pay damages for Ms. Rozier's death because her death was avoidable and the refusal of the blood transfusion by Ms. Rozier was objectively unreasonable. [Citations omitted.]

Plaintiff moved the trial court for reconsideration, which the court denied.

II. ANALYSIS

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants under the doctrine of avoidable consequences. We disagree.

We review the trial court's decision to grant a motion for summary disposition de novo. *Maiden v Rozwood*,

461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Human Servs Dep't*, 286 Mich App 230, 235; 780 NW2d 586 (2009). A genuine issue of material fact exists when reasonable minds could differ on a material issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

As an initial matter, plaintiff argues for the first time on appeal that the doctrine of avoidable consequences was extinguished through the abolition of contributory negligence and the adoption of comparative negligence. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Although this issue is not properly before this Court, we will briefly address it nevertheless.

The doctrine of avoidable consequences, which includes the principle of mitigation of damages, is a common-law doctrine. See *Pulver v Dundee Cement Co*, 445 Mich 68, 78; 515 NW2d 728 (1994); *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994); *Shiffer v Bd of Ed of Gibraltar Sch Dist*, 393 Mich 190, 197-198; 224 NW2d 255 (1974). "The common law remains in force until 'changed, amended or repealed.' " *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d

432 (2012), quoting Const 1963, art 1, § 7. "There is no question that both [our Supreme] Court and the Legislature have the constitutional power to change the common law." *Placek v Sterling Hts*, 405 Mich 638, 656; 275 NW2d 511 (1979). However, "[w]e will not lightly presume that the Legislature has abrogated the common law. Nor will we extend a statute by implication to abrogate established rules of common law." *Velez*, 492 Mich at 11 (citation omitted). Absent "a contrary expression by the Legislature, well-settled common-law principles are not to be abolished by implication . . . ." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652; 513 NW2d 799 (1994). "Rather, the Legislature should speak in no uncertain terms when it exercises its authority to modify the common law." *Velez*, 492 Mich at 11-12 (citations and quotation marks omitted).

In this case, plaintiff invites this Court to deem the doctrine of avoidable consequences implicitly abrogated by the adoption of comparative negligence. However, plaintiff has demonstrated neither that the Legislature has abrogated the doctrine "in no uncertain terms," nor that our Supreme Court has done so expressly, see, e.g., *Placek*, 405 Mich at 679 (expressly replacing the doctrine of contributory negligence with the doctrine of comparative negligence). Therefore, we decline to conclude that the doctrine of avoidable consequences has been abrogated by the adoption of comparative negligence.

Our Supreme Court has explained the doctrine of avoidable consequences as follows:

> Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages.

> The person wronged cannot recover for any item of damage which could thus have been avoided. [*Shiffer*, 393 Mich at 197 (citation, quotation marks, and emphasis omitted). See also *Morris v Clawson Tank Co*, 459 Mich 256, 263-264; 587 NW2d 253 (1998) (stating the same); *Talley v Courter*, 93 Mich 473, 474; 53 NW 621 (1892) ("A party against whom a trespass is committed has no right . . . by neglecting the obvious and ordinary means of preventing or lessening the damages, to make them more than they otherwise would have been . . . .").]

Thus, stated differently, the doctrine of avoidable consequences prevents parties from recovering damages that could have been avoided by reasonable effort. *Tel-Ex Plaza, Inc v Hardees Restaurants, Inc*, 76 Mich App 131, 134-135; 255 NW2d 794 (1977). This doctrine of mitigation is "designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community." *Shiffer*, 393 Mich at 198 (citation and quotation marks omitted). The lead opinion in *Kirby v Larson*, 400 Mich 585, 617-618; 256 NW2d 400 (1977) (opinion by WILLIAMS, J.), distinguished the doctrine of avoidable consequences from the principles of contributory negligence:

> Negligence subsequent to the injury is distinguished from contributory negligence, which is negligence which contributed proximately to cause the injury. If plaintiff fails to use due care to prevent or reduce damages subsequent to the injury complained of, he or she may not recover the enhanced damages. While the amount of damages may be reduced by such action or inaction, the action itself will not be barred. Thus, this doctrine of "avoidable consequences" is distinguished from contributory negligence and, in effect limits the latter doctrine to events which cause the original injury, even though plaintiff's action or inaction in aggravating the injury may result in damage out of all proportion to the original event. [Emphasis omitted.]

In the instant case, defendants contend that reasonable efforts were not made to avoid plaintiff's damages resulting from Rozier's death because the blood transfusion recommended to save Rozier's life was refused. Thus, the dispositive question is whether the blood transfusion was an objectively reasonable means to avoid or minimize damages following Rozier's original injury given the circumstances of this case. The parties dispute whether Rozier's religion should be considered when answering this question. Defendants argue that the trial court properly abstained from considering the subjective reason for the refusal of the blood transfusion. Plaintiff argues that the trial court should have considered the fact that Rozier's religion did not permit her to accept a blood transfusion when it was determining whether a question of fact exists regarding whether Rozier failed to undertake reasonable efforts under the circumstances to avoid the damages plaintiff seeks to recover in this case. This is a complex issue with First Amendment implications.

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." US Const, Am I. "The protections provided by the First Amendment . . . have been 'incorporated' and extended to the states and to their political subdivisions by the Fourteenth Amendment." *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, 379; 733 NW2d 734 (2007). The Free Exercise Clause of the First Amendment "generally prohibits governmental regulation of religious beliefs," *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 157; 756 NW2d 483 (2008), whereas "[t]he Establishment Clause guarantees governmental neutrality with respect to religion and guards against excessive governmental entanglement with religion." *Id*. at 156 (citation

omitted). Under the First Amendment, although a court or jury may inquire into whether a religious belief is genuine or sincere, it should not decide the truth or reasonableness of the belief. *Dep't of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 392-393; 455 NW2d 1 (1990); *United States v Ballard*, 322 US 78, 84-88; 64 S Ct 882; 88 L Ed 1148 (1944).

There is no binding authority in Michigan addressing the application of the doctrine of avoidable consequences in the context of a patient's refusal of lifesaving medical treatment and the interplay of the religion clauses of the First Amendment. However, there are a limited number of cases from other jurisdictions that address the issue. See, generally, Anno: *Refusal of Medical Treatment on Religious Grounds*, 3 ALR5th 721, 727-745, §§ 2-9.

In *Munn v Algee*, 924 F2d 568, 574-575 (CA 5, 1991), the United States Court of Appeals for the Fifth Circuit addressed whether an "objective approach," which does not consider religion as a factor, or a "case-by-case approach," which permits consideration of a plaintiff's religious beliefs, should be used when determining whether a plaintiff failed to mitigate damages. In *Munn*, the plaintiff, Ray Munn, and his wife, Elaine Munn were involved in a car accident with the defendant. *Id*. at 570-571. Elaine was taken to a hospital to receive treatment for a variety of injuries, but her condition deteriorated. *Id*. at 571. She died after she refused to accept a blood transfusion because she was a Jehovah's Witness. *Id*. The defendant asserted that the doctrine of avoidable consequences precluded an award of damages for Elaine's death. The trial court used the case-by-case approach, and a jury concluded that Elaine would not have died had she accepted the blood trans-

fusion and, therefore, awarded no damages on the plaintiff's wrongful-death claim. *Id*. at 571.

On appeal, the plaintiff argued that the application of the doctrine of avoidable consequences violated the Free Exercise and Establishment Clauses of the First Amendment by burdening his wife's exercise of the Jehovah's Witness faith and inviting the jury to consider the reasonableness of her religious beliefs. *Id*. at 574. The Fifth Circuit held that the application of the case-by-case approach would arguably violate the Establishment Clause but was nevertheless harmless error in the case before it. *Id*. at 574-575. The court determined that application of the doctrine did not violate the Free Exercise Clause under either the objective or the case-by-case approach because "generally applicable rules imposing incidental burdens on particular religions do not violate the free exercise clause." *Id*. at 574. The court emphasized that "[t]he more compelling problem with the application of the doctrine in this case is that it potentially invited the jury to judge the reasonableness of the Jehovah's Witnesses' religion." *Id*. The court explained the constitutional problem as follows:

> Application of the case-by-case approach allows a jury to consider the religious nature of a plaintiff's refusal to avoid the consequences of a defendant's negligence. Accordingly, otherwise unreasonable conduct may be deemed reasonable. However, the question of whether a jury decides to label such conduct as reasonable may depend upon its view of the religious tenet that motivated the plaintiff's failure to mitigate damages.
>
> If the jury finds the religion plausible, it will more likely deem the conduct reasonable; on the other hand, if the particular faith strikes the jury as strange or bizarre, the jury will probably conclude that the plaintiff's failure to mitigate was unreasonable. *Because the plaintiff's religion*

> *is the only basis upon which otherwise unreasonable conduct can be deemed reasonable, the jury undoubtedly assesses the plaintiff's religion in reaching its conclusion.* A strong case can be made that the first amendment forbids such an assessment. [*Id*. at 575 (citation omitted; emphasis added).]

Notwithstanding the constitutional problem, the court concluded that application of the case-by-case approach was harmless error. *Id*. The court explained that the plaintiff injected religion into the case; had the court prohibited the plaintiff from doing so (through the application of the objective standard), the jury would have undoubtedly deemed Elaine's refusal of the blood transfusion unreasonable; therefore, the jury's assessment of Elaine's religion did not harm the plaintiff's case. *Id*. The court encouraged trial courts to apply the objective standard in the future to religiously motivated refusals to mitigate damages because the approach does not violate the Free Exercise or Establishment Clauses of the United States Constitution.[5] *Id*. at 575 n 12.

In *Williams v Bright*, 230 AD2d 548, 556; 658 NYS2d 910 (1997), a New York appellate court took a different stance on the issue of what standard to apply than the court did in *Munn*, concluding that a plaintiff must be

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[5] It is noteworthy that the court also considered the propriety of the trial court's instruction to the jury that in determining whether the refusal of the blood transfusion was reasonable, the jury could consider Elaine's " 'religious beliefs and related teachings, . . . if you find that to be a factor in her decision.' " *Munn*, 924 F2d at 578. The court concluded that the instruction, while not purely objective because it permitted the jury to consider Elaine's religious beliefs, comported with state law that permitted courts to consider personal attributes in determining reasonableness. *Id*. at 579. However, the court emphasized that the state's law allowing the jury to consider personal attributes when determining reasonableness "does not in any way undermine our observation that jury consideration of religious beliefs may violate" the Establishment Clause. *Id*. at 579 n 20.

permitted to present to a jury the basis for the refusal of medical treatment. As in *Munn*, *Williams* involved the alleged failure of a Jehovah's Witness to mitigate damages by refusing a recommended blood transfusion for religious reasons. *Id*. at 550-551. The issue in *Williams* focused on the propriety of the following jury instruction regarding mitigation of damages, which the trial court provided to the jury after acquainting the jury with the existence of New York's pattern jury instruction regarding mitigation, which refers to the actions of a "reasonably prudent person":

> You have to accept as a given that the dictates of her religion forbid blood transfusions.
>
> And so you have to determine . . . whether she . . . *acted reasonably as a Jehovah's Witness* in refusing surgery which would involve blood transfusions.
>
> Was it reasonable for her, not what you would do or your friends or family, *was it reasonable for her given her beliefs*, without questioning the validity or the propriety of her beliefs? [*Id*. at 551 (quotation marks omitted).]

The appellate court held that this jury instruction constituted government endorsement of the Jehovah's Witness faith in violation of the First Amendment. *Id*. at 553-554. The court explained that "[t]he trial court, in accepting the sincerity of [the plaintiff's] beliefs as a given and asking the jury to consider the reasonableness of her actions only in the context of her own religion, effectively provided government endorsement to those beliefs." *Id*. at 554. "No secular court can decide—or, for that matter, lead a jury to decide—what is the reasonable practice of a particular religion without setting itself up as an ecclesiastical authority, and thus entangling it excessively in religious matters, in clear violation of the First Amendment." *Id*. at 555. The appellate court opined that the plaintiff's religious

beliefs were "held, as a matter of law, to relieve her of any legal obligation to mitigate damages under the same standard required of all other persons similarly situated who do not share similar religious convictions." *Id*. at 551-552.

In determining the proper jury instruction to be used on remand, the appellate court first noted that "[v]irtually all of the handful of jurisdictions to have considered the question have adopted the test of the reasonably prudent person instead of the formulation employed here." *Id*. at 552, citing *Munn*, 924 F2d 568; *Corlett v Caserta*, 204 Ill App 3d 403, 413-414; 149 Ill Dec 793; 562 NE2d 257 (1990); *Shorter v Drury*, 103 Wash 2d 645, 659; 695 P2d 116 (1985); *Nashert & Sons v McCann*, 460 P2d 941 (Okla, 1969). However, the court opined that strict adherence to an objective standard without allowing consideration of the basis for the refusal of medical treatment would work an injustice in cases in which the refusal was on religious grounds; the court believed that a jury should not be left with the fact of a patient's refusal without any explanation at all. *Id*. at 556. Thus, the court adopted what it described as a "reasonable believer" charge, and held that the trial court on remand should employ the following instruction to "strike a fair balance between the competing interests of [the] parties":

> "In considering whether the plaintiff acted as a reasonably prudent person, you may consider the plaintiff's testimony that she is a believer in the Jehovah's Witness faith, and that as an adherent of that faith, she cannot accept any medical treatment which requires a blood transfusion. I charge you that such belief is a factor for you to consider, together with all the other evidence you have heard, in determining whether the plaintiff acted reasonably in caring for her injuries, keeping in mind, however, that the overriding test is whether the plaintiff acted as a

> reasonably prudent person, under all the circumstances confronting her." [*Id*. at 556-557.]

The appellate court emphasized that the trial court was "*not* to permit the introduction of any 'theological' proof, by way of either expert or lay testimony, as to the validity of religious doctrine, nor should the court issue any instructions whatsoever on that score." *Id*. at 557. The court noted that its supplemented instruction "has found some support in other jurisdictions." *Id*., citing *Lange v Hoyt*, 114 Conn 590; 159 A 575 (1932); *Christiansen v Hollings*, 44 Cal App 2d 332; 112 P2d 723 (1941).

While we respect and appreciate the desire to strike a balance between the competing interests of the parties in a situation such as this, we find *Williams* to be flawed in that it inescapably entails a jury's assessment of the reasonableness of one's religious beliefs. We conclude that the adoption of a purely objective approach—which eliminates from consideration all subjective reasons and, thus, only incidentally burdens religious beliefs—is the only way to avoid running afoul of the First Amendment. Under the reasonable believer or case-by-case approach, if a trier of fact is asked to determine whether a blood transfusion was a reasonable means for a person to avoid death in circumstances in which the person's religious beliefs prohibit him or her from accepting the blood transfusion, the trier of fact will necessarily be required to judge either the reasonableness of the tenets of the person's religion or the reasonableness of the person's decision to abide by his or her religious beliefs in the face of death. Judging religion and the practice of that religion cannot be extricated from the process. If the trier of fact finds the religious prohibition of the blood transfusion to be reasonable, he or she will more likely deem the refusal

of the blood transfusion reasonable under the circumstances because the person's religion reasonably prohibits it; however, if the religious prohibition of the blood transfusion strikes the trier of fact as unreasonable, he or she will likely conclude that the refusal of the blood transfusion was unreasonable under the circumstances because the person's religion unreasonably prohibits it. See, generally, *Munn*, 924 F2d at 575. That approach would "foster an excessive government entanglement with religion" by permitting a court or jury to inquire into the truth or reasonableness of a religious belief. *Scalise v Boy Scouts of America*, 265 Mich App 1, 11-12; 692 NW2d 858 (2005) (quotation marks and citation omitted). See also *Emmanuel Baptist Preschool*, 434 Mich at 392; *Lemon v Kurtzman*, 403 US 602, 612-613; 91 S Ct 2105; 29 L Ed 2d 745 (1971); *Ballard*, 322 US at 84-88.

The purely objective approach, employed by the trial court in this case and recommended in *Munn*, does not suffer the same constitutional shortcoming. Under the objective approach, the proper inquiry is not whether the person's subjective reasons for refusing the transfusion were reasonable. Rather, the proper inquiry is whether the blood transfusion was an objectively reasonable means to avoid or minimize damages following the person's original injury given the circumstances of the case, circumstances that may include the gravity of the original injury, the intrusiveness of the proposed medical treatment and the risk of complications, the feasibility of alternative medical treatments, the expense of the proposed medical treatment, and the increased likelihood of recovery if the proposed medical treatment had been accepted by the patient. See generally *Corlett*, 204 Ill App 3d at 413-414. If the blood transfusion was an objectively reasonable means of avoiding or minimizing damages, then the refusal to

accept the transfusion means the individual unreasonably failed to mitigate his or her damages. This is a neutral approach that does not treat anyone disparately because it eliminates all subjective factors[6] from consideration, not just religion.

Applying the objective standard to the instant case, we conclude that there is no genuine issue of material fact that the blood transfusion was a reasonable procedure to minimize damages following Rozier's original injury under the circumstances of this case. The documentary evidence illustrates that after the biopsy and the initiation of plasmapheresis, there were strong indications that Rozier began bleeding internally, and her hemoglobin dropped to an unacceptably low level. As a result, Rozier needed a blood transfusion. Plaintiff's own expert witnesses agreed that Rozier likely would have survived had she been transfused with blood.[7] Internal bleeding accompanied by an unacceptably low hemoglobin level was a grave injury threatening Rozier's life. The blood transfusion was a necessary medical procedure under the circumstances, and there is no evidence that there was an alternative treatment available. Had the blood transfusion been accepted, Rozier "likely would have survived." Reasonable minds could not disagree that the blood transfusion was a reasonable means under the circumstances to minimize damages following Rozier's original injury, i.e., to avoid Rozier's death and the damages arising from her death.

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[6] Such other subjective reasons might include a heightened fear of blood transfusions (unrelated to objective data) due to the risk of contracting bloodborne infections such as Hepatitis or HIV.

[7] In his deposition testimony, Dr. Nasimul Ahsan agreed with defense counsel that Rozier "would have survived had she accepted blood products." In his deposition testimony, Dr. Harold Yang similarly agreed with defense counsel that Rozier's life "could have been saved" and that she "likely would have survived" had she been transfused with blood.

Therefore, because the blood transfusion was refused under these circumstances, reasonable minds could not disagree that reasonable efforts were not made to avoid Rozier's death and the resulting damages. The trial court did not err by concluding that the doctrine of avoidable consequences precluded plaintiff from recovering damages for Rozier's death.

Finally, plaintiff argues that the trial court improperly invoked the doctrine of avoidable consequences to bar plaintiff from compensation for damages other than those stemming from Rozier's death. We conclude that plaintiff has waived this issue.

It is well established that "[a] party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co*, 285 Mich App at 255. A waiver is a "voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Mich/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006). " '[A] party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute.' " *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

The representations by plaintiff's counsel in the trial court establish that plaintiff voluntarily and intentionally abandoned any right to pursue damages other than those stemming from Rozier's death, such as for any pain and suffering that Rozier may have experienced

because of the alleged malpractice before she died. On December 14, 2011, the trial court held a hearing to address defendants' motions for summary disposition. During the hearing, the following exchange occurred between the court and plaintiff's counsel regarding the damages plaintiff was seeking:

> *The Court*: You're not --- you're not suing for damages short of her dying, though, right? You're suing for what happened after that point in time?
>
> [*Plaintiff's Counsel*]: Exactly.

Plaintiff's counsel and the court also had the following exchange at the conclusion of the hearing when discussing the motion for summary disposition with regard to the doctrine of avoidable consequences:

> [*Plaintiff's Counsel*]: I just want --- the only thing I want to let the Court know is that --- it's essentially a motion for summary disposition because there are no economic claims in this case. She wasn't working and she --- she died, you know, on --- on the table. So if --- if that motion's granted, that's dispositive on the entire case, not partially dispositive. I just want the Court to be clear on that.
>
> *The Court*: All right.

Plaintiff is seeking to reopen a door to recover damages unrelated to the death, a door that he intentionally closed at the trial court level. Plaintiff has waived this issue.[8] See

[8] We reject plaintiff's contention that this issue is not waived because counsel's statements were ambiguous and counsel did not have an opportunity to fully express himself during the motion hearing due to repeated interruption by the court and opposing counsel. Our review of the transcript from the motion hearing reveals that counsel, although often interrupted, had ample opportunity to express himself on his client's behalf. Counsel's statements were not ambiguous. Finally, counsel had ample opportunity to express himself on behalf of plaintiff in the written responses to defendants' motions for summary disposition. At no point did plaintiff argue that that application of the doctrine of avoidable consequences would only entitle defendants to partial summary disposition.

Hilgendorf, 245 Mich App at 683; *Quality Prod & Concepts Co*, 469 Mich at 374; *The Cadle Co*, 285 Mich App at 255.

Accordingly, we conclude that the trial court did not err by granting summary disposition in favor of defendants.

Affirmed.

DONOFRIO and BECKERING, JJ., concurred.

BOONSTRA, P.J. (*concurring*). I fully concur in the majority opinion and in its excellent analysis. I write separately to emphasize that our opinion should not be interpreted as reflective of any viewpoint regarding religion generally or any particular religious belief or expression. To the contrary, it is reflective of the spirit of the First Amendment of the United States Constitution and its guarantee of every person's right to freely exercise and express the religious beliefs of his or her choice, without governmental interference.

That said, however, it bears noting that every person bears responsibility for the decisions and choices that he or she makes in life. People make decisions and choices in all aspects of their lives, and for untold hosts of reasons. But regardless of the reasons, decisions and choices have consequences. It is the essence of personal responsibility that the makers of decisions and choices, relative to their own lives, bear the consequences that flow from those decisions and choices. Our recognition of that fact is in no respect a criticism or indictment (or endorsement, for that matter) of any person's decision or choice (or of the reasons for which it was made). It is merely an acknowledgement of the principle of personal responsibility.

In this sad case, Gwendolyn Rozier and her family made a choice, and decided to forgo a blood transfusion that likely would have saved her life. In her particular case, and while the reasons could have been many, the reason for doing so was based on her religious beliefs. But the reason simply does not matter. The choice was hers to make, whether for reasons of religion, or for altogether different reasons entirely, or in fact for no reason at all. But as in any aspect of life, in which choices result in consequences, Ms. Rozier's choice resulted in a consequence for her. Sadly, that consequence was her death.

However unfortunate the nature of that consequence, it does not provide a basis for shifting responsibility for the consequence of Ms. Rozier's choice to others.[1] That choice, no matter how principled, admirable, and honorable it might have been, was hers and hers alone to make, and with that choice came the consequences that naturally flowed from it, irrespective of the righteousness of the reasons for which she made her choice.

For these additional reasons, I concur in the majority opinion.

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[1] In this case, that shifting of responsibility would place Ms. Rozier's medical professionals in the untenable position of having to choose between bearing legal responsibility for the consequences of Ms. Rozier's religion-based choices or, alternatively, opting not to treat her. In either event, they likely would face legal action, of different sorts. The First Amendment does not require that medical professionals be placed between such a rock and hard place.

DETROIT EDISON COMPANY v DEPARTMENT OF TREASURY

Docket No. 309732. Submitted December 4, 2013, at Lansing. Decided January 9, 2014, at 9:05 a.m. Leave to appeal sought.

The Detroit Edison Company brought an action in the Court of Claims against the Department of Treasury, seeking, in part, a refund of use taxes paid under protest for the tax period January 1, 2003, through September 30, 2006. Plaintiff alleged that the machinery and equipment that had been subjected to the tax was exempt from taxation under the industrial-processing exemption of the Use Tax Act (UTA), MCL 205.94o, because the machinery and equipment, which is located outside its generation plants, is used both to transmit and distribute the electricity and to continue the processing of the electricity. The Court of Claims, Paula J. M. Manderfield, J., granted summary disposition in favor of plaintiff. Defendant appealed.

The Court of Appeals *held*:

1. Plaintiff's machinery and equipment located outside its generation plants are used in the activity of converting and conditioning electricity by changing the quality, form, character, or composition of the electricity for ultimate sale at retail up until the time the electricity reaches its customers' meters, at which point it becomes a finished good. The terms "form, composition, quality, combination, or character" in MCL 205.94o(7)(a) are sufficiently broad and expansive so as to encompass voltage and current changes in electricity as it travels through the transmission and distribution system. Electricity is not a finished good ready for sale until it reaches the meters of plaintiff's customers.

2. Industrial processing occurs when the machinery and equipment at issue are used to inspect, test, and control the quality of electricity as it flows through the transmission and distribution system.

3. In a situation like the one in this case, where machinery and equipment are concurrently used in a unified system for both distribution and industrial processing, the industrial-processing exemption applies to the machinery and equipment in full. Con-

current taxable use with an exempt use does not remove the protection of the exemption. Plaintiff is entitled to the industrial-processing exemption in full.

4. Mich Admin Code, R 205.115(4), which would clearly preclude the exemption sought by plaintiff, conflicts with the Court of Appeals' interpretation of the industrial-processing exemption of the UTA. The rule is invalid and unenforceable.

Affirmed.

TAXATION — USE TAX ACT — WORDS AND PHRASES — INDUSTRIAL PROCESSING.

"Industrial processing" for purposes of the industrial-processing exemption in the Use Tax Act, includes the activities of inspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage; "industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail; industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage (MCL 205.94o(3)(d) and (7)(a)).

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *Patrick R. Van Tiflin*, *Lynn A. Gandhi*, and *June Summers Haas*) for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Julius O. Curling*, Assistant Attorney General, for defendant.

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

MURPHY, C.J. Defendant, Department of Treasury (Department), appeals as of right the Court of Claims' order granting summary disposition in favor of plaintiff, Detroit Edison Company (DTE). This action involves the question

whether DTE's machinery and equipment located outside its generation plants and indisputably used to transmit and distribute electricity are subject to taxation under the Use Tax Act (UTA), MCL 205.91 *et seq*. The tax period at issue is January 1, 2003, through September 30, 2006. DTE claims that it is entitled to the UTA's "industrial processing" exemption pursuant to MCL 205.94o, asserting that the machinery and equipment located outside its generation plants are used both to transmit and distribute electricity and to continue the "processing" of electricity. According to DTE, electricity is not a finished good ready for sale and in a usable form for its customers absent the ongoing industrial processing beyond the generation-plant walls, because the electricity leaves the plants at extremely high and unusable voltage levels. DTE further maintains that the machinery and equipment at issue are used to inspect, control the quality of, and test the electricity, which activities all constitute industrial processing that occurs before the electricity takes the form of a finished good. The Department contends that the machinery and equipment alleged to be subject to use tax are employed solely for purposes of distributing and delivering electricity and not for industrially processing the electricity, i.e., the machinery and equipment do not change the quality, form, and character of the electricity. The Department maintains that, given those circumstances, the Legislature clearly did not provide for the exemption being claimed by DTE. We agree with DTE's arguments and hold that DTE is entitled to the claimed "industrial processing" exemption. Accordingly, we affirm the ruling of the Court of Claims.

I. BACKGROUND

DTE is an electric utility that provides electricity to residential, commercial, and industrial customers.

DTE's operations include the production and generation of electricity at its generation plants, along with the transmission and distribution of electricity. The transmission and distribution system, or electric system, is an integrated, interconnected, and interrelated network of machinery and equipment, including, but not limited to, substations, transformers, high-voltage towers, cables, and poles. In its complaint, DTE alleged that the electric system "continues to process the electricity up to, and including, the final transformer prior to the customer's location;" that this "processing of the electricity involves changes to its quality, such as changes in voltage and volt amp reactive levels ('VARs');" that "customers cannot use the electricity until certain levels of voltage and VARs are achieved," which is not met "until the electricity leaves the final transformer in a consumable form at the customer's location;" and that the various items of machinery and equipment in the electric system are used to produce, process, monitor, test, and maintain the electricity, as well as to protect, test, inspect, and control other equipment in the electric system.

Voltage levels at a generation plant range from 15,000 to 25,000 volts, while standard usable levels are from 120 to 240 volts, with some industrial customers running on as much as 480 volts. One DTE expert averred in his affidavit that "[i]t is not practical under the laws of physics . . . for generation plants to produce electricity at the 120/240 volt level as it would require a wire that is 46 [times] greater in circumference than what is available." There is no dispute that once electricity leaves a generation plant, the voltage must be both increased to allow for transmission and decreased to allow for use, which increases and decreases are accomplished through the use of

the machinery and equipment at issue.[1]

The parties submitted documentary evidence consisting of detailed expert opinions, observations, and explanations regarding the nature of electricity, its generation and production, and its transmission and distribution. Of primary significance, the Department's expert opined that "[t]hrough the use of transformers stepping up and stepping down the voltage, the composition and character of the electricity *is not changed*." (Emphasis added.) He indicated that, although transformers and other electrical equipment assist in distributing, transmitting, and delivering electricity to DTE's customers, they do not alter the nature, composition, and character of the electricity. DTE's experts generally opined that the characteristics and quality of electricity *continue to change* in the transmission and distribution phase as brought about by the machinery and equipment located outside DTE's generation plants. In an affidavit, one DTE expert explained, "As it moves through the [e]lectric [s]ystem, the characteristics of electricity continue to change as the [e]lectric [s]ystem experiences load changes (electricity demand), faults and switching spikes." He further averred that after electricity passes through a customer's meter, "the electricity becomes a finished good and is sold to the end user as a retail product." Another DTE expert stated that DTE, in providing electricity to its customers, "engage[s] in continuous processing of the electricity" and "must continuously adjust the voltage and current of the electricity." A DTE expert emphasized that "[a]t

[1] A DTE expert testified that "[t]he electricity must go to a step-up transformer, where its voltage is increased to 115,000 to 500,000 volts[;]" "[t]he high voltage is necessary to move [the electricity] . . . closer to [the] customer." He further averred that "[a]s the electricity moves through the [e]lectric [s]ystem, the high voltage must be reduced to connect to lower voltage power lines."

no time does the electric power reach the form, character, composition or specific parameters at which it is usable by the customer of the utility until it reaches the customer's meter."

The relevance of the differences in the experts' positions is that for purposes of the industrial-processing exemption to the use tax, "industrial processing" was defined during the pertinent tax period as follows:

> [T]he activity of converting or conditioning tangible personal property *by changing* the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage. [MCL 205.94o(7)(a), as added by 1999 PA 117, as amended by 2004 PA 172 (emphasis added).]

In 2009, the Department determined that there had been a use tax deficiency in DTE's payments for the period of January 1, 2003, through September 30, 2006, which adjudged deficiency was based in part on disallowance of DTE's claimed exemptions under MCL 205.94o for machinery and equipment used in industrial processing. Subsequently, DTE paid the use tax bill in full and under protest and it proceeded to file the instant suit for a refund of the use tax payments, alleging that it had been erroneously assessed for the years in dispute.[2] We note that a separate issue in the lawsuit concerned whether the Department had im-

[2] DTE had, on its own volition, originally paid use taxes on some personal property without claiming an industrial-processing exemption. As part of the instant lawsuit, DTE sought a refund of those tax payments, along with the demanded refund of the protested use tax

properly assessed use taxes against DTE with respect to purchases allowing access to certain Internet databases for purposes of research and training. This claim was summarily dismissed, and the ruling is not being challenged on appeal. On competing motions for summary disposition filed by the parties, the Court of Claims ruled that DTE was entitled to summary disposition in regard to its claim demanding a tax refund predicated on the UTA's industrial-processing exemption. The Court of Claims stated and explained:

> At the end of the distribution system, the electricity is processed through a final step down transformer at or near the customer's meter, where the voltage is reduced to the 120/240 volt range, which is the range at which the electricity is usable by the customer. The electricity then finally moves through the customer's meter, where it undergoes a final monitoring process to ensure its compliance with regulations.
>
> [The Department] does not dispute the veracity of this process. It is clear that electricity is continuing to be processed up until the point where it reaches the customer's meter, because the voltage and current levels are drastically changed multiple times at set points, the last being at to near the customer's meter, and in between these changes the voltage and current levels are constantly being adjusted to keep them constant. Certainly these types of changes constitute changes to the form, composition, quality, combination, or character of the property.
>
> This conclusion is further solidified by the affidavits of many of [DTE's] witnesses, who have uniformly attested to the fact that the electricity continues to be processed, controlled, and monitored, and that the characteristics and quality of the electricity continue to change up until the point it is finally converted to 120/240 volts at or near the customer's meter.

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payments made to the Department relative to personal property for which DTE had claimed the industrial-processing exemption.

II. ANALYSIS

A. STANDARD OF REVIEW AND SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

This Court reviews de novo a ruling by the Court of Claims on a motion for summary disposition in a case involving the UTA. *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 248; 621 NW2d 450 (2000). Issues relating to the construction of the UTA are likewise reviewed de novo on appeal. *Id*.

The motions for summary disposition were brought and decided pursuant to MCR 2.116(C)(10). In *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), this Court acknowledged the foundational principles applicable to the analysis of a motion under MCR 2.116(C)(10), stating:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

B. STATUTORY INTERPRETATION PRINCIPLES

Generally speaking, tax laws will not be extended in scope by implication or forced construction, and when there is doubt with respect to interpretation, the tax laws are to be construed in favor of the taxpayer. *Brunswick Bowling & Billiards Corp v Dep't of Treasury*, 267 Mich App 682, 685; 706 NW2d 30 (2005); *DeKoning v Dep't of Treasury*, 211 Mich App 359, 361; 536 NW2d 231 (1995) ("Generally, tax laws are construed against the government."). However, tax exemptions under the UTA and in general are disfavored, and the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption. *Guardian Indus*, 243 Mich App at 249. Tax exemptions are strictly construed against the taxpayer because exemptions represent the antithesis of tax equality. *Id*. In *Menard, Inc v Dep't of Treasury*, 302 Mich App 467, 474; 838 NW2d 736 (2013), this Court expressed that tax exemptions are disfavored, will not be inferred from statutory language, and must be proven by the party claiming the exemption. Quoting *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), which quoted 2 Cooley, Taxation (4th ed), § 672, p 1403, the *Menard* panel elaborated:

> 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 [of] the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on

> a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. 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. [*Menard*, 302 Mich App at 474-475 (quotation marks omitted).]

With respect to the relationship between our interpretation of a statute and the construction given that statute by an administrative agency charged with enforcing it, our Supreme Court observed in *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008):

> With today's decision, we reaffirm the *Boyer-Campbell* [*Co v Fry*, 271 Mich 282; 260 NW 165 (1935)] standard of review, which provides a long-standing and clear standard for appellate courts to apply to an administrative agency's interpretation of a statute. In accordance with separation of powers principles and this Court's older cases, we hold that agency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute. While the agency's interpretation may be helpful in ascertaining the legislative intent, courts may not abdicate to administrative agencies the constitutional responsibility to construe statutes. Giving uncritical deference to an administrative agency would be such an improper abdication of duty.

In *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), the Supreme Court recited the standard and well-established principles of statutory construction:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [Citations omitted.]

C. DISCUSSION

The use tax is an excise tax that is levied on every person in this state for the privilege of consuming, storing, or using tangible personal property in Michigan. MCL 205.93(1); *Podmajersky v Dep't of Treasury*, 302 Mich App 153, 162; 838 NW2d 195 (2013); *Guardian Indus*, 243 Mich App at 249; *Combustion Engineering, Inc v Dep't of Treasury*, 216 Mich App 465, 468; 549 NW2d 364 (1996). The use tax complements the sales tax and was designed to govern transactions that are not covered by the General Sales Tax Act, MCL 205.51 *et seq*. *Guardian Indus*, 243 Mich App at 249. "[T]he use tax exempts from taxation property on which a sales tax is paid[.]" *Combustion Engineering*, 216 Mich App at 468, citing MCL 205.94(a). "The legal incidence of the use tax falls upon the consumer or purchaser." *Combustion Engineering*, 216 Mich App at 468. Here,

the "tangible personal property" alleged by the Department to be subject to use tax without exemption is the machinery and equipment located outside DTE's generation plants.[3] The tax rate under the UTA is 6% of the price of the property subject to taxation. MCL 205.93(1).

With respect to the "industrial processing" exemption, during the relevant period, MCL 205.94o provided, in pertinent part, as follows:

> (1) The tax levied under this act does not apply to property sold to the following after March 30, 1999. . . :
>
> (a) An industrial processor for use or consumption in industrial processing.
>
> (b) A person, whether or not the person is an industrial processor, if the tangible personal property is intended for ultimate use in and is used in industrial processing by an industrial processor.
>
> (c) A person, whether or not the person is an industrial processor, if the tangible personal property is used by that person to perform an industrial processing activity for or on behalf of an industrial processor.
>
> * * *
>
> (3) Industrial processing includes the following activities:
>
> * * *
>
> (d) Inspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage.
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> * * *

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[3] We are not addressing a question regarding sales or use tax on electricity itself or on the transmission and distribution of electricity.

4) Property that is eligible for an industrial processing exemption includes the following:

* * *

(b) Machinery [or] equipment . . . used in an industrial processing activity . . . .

* * *

(6) Industrial processing does not include the following activities:

* * *

(b) Sales, distribution, warehousing, shipping, or advertising activities.

* * *

(7) As used in this section:

(a) "Industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.

(b) "Industrial processor" means a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail. [See 1999 PA 117 and 2004 PA 172.]

The language in MCL 205.94o(7)(a) makes clear that industrial processing must involve the converting or

conditioning of "tangible personal property."[4] The UTA, before the effective date of 2004 PA 172, which was September 1, 2004, defined "tangible personal property," in part, as follows:

> [B]eginning September 20, 1999, [it] includes electricity, natural or artificial gas, or steam and also the transmission and distribution of electricity used by the consumer or user of the electricity, whether the electricity is purchased from the delivering utility or from another provider. [MCL 205.92(*l*), as amended by 2000 PA 391, effective January 3, 2001.]

Pursuant to 2004 PA 172, "tangible personal property" was defined as follows:

> [P]ersonal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software. [MCL 205.92(k).][5]

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[4] We note, therefore, that the term "tangible personal property" is used, for our purposes, in two different contexts. First, a use tax is levied on tangible personal property, MCL 205.93(1), which property indisputably encompasses the machinery and equipment located outside DTE's generation plants. Second, relevant to the industrial-processing exemption, it is tangible personal property that must be subject to processing by way of a change in the tangible personal property's form, composition, quality, combination, or character for ultimate sale. MCL 205.94o(7)(a). We further note that machinery and equipment in general fits within the parameters of the type of property that might be eligible for the industrial-processing exemption. MCL 205.94o(4)(b).

[5] Further, also pursuant to 2004 PA 172, the Legislature separately provided that "in the same manner as tangible personal property is taxed under [the UTA]," a use tax is imposed on, "[t]he transmission and distribution of electricity, whether the electricity is purchased from the delivering utility or from another provider, if the sale is made to the consumer or user of the electricity for consumption or use rather than for resale." MCL 205.93a(1)(e). There is no argument by the parties that the statutory change in the definition of "tangible personal property" affects the outcome of this litigation and appeal. Further, it is clear that the

Here, the "tangible personal property" implicated by MCL 205.94o is coal, oil, natural gas, and electricity itself. There is no dispute that, in general, DTE is indeed an industrial processor and that it is engaged in industrial processing when using machinery and equipment located within its plants, converting or changing natural resources in the process of generating or producing electricity.[6] The question framed by the parties is whether industrial processing of electricity continues to occur once the electricity leaves a generation plant for purposes of transmission and distribution. Stated otherwise, the issue presented is whether DTE, through the use of its machinery and equipment located outside its generation plants, is engaged in "the activity of converting or conditioning tangible personal property [electricity] by changing the form, composition, quality, combination, or character of the property for ultimate sale[.]" MCL 205.94o(7)(a). Another component of this case is MCL 205.94o(3)(d), which provides, as indicated earlier, that industrial processing includes the activities of "[i]nspection, quality control, or testing to determine whether particular units of materials or products or

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Legislature was focused on the taxation of electricity and its transmission and distribution, not the "industrial processing" exemption.

[6] As indicated in an affidavit executed by a DTE expert:

> The production of electricity begins at a generation plant. The production begins with the conversion of energy, stored in fuel such as coal, oil or natural gas, into heat. This heat is used to boil water to form steam. The steam is injected into a turbine to cause the turbine blades to create rotations. The turbine shaft is coupled to the shaft of a generator on which a coil of wire is built. As the shaft rotates, other coils of wire remain fixed. A direct current is sent through the coil on the rotating generator shaft and causes a rotating magnetic field within the fixed coils. The rotation of the magnetic field induces a current into the fixed coils. This current is the electric product as produced at the generator. At the generator, the voltage level ranges from 15,000 to 25,000 volts. [Numerals omitted; paragraph format altered.]

processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage." DTE presented extensive documentary evidence indicating that the machinery and equipment at issue are used not only to change the form and character of electricity, but to inspect, test, and control the electricity in order to determine whether it conforms to specified parameters at a time before the electricity becomes a finished good. The documentary evidence reflected that DTE is required to engage in such monitoring to be in compliance with rules and regulations of the Michigan Public Service Commission (MPSC) and federal agencies. A DTE expert averred, "In order to ensure our compliance with the necessary MPSC and other industry standards, regulations and ratings, we must constantly monitor the electricity, as well as monitor the equipment necessary to process and control the electricity[.]" The Department does not cite any documentary evidence that counters the position of DTE's experts that the machinery and equipment are used to inspect, test, and control the quality of the electricity.

We conclude that DTE's machinery and equipment located outside its generation plants are used in the activity of converting and conditioning electricity by changing the quality, form, character, or composition of the electricity for ultimate sale at retail up until the time the electricity reaches its customers' meters, at which point it becomes a finished good. We initially note that, as opposed to the extremely detailed scientific views espoused by DTE's experts, which explain and elaborate on the physics involved and why the electricity continues to be "processed," the one expert relied on by the Department submitted an affidavit that is essentially conclusory in form, cursorily stating that the composition, nature, and character of electricity does

not change during transmission and distribution. "[M]ere conclusory allegations within an affidavit that are devoid of detail are insufficient to create a question of fact." *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006), citing *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). Further, in his deposition, the Department's expert testified:

> *Q.* So at the point where these lines are coming out of generation across the transmission line before it gets to the bulk power station, that — the electricity at that voltage level isn't in a form where it's usable to any customer; is that right? Nobody can tap into 138,000 volt[s]?
>
> *A.* No, most likely not, unless you had some large industrial user . . . .
>
> *Q.* But for the bulk of our customers, they're not going to be able to use that power that's on a high voltage transmission line until it's transformed?
>
> *A. Until it's transformed, yes*. [Emphasis added.]

While the Department's expert generally testified in his deposition in a manner consistent with the Department's position, he struggled at times to do so, e.g., "I guess that would be considered conditioning, yeah, because we want to change that phase angle [relative to voltage and current] to something different."

The terms "form, composition, quality, combination, or character," MCL 205.94o(7)(a), are sufficiently broad and expansive to encompass voltage and current changes in electricity as it travels through the transmission and distribution system. We are in accord with the analysis of the Court of Claims. Additionally, we find it indisputable that electricity is not a finished good ready for sale until it reaches the meters of DTE's customers. The expert testimony and affidavits clearly indicated that electricity is not in usable form for

customers, and is in fact a danger or hazard to customers, until it completes its passage through the transmission and distribution system.

Furthermore, as discussed earlier, the Department has effectively failed to challenge DTE's position under MCL 205.94o(3)(d) that the machinery and equipment in dispute are used to inspect, test, and control the quality of electricity as it flows through the transmission and distribution system. Under MCL 205.94o(3)(d), these functions or activities are defined as constituting industrial processing. And again, we conclude that electricity is not a finished good until it reaches the meters of DTE's customers.[7]

At oral argument, the Department adamantly contended that the case was easily decided under MCL 205.94o(6)(b), which provides that "[i]ndustrial processing does not include . . . distribution . . . activities," given that it is beyond reasonable dispute that the machinery and equipment are used to distribute electricity to customers. DTE argues that MCL 205.94o(6)(b) is only implicated after the activity of industrial processing is completed and a finished good is produced. MCL 205.94o(7)(a), which provides that industrial processing "ends when finished goods first come to rest in finished goods inventory storage," and MCL 205.94o(3)(d), which contains comparable language, can be construed to complement the distribution-activity exclusion in MCL 205.94o(6)(b).

[7] We also note that because "electricity" was and is expressly included in the definition of "tangible personal property," MCL 205.92(*l*), as amended by 2000 PA 391, effective January 3, 2001; MCL 205.92(k), as amended by 2004 PA 172, effective September 1, 2004, and because it is "tangible personal property" that must be converted or conditioned, MCL 205.94o(7)(a), it could be argued that it was envisioned that "electricity" might be subject to ongoing and continuing industrial processing.

The Legislature seemingly envisioned a simple manufacturing situation in which a company engages in industrial processing at its plant to produce a product, the product is in the form of a finished good and ready for retail sale while awaiting transport at the company's plant, and then the company ships or distributes the product to a customer. In that situation, where there is a clean line of demarcation between production and distribution, one can more easily and reasonably read MCL 205.94o(3)(d), (6)(b), and (7)(a) *in pari materia*, *Tyler v Livonia Pub Sch*, 459 Mich 382, 391-392; 590 NW2d 560 (1999), allowing an exemption for equipment in the plant used to produce the product, but disallowing an exemption for any equipment used to distribute the product from the plant to the customer. The case at bar does not present such a simple fact pattern.

In light of our holding earlier in this opinion, we have a situation in which machinery and equipment are concurrently used in a unified system for purposes of both distribution *and* industrial processing. In such a situation, the caselaw is clear that the "industrial processing" exemption applies to the machinery and equipment *in full*. In *Mich Allied Dairy Ass'n v State Bd of Tax Admin*, 302 Mich 643, 649-651; 5 NW2d 516 (1942), our Supreme Court affirmed the circuit court's allowance of a full exemption with respect to milk bottles and cans that were used for distribution *and* for the industrial processing[8] of milk:

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[8] The Court explained how the milk bottles and cans were used to keep the milk cool and free from germs, additionally observing:

> Milk is not marketable until rendered suitable for purchase and consumption from the point of view of the consumer, for only milk which, after pasteurization, has been cooled and protected against subsequent contamination or deterioration may be used

> The question is raised whether the exemption should apply inasmuch as the milk bottles and cans are also used as delivery containers, the latter use not being industrial processing. Without considering the practical disadvantages of using one set of bottles and cans for refrigeration and another for delivery, we believe that the one use of bottles and cans in industrial processing makes them exempt from the general sales and use taxes, *notwithstanding the fact that they are also put to another use not in industrial processing*.
>
> Where an article has more than one use, one or more (but not all) of which are within the agricultural producing or industrial processing exemptions, the legislature could have provided that the portion of the value of the article representing its nonexempt uses should bear the tax, but it has not done so. [Emphasis added.]

"[C]oncurrent taxable use with an exempt use does not remove the protection of exemption." *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 495; 618 NW2d 917 (2000). When equipment is used from the outset in industrial processing as well as otherwise, the full exemption is to be allowed, and apportionment is not permitted "when the equipment involved is put to mixed use, but in a unified process." *Mich Bell Tel Co v Dep't of Treasury*, 229 Mich App 200, 211-212; 581 NW2d 770 (1998). Accordingly, DTE is entitled to the claimed "industrial processing" exemption in full, despite the fact that the machinery and equipment in dispute are used, in part, for a nonexempt purpose, i.e., distribution, given that the machinery and

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> with confidence that it has been rendered safe as regards pathogenic bacteria. [*Id*. at 648-649 (citation and quotation marks omitted).]

By analogy, electricity is not marketable and safe, given the voltage levels, until it reaches a customer's meter. *Mich Allied Dairy* thus provides further support for our holding that DTE uses the machinery and equipment for purposes of industrial processing.

equipment are concurrently being used to also industrially process electricity, all as part of a unified process or system.

Finally, we must address a rule promulgated by the Department, Mich Admin Code, R 205.115(4), which has existed for many years, and which provides:

> The sale of tangible personal property consumed or used in the transmission or distribution of electricity . . . is taxable. Such transmission or distribution starts at the place where the product leaves the immediate premises from which it is manufactured.

Rule 205.115(4) would clearly preclude the exemption sought by DTE. However, "interpretive rules are invalid when they conflict with the governing statute . . . ." *Guardian Indus*, 243 Mich App at 254. Here, R 205.115(4) conflicts with the UTA and the industrial-processing exemption as construed by us today; therefore, the provision is invalid and unenforceable.

III. CONCLUSION

The machinery and equipment located outside DTE's generation plants, which the Department asserts are subject to use tax, are used to transmit and distribute electricity, but they are also used for industrial processing with respect to the electricity. Therefore, the machinery and equipment are exempt from use tax under MCL 205.94o as found by the Court of Claims. DTE is entitled to the "industrial processing" exemption.

Affirmed. Having fully prevailed on appeal, DTE is awarded taxable costs pursuant to MCR 7.219.

FITZGERALD and BORRELLO, JJ., concurred with MURPHY, C.J.

PEOPLE v ROSCOE

Docket No. 311851. Submitted January 8, 2014, at Lansing. Decided January 14, 2014, at 9:00 a.m. Leave to appeal sought.

A jury in the Washtenaw Circuit Court, Archie C. Brown, J., convicted Shane N. Roscoe of felony murder, MCL 750.316(1)(b); safe breaking, MCL 750.531; breaking and entering a building with intent to commit a larceny, MCL 750.110, and assaulting, resisting, or obstructing a police officer, MCL 750.81d. The charges arose from the breaking and entering of a car dealership at which defendant had previously worked. During the break-in, an employee was beaten and run over with his own vehicle, and he subsequently died. Defendant appealed.

The Court of Appeals *held*:

1. Under MRE 804(b)(6), the forfeiture-by-wrongdoing exception to the hearsay rule, a defendant can forfeit the right to exclude hearsay by his or her own wrongdoing. The rule provides that a statement is not excluded under the hearsay rule if the declarant is unavailable and the statement is offered against a party who engaged in or encouraged wrongdoing that was intended to and did procure the unavailability of the declarant as a witness. To admit evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that (1) the defendant engaged in or encouraged wrongdoing, (2) the wrongdoing was intended to procure the declarant's unavailability, and (3) the wrongdoing did procure the unavailability. The forfeiture-by-wrongdoing rule is also an exception to a defendant's constitutional right of confrontation. Both the Sixth Amendment and the court rule incorporate a specific intent requirement. Therefore, for the forfeiture-by-wrongdoing rule to apply, the defendant must have specifically intended his or her wrongdoing to render the witness unavailable to testify.

2. The trial court erred by admitting under the forfeiture-by-wrongdoing rule a statement from the deceased victim that identified defendant as his attacker. The admission of the statement violated both the rules of evidence and defendant's right to confront the witness because the trial court failed to find that defendant had the requisite specific intent and, in fact, stated that

the issue of intent was not before it, which was a clear abuse of discretion. The specific intent requirement necessitates the prosecution's showing that the defendant acted with, at least in part, the particular purpose of causing the witness's unavailability, rather than merely knew that the wrongdoing might cause the witness's unavailability. While there was evidence from which the jury could have inferred that defendant killed the victim because he was caught trying to steal from the dealership, it did not support an inference that defendant specifically intended to kill the victim to prevent him from testifying at trial, particularly given that there were no pending charges against defendant. The victim was hit in the head before the breaking and entering had been reported, and there was no evidence that the victim said he was going to call the police. Without specific findings by the trial court regarding intent, defendant's action were as consistent with the inference that he intended the breaking and entering to go undiscovered as they were with an inference that he specifically intended to prevent the victim from testifying.

3. Because the error regarding forfeiture by wrongdoing was not outcome determinative, however, it did not warrant reversal under evidentiary or constitutional standards. The prosecution presented ample other evidence from which a jury could conclude that defendant killed the victim, including (1) the fact that defendant matched the general description given by the victim in an admissible statement, (2) defendant's asking his wife, who worked at the hospital, to look into the victim's medical records, and (3) defendant's Internet searches regarding the incident. This was evidence of consciousness of guilt. Defendant also still had keys to the dealership, and there was no evidence of forced entry. He made statements to the police that showed that he had personal knowledge of the victim's attack because the details had not been released to the public. Moreover, defendant had a history of stealing from dealerships, and the police found stolen car parts unrelated to the present offense at defendant's home. Finally, defendant's ex-wife testified that defendant told her that he and another individual broke into the dealership and something went wrong, so he hit the victim twice in the head with a brick, which was consistent with the victim's injuries. In light of this other evidence, the erroneous admission of the victim's statement was not outcome determinative.

4. Defendant's counsel was not ineffective for failing to object on confrontation grounds to the admission of the victim's statement. To prove that he or she received ineffective assistance of counsel, a defendant must show (1) that defense counsel's perfor-

mance was deficient in that it fell below an objective standard of professional reasonableness and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's performance. There is a presumption of effective assistance of counsel, and the burden is on the defendant to prove otherwise. An appellate court should neither substitute its judgment for that of counsel on matters of trial strategy nor use the benefit of hindsight when assessing counsel's competence. Although defense counsel here did not cite the Sixth Amendment as grounds to exclude the evidence, he vigorously argued that there was no evidence that defendant specifically intended to kill the victim to prevent him from testifying. Because the specific-intent requirement applies to the analysis under both the rules of evidence and the Sixth Amendment, the constitutional question will often go hand-in-hand with the evidentiary question. Thus, the fact that defense counsel did not specifically address the confrontation argument did not render his performance deficient. Given that the analysis for the evidentiary and constitutional questions is the same, it is unlikely that the trial court would have ruled differently had defendant actually raised a confrontation argument. Moreover, the admission of the victim's statement did not affect the outcome of the trial.

5. The trial court did not improperly admit evidence of other larcenies by defendant, including thefts from car dealerships, and there accordingly was no due process violation in the admission of the other-acts evidence. Under MRE 404(b)(1), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when material. The trial court must determine (1) whether the evidence is offered for a proper purpose, (2) whether the evidence is relevant under MRE 401 and MRE 402, and (3) whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403. Upon request, the trial court may provide a limiting instruction. The prosecution offered the evidence to prove that defendant had a common scheme or plan of breaking into businesses and stealing items that when sold together had a higher resale value, which was a proper purpose under MRE 404(b). The evidence was relevant because it showed that defendant had the same scheme or plan in this case, and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. The trial court gave a limiting

instruction, which helped alleviate any danger of unfair prejudice, given that jurors are presumed to follow their instructions.

6. The trial court did not err by denying defendant's motion to disqualify the trial judge. MCR 2.003(C)(1)(b) provides that disqualification of a judge is warranted when from objective and reasonable perceptions the judge has either a serious risk of actual bias affecting the due process rights of a party or failed to adhere to the appearance-of-impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. A trial judge's ruling regarding the admission of evidence, no matter how erroneous, is not grounds for disqualification. Judicial disqualification based on due process grounds is reserved for extreme cases, and a ruling against a defendant, even if erroneous, generally does not create a serious, objective risk of actual bias that rises to an unconstitutional level. Although the trial court in this case incorrectly applied the forfeiture-by-wrongdoing rule, one erroneous ruling does not give the appearance of impropriety.

7. While defendant alleged instances of prosecutorial misconduct, they did not deny him his due process right to a fair trial. Because a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. Issues of prosecutorial misconduct are decided case by case, and the reviewing court must examine the entire record and evaluate the prosecutor's remarks in context. Defendant argued that the prosecutor committed misconduct by stating during her opening statement that defendant stole snowmobiles and a trailer with his nephew. However, the opening statement is the appropriate time to state the facts that will be proved at trial. Moreover, the trial court ruled that those prior acts could properly be admitted, and the prosecutor presented evidence of the acts at trial. The prosecutor did commit misconduct when she stated that she had personal knowledge that a prosecution witness was lying. A prosecutor may not vouch for the credibility of a witness or suggest that he or she has some special knowledge that the witness is testifying truthfully, and similarly may not suggest that he or she has some special knowledge that the witness is testifying untruthfully. The error was not outcome determinative, however, and had defendant objected, an immediate curative instruction would have been sufficient to cure the error. Additionally, the prosecutor called other witnesses who testified about defendant's involvement with the snowmobile incident. Thus, although the prosecutor stated that she had special knowledge of the witness's untruthfulness, the jury eventually heard other testimony that the witness was lying.

8. Defendant argued that the trial court violated MCR 6.411 when it did not dismiss an alternate juror by random draw. Defense counsel, however, acting on behalf of defendant, requested that the juror be selected as one of the alternates because he was scheduled to take a test. The prosecutor agreed, and defendant did not object. Thus, defendant waived his right to have the jury alternates chosen by random draw, which extinguished the underlying error.

Affirmed.

1. EVIDENCE — HEARSAY — FORFEITURE BY WRONGDOING — INTENT TO PROCURE DECLARANT'S UNAVAILABILITY.

MRE 804(b)(6), the forfeiture-by-wrongdoing exception to the hearsay rule, provides that a statement is not excluded under the hearsay rule if the declarant is unavailable and the statement is offered against a party who engaged in or encouraged wrongdoing that was intended to and did procure the unavailability of the declarant as a witness; the rule is also an exception to a defendant's Sixth Amendment right of confrontation; to admit evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that (1) the defendant engaged in or encouraged wrongdoing, (2) the wrongdoing was intended to procure the declarant's unavailability, and (3) the wrongdoing did procure the unavailability; for the forfeiture-by-wrongdoing rule to apply, the defendant must have specifically intended his or her wrongdoing to render the witness unavailable to testify, which requires the prosecution to show that the defendant acted with, at least in part, the particular purpose of causing the witness's unavailability, rather than merely knew that the wrongdoing might cause the witness's unavailability.

2. JUDGES — DISQUALIFICATION — ERRONEOUS RULINGS.

MCR 2.003(C)(1)(b) provides that disqualification of a judge is warranted when from objective and reasonable perceptions the judge has either a serious risk of actual bias affecting the due process rights of a party as enunciated in *Caperton v A T Massey Coal Co, Inc*, 556 US 868 (2009), or failed to adhere to the appearance-of-impropriety standard set forth in Canon 2 of the Code of Judicial Conduct; a trial judge's ruling regarding the admission of evidence, no matter how erroneous, is not grounds for disqualification, and one erroneous evidentiary ruling does not give the appearance of impropriety.

3. PROSECUTING ATTORNEYS — MISCONDUCT — VOUCHING FOR WITNESSES' CREDIBILITY.

The test for prosecutorial misconduct is whether a defendant was

denied a fair and impartial trial; issues of prosecutorial misconduct are decided case by case, and the reviewing court must examine the entire record and evaluate the prosecutor's remarks in context; a prosecutor may not vouch for the credibility of a witness or suggest that he or she has some special knowledge that the witness is testifying truthfully, and similarly may not suggest that he or she has some special knowledge that the witness is testifying untruthfully.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Mark Kneisel*, Assistant Prosecuting Attorney, for the people.

Shane N. Roscoe, *in propria persona*, and *Jonathon B. D. Simon* for defendant.

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

PER CURIAM. Defendant appeals as of right his jury-trial convictions of first-degree felony murder, MCL 750.316(1)(b); safe breaking, MCL 750.531; breaking and entering a building with intent to commit a larceny, MCL 750.110, and assaulting, resisting, or obstructing a police officer, MCL 750.81d. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to a prison term of life without parole for the felony-murder conviction. He was also sentenced to terms of 19 to 50 years' imprisonment for the safe-breaking conviction, 152 to 240 months' imprisonment for the breaking-and-entering conviction, and 1 to 2 years' imprisonment for the resisting-a-police-officer conviction. On appeal, defendant raises issues in an appellate brief prepared by appellate counsel and in a pro se supplemental brief pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. We affirm.

This case arises out of a breaking and entering at Jim Bradley's Pontiac dealership in Ann Arbor that resulted

in the death of one of the employees. It was alleged that defendant and his cousin, Jonathon Aiden, broke into the dealership, where they had previously worked, and stole paint and chemical hardeners. In the process, one of the night workers discovered the two men, and as a result, they hit him in the head twice with a blunt object and then ran him over with his own vehicle.

I. FORFEITURE BY WRONGDOING

In the appellate brief, defendant first argues that the trial court abused its discretion by admitting the victim's hearsay statement pursuant to the forfeiture-by-wrongdoing rule, MRE 804(b)(6), and violated his right to confrontation in doing so. We agree, but conclude that reversal is not warranted.

To the extent defendant argues that admission of the evidence violated the rules of evidence, we review this preserved evidentiary error for an abuse of discretion. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). "A preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Id*. (quotation marks and citation omitted). However, to the extent that defendant argues that the admission of the evidence violated his confrontation right, we review this unpreserved constitutional error for plain error affecting defendant's substantial rights. See *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003) (noting that an objection based on the rules of evidence does not preserve the issue of whether the admission violated a constitutional right); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must show that the error affected the outcome of the lower court proceedings, and reversal is only warranted if the defendant is actually innocent or if

the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Carines*, 460 Mich at 763.

Under MRE 804(b)(6), which is commonly known as the forfeiture-by-wrongdoing rule, "[a] defendant can forfeit his right to exclude hearsay by his own wrongdoing." *Burns*, 494 Mich at 110-111. This rule provides that a statement is not excluded by the hearsay rule if the declarant is unavailable and the " 'statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.' " *Id*. at 110, quoting MRE 804(b)(6) (alteration in original). "To admit evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the declarant's unavailability; and (3) the wrongdoing did procure the unavailability." *Burns*, 494 Mich at 115.

The forfeiture-by-wrongdoing rule is also an exception to defendant's constitutional right of confrontation. *Id*. at 111. Both the Sixth Amendment and the court rule incorporate a specific-intent requirement. *Id*. at 111, 113-114. Thus, for the forfeiture-by-wrongdoing rule to apply, the defendant must have specifically intended his wrongdoing to render the witness unavailable to testify. *Id*. at 111, 113. The parties in this case do not dispute that the victim's statement was testimonial and, thus, subject to Sixth Amendment scrutiny.

Defendant argues that the victim's statement made on August 23, 2006, which identified defendant as the attacker, should have been excluded.[1] We agree. However, we find that because the erroneous admission of

[1] The victim made two other statements on August 20 and 26, 2006, but defendant does not challenge those statements on appeal.

the evidence was not outcome determinative, reversal is not warranted. The trial court's admission of the victim's August 23, 2006 statement violated both the rules of evidence and defendant's right to confront the witness because the trial court failed to make a factual finding that defendant had the requisite specific intent. See *Burns*, 494 Mich at 117. In fact, the trial court stated that the issue of intent was not before the court, which was a clear abuse of discretion because that was the main issue the trial court should have determined.

The prosecution, however, argues that there was sufficient evidence presented from which one could easily infer that defendant intended to murder the victim to prevent him from testifying at trial. However, as was the case in *Burns*, the record does not compel such a finding. *Id*. at 115. Although there was evidence from which to infer that defendant killed the victim because he was caught trying to steal from the dealership, this does not support an inference that defendant specifically intended to kill the victim to prevent him from testifying at trial, particularly given that there were no pending charges against defendant. "[A] defendant's wrongdoing *after* the underlying criminal activity has been reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability." *Id*. at 116. In this case, the victim was hit in the head before the breaking and entering had been reported, and there was no evidence that the victim said that he was going to call the police. As our Supreme Court stated, without specific findings by the trial court regarding intent, defendant's action were as consistent with the inference that his intention was that the breaking and entering he was committing go undiscovered as they were with an inference that he specifically intended to prevent the victim from testifying. *Id*. at 116-117. Further, the

specific-intent requirement demands that the prosecution "show that defendant acted with, at least in part, the particular purpose to cause [the witness's] unavailability, rather than mere knowledge that the wrongdoing may cause the witness's unavailability." *Id*. at 117. Thus, given that the trial court failed to make findings of defendant's specific intent to prevent the victim from testifying, it was error to admit the victim's August 23, 2006 statement.

However, because this error was not outcome determinative, it does not warrant reversal under evidentiary or constitutional standards. See *id*. at 110; *Carines*, 460 Mich at 763. The prosecution presented ample other evidence from which a jury could conclude beyond a reasonable doubt that defendant killed the victim. Defendant was a white male, with dark hair, and a former employee of the dealership, which matched the general description given by the victim.[2] Following the incident, defendant asked his wife, who worked at the hospital, to look into the victim's medical records. There was also evidence that he conducted Internet searches regarding the incident, and he also searched the Ann Arbor death notices and the felonious-assault statute. This is evidence of consciousness of guilt. Additionally, defendant told the police that he still had keys to the dealership, and notably, there was no evidence of forced entry. He also made statements to the police that showed that he had personal knowledge of

[2] Although defendant does not challenge this evidence on appeal, the victim's statement made on August 20, 2006, which provided that information, was admissible as a dying declaration. It is clear from the victim's repetitive statement "I'm dying, please get my mother" that he believed death was imminent, and given that he had suffered a severe head injury, the surrounding circumstances clearly indicate that the victim was *in extremis*. See MRE 804(b)(2); *People v Stamper*, 480 Mich 1, 3-4; 742 NW2d 607 (2007).

the victim's attack given that the details had not been released to the public. Further, there was evidence that defendant had a history of stealing from dealerships, and while executing a search warrant at defendant's home, the police found stolen car parts unrelated to the present offense. Finally, defendant's ex-wife testified that defendant told her that he and Aiden had broken into the dealership and something went wrong, so he hit the victim twice in the head with a brick, which was consistent with the victim's injuries. She also testified that defendant told her that they took a cell phone from the dealership and Aiden called 911 before throwing it out the window, and other evidence presented supported this testimony. Thus, in light of this other evidence, the erroneous admission of the victim's statement was not outcome determinative.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues in the appellate brief that defense counsel was ineffective for failing to object to the admission of the victim's statement on confrontation grounds. We disagree.

Our review is "limited to mistakes apparent from the record" because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request an evidentiary hearing as required by *People v Ginther*.[3] *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

To prove that defendant received ineffective assistance of counsel, he must show (1) "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness" and (2) that there is a reasonable probability that the

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

outcome of the trial would have been different but for counsel's performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007), see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a presumption of effective assistance of counsel, and the burden is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). An appellate court should neither "substitute [its] judgment for that of counsel on matters of trial strategy, nor . . . use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

It is not apparent from the record that defense counsel was ineffective for failing to object to the admission of the victim's statement on confrontation grounds. Although defense counsel did not cite the Sixth Amendment as grounds to exclude the evidence, he vigorously argued at the motion hearing that there was no evidence that defendant intended to kill the victim to prevent him from testifying. As discussed, the intent requirement applies to both the rules of evidence and the Sixth Amendment analysis, and "the constitutional question will often go hand-in-hand with the evidentiary question . . . ." *Burns*, 494 Mich at 113-114. Thus, the fact that defense counsel did not specifically address the confrontation argument does not render his performance deficient. Additionally, given that the analysis for the evidentiary and constitutional questions is the same, it is unlikely that the trial court would have ruled differently had defendant actually raised a confrontation argument. This is particularly so considering that the trial court stated that the issue before the court was not intent; it was whether defendant had forfeited the right to confront the witness. Further, as discussed, the admission of the victim's statement did

not affect the outcome of the trial. Thus, even if defense counsel's performance was deficient, there is not a reasonable probability that the outcome of the trial would have been different. Accordingly, defendant has failed to establish that defense counsel's performance denied him his constitutional right to effective assistance of counsel.

III. OTHER-ACTS EVIDENCE

Next, defendant argues in the appellate brief that the trial court violated the rules of evidence and due process of law by improperly admitting other-acts evidence. We disagree.

We review this preserved evidentiary error for an abuse of discretion. *Burns*, 494 Mich at 110.

Defendant argues that the trial court erred by admitting the following bad acts: (1) a 2000 larceny of snowmobiles and a trailer, (2) a 2008 larceny of black India granite and bags of setting materials from a job site in Kentucky where defendant was working, and (3) three incidents in 1991 in which defendant stole items from three separate car dealerships.

MRE 404(b)(1) provides:

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

In determining the admissibility of other-acts evidence, the trial court must determine (1) whether the evidence is offered for a proper purpose under MRE 404(b), (2)

whether the evidence is relevant under MRE 401 and MRE 402, and (3) whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Also, upon request, the trial court may provide a limiting instruction. *Id*. at 75.

The prosecution offered evidence to prove that defendant had a common scheme or plan of breaking into businesses and stealing items that when sold together have a higher resale value, which is a proper purpose under MRE 404(b). Additionally, the evidence was relevant in that it showed that defendant had the same scheme or plan in the case at bar. The threshold for relevance is minimal, and *any* tendency is sufficient. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence shows a common scheme or plan by defendant of targeting car dealerships. The evidence also shows that defendant has a tendency to steal items that may not be of much value to the average person, but actually have a high resale value when sold together, such as the granite and setting materials. The similarity between the other incidents and this case make the evidence highly probative of a common scheme or plan, particularly because in this case defendant targeted a car dealership and the items missing were paint and hardening chemicals, which to the average person have little value, but defendant had knowledge of their high resale value. Additionally, the trial court provided a limiting instruction, which can help to alleviate any danger of unfair prejudice, given that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, the trial court did not err by

admitting the evidence pursuant to MRE 404(b), and as such, there was no due process violation.

Accordingly, we find no errors in defendant's appellate brief warranting reversal.

IV. STANDARD 4 BRIEF ISSUES

Defendant also raises three claims of error in a separate, Standard 4 brief. First, defendant argues that the trial court erred by denying his motion to disqualify the trial judge. We disagree.

"When this Court reviews a decision on a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion, while the application of the facts to the relevant law is reviewed de novo." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Defendant argues that the trial judge should have been disqualified pursuant to MCR 2.003(C)(1)(b), which provides that disqualification of a judge is warranted when

> [t]he judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v* [*A T*] *Massey* [*Coal Co, Inc*], [556] US [868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

Contrary to defendant's argument, a trial judge's ruling regarding the admission of evidence, no matter how erroneous, is not grounds for disqualification. See *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). Judicial disqualification based on due process grounds is reserved for extreme cases. *Caperton*, 556 US at 890. And a ruling against a defendant, even if

erroneous, does not create a serious, objective risk of actual bias that rises to an unconstitutional level. See *id*. at 886-887. Additionally, although the trial judge incorrectly applied the forfeiture-by-wrongdoing rule, one erroneous ruling does not give the appearance of impropriety. Accordingly, defendant has failed to prove that judicial disqualification was warranted under MCR 2.003(C)(1)(b).

Next, defendant argues that there were instances of prosecutorial misconduct that denied him his due process right to a fair trial. We disagree.

We review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is only warranted if defendant was actually innocent and the plain error caused defendant to be convicted or "if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' " regardless of defendant's innocence. *Id*. at 454, quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64.

First, defendant argues that the prosecutor committed misconduct by stating during the opening statement that defendant stole snowmobiles and a trailer with his nephew. However, the "[o]pening statement is the appropriate time to state the facts that will be proved at trial." *People v Ericksen*, 288 Mich App 192,

200; 793 NW2d 120 (2010). Before trial, the trial court ruled that these prior acts of defendant could properly be admitted at trial, and the prosecutor presented evidence of the acts at trial. Thus, the prosecutor did not commit misconduct by referring to defendant's involvement with stealing snowmobiles.

Second, defendant argues that the prosecutor committed misconduct when she stated that she had personal knowledge that the government's witness was lying. It is true that a prosecutor may not vouch for the credibility of a witness or suggest that he or she has some special knowledge that the witness is testifying truthfully. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Similarly, a prosecutor may not suggest that he or she has some special knowledge that the witness is testifying untruthfully. Accordingly, the prosecutor erred in this regard. However, this error was not outcome determinative. *Unger*, 278 Mich App at 235. Had defendant objected to this instance of prosecutorial misconduct, an immediate curative instruction would have been sufficient to cure the error. Additionally, the prosecutor called other witnesses who testified about defendant's involvement with the snowmobile incident. Thus, although the prosecutor stated that she had special knowledge of the witness's untruthfulness, the jury eventually heard other testimony that the witness was lying. Accordingly, the prosecutor's remarks did not deprive defendant of his due process right to a fair trial.

Finally, defendant argues that the trial court violated MCR 6.411 when it did not dismiss an alternate juror by a random draw. However, defense counsel, acting on behalf of defendant, requested that the juror be selected as one of the alternates because of a test he was scheduled to take. The prosecution agreed and defen-

dant did not object. Thus, defendant waived his right to have the jury alternates chosen by random draw, which extinguished the underlying error, and defendant may not seek appellate review of this issue. *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012).

Accordingly, we also find no errors in defendant's Standard 4 brief warranting reversal.

Affirmed.

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

AFT MICHIGAN v MICHIGAN

Docket Nos. 313960 and 314065. Submitted August 6, 2013, at Lansing. Decided January 14, 2014, at 9:05 a.m. Leave to appeal sought.

AFT Michigan and other labor organizations brought an action in the Court of Claims against the state of Michigan and others, challenging the constitutionality of certain provisions of 2012 PA 300, which require members of the Michigan Public School Employees' Retirement System (MPSERS) to increase their payroll deductions in order to maintain the 1.5% pension factor that formerly applied to public school employee pensions and to contribute 3% of their compensation in order receive retiree healthcare benefits. The Michigan Education Association and other labor organizations filed a similar action in the Court of Claims against the state of Michigan and others. The Court of Claims consolidated the actions. The court, Rosemarie E. Aquilina, J., granted summary disposition in favor of defendants with regard to the constitutionality of the challenged pension and healthcare provisions in 2012 PA 300. Plaintiffs appealed. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The federal and state Constitutions prohibit the impairment of contracts. There is a three-step inquiry to determine if a state statute violates those prohibitions. First, the court must determine whether the state law has operated as a substantial impairment of a contractual relationship. Second, if there is a substantial impairment, the court must determine whether the state law serves a significant and legitimate public purpose. And third, if there is a legitimate public purpose, the court must examine whether the adjustment of rights and responsibilities of the contracting parties is based on reasonable conditions and is of a character appropriate to the public purpose justifying the adoption of the legislation. In this case, there was no impairment of a contractual relationship. The booklets prepared by the state that described the pension benefits to which members of MPSERS were formerly entitled did not create an enforceable contract, but rather were simply informational brochures concerning the then existing pension formula. Nor did the enactment of 1980 PA 300 create an

enforceable contract that the multiplier used to calculate pension benefits would remain 1.5%. There is a strong presumption that statutes do not create contractual rights, and there was no language in 1980 PA 300 indicating that the Legislature intended to surrender its legislative powers through the creation of contractual rights. Finally, Const 1963, art 9, § 24, states that the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof. Section 24, however, only protects accrued benefits. 2012 PA 300 does not impair accrued benefits. Members of MPSERS will still have the 1.5% multiplier applied to services rendered before December 2012. It is only future services that are subject to a reduced multiplier should a member elect not to contribute 4% to his or her pension fund. Therefore, there was no impairment of a contract in violation of either the state or federal Constitutions.

2. Article 9, § 24 of Michigan's Constitution provides that the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof, and that financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities. 2012 PA 300 does not violate the first clause of Const 1963, art 9, § 24 because the constitutional provision only protects accrued benefits, and the act does not diminish accrued benefits—only future benefits are implicated. Nor does 2012 PA 300 violate the second clause of Const 1963, art 9, § 24 by using current contributions to finance unfunded accrued liabilities. Const 1963, art 9, § 24 mandates that public employee pension systems be funded to a level that includes unfunded accrued liabilities, which are the estimated amounts that will be needed according to actuarial projections to fulfill presently existing pension obligations. A distinction must be drawn between the right to receive pension benefits and the funding method adopted by the Legislature to assure that monies are available for the payment of those benefits.

3. With regard to retiree healthcare benefits, those benefits are not accrued financial benefits protected by Const 1963, art 9, § 24. Further, employee contributions under 2012 PA 300 are voluntary. A member may choose to continue to participate in the retiree healthcare program and contribute 3% of his or her salary in order to do so, or the member may opt out of the program. Members who opt in but fail to qualify for retiree healthcare benefits will be refunded their contributions after they turn 60. Accordingly, 2012

PA 300 does not suffer from the same constitutional deficiencies identified in *AFT Mich v Michigan*, 297 Mich App 597 (2012), with regard to former MCL 38.1343e, as enacted by 2010 PA 75. By seeking voluntary participation from members, 2012 PA 300 rationally relates to the legitimate governmental purpose of maintaining healthcare benefits for retirees while easing financial pressure on public schools; therefore, it does not violate members' substantive due process rights. Similarly, because participation in the retiree healthcare system is now voluntary, there is no taking in violation of the state or federal Constitutions.

Affirmed.

GLEICHER, J., concurred in the result. With regard to retiree healthcare benefits, the majority reasons that the voluntary nature of 2012 PA 300 cured the constitutional infirmities identified in *AFT*, and plaintiffs fail to persuasively counter that conclusion. Plaintiffs' pension benefits are clothed with constitutional protection from impairment or diminishment under Const 1963, art 9, § 24, but 2012 PA 300 does not impair or reduce benefits earned pursuant to the 1.5% multiplier before 2012 PA 300 took effect, and the Legislature may properly attach new conditions for earning financial benefits that have not yet accrued. Further, with regard to the second clause of Const 1963, art 9, § 24, if 2012 PA 300 resulted in the collection of money used to meet pre-2012 unfunded liabilities through an improper borrowing scheme, as applied the act would raise constitutional concerns. However, the evidence necessary to evaluate that issue was not before the Court, and 2012 PA 300 passed constitutional muster with regard to the issues raised and presented.

1. CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACTS BY GOVERNMENT — INFORMATIONAL BROCHURES — PUBLIC SCHOOL EMPLOYEES — PENSION BENEFITS.

The booklets prepared by the state that described the pension benefits to which members of the Michigan Public School Employees' Retirement System were formerly entitled did not create an enforceable contract, but were simply informational brochures concerning the then existing pension formula.

2. CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACTS BY GOVERNMENT — STATUTES — PUBLIC SCHOOL EMPLOYEES — PENSION BENEFITS.

There is a strong presumption that statutes do not create contractual rights; 1980 PA 300 did not create an enforceable contract that the multiplier used to calculate pension benefits would remain 1.5% for members of the Michigan Public School Employees' Retirement System.

3. CONSTITUTIONAL LAW — PUBLIC SCHOOL EMPLOYEES — PENSION BENEFITS.

Under Const 1963, art 9, § 24, the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof, and financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities; 2012 PA 300, which requires members of the Michigan Public School Employees' Retirement System to increase their payroll deductions in order to maintain the 1.5% pension factor that formerly applied to public school employee pensions does not violate Const 1963, art 9, § 24.

4. CONSTITUTIONAL LAW — PUBLIC SCHOOL EMPLOYEES — RETIREE HEALTHCARE BENEFITS.

Under Const 1963, art 9, § 24, the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof; retiree healthcare benefits are not accrued financial benefits implicated by Const 1963, art 9, § 24.

5. CONSTITUTIONAL LAW — PUBLIC SCHOOL EMPLOYEES — RETIREE HEALTHCARE BENEFITS — VOLUNTARY CONTRIBUTIONS — SUBSTANTIVE DUE PROCESS — TAKINGS CLAUSE.

Under 2012 PA 300, members of the Michigan Public School Employees' Retirement System must contribute 3% of their compensation in order receive retiree healthcare benefits; members who opt in but fail to qualify for retiree healthcare benefits will be refunded their contributions after they turn 60; 2012 PA 300 rationally relates to the legitimate governmental purpose of maintaining healthcare benefits for retirees while easing financial pressure on public schools and does not violate members' substantive due process rights; because participation in the retiree healthcare system is voluntary, there is also no taking in violation of the state or federal Constitutions.

Mark Cousens for AFT Michigan and others.

White, Schneider, Young & Chiodni, PC (by *James A. White*, *Kathleen Corkin Boyle*, and *Timothy J. Dlugos*), and *Arthur R. Przybylowicz* for the Michigan Education Association.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Frank J. Monticello*, *Joshua O. Booth*, and *Patrick M. Fitzgerald*, Assistant Attorneys General, for the state of Michigan and others.

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

K. F. KELLY, J. Plaintiffs in these consolidated appeals, AFT Michigan et al. and the Michigan Education Association (the MEA) et al.,[1] labor organizations representing public school employees, appeal of right the Court of Claims' orders dismissing their challenges to provisions of 2012 PA 300. 2012 PA 300, effective September 4, 2012, amended the Public School Employees Retirement Act (PSERA), MCL 38.1301 *et seq*., and altered future healthcare and retirement benefit plans available to public school employees for services performed after December 1, 2012. Finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Pursuant to MCL 38.1359, MCL 38.1343g, and MCL 38.1384b, members of the Michigan Public School Employees' Retirement System (MPSERS) created under the PSERA were asked to make a choice in terms of their future pension benefits:

(1) Members of the "Basic Plan," who historically contributed nothing to their pensions, would now be expected to contribute 4% of their compensation to their pensions. Those individuals hired between January 1990 and July 2010 and those former Basic Plan members who transferred into the Member Investment

[1] Referred to collectively as "plaintiffs."

Plan (MIP) would increase their contribution to 7%. Members who opted into the Basic Plan and MIP Plan would maintain the current 1.5% pension multiplier.

(2) Members could maintain current contribution rates, freeze existing benefits at the 1.5% multiplier, and receive a 1.25% pension multiplier for future years of service.

(3) Members could freeze existing pension benefits and move into a defined contribution, 401(k)-style, plan with a flat 4% employer contribution for future service.

Additionally, under MCL 38.1343e and MCL 38.1391a members were asked to opt in or out of retiree healthcare benefits; members could either contribute 3% of their compensation to receive the future benefit, or they could choose to receive no retiree healthcare benefits at retirement. MCL 38.1391a(8) further provided that a member who opted into the retiree healthcare program, but ultimately did not meet the eligibility requirements (e.g., because of a failure to work the requisite number of years) would be refunded his or her contribution starting at age 60 over a period of 60 months.

In two separate actions, plaintiffs filed complaints alleging: breach of contract and diminishment of contract, unconstitutional diminishment of members' accrued financial benefits, denial of substantive due process, and unjust enrichment to the state. The Court of Claims consolidated the two cases and considered the parties' competing motions for summary disposition. The Court of Claims concluded:

> As much as I would like to strike the section that deals with the state keeping the money on the health care and find that it's an unjust enrichment or a taking, . . . [m]y problem is this, if it were the only choice I would strike it down. The problem is we have informed consent and there are a number of choices, so the legislature in putting together this law

thought about that. It's very clear to me. They are giving choices and they are saying be careful, because if you leave early, for whatever reason, we're going to hang on to your money and you'll get it at the age of 60 as you retire and you'll get some money back on top of it but it's probably not going to be a lot of money because we're going to use it in the meantime. Now, I'm not happy about that and it's probably usury, but it's with that party's consent because they certainly have enough time, especially with the striking of the 52 days, to do the research, to do the math, to consult with an accountant, a financial planner, an advisor, and maybe not make that choice so the state doesn't have their money. On the other hand, if they're not a person who can save money, maybe that is the best choice for them.

As to the rest of the sections, again, there is this delineation between vested and non-vested benefits. It does not appear to me that the legislature is touching anything that is vested.

And as to the brochures, here's the problem. I have made rulings against the state for exactly this. Treasury, for example, puts out these advisories about how our tax code is going to change and how people should pay taxes and they've come in here on cases saying that a business did not follow these advisory tax rules and they have charged people with additional taxes because they didn't follow this advisory rule. And I've said, well, this is only advisory, it's not in the tax code yet so, state, you can't have your way and the taxpayer wins. Because there's also disclaimers there.

And I find the same ruling here. There are pamphlets that the state puts out about here's how your pension is going to work and there's disclaimers on it. It's really only advisory in nature about how--here's how your retirement works. I don't believe that a pamphlet can be part of a contract. I think it's nice that it's out there. I think it helps, but unless it is attached to the contract, it's got everybody's signatures, and it's made part of the black and white contract, it's not part of the contract. So I am finding that as informative as those pamphlets are, they're not part of

> the contract. It's consistent with other rulings that I've made that I have been upheld on.
>
> And so I think what the state has done with Public Act 300 of 2012 is left intact the retirement system with what's been vested and they are making members make elections on unvested pieces. So with the exception of the 52 days, I'm leaving the rest intact.[2]

Plaintiffs now appeal as of right,[3] challenging four separate provisions of 2012 PA 300:

(1) MCL 38.1343e, which requires a 3% contribution toward retiree healthcare.

(2) MCL 38.1343g, which requires a 4% contribution to the pension plan for a member to remain in the Basic Plan.

(3) MCL 38.1384b, which reduces the multiplier used in calculating pension benefits for those individuals who opt out of making the contributions required under MCL 38.1343g.

(4) MCL 38.1391a(8), which provides the mechanism for refunding contributions to individuals who opt into the retiree healthcare plan but ultimately fail to qualify to receive those benefits.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich

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[2] Although not an issue on appeal, the Court of Claims struck as unreasonable a 52-day election period provided under MCL 38.1359, finding that such a short time deprived members of the opportunity to make a reasonably informed decision.

[3] The appeals have been consolidated for appellate review. *AFT Mich v Michigan*, unpublished order of the Court of Appeals, entered January 9, 2013 (Docket Nos. 313960 and 314065).

109, 118; 597 NW2d 817 (1999). Whether a contract exists is a question of law that this Court reviews de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Finally, the question whether 2012 PA 300 violates the Constitution is a question of law that is reviewed de novo. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

B. BREACH OF CONTRACT

Plaintiffs argue that 2012 PA 300 unconstitutionally impairs existing contractual obligations concerning pension and retiree healthcare benefits in violation of both the federal and state Constitutions. We disagree.

In relevant part, the United States Constitution provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." US Const, art I, § 10, cl 1. And Michigan's 1963 Constitution states, in relevant part that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, art 1, § 10. We have recently set forth the process for determining whether a statute violates these constitutional clauses:

> Currently, whether a state statute violates the Contract Clause is determined by reference to a three-step inquiry . . . . First, courts must determine whether the state law has operated as a substantial impairment of a contractual relationship. If it constitutes a substantial impairment, the court must look at whether the justification for the state law is based on a significant and legitimate public purpose. If a legitimate public purpose can be identified, the court looks at whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. With respect to this third inquiry, [as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness

of a particular measure unless the state is one of the contracting parties. [*Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 300 Mich App 361, 373-374; 835 NW2d 593 (2013) (citations and quotation marks omitted; alterations in original).]

1. MEMBER HANDBOOKS AND BROCHURES

The AFT and its affiliated labor organizations (AFT) argue that the various pamphlets, handbooks, and informative brochures published by the state evidence a contract between the state and the members of MPSERS, under which the state agreed that a 1.5% multiplier would be used to calculate pension benefits. Alternatively, AFT argues that there is an "implied in law" contract.

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). A valid contract has five elements: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012) (citation and quotation marks omitted).

An implied-in-law contract is a legal fiction "to enable justice be accomplished" even if there was no meeting of the minds and no contract was intended. *Detroit v Highland Park*, 326 Mich 78, 100; 39 NW2d 325 (1949). A contract will be implied in law to prevent unjust enrichment. *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). To sustain an unjust enrich-

ment claim, a plaintiff must demonstrate (1) the defendant's receipt of a benefit from the plaintiff and (2) an inequity to plaintiff as a result. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991); *Karaus v Bank of New York Mellon*, 300 Mich App 9, 23; 831 NW2d 897 (2013). Stated differently, to prevent unjust enrichment, the law will imply a contract when the defendant has been inequitably enriched at the expense of the plaintiff. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). Courts, however, may not imply a contract if the parties have an express contract covering the same subject matter. *Martin*, 193 Mich App at 177.

AFT argues that publications generated by MPSERS clearly set forth that a member's pension would be based on a 1.5% multiplier. By way of example, AFT points to a 1990 booklet titled, "An Introduction to Your Retirement Plan." Under the heading, "PENSION FORMULA," the document states, "Your Retirement Plan provides a benefit that is determined by a formula. The formula is your final average salary times 1.5% (.015) times your total years of service credit . . . ." However, this same document contains the following disclaimer:

> This booklet was written as an introduction to your retirement plan. You should find it very helpful in the early stages of your planning for retirement. It is designed to answer commonly asked questions in a simple and easy to understand style. However, information in this booklet is not a substitute for the law. If differences of interpretation occur, the law governs. *The law may change at any time altering information in this booklet*. [Emphasis added.]

AFT also points to a 1997 publication which provides:

> Your pension is calculated according to the following formula:
>
> *Your final average compensation*
> *X*
> *1.5% (.015)*
> *X*
> *Your years of service credit =*
> *Your annual pension*

Again, however, the same publication provides the following disclaimer:

> Remember, this book is a summary of the main features of the plan and not a complete description. The operation of the plan is controlled by the Michigan Public School Employees Retirement Act (Public Act 300 of 1980, as amended). *If the provisions of the Act conflict with this summary, the Act controls.* [Emphasis added.]

The Court of Claims did not err by concluding that the documents did not form an enforceable contract. The pamphlets and brochures were simply an informational explanation of the then existing formula; the state was not bound, in perpetuity, by the contents of those publications. Importantly, the disclaimers contained within each of the documents plainly demonstrate that the retirement system manifested no intent to be contractually bound by the formula and clearly warned that pensions were a product of legislation, which was subject to change at any time. These same disclaimers also compel a finding that AFT's claim for breach of implied contract must fail.

2. 1980 PA 300

AFT argues that 1980 PA 300 created a contract between the state and public school employees; beginning in 1945 every public school employee was given a

clear promise that the retirement multiplier used to calculate pension benefits would be 1.5%. However, this notion was specifically rejected by our Supreme Court in *Studier v Michigan Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005).

At issue in *Studier* was whether 1980 PA 300 created a contract with public school retirees such that retiree healthcare benefits could not be changed without running afoul of the contract clauses of the federal and state Constitutions. *Id.* at 645. Amendments of the healthcare plan increased the amount of deductibles that retirees were required to pay and also increased the copays and out-of-pocket expenses that retirees paid for prescription drugs. *Id.* at 646. Several public school retirees brought suit, arguing, *inter alia*, that the copay and deductible increases impaired an existing contractual obligation. *Id*. at 647-648.

In rejecting the assertion that the statute created a contractual right to receive healthcare benefits, our Supreme Court noted that "a fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature." *Id.* at 660. It further noted "the strong presumption that statutes do not create contractual rights." *Id.* at 661. This is in keeping with " 'the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state.' " *Id.* quoting *Nat'l R Passenger Corp v Atchison, Topeka & Santa Fe R Co*, 470 US 451, 465–466; 105 S Ct 1441; 84 L Ed 2d 432 (1985).

Thus, "[i]n order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a con-

tract," and "absent an adequate expression of an actual intent of the State to bind itself, courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Studier*, 472 Mich at 662 (quotation marks and citations omitted). A legislature may demonstrate its intent to be contractually bound by using terms such as "contract," "covenant" or "vested rights." *Id.* at 663-664. Our Supreme Court noted that nothing in MCL 38.1391 (the statute establishing the healthcare benefits) indicated the creation of contractual rights:

> Indeed, by its plain language, the statute merely shows a policy decision by the Legislature that the retirement system pay "the entire monthly premium or membership or subscription fee" for the listed health care benefits on behalf of a retired public school employee who chooses to participate in whatever plan the board and the Department of Management and Budget authorize. However, nowhere in the statute did the Legislature require the board and the department to authorize a particular plan containing a specific monthly premium, membership, or subscription fee or, alternatively, explicitly preclude the board and the department from amending whatever plan they authorize. Additionally, nowhere in the statute did the Legislature require the board and the department to authorize a plan containing specified deductibles and copays. In fact, nowhere in the statute did the Legislature even mention deductibles and copays. Further, nowhere in the statute did the Legislature covenant that it would not amend the statute to remove or diminish the obligation of the MPSERS to pay the monthly premium, membership, or subscription fee; nor did it covenant that any changes to the plan by the board and the department, or amendments to the statute by the Legislature, would apply only to a specific class or group of public school retirees. Again, had the Legislature intended to surrender its power to make such changes, it would have done so explicitly. [*Id.* at 664-665 (citations omitted).]

The Supreme Court also noted that previous legislatures had exercised their powers to amend the statute throughout the years, which was further indication that no contractual rights were created. *Id*. at 665-666.

We conclude that *Studier* applies to plaintiffs' claims and that 1980 PA 300 did not create an enforceable contract. There is absolutely nothing in the statute that indicates the Legislature's intent to enter into a contract and bind future legislatures. Had the Legislature intended to surrender its legislative powers through the creation of contractual rights, it would have expressly done so by employing such terms as "contract," "covenant," or "vested rights." *Id.* at 663-664.

3. CONST 1963, ART 9, § 24

Finally, plaintiffs argue that pension benefits are contractual rights guaranteed by the state Constitution and that 2012 PA 300 unconstitutionally diminishes those benefits in violation of Const 1963, art 9, § 24. However, as will be discussed further, § 24 protects only those pension benefits that have already accrued, not future benefits.

Accordingly, because there was no breach of contract, it follows that there was no impairment of contract in violation of either the state or federal Constitutions.

C. PENSION BENEFITS

Plaintiffs argue that 2012 PA 300 violates Const 1963, art 9, § 24, which provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Again, we hold that *Studier* is applicable here. At issue in *Studier* was whether healthcare benefits paid to public school retirees constituted "accrued financial benefits" subject to protection from diminishment or impairment under Const 1963, art 9, § 24. *Studier*, 472 Mich at 645.

Our Supreme Court concluded that "health care benefits are not protected by Const 1963, art 9, § 24 because they neither qualify as 'accrued' benefits nor 'financial' benefits as those terms were commonly understood at the time of the Constitution's ratification and, thus, are not 'accrued financial benefits.' " *Id*. at 658-659. First, as it related to the term "accrued," the Court held that "the ratifiers of our Constitution would have commonly understood 'accrued' benefits to be benefits of the type that increase or grow over time—*such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed*." *Id*. at 654 (emphasis added). Next, as it related to the term "financial," the Court noted that healthcare benefits did not qualify as financial benefits because "the ratifiers of our Constitution would have commonly understood 'financial' benefits to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as health care benefits." *Id*. at 655. "[T]he ratifiers would have commonly understood the phrase 'accrued financial benefits' to be one of limitation that would restrict the scope of protection provided by art 9, § 24 to monetary payments for *past* services." *Id*. at 657-658 (emphasis added).

Therefore, under *Studier*, pension benefits are the type that increase or grow over time commensurate with the number of years of service a public school employee has completed and such benefits are protected by Const 1963, art 9, § 24. However, pension benefits are protected by § 24 only to the extent that they are for *past* services. 2012 PA 300 does nothing to affect or impair members' vested pension benefits. Members will still have the 1.5% multiplier applied to services rendered before December 2012. It is only future service that becomes subject to a reduced 1.25% multiplier should a member elect not to contribute 4% to his or her pension fund.

We also find persuasive our Supreme Court's advisory opinion *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659; 209 NW2d 200 (1973), which addressed the constitutionality of a statute requiring members to pay an increased contribution to pensions with no corresponding increase in benefits.[4] The Court first noted that pensions were no longer considered a mere gratuity since the passage of Const 1963, art 9, § 24. *Id*. at 662-663. It further noted:

> Under this constitutional limitation the Legislature cannot diminish or impair accrued financial benefits, but we think it may properly attach new conditions for earning financial benefits which have not yet accrued. Even though compliance with the new conditions may be necessary in order to obtain the financial benefits which have accrued, we would not regard this as a diminishment or impairment of such accrued benefits unless the new conditions were unreasonable and hence subversive of the constitutional protection. [*Id*. at 663-664.]

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[4] "It is important to emphasize the fact that an advisory opinion does not constitute a decision of the Court and is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 460 n 1; 208 NW2d 469 (1973).

Although the advisory opinion may not be binding, its analysis is persuasive. 2012 PA 300 does nothing to diminish or impair a member's vested pension benefits; only future benefits are implicated. Accordingly, reading the advisory opinion in conjunction with *Studier*, we conclude that 2012 PA 300 does not run afoul of Const 1963, art 9, § 24, and plaintiffs' claims are without merit.

The MEA's argument that 2012 PA 300 violates the second clause of § 24 must also fail. The *Studier* Court explained:

> That art 9, § 24 only protects those financial benefits that increase or grow over time is not only supported but, indeed, confirmed by the interaction between the first and second clauses of that provision. Specifically, the first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits . . . ." Thereafter, the second clause seeks to ensure that the state and its political subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those "[f]inancial benefits arising on account of service rendered in each fiscal year . . . ." Thus, because the second clause only requires the state and its political subdivision to set aside funding for "[f]inancial benefits arising on account of service rendered in each fiscal year" to fulfill their contractual obligation of paying for "accrued financial benefits," it reasonably follows that "accrued" financial benefits consist only of those "[f]inancial benefits arising on account of service rendered in each fiscal year . . . ." [*Studier*, 472 Mich at 654-655 (alterations in original).]

"In years prior to the Constitution of 1963, the Legislature did not always make adequate appropriations to maintain the MPSERS on an actuarially sound basis. . . . The practical effect of this underfunding was that many pensioners had accumulated years of service

for which insufficient money had been set aside in the pension reserve funds to pay the benefits to which their years of service entitled them." *Kosa v State Treasurer*, 408 Mich 356, 365; 292 NW2d 452 (1980). MPSERS used current members' contributions to pay for unfunded accrued liabilities of retirees' pensions that had accrued before the passage of the 1963 Constitution. The Supreme Court held that "borrowing" from post-1963 Constitution reserves to pay pre-1963 Constitution benefits violated Const 1963, art 9, § 24 by using current service funds to finance unfunded accrued liabilities. *Id*. at 367-368.

The *Kosa* Court analyzed the history of the legislation by looking to the constitutional debates. It noted that "[a] clear distinction must be drawn between the right to receive pension benefits and the funding method adopted by the Legislature to assure that monies are available for the payment of such benefits." *Id*. at 371. As one Constitutional Convention delegate noted, " 'It is not intended that an individual employee should . . . be given the right to sue the employing unit to require the actuarial funding of past service benefits . . . . What it is designed to do is to say that when his benefits come due, he's got a contractual right to receive them.' " *Id*. at 370 n 21, quoting 1 Official Record, Constitutional Convention 1961, pp 773-774.

In fact, contrary to plaintiffs' argument, "the second paragraph of art 9, § 24 expressly mandates townships and municipalities to fund all public employee pension systems to a level *which includes unfunded accrued liabilities*," *Shelby Twp Police & Fire Retirement Bd v Shelby Twp*, 438 Mich 247, 255-256; 475 NW2d 249 (1991) (emphasis added), which " 'are the estimated amounts which will be needed according to actuarial

projections to fulfill presently existing pension obligations . . . ,' " *id*. at 256 n 4, quoting *Kosa*, 408 Mich at 364 n 11.

Accordingly, 2012 PA 300 does not violate Const 1963, art 9, § 24 as it relates to members' pensions.

D. HEALTHCARE BENEFITS

Plaintiffs contend that 2012 PA 300 does not cure the constitutional deficiencies identified in *AFT Mich v Michigan*, 297 Mich App 597; 825 NW2d 595 (2012). We disagree.

In *AFT*, several public school employees and their representative organizations brought a challenge to the former version of MCL 38.1343e, as enacted by 2010 PA 75, which required public school districts and reporting units to withhold 3% of public school employees' wages and remit the amount to MPSERS as "employer contributions" to the trust that funded retiree healthcare benefits. *AFT*, 297 Mich App at 603-604. The plaintiffs argued that the statute resulted in the impairment of contracts and violated their rights under both the Takings and Due Process Clauses of the federal and state Constitutions. The trial court held that the statute did not violate the Contract Clauses, but that it did violate the plaintiffs' rights under both the Takings and Due Process Clauses of the federal and state Constitutions. *Id*. at 606-607.

This Court disagreed with the trial court's conclusion that there was no violation of the Contract Clauses. We held that former MCL 38.1343e operated "as a substantial impairment of the employment contracts between plaintiffs and the employing educational entities. The contracts provide for a particular amount of wages and the statute requires that the employers not pay the contracted-for wages, but instead pay three percent less

than the contracts provide." *Id*. at 610. The Court noted, however, that while there was clearly substantial impairment of the employees' contract, the inquiry into whether there had been a violation of the Contract Clauses necessarily involved an examination as to "whether the particular impairment is necessary to the public good . . . ." *Id*. at 612 (citation and quotation marks omitted; emphasis omitted). And "[b]ecause governmental entities are parties to the contracts and benefit from the impairment, we are to employ heightened scrutiny in our review of the statute." *Id*. The Court examined cases from other jurisdictions wherein governments implemented temporary actions to deal with budget shortfalls, such as implementing mandatory furlough days. These jurisdictions held that such actions were tolerable because, although clearly an impairment of contract, the actions were implemented after other attempts to reduce budgetary shortfalls, including layoffs and reductions in services. Additionally, the employees' work hours were reduced to correspond with the reduction in wages. *Id*. at 613-614. In contrast, former MCL 38.1343e was not temporary; rather, it was a permanent reduction in salary meant as a long-term mechanism to restructure benefits. *Id*. at 614. "The state has not shown that it first undertook to reduce retiree health care benefits, or to require present retirees to contribute to their own health care plans, or to restructure the benefits system in any way other than to legislate state-imposed modifications of freely negotiated contracts." *Id*. at 615.

In holding that the statute was an unconstitutional infringement of the plaintiffs' substantive due process rights, this Court explained:

> Defendants argue that the compelled contributions are not arbitrary because they are assessed against public

> school employees to support a fund that pays for retiree health care for public school employees. This, however, is an overly general characterization that gives the false impression that plaintiff employees are being required to contribute toward the funding of their own retirement benefits. The *mandatory contributions* imposed on current public school employees do not go to fund their own retirement benefits but, instead, to pay for retiree health care for already-retired public school employees.
>
> While the present employees and the retired employees have in common their present or former employment by a public school employer, that does not mean that their interests as individuals (or even as groups of employees) are identical. Defendants have offered no legal basis for the conclusion that it comports with due process to require present school employees to transfer three percent of their incomes in order to fund the retirement benefits of others. Rather, it is a *mandatory, direct transfer* of funds from one discrete group, present school employees, for the benefit of another, retired school employees. The fact that these groups share employers does not render the scheme outside the constitutional protection of substantive due process. [*Id*. at 622-623 (emphasis added).]

Additionally, under *Studier*, there was no guarantee that current employees would enjoy retiree healthcare benefits because they were not "accrued financial benefits" and, therefore, were subject to revision and total revocation.

> We cannot envision a court approving as constitutional a statute that requires certain individuals to turn a portion of their wages over to the government in return for a "promise" that the government will return the monies, with interest, in 20 years when the government retains the unilateral right to "cancel" the "promise" at any time and does not even agree that, if they do so, the monies taken will be returned. School employees cannot constitutionally be required to "loan" money to their employer school districts, with no enforceable right to receive anything in

> exchange and without even a binding guarantee that the "loan" will be repaid. [*Id*. at 625.]

In contrast to the scheme established under 2010 PA 75, which was deemed unconstitutional in *AFT*, employee contributions under 2012 PA 300 are now voluntary. A member may now choose to either continue to participate in the retiree healthcare program and contribute 3% of his or her salary to do so, or the member may simply opt out of the program altogether. Members who opt in but fail to qualify for retiree healthcare benefits will be refunded their investment once they turn 60. At that time, they will receive an allowance over a 60-month period, using the same multiplier as for pension benefits. Thus, the constitutional infirmities found in *AFT* have now been cured. Although plaintiffs argue that this unreasonably affects members who have already vested, *Studier* clearly provides that retiree healthcare benefits are not accrued financial benefits implicated by Const 1963, art 9, § 24.

Accordingly, 2012 PA 300 does not violate Const 1963, art 9, § 24 as it relates to retiree healthcare benefits.

E. SUBSTANTIVE DUE PROCESS

As an initial matter, although the state argues that plaintiffs cannot claim constitutional deprivations under both the Takings and Due Process Clauses of the state and federal Constitutions, this argument appears to have been specifically rejected in our Court's decision in *AFT*, in which this Court addressed the substantive arguments of both issues. In addition, although the state correctly argues that AFT has failed to preserve this issue for appellate review because it did not make such a broad argument in the Court of Claims, MEA has

consistently argued that 2012 PA 300 violates substantive due process. Therefore, a thorough examination of the issue is warranted.

US Const, Am XIV provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." Const 1963, art 1, § 17 provides that "[n]o person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

> [A]lthough the text of the Due Process Clauses provides only procedural protections, due process also has a substantive component that protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public. In the context of government actions, a substantive due process violation is established only when the governmental conduct [is] so arbitrary and capricious as to shock the conscience. [*Bonner v City of Brighton*, 298 Mich App 693, 705-706; 828 NW2d 408 (2012) (citations and quotation marks omitted; alteration in original).]

Additionally,

> [t]he party challenging a legislative enactment subject to rational basis review must negative every conceivable basis which might support it. Under rational basis review, it is constitutionally irrelevant [what] reasoning in fact underlay the legislative decision. [W]e will be satisfied with the government's rational speculation linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data. Thus, if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny. [*Wells Fargo Bank*, 300 Mich App at 381 (citations and quotation marks omitted; second and third alterations in original).]

As previously stated, in striking down former MCL 38.1343e, as "unreasonable, arbitrary, and capricious and violat[ive of] the Due Process Clause," *AFT*, 297 Mich App at 627, this Court explained as follows:

> Defendants argue that the compelled contributions are not arbitrary because they are assessed against public school employees to support a fund that pays for retiree health care for public school employees. This, however, is an overly general characterization that gives the false impression that plaintiff employees are being required to contribute toward the funding of their own retirement benefits. The *mandatory contributions* imposed on current public school employees do not go to fund their own retirement benefits but, instead, to pay for retiree health care for already-retired public school employees.
>
> While the present employees and the retired employees have in common their present or former employment by a public school employer, that does not mean that their interests as individuals (or even as groups of employees) are identical. Defendants have offered no legal basis for the conclusion that it comports with due process to require present school employees to transfer three percent of their incomes in order to fund the retirement benefits of others. Rather, it is a *mandatory, direct transfer* of funds from one discrete group, present school employees, for the benefit of another, retired school employees. The fact that these groups share employers does not render the scheme outside the constitutional protection of substantive due process. [*Id*. at 622-623 (emphasis added).]

Additionally, this Court acknowledged that, under *Studier*, there was no guarantee that current employees would enjoy future retiree healthcare benefits because those benefits were not accrued financial benefits; accordingly, those benefits were subject to revision and total revocation.

> We cannot envision a court approving as constitutional a statute that *requires* certain individuals to turn a portion

> of their wages over to the government in return for a "promise" that the government will return the monies, with interest, in 20 years when the government retains the unilateral right to "cancel" the "promise" at any time and does not even agree that, if they do so, the monies taken will be returned. School employees cannot constitutionally be *required* to "loan" money to their employer school districts, with no enforceable right to receive anything in exchange and without even a binding guarantee that the "loan" will be *repaid*. [*Id*. at 625 (emphasis added).]

The Court noted that former MCL 38.1343e provided "that the government confiscate the income of one discrete group in order to fund a specific governmental obligation to another discrete group." *Id*. at 627.

These constitutional infirmities have been cured by the voluntary nature of 2012 PA 300. Members may now opt in or opt out of the legislative scheme. Their voluntary contributions will be used to pre-fund their benefits. And, although plaintiffs complain that there is no guarantee of future healthcare benefits, under MCL 38.1391a(8), members' contributions are now protected with a refund mechanism. As the Court of Claims noted, it is clear that the Legislature carefully crafted 2012 PA 300 with the infirmities noted by *AFT* in mind.

The state, in enacting 2012 PA 300, has set forth a legitimate governmental purpose: to help fund retiree healthcare benefits while ensuring the continued financial stability of public schools. It is undisputed that in recent years public schools have been required to pay higher fees for the healthcare of retirees and their dependents. Healthcare costs are expected to continue to rise in the future. By seeking voluntary participation from members, the statute rationally relates to the legitimate governmental purpose of maintaining healthcare benefits for retirees while easing financial pressures on public schools.

That members have no assurance of receiving healthcare benefits upon retirement does not defeat the fact that 2012 PA 300 is reasonably related to a legitimate governmental purpose; instead, plaintiffs' arguments are focused primarily on whether the plan is ideal, which is not our inquiry. Plaintiffs have not negated the conclusion that the legislation reasonably relates to a legitimate governmental purpose.

Accordingly, we hold 2012 PA 300 does not violate members' substantive due process rights under the state or federal Constitutions.

F. UNLAWFUL TAKING AND UNJUST ENRICHMENT

Finally, plaintiffs assert that the healthcare contributions set forth in 2012 PA 300 are an unlawful taking of their members' property and the state is unjustly enriched as a result. We disagree.

US Const, Am V provides, "[N]or shall private property be taken for public use, without just compensation." Similarly, Const 1963, art 10, § 2 states, "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

Unjust enrichment is an equitable doctrine. *Morris Pumps*, 273 Mich App at 193. It is the equitable counterpart of a legal claim for breach of contract. See *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). "Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (citation and quotation marks omitted). "[I]n order to sustain a claim of . . . unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity

resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps*, 273 Mich App at 195.

In *AFT*, this Court concluded that former MCL 38.1343e violated the Takings Clauses of the federal and state Constitutions, rejecting the defendants' assertion that the Takings Clauses were not implicated. The Court stated that "where the government does not merely impose an assessment or require payment of an amount of money without consideration, but instead asserts ownership of a specific and identifiable 'parcel' of money, it does implicate the Takings Clause. Indeed, the United States Supreme Court has termed such actions violations 'per se' of the Takings Clause." *AFT*, 297 Mich App at 618, quoting *Brown v Legal Foundation of Washington*, 538 US 216, 235; 123 S Ct 1406; 155 L Ed 2d 376 (2003). Therefore, because MCL 38.1343e took private property without providing any form of compensation, the trial court correctly ruled that the statute violated the Takings Clauses of the Fifth Amendment and Const 1963, art 10, § 2. *Id*. at 621.

However, there is no "taking" under 2012 PA 300 because participation in the retiree healthcare system is now voluntary. Unlike in *AFT*, in which the retiree healthcare contributions were mandatory and involuntary, members under the new legislation now have a choice. Thus, it cannot be argued that members' wages have been seized or confiscated, as was the case in *AFT*. In addition, MCL 38.1391a(8), as enacted by 2012 PA 300, provides for repayment of member contributions for those individuals who have elected into the retiree healthcare system, but fail to vest in the system. Members are provided a full refund increased by 1.5% multiplied by the total number of years of contributions. While plaintiffs argue that they are deprived of

the time-value of this money, that does not negate the fact that the process is entirely voluntary.

Accordingly, 2012 PA 300 neither unlawfully takes members' property nor does it amount to unjust enrichment.

Affirmed. No costs awarded to either party, a public question being involved. MCR 7.216(A)(7) and MCR 7.219(A).

SAAD, P.J., concurred with K. F. KELLY, J.

GLEICHER, J. (*concurring*). I concur with the result reached by the majority. I write separately to clarify my reasons for doing so.

In broad outline, plaintiffs have raised constitutional challenges to two portions of 2012 PA 300. The first involves pension benefits. Pursuant to the act, members of the Michigan Public School Employees' Retirement System (MPSERS) must increase their payroll deductions to maintain the 1.5% pension factor that formerly applied to all public school employee pensions. And under 2012 PA 300, MPSERS members must pay an increased healthcare premium equivalent to 3% of their compensation or instead elect to join a "Tier 2" defined contribution benefit plan.

I concur with the majority's resolution of plaintiffs' healthcare benefit claim. As the majority explains, the Supreme Court concluded in *Studier v Michigan Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), that public school employees have no constitutional entitlement to healthcare benefits. The *Studier* Court held, "[T]he Legislature intended for payment of health care benefits by the MPSERS under MCL 38.1391(1) to simply be a 'fringe benefit' to which public school employees would never have a contractual

entitlement." *Id*. at 667-668. Healthcare benefits do not even qualify as "financial" benefits protected under Const 1963, art 9 § 24, the *Studier* Court further held, because they are not in the form of "monetary payments." *Id*. at 655. As Justice CAVANAGH articulated in dissent, the *Studier* majority found it constitutionally acceptable for our state to promise healthcare benefits to its teachers, and to break this promise at will. *Id*. at 679 (CAVANAGH, J., dissenting).

Nevertheless, in *AFT Mich v Michigan*, 297 Mich App 597, 604; 825 NW2d 595 (2012), this Court struck down on constitutional grounds a statutory modification of plaintiffs' healthcare benefit formula. The 2010 act at issue in *AFT* required "that public school districts . . . withhold three percent of each employee's wages and remit the amount to the MPSERS as 'employer contributions' to the trust that funds retiree health care benefits." *Id*. The *AFT* Court held that the law impaired contractual rights and allowed the government to take private property without compensation. *Id*.

The Legislature made virtually no change to the language struck down in *AFT*, but added a provision—MCL 38.1391a(5)—permitting members to avoid the 3% wage withholding by joining a "Tier 2" plan. The majority reasons that "the voluntary nature of 2012 PA 300" allowing public school employees to "opt in or opt out of the legislative scheme" cured the constitutional infirmities discerned by the *AFT* Court. Plaintiffs fail to persuasively counter this logic. Plaintiff Michigan Education Association (MEA) argues that the act "impose[s] a significant contribution requirement on all MPSERS members, including those who have been members of the retirement system for many years and whose rights to retiree health premium payments have vested." The MEA concedes, however, that *Studier* negates this argument.

On the other hand, I agree with plaintiffs that *pension* benefits are clothed with constitutional protection from impairment or diminishment. Const 1963, art 9, § 24 serves "to ensure that public pensions be treated as contractual obligations that, once earned, could not be diminished." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 311; 806 NW2d 683 (2011). See also *Kosa v State Treasurer*, 408 Mich 356, 360; 292 NW2d 452 (1980) ("To gain protection of their pension rights, Michigan teachers effectively lobbied for a constitutional amendment granting contractual status to retirement benefits."). As the Supreme Court explained in *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 662-663; 209 NW2d 200 (1973), "it was the intention of the framers of the constitution" to make the accrued financial benefits of public pensions "contractual rights."

Plaintiffs contend that the enforceable contract includes the 1.5% multiplier formula in effect by statute since 1945. However, no evidence supports that 2012 PA 300 impairs or reduces the benefits earned pursuant to the 1.5% multiplier that accrued before 2012 PA 300 took effect. Further, in *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich at 663, the Supreme Court observed that under Const 1963, art 9, § 24, "the Legislature cannot diminish or impair accrued financial benefits, *but we think it may properly attach new conditions for earning financial benefits which have not yet accrued*." (Emphasis added.) Plaintiffs have failed to distinguish this language from the case at bar. Although plaintiffs have pointed to caselaw from other jurisdictions that reached a result contrary to the majority opinion, in most of those cases the courts found that statutory language created binding contracts. To date, our Supreme Court has not found any binding contrac-

tual obligations residing within legislative enactments. To the contrary, in *Studier*, 472 Mich at 661, the Supreme Court emphasized "the strong presumption that statutes do not create contractual rights."

Finally, plaintiffs contend that 2012 PA 300 violates the second sentence of art 9, § 24, which states, "Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities." MEA's brief contends that the act "uses current service contributions levied against the members to finance the unfunded accrued liabilities of MPSERS, *i.e.*, $15.6 billion of the State's unfunded accrued liability that accrued to MPSERS members in the past."[1] According to plaintiffs, 2012 PA 300 "is an attempt to make the members of MPSERS pay for a large portion of the pension benefits which had already accrued to them prior to" the act's passage.

The record neither supports nor refutes that at the time 2012 PA 300 was enacted, the MPSERS balance sheet included "unfunded accrued liabilities" that will be paid through a mechanism created by the act. Nor does the record demonstrate whether the Legislature, or MPSERS, has applied current member contributions against unfunded accrued liabilities. If 2012 PA 300 has resulted in the collection of money used to meet pre-2012 unfunded accrued liabilities through a "borrowing scheme" similar to that condemned in *Kosa*, 408 Mich 356, I would agree that *as applied*, the act raises constitutional concerns. In my view, this issue should be

[1] Earlier in the same brief, the MEA proclaims: "There is no financial crisis regarding MPSERS. It is and has been paying for all pension benefits that come due. The Michigan Legislature has never declared that there was a financial crisis regarding MPSERS. MPSERS has sufficient money to meet its financial commitments to its retirees."

addressed with the benefit of a full evidentiary record in a different case. Because the evidence necessary to evaluate this issue is not before this Court, I concur with the majority that based on the challenges raised here, 2012 PA 300 passes constitutional muster.

In re DEARMON

Docket Nos. 314459 and 316653. Submitted December 11, 2013, at Grand Rapids. Decided January 14, 2014, at 9:10 a.m.

The Department of Human Services (DHS) petitioned the Kent Circuit Court, Family Division, in August 2012, requesting that the court take jurisdiction over E. Harverson's two children and terminate her parental rights after a report of domestic violence between Harverson and her boyfriend. The court, Kathleen A. Feeney, J., authorized the petition, and it was properly served on Harverson. The DHS subsequently filed an amended petition in October 2012, which was never authorized by the court or served on Harverson. The DHS filed a second amended petition that corrected some date errors and contained allegations of the boyfriend's domestic-violence conviction and allegations of domestic violence involving the children's father. The court authorized that petition in December 2012, but it was never served on Harverson. Before empaneling the jury at the adjudication, the court read the allegations in the December petition to the venire. Later in the trial, the court denied Harverson's motion for a mistrial on that ground and read the allegations from the August petition to the jury. The jury found that the DHS had established grounds for jurisdiction over the children, and Harverson appealed. Following the termination hearing, the court terminated Harverson's parental rights under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood of harm if child returned to parent), concluding under MCL 712A.19b(5) that termination was in the children's best interests. Harverson appealed, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Because respondent was properly served with the initial petition and an accompanying summons, the circuit court had personal jurisdiction over her. In child protective proceedings, service of a summons and a petition places a parent on notice of the petitioner's intention to remove a child from the home or terminate the parent's right to a child's care and custody. MCL 712A.12 requires that the parent named in a termination petition receive personal service of a summons before the court may

conduct a hearing. In the absence of personal service or a waiver of personal service, jurisdiction is not established and the court's orders are void. Moreover, the fact that the respondent had actual notice does not cure the jurisdictional defect. Harverson was personally served with a summons and the original petition, which sought circuit court jurisdiction over the children. The petition clearly communicated the nature of the DHS's allegations and described in detail the conduct underlying its request for jurisdiction. The original petition also sought termination of respondent's parental rights. Service of these documents afforded Harverson notice of the nature of the proceedings and conferred personal jurisdiction over her on the circuit court. Once personal jurisdiction was established, it did not evaporate merely upon the filing of the amended petitions. The DHS's preparation and filing of the amended petitions did not invalidate the personal jurisdiction that had already been obtained.

2. The circuit court's reading from the December petition did not violate due process. The December petition contained several new averments, but with the exception of boyfriend's conviction, the allegations in the December petition referred to the same facts and circumstances as those set forth in the original petition. The initial petition placed respondent on notice of the evidence that would be presented at the trial. Accordingly, the circuit court's reading of the December petition was harmless error, and the court did not abuse its discretion by denying Harverson's motion for a mistrial.

3. Harverson also argued that her due process rights were violated by the introduction of jailhouse telephone conversation audiotapes obtained after the DHS filed the August petition. The tapes reflected respondent's desire to maintain a close relationship with her boyfriend and were admitted after the court ruled that Harverson's counsel had opened the door by asserting through his questioning that Harverson had separated from her boyfriend and had no voluntary contact with him after the first of the three assaults against Harverson in the summer of 2012. Harverson argued that the evidence should have been excluded because it arose after the filing of the original petition. Neither the juvenile code, MCL 712A.1 *et seq*., nor the court rules mandate the exclusion of evidence concerning events that occur after a jurisdictional petition has been filed. Rather, the rules of evidence apply in adjudications. MCR 3.972(C)(1) provides that the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial even if the petition contains a request to terminate parental rights. Evidence that is

relevant should be admitted. Under MRE 401, relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. If evidence of postpetition facts qualifies as relevant to an issue presented in an adjudication and is otherwise admissible under the rules of evidence, it may be admitted. Evidence bearing on a witness's credibility is always relevant. The August petition included allegations related to domestic violence and the fact that Harverson and her boyfriend were not to have contact with each other. The DHS asserted that Harverson was unable to extricate herself from her boyfriend and that their inherently violent, abusive relationship endangered the children. Harverson insisted that she had done everything in her power to distance herself from the boyfriend. Her credibility was at issue, and the jailhouse tapes bore directly on that credibility, regardless of when she uttered them. Because Harverson had notice of the existence of the tapes, there was no due process violation.

4. The circuit court did not clearly err by terminating Harverson's parental rights. The court found that Harverson had unsuccessfully participated in several domestic violence classes and refused to extricate herself from her relationship with her abusive boyfriend. Harverson had a long history of engaging in domestic violence and repeatedly selected violent, abusive partners. Her halfhearted efforts to escape the cycle of violence that she helped to create resulted in danger to her children.

Affirmed.

1. CHILD PROTECTIVE PROCEEDINGS — TERMINATION OF PARENTAL RIGHTS — PERSONAL JURISDICTION — AMENDED PETITIONS.

Service of a summons and a petition are necessary in a child protective proceeding to place a parent on notice of the petitioner's intention to remove a child from the home or terminate the parent's rights to a child's care and custody; the parent named in a termination petition must receive personal service of a summons before the family court may conduct a hearing, and in the absence of personal service or a waiver of personal service, jurisdiction is not established and the court's orders are void; the fact that the respondent had actual notice does not cure the jurisdictional defect; once personal jurisdiction has been established, however, the petitioner's preparing and filing amended petitions does not invalidate the personal jurisdiction that had already been obtained even if the amended petitions are not served on the respondent (MCL 712A.12).

2. EVIDENCE — CHILD PROTECTIVE PROCEEDINGS — POSTPETITION EVENTS.

Evidence concerning events that occurred after the filing of a petition for jurisdiction in a child protective proceeding may be admitted if it is relevant to an issue presented in the trial and otherwise admissible under the rules of evidence even if the petition contains a request to terminate parental rights; evidence bearing on a witness's credibility is always relevant (MCL 712A.1 *et seq*.; MCR 3.972(C)(1); MRE 401).

William A. Forsyth, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *T. Lynn Hopkins*, Assistant Prosecuting Attorney, for the Department of Human Services.

Mark T. Van Slooten for E. Harverson.

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

PER CURIAM. These consolidated appeals present procedural due process issues that arose during an adjudication trial and respondent-mother's challenge to the circuit court's subsequent termination decision. One due process issue relates to personal jurisdiction. Respondent argues that the circuit court's failure to serve her with two amended petitions seeking immediate termination of her parental rights divested the court of power to conduct the proceedings. We conclude that personal jurisdiction attached with proper service of the original summons and petition seeking immediate termination and need not have been reestablished during the proceedings.

The more difficult due process question is whether evidence obtained after a petition has been filed and served may be presented at an adjudication. We hold that evidence relevant to prove or defend a statutory ground for termination is potentially admissible at an adjudication despite that the evidence involves postpe-

tition facts. The evidence must conform to the rules of evidence, and the parties must have notice of the evidence. Here, the evidence presented satisfied those conditions. Because we further find that the circuit court's termination decision was not clearly erroneous, we affirm.[1]

I. BACKGROUND

On July 17, 2012, Children's Protective Services (CPS) investigator Courtni Adamec received a report that respondent and her boyfriend, Desmond Long, had engaged in domestic violence two days earlier in the presence of Long's four-year-old daughter, ML. Adamec's initial investigation revealed that respondent had a "significant CPS history involving a prior termination of parental rights." Adamec called respondent and requested an opportunity to verify the well-being of respondent's young children, JD and AHD. Respondent said that she would call back and hung up the phone. During their second conversation respondent informed Adamec that she would "ship her children off" if CPS and the courts "get involved." Adamec visited the children the next day. She observed that the children appeared healthy and well fed, but respondent had two black eyes and a swollen face. Respondent initially refused to answer Adamec's questions. Later, respondent claimed that she had obtained a personal protection order (PPO) against Long, planned to press charges for the assault, and had changed the locks on her doors. Respondent adamantly denied that her children had been present during Long's assault.

[1] The circuit court also terminated the parental rights of the minor children's biological father. He has not appealed that order.

Adamec found no record of a PPO. Instead she discovered that Long had been arrested a month earlier for assaulting respondent and that a condition of his bond required that he refrain from contact with her. Next, Adamec conducted a forensic interview of ML. ML recounted that Long and respondent had fought in respondent's apartment and that both combatants had wielded knives. During the altercation, ML and respondent's children attempted to hide behind a mattress. ML recalled that respondent had been bleeding.[2]

Adamec then spoke with the property manager of respondent's apartment complex, who expressed belief that respondent and Long lived together throughout the summer. Adamec concluded that the children had been present during the July 15 brawl and that respondent and Long had continued to cohabitate despite the no-contact bond condition from June 2012. On August 7, 2012, Adamec signed a petition requesting that the circuit court take jurisdiction of the children involved and terminate respondent's parental rights.[3] The court authorized the petition, and the parties agree that it was properly served on respondent.

The petition's factual allegations set forth the dates of the previous terminations of respondent's parental rights and described the information that came to light during Adamec's investigation. On October 12, 2012, petitioner filed an amended petition substantially similar to the original. The October amended petition was never authorized by the court or served on respondent. Petitioner prepared a second amended petition that was

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[2] Respondent's children were too young to undergo forensic interviews.

[3] Because the circuit court had previously terminated respondent's parental rights to other children, petitioner was required to seek termination of her parental rights in the initial petition. See MCL 722.638(1)(b)(*i*) and (2).

authorized on December 12, 2012, but again was never served on respondent.[4] The December petition corrected date errors in the first petition and added that (1) Long had been convicted of domestic violence arising from the July 15, 2012 assault and (2) domestic violence had marred respondent's relationship with the father of her children. Otherwise, the third petition's factual allegations echoed those of the first. All three petitions stated the same statutory grounds for jurisdiction.

Respondent exercised her right to an adjudication trial, which commenced on January 7, 2013. Before empaneling the jury, the circuit court read aloud to the venire the factual allegations within the December 12, 2012 amended petition. At the time, none of the parties realized that the December petition had not been served on respondent.

In her opening statement, the prosecutor asserted that "[t]his case is very simply about [respondent's] on-going domestic violence and assaultive history and how it places [the children] at a substantial risk of harm in her care and makes their home environment unfit." Respondent's counsel told the jury that respondent was "a victim" of domestic violence who "was doing everything pro-actively to prevent this from happening again. She wanted to prosecute the man who did this." Respondent further contended that the children were not present during the July 15, 2012 altercation.

Adamec described her investigation to the jury and explained her decision to file a petition seeking jurisdiction. The testimony of several other witnesses sup-

[4] We highlight that the amended petitions were not "supplemental petitions." A supplemental petition contains additional allegations of abuse or neglect concerning a child who is under the court's jurisdiction. MCL 712A.19(1). Jurisdiction had not been established in this case when the amended petitions were filed.

ported that ML and respondent's children had been present during the July 15 assault. Law enforcement personnel testified about two other episodes of domestic violence between respondent and Long predating the July 15 fight. A sheriff's deputy opined that respondent had initiated the first assault by striking the first blow. The second assault led to Long's prosecution for domestic violence despite respondent's refusal to cooperate. By brawling with respondent on July 15, Long violated a bond condition imposed when he was charged with the second of the three assaults.

On the third day of the adjudicative trial, petitioner sought to introduce audiotaped conversations obtained in September 2012, while Long was lodged in the Kent County Correctional Facility. Over respondent's vigorous objection, the circuit court permitted the jury to listen to the tapes. Although the tapes were not transcribed for this Court's review, subsequent transcript references suggest that the calls reflected respondent's desire to maintain a close relationship with Long.[5] The court ruled that respondent's counsel had opened the door to the introduction of the tapes by asserting through his questioning that respondent had separated from Long and had no voluntary contact with him after the first of the three assaults in the summer of 2012.

When the fourth day of trial commenced, the court notified the parties that it had erroneously read aloud from the December 2012 amended petition rather than the original August petition. After entertaining lengthy argument, the court denied respondent's motion for a mistrial. During the court's final instructions to the

[5] In the future, we urge trial courts to order recordings such as the jailhouse audiotapes transcribed when they are played for the jury. Alternatively, the parties may prepare and stipulate to a transcript of recordings. See MCR 7.210(A)(4).

jury, the court read the factual allegations from the August petition. The jury found that petitioner had established a statutory jurisdictional ground. The court entered an order of adjudication, and respondent claimed a timely appeal.

The termination hearing began in February 2013, and additional hearings were conducted in April and May. A foster-care worker testified at great length regarding respondent's failure to benefit from a plethora of offered services. The worker summarized that despite counseling and support group therapy, respondent remained hostile, aggressive, and emotionally unstable. Her frequent angry outbursts during supervised parenting time sessions led to early termination of several visits with her children. During her testimony, respondent denied a history of domestic violence and admitted being pregnant with Long's child (a condition that apparently arose after the current proceedings began). The circuit court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(g) and (j):

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The court further concluded that termination would serve the children's best interests. See MCL 712A.19b(5).

Respondent also appealed the termination order, and this Court consolidated her two appeals.

II. ANALYSIS

Respondent challenges the adjudication proceedings on two different due process grounds and contends that that the circuit court lacked clear and convincing evidence to support either statutory ground for termination. We address these contentions individually.

A. PERSONAL JURISDICTION

Respondent first asserts that because she was never served with the December amended petition, the circuit court lacked personal jurisdiction over her. This jurisdictional flaw, respondent argues, violated her right to due process of law, rendered the proceedings "void," and compelled the circuit court to grant her mistrial motion. Because respondent was properly served with the initial petition and an accompanying summons, we find her jurisdictional argument unpersuasive.

We review de novo whether child protective proceedings complied with a respondent's constitutional rights. *In re HRC*, 286 Mich App 444, 462; 781 NW2d 105 (2009). Similarly, we review de novo whether a court has properly obtained personal jurisdiction over a party. *In re SZ*, 262 Mich App 560, 564; 686 NW2d 520 (2004).

In child protective proceedings, service of a summons and petition places a parent on notice of a petitioner's intention to remove a child from the home or terminate a parent's right to a child's care and custody. The Legislature requires that a parent named in a termination petition receive personal service of a summons before the court may conduct a hearing. MCL 712A.12. "[S]tatutes requiring service of notice to parents must be strictly construed." *In re Kozak*, 92 Mich App 579, 582; 285 NW2d 378 (1979). In *In re Brown*, 149 Mich App 529, 541-542; 386 NW2d 577 (1986), this Court

emphasized that personal service not only provides a parent notice, but also apprises the parent of the charges levied against him or her and affords a reasonable time to prepare a defense. In the absence of personal service or a waiver of personal service, jurisdiction is not established and the court's orders are void. *Id*. at 542. Notably, this Court determined in *Brown* that the fact that the respondent had actual notice did not cure the jurisdictional defect. *Id*. at 541.

The court rules reinforce the necessity of personal service. "In a child protective proceeding, a summons must be served on the respondent." MCR 3.920(B)(2)(b). MCR 3.921(B)(3) states that "[w]ritten notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in subrule (B)(2)." Subrule (B)(2) includes "the parents of the child." MCR 3.921(B)(2)(c). And MCR 3.920(B)(4)(a) and (b) demand personal service unless the petitioner proves that it "is impracticable or cannot be achieved." The petition must set forth basic information about the children and the parents, as well as "[t]he essential facts that constitute an offense against the child" with a citation of the relevant provisions of the juvenile code. MCR 3.961(B)(1) through (4). These rules serve "to ensure due process to a parent facing . . . termination of his parental rights . . . ." *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.).

Respondent was personally served with a summons and the original petition, which sought circuit court jurisdiction over the children.[6] The petition clearly communicated the nature of petitioner's allegations and described in detail the conduct underlying petition-

[6] The circuit court obtained jurisdiction over the *children* with the jury's verdict.

er's request for jurisdiction. The original petition sought termination of respondent's parental rights. Service of these documents afforded respondent with notice of the nature of the proceedings and conferred on the circuit court personal jurisdiction over her. Once personal jurisdiction was established, it did not evaporate merely upon the *filing* of the amended petitions. Alternatively stated, petitioner's preparation and filing of the amended petitions did not invalidate the personal jurisdiction that had already been obtained.[7]

Nor do we discern any due process grounds for a new adjudication trial arising from the circuit court's reading from an inapposite petition. The December petition contained several new averments, including that "[respondent] has a history of domestic violence with Mr. Desmond Long, [respondent's] boyfriend" and "Mr. Long was charged with, and pled to, Domestic Violence 2nd and Larceny $200-$1000, as a result of the incident on 07/15/2012." With the exception of Long's conviction, the allegations in the December petition referred precisely to the same facts and circumstances as had been set forth in the original petition. The initial petition placed respondent on notice of the evidence that would be presented at the trial. Accordingly, the circuit court's reading of the December petition qualifies as harmless error, and the court did not abuse its discretion by denying respondent's motion for a mistrial.

B. EVIDENCE OF POSTPETITION EVENTS

Respondent next asserts that her due process rights were violated by the introduction of evidence—

[7] MCL 712A.11(6) permits amendment of a petition "at any stage of the proceedings as the ends of justice require."

primarily the jailhouse telephone conversation audiotapes—obtained after petitioner filed the August 7, 2012 petition. According to respondent, the circuit court incorrectly used the December petition as "a guideline" for the proofs, and by so doing erroneously permitted the petitioner to introduce evidence that should have been excluded because it postdated the original petition.

Neither the juvenile code nor the court rules mandates the exclusion of evidence concerning events that occur after a jurisdictional petition has been filed. Rather, the Michigan Rules of Evidence apply in adjudication trials. MCR 3.972(C)(1) provides, "Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial, notwithstanding that the petition contains a request to terminate parental rights." "Relevance is the fundamental component of the law of evidence. Evidence that is irrelevant should not be admitted at trial. Evidence that is relevant should be admitted, unless barred by some other rule." 2 Jones, Evidence (7th ed), § 11:1, p 258. See MRE 401. If evidence of postpetition facts qualifies as relevant to an issue presented in an adjudication trial and is otherwise admissible under the rules of evidence, it may be admitted.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence bearing on a witness's credibility is always relevant:

> Assume that a witness on the stand gives some testimony or that a counsel introduces an out-of-court declarant's hearsay statement as substantive evidence. As

> soon as the testimony or hearsay statement is admitted, the credibility of the witness or declarant becomes a fact of consequence within the range of dispute at trial under Federal Rule 401. [1 McCormick, Evidence (7th ed), § 33, p 203.][8]

The August petition invoked two statutory grounds for jurisdiction: MCL 712A.2(b)(1) (asserting that respondent neglected or refused to provide the children "proper or necessary support, education, medical, surgical, or other care necessary for" their health or subjected them "to a substantial risk of harm to [their] mental well-being") and MCL 712A.2(b)(2) (asserting that respondent's "home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for" the children to live). In support of these statutory grounds, the August petition alleged in relevant part that (1) on June 17, 2012, respondent and Long engaged in an episode of violence, (2) pursuant to a June 18, 2012 bond condition, Long was not supposed to have contact with respondent, (3) Long nevertheless was seen daily at respondent's residence, (4) on July 15, 2012, respondent accused Long of a violent attack during which she attempted to use a knife to defend herself, (5) ML disclosed during a forensic interview that she and respondent's children witnessed the July assault, and (6) respondent reported to CPS that she had no voluntary contact with Long after he posted bond and "has maintained that Mr. Long forced himself into her home on 7/15/12 and then assaulted her."

Petitioner structured its jurisdictional claim on the argument that respondent was unable to extricate herself from her relationship with Long and that their

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[8] FRE 401 is identical with MRE 401.

inherently violent, abusive relationship endangered respondent's children. Respondent countered that Long had entered her home without permission on July 15, denied that her children had witnessed this altercation, and insisted that she had done everything in her power to distance herself from Long. Obviously, respondent's credibility was at issue given petitioner's contrary evidence. The jailhouse tapes bore directly on respondent's credibility. They tended to discredit her disavowal of voluntary contact with Long after the first assault.

The purpose of an adjudication is "to determine whether the child is neglected within the meaning of [MCL 712A.2(b)] . . . ." *In re Hatcher*, 443 Mich 426, 435; 505 NW2d 834 (1993). Ultimately, the question presented to the jury is whether a respondent's actions or inactions created an unfit environment for the children. A fact-finder may consider evidence gathered after the events cited in the petition if that evidence is relevant to a fact of consequence flowing from that question and otherwise admissible. Respondent's recorded conversations with Long related to her credibility and whether she had severed her relationship with Long before the third assault. That the evidence arose after the date of the petition did not render it irrelevant to issues of consequence to the action. And because respondent had notice of the existence of the tapes, see MCR 3.922(A)(1)(a), we find no due process violation.

In reaching this holding, we highlight the important distinction between evidence of an event supporting jurisdiction that was not alleged in a petition and evidence obtained after the petition was filed. Because the petition communicates to the respondent the specific charges that he or she faces, a court must not entertain evidence of neglectful acts that fall outside the petition's allegations. Our Supreme Court observed

in *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), that due process safeguards apply during the adjudicative phase of a child protective proceeding:

> An adjudicative proceeding determines whether the [family] court may acquire jurisdiction over a child. Hence, the liberty interest at stake is the parents' interest in the management of their children.
>
> The procedures used in adjudicative hearings protect parents from the risk of erroneous deprivation of this interest.

Fundamentally, evidence gathered postpetition should be shared with the opposing party to avoid unfair surprise. Adherence to the rules governing discovery embodied in MCR 3.922 should avoid prejudice to either party's due process rights.

Here, respondent and her counsel were aware of the existence of the audiotapes and of the prosecutor's intent to use them at the trial. Further, the circuit court instructed the jury that "the statements of the man" heard on the tape constituted hearsay and were not to be considered as substantive evidence. Because respondent's recorded statements bore directly on her credibility, they were relevant regardless of the date she uttered them. We find no due process violation.

C. THE TERMINATION DECISION

Finally, respondent contends that the circuit court lacked clear and convincing evidence to support either of the statutory grounds for termination of her parental rights. The clear-error standard controls our review of both the court's decision that clear and convincing evidence supported a ground for termination and that termination served the children's best interests. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286

(2009). Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996). In reviewing the circuit court's decision, we also must give "due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Respondent argues that her participation in services and her cessation of contact with Long demonstrated her ability to provide proper care for her children. The circuit court found to the contrary—that respondent had unsuccessfully participated in several domestic violence classes and refused to extricate herself from her relationship with Long. The record amply supports those findings. Further, the circuit court's detailed and thoughtful bench opinion painstakingly describes respondent's long history of engaging in domestic violence and her repetitive selection of violent, abusive partners. Given respondent's halfhearted efforts to escape the cycle of violence that she helped to create, and the resulting danger to her children, the circuit court did not clearly err by terminating her parental rights.

We affirm.

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

In re WHITE

Docket No. 316749. Submitted January 10, 2014, at Lansing. Decided January 16, 2014, at 9:00 a.m.

The Department of Human Services petitioned the Bay Circuit Court, Family Division, for protective custody over L. Rinnert's three daughters. After Rinnert admitted that her husband had kicked the oldest daughter, that she had lived in at least 20 different places in 9 years, and that she made poor relationship decisions, including involvement with a sex offender who had attempted third-degree criminal sexual conduct against a minor, the court, Karen A. Tighe, J., took jurisdiction over the children. Rinnert actively participated in services and interacted well with the children during parenting time, but the children did well in foster care. During a supervised parenting visit at Rinnert's apartment, a man whom Rinnert had met through Facebook arrived with beer. Another man whom Rinnert had met on the Internet and was dating was staying with her. In addition, Rinnert's uncle stayed at her apartment occasionally. The court eventually authorized a petition to terminate Rinnert's parental rights. Following a hearing, the court concluded that clear and convincing evidence supported terminating Rinnert's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). The court found that despite Rinnert's participation in services, the conditions that led to the adjudication had not sufficiently changed, that she continued to exhibit poor judgment and allow men she knew very little about to stay in her home, that she had not demonstrated that she could provide a safe and healthy environment for her children, and that she would not be able to rectify this condition within a reasonable time because she continued to engage in the same behavior after two years. The court found that Rinnert was unable to provide proper care and custody for the children and that there was a reasonable likelihood the children would be harmed if returned to her home. With regard to the children's best interests, the trial court found that the children were strongly bonded to Rinnert. Because the oldest child had physical and mental handicaps and the younger children had attention deficit and bipolar disorders, the court found that they required stability, full-time attention, and a safe home. The court found that Rinnert contin-

ued to surround herself with people of questionable character and that the children were the most stable in foster care. The foster family was willing to keep the children safe until adoption, and the court found that the children were developing in a healthy and safe manner. Accordingly, the court ordered Rinnert's parental rights terminated, and she appealed.

The Court of Appeals *held*:

1. MCL 712A.19b(3)(c)(*i*) provides that the trial court may terminate a parent's rights if the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. This statutory ground applies when the conditions that brought the children into foster care continue to exist despite the parent's having time to make changes and the opportunity to take advantage of a variety of services. MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's rights if he or she, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age. The parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide proper care and custody. MCL 712A.19b(3)(j) provides that the trial court may terminate parental rights if there is a reasonable likelihood from the parent's conduct or capacity that the child will be harmed if returned to the parent's home. A parent's failure to comply with the terms and conditions of the service plan is also evidence that the child will be harmed if returned to the parent's home.

2. The trial court did not clearly err when it found that the evidence supported terminating Rinnert's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). Rinnert made significant progress with the parenting aspects of her service plan, but her deficient parenting abilities were not the only conduct that brought her children into care. She made poor relationships decisions, such as exposing her daughters to a sex offender and inviting a man with a criminal history into her home. Her psychological evaluation indicated that she was emotionally immature and likely to engage in relationships with exploitive men. Although the court had instructed Rinnert several times to stop bringing new men home, she proved unwilling or unable to do so. Besides the parenting-time incident and her allowing an uncle to stay with her at the time of the termination hearing, Rinnert continued to invite men into her home during the two-year

pendency of this case. Rinnert's oldest daughter was particularly vulnerable to abuse and harm because of her autism, and Rinnert's willingness to expose her children to exploitive individuals put them at a risk of harm.

3. Under MCL 712A.19b(5), the trial court must order the parent's rights terminated if the petitioner established a statutory ground for termination by clear and convincing evidence and the court finds from a preponderance of the evidence on the whole record that termination is in the children's best interests. The trial court should weigh all the evidence available to determine the children's best interests. The court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption.

4. The trial court did not clearly err when it found that terminating Rinnert's parental rights was in the children's best interests. While the trial court found that the children and Rinnert shared a bond, the strength of the bond was only one factor among many that the court considered. It also found that Rinnert had a history of failing to comply with her case service plan by inviting strange men into her home, that the children were doing well in foster care, that there was a possibility that the children would be adopted, and that the children strongly needed permanence and stability. The trial court gave strong weight to the children's need for safety and stability.

5. The trial court did not clearly err by failing to distinguish individual children's best interests. The court has a duty to decide the best interests of each child individually, and if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control. If the best interests of the individual children significantly differ, the trial court should address those differences when making its determination of the children's best interests. The court is not, however, required to explicitly make individual and often redundant factual findings concerning each child's best interests. The trial court found that all the children shared a strong bond with Rinnert. Multiple witnesses testified that the children loved Rinnert, were bonded with her, and wanted to return to her home. The oldest daughter found it traumatic to be separated from anyone significant in her life, including her mother, sisters, or the foster family. The trial court did not clearly err by

failing to find that the oldest daughter shared a particular, stronger bond with Rinnert than the younger children. Additionally, the court distinguished between the children when their needs differed in significant ways, such as when it considered the children's individual and different special needs.

Affirmed.

1. TERMINATION OF PARENTAL RIGHTS — BEST INTERESTS OF THE CHILD — FACTORS TO CONSIDER.

The trial court must order a person's parental rights terminated if the petitioner establishes a statutory ground for termination by clear and convincing evidence and the court finds from a preponderance of the evidence on the whole record that termination is in the child's best interests; the court should weigh all the evidence available; the court should consider a wide variety of factors, including the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home; the court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the child's well-being while in care, and the possibility of adoption (MCL 712A.19b(3) and(5)).

2. TERMINATION OF PARENTAL RIGHTS — BEST INTERESTS OF THE CHILD — INDIVIDUAL DETERMINATIONS FOR EACH CHILD.

A trial court determining whether to terminate parental rights has a duty to decide the best interests of each child individually, and if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control; if the best interests of the individual children significantly differ, the court should address those differences when making its determination of the children's best interests; the court is not, however, required to explicitly make individual factual findings concerning each child's best interests (MCL 712A.19b(5)).

Kurt C. Asbury, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for the Department of Human Services.

James A. Perry for L. Rinnert.

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

PER CURIAM. Respondent-appellant, L. Rinnert, appeals as of right the trial court's order terminating her parental rights to her three minor children under MCL 712A.19b(3)(c)(*i*), (g), and (j). The trial court also terminated the parental rights of the children's father, J. White, who is not a party to this appeal. Because Rinnert failed to demonstrate that she could provide a safe and stable environment for her children, we affirm.

I. FACTS

A. BACKGROUND FACTS

Children's Protective Services received multiple referrals concerning Rinnert's care of her three daughters beginning in 2002. Rinnert's oldest daughter is autistic, and the younger daughters suffer from attention deficit and bipolar disorders. Rinnert is physically disabled.

In 2011, the Department of Human Services (the Department) petitioned the trial court for protective custody over the children. In response to the petition, Rinnert admitted that her husband at the time had kicked the oldest daughter in 2010. Rinnert admitted that she had lived in at least 20 different places in 9 years. Rinnert admitted that she makes poor relationship decisions, including being involved with J. Harris, a sex offender who had attempted third-degree criminal sexual conduct against a person between the ages of 13 and 15. On these bases, the trial court took jurisdiction over the children.

B. RINNERT'S PROGRESS WITH SERVICES

Rinnert's psychological evaluation reported that Rinnert was emotionally immature and was unable to make the psychological transition to adulthood because of abuse that she had suffered at the hands of her

biological and adoptive families. The evaluation noted that Rinnert was likely to "routinely seek out relationships in which she is exploited" and "attracts individuals willing to exploit her[.]" The evaluation stated that Rinnert did not understand that associating with such individuals places her children at a risk of harm.

At a review hearing on May 7, 2012, Jessica Duvall, the children's caseworker, reported that Rinnert actively participated in services. Duvall reported that Rinnert interacted very well with the children during parenting time. Duvall also reported that the children were doing well in foster care.

At a hearing on July 30, 2012, Duvall reported that a strange man arrived with a six-pack of beer during a supervised parenting visit at Rinnert's apartment. Rinnert admitted that the man was someone she had met through Facebook. Rinnert asked the man to leave, and eventually the police were called. In a letter, Amy Anderson, Rinnert's therapist, reported that Rinnert had been given permission to hold a birthday party for the oldest daughter at a state park as long as she did not do any grilling and did not invite guests. Rinnert brought four guests and grilling equipment to the park. The trial court agreed that Rinnert had demonstrated progress, but instructed Rinnert to "stay away from men" and close her Facebook account.

At a hearing on October 19, 2012, Ned Heath, a Department employee, reported that a man, B. Johnson, was staying with Rinnert. Rinnert stated that Johnson was her cousin. Heath testified that he found Johnson shirtless in Rinnert's apartment when he arrived for a check-in and that Rinnert had a picture of Johnson lying on her bed shirtless. White testified that Rinnert's birth mother had informed him that Rinnert and Johnson met on the Internet and were dating.

The trial court informed Rinnert that if it did not see progress with Rinnert's issue of finding strange men on the Internet and allowing them to come into the house to spend the night, it would not be safe to return the children to Rinnert's care.

The children originally came into care with head lice. Heath also reported that head lice continued to be a concern because the children had lice again after visiting Rinnert. The trial court instructed Rinnert to take care of the lice issue.

At the January 6, 2013 hearing, Heath reported that Rinnert and Johnson were still seeing each other at the home of a mutual friend. Heath reported that when Rinnert did not have the children, she was staying at a friend's house where Johnson was also staying. The trial court authorized the prosecutor to petition to terminate Rinnert's parental rights.

C. TERMINATION HEARING

At the termination hearing, Lisa Del Valle, Rinnert's therapist, testified that Rinnert had strongly progressed toward building self-esteem and being assertive. Ann Arnold, Rinnert's parenting educator, testified that Rinnert had done very well at setting boundaries for her children. Rebecca Mouch, Rinnert's women's support group counselor, testified that Rinnert had made "tremendous" progress at understanding boundaries.

Lindsay Craves, the oldest child's therapist, testified that she requires a high degree of special care because of her autism. Craves testified that Rinnert would have to be very careful about the people she brought near the oldest child because of her vulnerability. Craves testified that she worried about Rinnert's decisions as they related to keeping the oldest child safe.

Johnson testified that he and Rinnert met on an Internet dating website and discovered that they were distantly related through Rinnert's birth mother. Rinnert testified that her birth mother had found Johnson on the dating website and suggested that Rinnert invite him to Michigan to assist around Rinnert's home. Rinnert testified that she knew that Johnson had a criminal background when she invited him to Michigan, but she wanted to "give him a chance."

Johnson testified that he moved to Rinnert's home from Texas and lived there for a month, but they did not have a sexual relationship. Rinnert testified that Johnson never lived with her. Johnson confirmed that he saw Rinnert on several occasions after leaving her home.

Rinnert denied that she had ever had a relationship with Harris, despite having admitted it at the preliminary hearing. Rinnert also testified that an uncle was occasionally staying at her apartment. Heath testified that he was unsure whether Rinnert had benefitted from services.

D. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS

The trial court concluded that clear and convincing evidence supported terminating Rinnert's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). It found that, despite Rinnert's participation in services, the conditions that led to the adjudication had not sufficiently changed. The trial court found that Rinnert continued to exhibit poor judgment, allow men that she knew very little about to stay in her home, and "meet, greet, and entertain dangerous companions." The trial court found that Rinnert had not demonstrated that she could provide a safe and healthy environment for her children. The trial court found that Rinnert would

not be able to rectify this condition within a reasonable time because after two years she continued to engage in the same behavior. The trial court found that Rinnert was unable to provide proper care and custody for the children and that there was a reasonable likelihood that the children would be harmed if returned to Rinnert's home.

Considering the children's best interests, the trial court found that the children were strongly bonded to Rinnert. The trial court found that the children have special needs: the oldest child has physical and mental handicaps, and the younger two children have attention deficit and bipolar disorders. The trial court found that because of these needs, the children "require stability and full-time attention" and a safe and stable home.

The trial court found that Rinnert had continued to "surround herself with people of questionable character." It found that the children were the most stable in foster care, where they had lived for the longest single period in their lives. The trial court noted that the foster family was willing to keep the children safe until adoption. The trial court found that the children were developing in a healthy and safe manner.

The trial court ordered Rinnert's parental rights terminated.

II. STATUTORY GROUNDS

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination.[1] The trial court's factual findings are clearly erroneous if the evidence

[1] MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

supports them, but we are definitely and firmly convinced that it made a mistake.[2]

B. LEGAL STANDARDS

MCL 712A.19b(3)(c)(*i*) provides that the trial court may terminate a parent's rights if

> [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

This statutory ground exists when the conditions that brought the children into foster care continue to exist despite "time to make changes and the opportunity to take advantage of a variety of services . . . ."[3]

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's rights if

> [t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody.[4]

MCL 712A.19b(3)(j) provides that the trial court may terminate parental rights if

> [t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

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[2] *Mason*, 486 Mich at 152.

[3] See *In re Powers Minors*, 244 Mich App 111, 119; 624 NW2d 472 (2000).

[4] *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003); *In re Trejo Minors*, 462 Mich 341, 358-360; 612 NW2d 407 (2000).

Similarly, a parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home.[5]

C. APPLYING THE STANDARDS

Rinnert contends that the trial court clearly erred by finding that clear and convincing evidence supported the statutory grounds because she participated in and benefitted from services. We disagree.

We recognize that a variety of witnesses testified that Rinnert had made significant progress with the parenting aspect of her service plan. However, Rinnert's formerly deficient parenting abilities were not the only conduct that brought Rinnert's children into care. At the preliminary hearing, Rinnert admitted that she made poor relationships decisions, such as exposing her young daughters to a sex offender who had attempted to molest a child.

Rinnert's psychological evaluation indicated that Rinnert was emotionally immature and likely to engage in relationships with exploitive men who would put her children at a risk of harm. The trial court instructed Rinnert several times throughout the pendency of this case to stop bringing new men into her home. Rinnert proved unwilling or unable to do so.

Rinnert asserts that she denied having a sexual relationship with Johnson. Rinnert also denied allowing Johnson to live in her home. We defer to the special ability of the trial court to judge the credibility of witnesses.[6] The trial court found that Rinnert invited Johnson into her home. Johnson testified that Rinnert

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[5] MCL 712A.19a(5); see also *Trejo*, 462 Mich at 360-363.

[6] MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

invited him into her home after they met on a dating website. Heath testified that he found Johnson in Rinnert's home on a Sunday morning wearing no shirt. The trial court's finding was not clearly erroneous.

Rinnert's assertion also misses the point. Whether Rinnert engaged in a sexual relationship with Johnson does not negate that she invited Johnson, whom she knew had a criminal history, into her home. Rinnert previously admitted exposing her children to a sex offender. After the children were removed from her care, a man that she met on Facebook arrived at parenting time with alcoholic beverages. At the time of the termination hearing, Rinnert was allowing an uncle to stay with her. During the two-year pendency of this case, Rinnert continued to invite men into her home. One of these men had a criminal background; the other left only after the police were called. Accordingly, we are not definitely and firmly convinced that the trial court made a mistake when it found that the evidence supported terminating Rinnert's parental rights under MCL 712A.19b(3)(c)(*i*).

Similarly, we are not definitely and firmly convinced that the trial court made a mistake when it found that clear and convincing evidence supported that (1) Rinnert could not provide her children with proper care and custody and (2) the children were likely to be harmed if returned to Rinnert's care. Rinnert had a history of inviting men with criminal backgrounds into her home. Rinnert continued to invite men into her home throughout the pendency of the case, demonstrating that she did not benefit from her service plan. Craves testified that Rinnert's oldest daughter was particularly vulnerable to abuse and harm because of her autism. Rinnert's psychological evaluation indicated that Rinnert's willingness to expose her children

to exploitive individuals put them at a risk of harm. Given Rinnert's failure to benefit from her service plan and the likelihood that her behavior would put her children at a risk of harm, we conclude that the trial court did not clearly err when it found that the evidence supported terminating her parental rights under MCL 712A.19b(3)(g) and (j).

III. THE CHILDREN'S BEST INTERESTS

A. STANDARD OF REVIEW

The trial court must order the parent's rights terminated if the Department has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the children's best interests.[7] We review for clear error the trial court's determination regarding the children's best interests.[8]

B. LEGAL STANDARDS

The trial court should weigh all the evidence available to determine the children's best interests.[9] To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home."[10]

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[7] MCL 712A.19b(5); *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012); *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013).

[8] MCR 3.977(K); *Trejo*, 462 Mich at 356-357.

[9] See *Trejo*, 462 Mich at 356-357.

[10] *Olive/Metts*, 297 Mich App at 41-42 (citations omitted).

The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption.[11]

C. APPLYING THE STANDARDS

Rinnert asserts that the trial court clearly erred when it found that termination was in the children's best interests because she and the children shared a strong bond. We disagree.

The strength of the children's bond was only one factor among many that the trial court considered. The trial court found that the children and Rinnert shared a bond. However, it also found that Rinnert had a history of failing to comply with her case service plan by inviting strange men into her home. It found that that the children were doing very well in foster care. It found that there was a possibility that the children would be adopted. And it found that the children strongly needed permanence and stability. The trial court gave strong weight to the children's need for safety and stability. Considering the record in this case, we are not definitely and firmly convinced that the trial court made a mistake when it found that terminating Rinnert's parental rights was in the children's best interests.

Rinnert also asserts that the trial court erred by failing to consider the needs of each child individually because it failed to address the oldest child's special bond with Rinnert. We disagree.

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[11] See *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001); *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re Jones*, 286 Mich App 126, 129-130; 777 NW2d 728 (2009).

In *In re Olive/Metts Minors*, this Court held that the trial court "has a duty to decide the best interests of each child individually."[12] The Court relied on *Foskett v Foskett*, a custody case that held that "if keeping the children together is contrary to the best interests of an *individual* child, the best interests of *that* child will control."[13] The Court also relied on *In re HRC*, in which the Court noted that the trial court on remand should "make findings as to each child's best interests before deciding whether termination of respondents' parental rights is warranted."[14]

In *Olive/Metts*, the trial court clearly erred by failing to consider the individual best interests of the children because it failed to address that some of the children were placed with relatives and others were not.[15] Notably, the Court held that the trial court clearly erred by failing to distinguish between two *groups* of children—the younger children, who were placed with relatives, and the older children, who were not.[16] The younger children's placement with relatives was a significant basis for distinguishing them from the older children because a trial court *must* address a child's placement with relatives.[17]

We conclude that this Court's decision in *In re Olive/Metts* stands for the proposition that, if the best interests of the individual children *significantly* differ, the trial court should address those differences when making its determination of the children's best inter-

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[12] *Olive/Metts*, 297 Mich App at 42.

[13] *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001) (quotation marks and citation omitted).

[14] *In re HRC*, 286 Mich App 444, 457; 781 NW2d 105 (2009).

[15] *Olive/Metts*, 297 Mich App at 43-44.

[16] *Id*.

[17] See *id*.

ests. It does not stand for the proposition that the trial court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests.

We review for clear error whether the trial court failed to address a significant difference between each child's best interests.[18] The trial court found that *all* the children shared a strong bond with Rinnert. Multiple witnesses testified that all the children loved Rinnert, were bonded with Rinnert, and wanted to return to her home. Craves opined that the oldest daughter found it traumatic to be separated from anyone significant in her life, including her mother, sisters, or the foster family. There is no indication that the trial court clearly erred by failing to find that the oldest daughter shared a particular, stronger bond with Rinnert than the younger children.

Additionally, the trial court *did* distinguish between the children when their needs differed in significant ways, such as when it considered the children's individual and different special needs. We conclude that the trial court did not clearly err by failing to distinguish the individual best interests of the children.

IV. CONCLUSION

We conclude that the trial court did not clearly err when it found that the evidence supported terminating Rinnert's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j) because Rinnert failed to comply with her service plan by continuing to invite strange men into her home. We conclude that the trial court did not clearly err when it found that terminating Rinnert's parental rights was in the children's best interests. We

[18] See *id*. at 44.

also conclude that the trial court did not fail to consider the individual best interests of the children.

We affirm.

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

HOLTON v WARD

Docket No. 308454. Submitted January 9, 2014, at Detroit. Decided January 23, 2014, at 9:00 a.m. Leave to appeal sought.

James and Nancy Holton brought an action in the Oakland Circuit Court against Carole Ward, seeking declaratory and injunctive relief. Plaintiffs and defendant owned adjacent parcels of land that were once owned, and subsequently were divided and sold, by a common owner. The common owner had dredged part of a wetland on the property and had built an earthen dam that allowed surface water to collect in the wetland, forming a large pond. Plaintiffs claimed a right to use that portion of the pond on defendant's property. Defendant moved for summary disposition, asserting that plaintiffs' action was barred by collateral estoppel and res judicata because the Department of Environmental Quality (DEQ) had previously ruled in a contested case hearing that plaintiffs did not have riparian rights in the pond. Defendant also sought sanctions against plaintiffs for bringing a frivolous lawsuit. The court, Rae Lee Chabot, J., granted summary disposition in favor of defendant, holding that collateral estoppel barred plaintiffs' action, but denied defendant's request for sanctions. Plaintiffs appealed and defendant cross-appealed.

The Court of Appeals *held*:

1. Riparian rights are special rights to make use of water in a waterway adjoining the owner's property. Riparian rights attach to land that abuts or includes a natural watercourse—i.e., a natural stream of water fed from permanent or periodical sources and usually flowing in a particular direction in a defined channel, having a bed and banks or sides, and usually discharging into some other stream or body of water. Riparian rights do not attach to land that abuts an artificial watercourse—i.e., waterways that owe their origin to acts of man. The pond in which plaintiffs claimed riparian rights was an artificial body of water. The original wetland dredged and dammed by the common owner served as a mere collection point for surface waters. Because the original wetland was not a natural watercourse, plaintiffs possessed no riparian rights in the artificial pond created by the common owner's actions.

2. MCL 324.30101(r) defines the term "riparian owner" as a person who has riparian rights, and MCL 324.30101(s) defines the term "riparian rights" as those rights that are associated with the ownership of the bank or shore of an inland lake or stream. These definitional sections in Part 301 of the Natural Resources and Environmental Protection Act, MCL 324.30101 *et seq*., do not grant riparian rights to new groups of property holders or enlarge the common-law understanding of riparian rights, but simply define those terms as they are generally understood.

3. For collateral estoppel to apply, three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment, (2) the same parties must have had a full and fair opportunity to litigate the issue, and (3) there must be mutuality of estoppel. Collateral estoppel applies to administrative proceedings if the determination was adjudicatory in nature, allowed for an appeal, and the Legislature intended that the decision would be final if no appeal was taken. In this case, defendant's predecessor in interest, Sharon Bone, was a party to the earlier action before the DEQ, and defendant would have been bound by a decision against Bone in that action. Both Bone and James, who participated in the DEQ action, had a full and fair opportunity to litigate the issue of plaintiffs' alleged riparian rights in the DEQ action. The question whether James possessed any water rights in the pond was an essential part of the DEQ action, and the DEQ decided the matter, holding that he did not have any riparian rights in the pond. The DEQ action was adjudicatory in nature, allowed for an appeal, and the Legislature intended that the decision would be final if no appeal was taken. Accordingly, the trial court correctly concluded that this case was barred by collateral estoppel and properly granted summary disposition in favor of defendant.

4. A party pleading a frivolous claim is subject to costs as provided in MCR 2.625(A)(2). Under MCR 2.625(A)(2), if the court finds an action or defense frivolous, costs shall be awarded as provided by MCL 600.2591. MCL 600.2591(1) mandates that if a claim or defense is frivolous, the court shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney. An action 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 legal merit. In this case, the law is well established that riparian rights do not attach to artificial bodies of water, plaintiffs knew the waterway in question was artificial, and the DEQ had previously held that James had no riparian rights in the water in question. Therefore, plaintiffs' position was devoid of arguable legal merit, and the filing of this action was an effort to harass defendant. The action was frivolous, and defendant was entitled to attorney fees and costs.

Summary disposition in favor of defendant affirmed; denial of sanctions against plaintiffs reversed. Remanded to the trial court for imposition of sanctions against plaintiffs in an appropriate amount.

UAW-GM Legal Services Plan (by *Carol Nosanchuk Birnkrant* and *Frederick L. Miller*) for plaintiffs.

Butzel Long PC (by *Patrick Karbowski* and *Susan Lynn Johnson*) and *The Smith Appellate Law Firm* (by *Michael F. Smith*) for defendant.

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

SAAD, P.J. In this alleged riparian rights case, plaintiffs, James and Nancy Holton, appeal the trial court's grant of summary disposition to defendant, Carole Ward. Defendant cross-appeals because the trial court declined to hold that plaintiffs' lawsuit was frivolous and, therefore, denied defendant's motion for sanctions. Because plaintiffs have no riparian rights to the man-made body of water at issue, we affirm the trial court's grant of summary disposition. And because plaintiffs' suit is frivolous, we reverse the trial court's refusal to grant sanctions.

I. NATURE OF THE CASE

Plaintiffs and defendant own adjacent land parcels once owned, and subsequently divided and sold by, a common owner. To prevent his cattle from walking

through a muddy wetland, the common owner dredged part of the wetland and built an earthen dam, which allowed surface water to collect in the wetland. His actions created a very large pond, which is now split between plaintiffs' and defendant's properties.

Plaintiffs claim the right to use that portion of the pond on defendant's property under the theory of riparian rights,[1] despite the fact that (1) the pond is artificial and man-made, and (2) their parcel does not abut a natural watercourse, but merely this artificial pond.

Michigan law is clear that riparian rights adhere to land that abuts a natural watercourse, and not, as here, to artificial or man-made bodies of water. Yet despite this well-established Michigan precedent and an earlier ruling by the Michigan Department of Environmental Quality (DEQ) that rejected a similar riparian rights claim brought by Mr. Holton to gain access to defendant's property, plaintiffs once again seek to establish riparian rights to gain access to property which is rightfully defendant's.

We hold that plaintiffs have no riparian rights to gain access to that portion of the pond that forms part of defendant's property. We accordingly affirm the part of the trial court's ruling that reflects this black-letter law. Moreover, because, in an earlier decision, the DEQ ruled that Mr. Holton had no riparian rights to access and disturb defendant's peaceful enjoyment of her property rights, we hold that collateral estoppel also

[1] As defendant correctly notes, the land at issue in this case is properly termed "littoral"—i.e., land that abuts or includes a lake. "Riparian" lands abut or include a river. Michigan courts, however, have used the term "riparian" to encompass both types of property, and we follow that approach throughout this opinion. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 138 n 1; 793 NW2d 633 (2010).

bars plaintiffs' claim. In light of the DEQ ruling and well-established Michigan precedent, plaintiffs and their counsel knew or should have known that this claim was frivolous and vexatious, and therefore the trial court should have granted appropriate sanctions. Because it failed to do so, we remand for a determination of appropriate sanctions.

We so hold not only because of the obvious frivolity of plaintiffs' case. A landowner should not have to confront the Hobson's choice of either repeated expensive litigation to reestablish the right of peaceful enjoyment of her property, or the abandonment of these historically cherished and valued property rights.

II. FACTS AND PROCEDURAL HISTORY

The parties own adjacent land parcels, which they obtained from a common owner. In the 1950s, the common owner sought to drain part of a wetland on his property, and did so by dredging a portion of the wetland and constructing an earthen dam.[2] This new infrastructure captured surface water created by rain and melted snow. In the process, it transformed what had been a muddy wetland into a very large pond.

The wetland-pond covers approximately 20 acres. When the common owner divided his lot into two parcels, the wetland-pond was also split in two, with part on plaintiffs' property and part on defendant's. This area of plaintiffs' and defendant's properties has been the subject of two prior lawsuits, both brought by Mr. Holton: (1) a 2003 action before the Oakland County Circuit Court to force defendant's predecessor

[2] For a detailed discussion of the relevant facts see *Holton v Bone*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2007 (Docket No. 272113), pp 1-2.

in interest to remove a culvert that lowered the water level of the wetland-pond area (which Mr. Holton won),[3] and (2) a 2004 suit before the DEQ to prevent defendant's predecessor in interest from, among other things, maintaining a fence in the wetland area that prevented Mr. Holton from trespassing on the portion of the wetland-pond on defendant's property (which Mr. Holton lost). In the latter action, Mr. Holton claimed that the fence would violate his "water rights" in the wetland-pond—an argument that the DEQ rejected.[4]

Undeterred by this legal setback, plaintiffs launched this lawsuit in 2011 in the Oakland Circuit Court, in yet another effort to gain access to the portion of the wetland-pond on defendant's property (currently barred by defendant's fence), and claimed that defendant's denial of access violates plaintiffs' riparian rights. Defendant sought summary disposition under MCR 2.116(C)(7) and 2.116(C)(8), and in support asserted that plaintiffs' complaint is barred by collateral estoppel and res judicata because the DEQ ruled that plaintiffs have no riparian rights in this body of water. She also sought sanctions against plaintiffs for bringing a frivolous lawsuit because (1) plaintiffs knew when they brought this suit that well-established Michigan law holds that plaintiffs have no riparian rights to a man-made body of water, and (2) that the DEQ so ruled in Mr. Holton's earlier litigation.

The trial court correctly rejected plaintiffs' claims and granted defendant's motion for summary disposition. It held that collateral estoppel barred plaintiffs' action because the 2006 DEQ ruling stressed that

[3] Our Court affirmed the trial court's judgment. *Holton*, unpub op at 5.

[4] The DEQ issued a final determination and order on this suit in October 2006. Mr. Holton appealed an unrelated portion of the DEQ suit to the Oakland Circuit Court, which denied the appeal.

defendant had no riparian rights in the large wetland-pond, because the wetland-pond was an artificial—i.e., man-made—waterway. The trial court, however, denied defendant's request for sanctions, holding that the riparian-rights issue was "arguable."

Plaintiffs appeal and argue that the trial court erred when it granted defendant's motion for summary disposition. They claim that they possess riparian rights in the wetland-pond, and that their suit should not have been collaterally estopped on the basis that they lack riparian rights. Plaintiffs also raise a new argument on appeal, asserting that Part 301 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30101 *et seq*., which concerns inland lakes and streams, provides them with a statutory basis for riparian rights in the wetland-pond. Defendant cross-appeals, and reasserts (1) that res judicata (as well as collateral estoppel) bars plaintiffs' claims, and (2) the trial court erred when it denied her request for sanctions against plaintiffs.

III. ANALYSIS

We review de novo a trial court's decision on a motion for summary disposition, *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008), and under MCR 2.116(C)(7) we aim to determine whether the moving party was entitled to judgment as a matter of law, *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a plaintiff's claim based on the pleadings alone to determine whether the plaintiff has set forth a claim on which relief may be granted. *Maple Grove Twp v*

Misteguay Creek Intercounty Drain Bd, 298 Mich App 200, 206; 828 NW2d 459 (2012). "Summary disposition under subrule (C)(8) is appropriate if no factual development could justify the plaintiff's claim for relief." *Id*. (quotation marks and citation omitted).

A. RIPARIAN RIGHTS

Claims of riparian rights are common-law claims and they are, accordingly, reviewed de novo by our Court. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 53; 709 NW2d 174 (2005) (opinion by SMOLENSKI, J.), aff'd in part and rev'd in part on other grounds 479 Mich 280 (2007). " '[R]iparian rights' are special rights to make use of water in a waterway adjoining the owner's property." *Dyball v Lennox*, 260 Mich App 698, 705; 680 NW2d 522 (2004) (citations and quotation marks omitted). Among other privileges, these rights include: the right to make natural and artificial use of the water in the watercourse;[5] the right to construct and maintain a dock;[6] and the right to use the entire surface of the watercourse for

[5] See *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967) (opinion by T. M. KAVANAGH, J.) (noting that there are two classes of riparian uses: natural and artificial, defining natural uses as those that "encompass all those absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purposes," and defining artificial uses as those that "merely increase one's comfort and prosperity and do not rank as essential to his existence, such as commercial profit and recreation"). Both natural and artificial use of water is limited by the doctrine of "reasonable use," which mandates that riparian owners on the same watercourse have an equal right to use of the water. For a recent explanation of Michigan reasonable-use doctrine, see *Nestlé*, 269 Mich App at 55-58 (opinion by SMOLENSKI, J.).

[6] *McCardel v Smolen*, 404 Mich 89, 94; 273 NW2d 3 (1978) ("Erecting or maintaining docks or boat hoists near the water's edge is a riparian or littoral right . . . .").

recreational purposes.[7] Such rights are distinct from other state-law water-related legal privileges, such as the public right of recreational access, which allows for qualified public use of waterways that are navigable under Michigan law.[8]

Michigan has a straightforward rule governing riparian rights: riparian rights attach to land that abuts or includes a natural watercourse—i.e., a "natural stream of water fed from permanent or periodical natural sources and usually flowing in a particular direction in a defined channel, having a bed and banks or sides, and usually discharging itself into some other stream or body of water" *Kernen v Homestead Dev Co*, 232 Mich App 503, 511 n 5; 591 NW2d 369 (1998) (citations and quotation marks omitted). Riparian rights do not attach to land that abuts an artificial watercourse—i.e., "waterways that owe their origin to acts of man, such as canals, drainage and irrigation ditches, aqueducts, flumes, and the like." *Thompson*, 379 Mich at 679 (opinion by T. M. KAVANAGH, J.), citing 4 Restatement Torts, § 841, p 321. Stated another way, "it is clear under Michigan law that no riparian rights arise from an artificial body of water." *Persell v Wertz*, 287 Mich App 576, 579; 791 NW2d 494 (2010).

As Justice KAVANAGH noted in *Thompson*, this rule is

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[7] *Rice v Naimish*, 8 Mich App 698, 703; 155 NW2d 370 (1967) ("Among the rights of a littoral owner is the right to use his upland property to gain access to the lake waters; the right to put out in a boat or on foot from his upland property where it touches the lake waters; the right, after so embarking, to go boating, swimming, water skiing, fishing, ice skating or sledding or to engage in other aquatic sports, in or upon the lake waters; and the right to use the entire surface and sub-surface lake waters for such purposes.").

[8] See *Bott v Natural Resources Comm*, 415 Mich 45, 60-65; 327 NW2d 838 (1982).

followed by many of our sister states,[9] and ultimately has its origins in the most ancient property right: the right to exclude. See *Ruggles v Dandison*, 284 Mich 338, 340-341; 279 NW 851 (1938) (holding that the plaintiff had no riparian rights in a natural lake when the plaintiff's access to the lake was provided by a man-made channel, and that the defendant was entitled to exclude the plaintiff from the lake by installing a fence). More recent cases have focused on the economic advantages of limiting riparian rights to natural waters.[10] In its discussion of the principle, the Illinois Supreme Court[11] explained:

> The commonsense rationale underlying [the artificial-waters rule] is that, unlike a natural body of water, which exists because of natural processes, an artificial body of water is the result of someone's labor. An artificial body of water is not a natural resource to be shared by all. Consequently, as a general rule, it would be inequitable to grant a property owner rights to an artificial body of water

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[9] Specifically, Justice KAVANAGH's lead opinion in *Thompson* cites cases from Wisconsin, Texas, Virginia, and Nebraska. *Thompson*, 379 Mich at 679-681. For a more recent listing of decisions adopting the artificial waters rule, see *Anderson v Bell*, 433 So2d 1202, 1204-1205 (Fla, 1983) (restating the rule and citing supporting cases from Arizona, Connecticut, and New Jersey). *Anderson* also cites *Thompson* with approval. *Id*. at 1204.

[10] See, for example, *Anderson*, 433 So2d at 1205 ("Because the construction of a man-made water body often involves the expenditure of substantial sums of money and the expense is not, as a rule, divided proportionately among the various abutting owners, the individual making the expenditure is justified in expecting that superior privileges will inure to him in return for his investment."), and *White's Mill Colony, Inc v Williams*, 363 SC 117, 134; 609 SE2d 811 (SC App, 2005) (citing *Anderson*'s rationale with approval and noting that "[p]roperty owners should be able to make improvements to their real property without fear that their investment will be diminished should they create a body of water that touches upon the property line of a neighboring landowner").

[11] Cases from foreign jurisdictions are not binding, but can be persuasive. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

> that has been created by someone else solely because the property abuts the water. [*Alderson v Fatlan*, 231 Ill 2d 311, 320-321; 325 Ill Dec 548; 898 NE2d 595 (2008).[12]]

It is undisputed that the wetland-pond in which plaintiffs claim riparian rights is an artificial body of water. The pond and deeper wetland were created in the 1950s by the common owner's earthen damming and dredging of a muddy wetland, which caused surface waters to collect in the deeper wetland, and created a pond. Accordingly, the wetland-pond area created by the dam is artificial, and plaintiffs possess no riparian rights in it. Plaintiffs have made no allegations that the common owner dammed a natural watercourse, nor is there any evidence to suggest that he did. In fact, it appears that the original wetland dredged and dammed by the common owner merely served as a collection point for surface waters—i.e., " 'waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence.' Such waters are lost by percolation, evaporation, or by reaching some definite watercourse or substantial body of water into which they flow." *Kernen*, 232 Mich App at 511 n 7, quoting *Fenmode, Inc v Aetna Cas & Surety Co*, 303 Mich 188, 192; 6 NW2d 479 (1942). Surface waters do not give rise to riparian rights: said rights only attach to land that abuts a natural watercourse. See *Gregory v Bush*, 64 Mich 37, 41; 31 NW 90 (1887) (noting that "outlet[s] for surface

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[12] After its explanation of the artificial-waters rule, *Alderson* lists cases in which Illinois courts have found exceptions to the rule—i.e., cases in which the parties *did* possess riparian rights in artificial bodies of water. *Alderson*, 231 Ill 2d at 321-323. None of these exceptions is relevant to our case, however, because, as noted, Michigan law has a bright-line rule: riparian rights do not arise from artificial watercourses. See *Persell*, 287 Mich App at 579; *Thompson*, 379 Mich at 679.

water" that have "no defined bed or channel, with banks and sides" and "no permanent source of supply" are not "governed by the well-settled rules applying to natural streams"). If the original wetland modified by the common owner was not a "natural watercourse," it is impossible for plaintiffs to have any riparian rights in the (artificial) pond and deeper wetland created by the common owner's actions. Plaintiffs cite no caselaw to the contrary, and their attempts to distinguish their situation are unavailing.[13]

Perhaps in tacit admission that they have no viable common-law riparian-rights claim, plaintiffs, for the first time in this appeal, turn to a statute for a remedy. They assert that the definitional section of Part 301 of NREPA[14] abrogates the common law and creates riparian rights for all owners of property that abut watercourses larger than five acres. Because this argument was not raised by plaintiffs below or decided by the trial court, plaintiffs waived this argument and it is not preserved for appeal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). We accordingly need not address it, as "[i]ssues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

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[13] Plaintiffs also assert that the trial court never should have decided the issue of riparian rights, because defendant supposedly raised the issue for the first time in her reply brief. This assertion is belied by the record. The first page of plaintiffs' complaint states that this is an action to "claim access rights, as riparian owners, to the entirety of a body of water that is on their property and the property of Defendant." In addition, plaintiffs were well aware of the artificial waterway issue—as noted, our Court recognized the wetland-pond as artificial four years before plaintiffs launched this lawsuit. *Holton*, unpub op at 1. They cannot claim surprise now that defendant has raised that same issue yet again.

[14] Specifically MCL 324.30101(i) and (s).

In any event, plaintiffs' argument under Part 301 lacks merit.[15] By its plain meaning, the statute does not grant or enlarge riparian rights—it simply defines those terms as generally understood. See MCL 324.30101(r) (" '[r]iparian owner' means a person who *has* riparian rights") (emphasis added); MCL 324.30101(s) (" '[r]iparian rights' means those rights which are associated with the ownership of the bank or shore of inland lake or stream"). The use of "has" indicates that MCL 324.30101(r) refers to landowners who already possess riparian rights—it does not extend riparian rights to new groups of property holders. In addition, the statute nowhere mentions that it abrogates the common law, nor does it evince intent to do so. See *Hamed v Wayne Co*, 490 Mich 1, 22 n 57; 803 NW2d 237 (2011) ("The Legislature is presumed to know the common law, and any abrogation of the common law must be explicit."). See also *Stidham v Algonquin Lake Community Ass'n*, 133 Mich App 94, 98; 348 NW2d 46 (1984) (holding that "[t]he existence of the Inland Lakes and Streams Act

[15] In support of their claim, plaintiffs cite an unpublished opinion of this Court, *Parsons v Whittaker*, which held that the Inland Lakes and Streams Act (ILSA), former MCL 281.951 *et seq*., which has been recodified as Part 301 of NREPA, did create riparian rights in landowners whose parcels abut waterways (natural and artificial) that are over five acres in size. *Parsons v Whittaker*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 1996 (Docket No. 170274). Unpublished opinions are not binding, but may be considered persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

As discussed *infra*, we are not persuaded by *Parsons*' interpretation of the ILSA, and believe that the case was wrongly decided. We further note that the *Parsons* court was divided—Judge WHITE wrote a dissent that reached the same conclusions that we reach. See *Parsons*, unpub op at pp 1-3 (WHITE, P.J., dissenting in part). And no subsequent decision has cited *Parsons*, except for *Persell*—which does so negatively. See *Persell*, 287 Mich App at 580-581 (disagreeing with *Parsons*' interpretation of the ILSA).

[subsequently recodified as Part 301 of NREPA] does not preclude plaintiff's common-law remedies").

We therefore affirm the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(8) on the basis of plaintiffs' lack of riparian rights, because no factual development could justify plaintiffs' claim for relief.

B. COLLATERAL ESTOPPEL

"Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (citation and quotation marks omitted) (alteration in original).[16] "[M]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, [t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Id*. at 684-685 (citations and quotation marks omitted) (alterations in original). The application of collateral estoppel is a question of law that is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Collateral estoppel applies to administrative proceedings if the determination was adjudicatory in nature, allowed for an appeal, and the Legislature intended that

[16] As defendant notes, *Monat* suggests that mutuality of estoppel is not always required for collateral estoppel to apply. See *Monat*, 469 Mich at 687-688. This caveat is immaterial to our case, however, as mutuality of estoppel is present here.

the decision would be final if no appeal was taken. *Dearborn Hts Sch Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 129; 592 NW2d 408 (1998). An administrative agency's decision is " 'conclusive of the rights of the parties, or their privies, in all other actions or suits in the same or any other tribunal of concurrent jurisdiction on the points and matters in issue in the first proceeding.' " *Nummer v Treasury Dep't*, 448 Mich 534, 557; 533 NW2d 250 (1995) (MALLETT, J., dissenting), quoting *Lilienthal v City of Wyandotte*, 286 Mich 604, 616; 282 NW 837 (1938).

In this case, mutuality is present and each party (or their predecessor in interest) has had a full and fair opportunity to litigate the issue of plaintiffs' riparian rights. Defendant's predecessor in interest, Sharon Bone, was a party to the 2004 action before the DEQ, and defendant would have been bound by an adverse decision against Bone. See *Monat*, 469 Mich at 684-685. And both Mr. Holton and Bone had a full and fair opportunity to litigate Mr. Holton's riparian rights before the DEQ. The transcript of the DEQ hearing reveals that Mr. Holton, Bone, and defendant herself all provided extensive testimony and were cross-examined before the administrative law judge (ALJ).[17] The ALJ also heard testimony from additional witnesses and reviewed a large body of evidence.

In addition, a question of fact essential to the judgment in this case was actually litigated and determined by an earlier valid and final judgment—namely, the

[17] The DEQ proceeding itself meets the requirements for collateral estoppel to apply: the determination was adjudicatory in nature, it allowed for an appeal (which Mr. Holton made, albeit on an issue unrelated to the fence and his supposed riparian rights), and the Legislature intended that the decision would be final if no appeal was taken (see MCL 324.99903(13)). See *Dearborn Hts Sch Dist*, 233 Mich App at 129.

question of plaintiffs' claimed riparian rights in the wetland-pond was decided by the DEQ in its 2006 ruling. See *Monat*, 469 Mich at 682. As the ALJ noted, Mr. Holton's primary complaint in his 2004 DEQ action was that defendant's fence violated his riparian rights in the wetland pond:

> The gravaman of [Mr. Holton's] complaint is that, in some manner, the fence will impede his "water rights" and his ability to access the wetland on the [defendant's] property. He did not specify the precise nature of his perceived "water rights", but the fence could not conceivably impact free flow of water to his detriment. He also testified the fence will prevent him from accessing the wetland on the [defendant's] property. This concern is misplaced in that he has no right to access the wetland on private property and could not do so even if physically possible without trespassing. In fact, preventing such activity is the express purpose of the fence. *In his petition for contested case he characterized it as "[limiting] my right of riparian owner of public waters". Again, this assertion is misplaced as no public waters are involved.* [*In re Exemption issued to Sharon Bone*, DEQ Final Determination and Order (File Nos. 01-63-0108-P and 04-63-0053-P), issued October 16, 2006 (emphasis added) (alteration in original).]

As such, whether Mr. Holton possessed such "water rights" was an essential part of his 2004 DEQ action.[18] And the DEQ decided the matter, holding that Mr. Holton did not have riparian rights in the wetland-pond.

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[18] Plaintiffs make much of the fact that the water level of the wetland-pond has risen since the DEQ's holding. This observation is inconsequential to the collateral estoppel determination. The basis of DEQ's holding— Mr. Holton's lack of riparian rights in the wetland-pond—is the same today as it was in 2006, and will remain so indefinitely, because the wetland-pond is an artificial waterway.

Accordingly, the trial court correctly concluded that plaintiffs' claim is barred by collateral estoppel and properly granted summary disposition in favor of defendant.[19]

C. SANCTIONS[20]

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010) (citation and quotation marks omitted). "If a pleading is signed in violation of MCR 2.114(D), the party or attorney, or both, must be sanctioned." *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). See also MCR 2.114(E). MCR 2.114(F) provides that "a party pleading a frivolous claim . . . is subject to costs as provided in MCR 2.625(A)(2)." In turn, MCR 2.625(A)(2) states, "[I]f the court finds . . . an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591(1) mandates that, if a claim or defense is found to be frivolous, "the court . . . shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." The statute

[19] Because the trial court correctly held that plaintiffs' claim was barred by collateral estoppel, we need not address defendant's argument that res judicata should also apply.

[20] This Court reviews a trial court's decision regarding the imposition of a sanction for clear error. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). "The trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Id*. However, to the extent that our review requires interpretation of MCR 2.114 or MCL 600.2591, this Court reviews the issue de novo. See *Estes*, 481 Mich at 578-579.

defines "frivolous" to mean "that at least 1 of the following conditions is met":

> (*i*) The party's primary purpose in initiating the action or asserting the defense 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 legal merit. [MCL 600.2591(3)(a).]

Plaintiff's position in this case—when viewed in light of the well-established common law that makes clear there are no riparian rights to artificial bodies of water and the DEQ's straightforward ruling that Mr. Holton had no riparian rights in the water in question—was devoid of arguable legal merit. By plaintiffs' own admission, the waterway in question is artificial—and plaintiffs knew of its artificial nature before they brought this suit. Plaintiffs also knew that the subject of this action—their alleged riparian rights in the wetland-pond—had already been adjudicated by the DEQ in 2006.[21] And certainly they and their lawyer had reason to know that the DEQ's determination was correct: the Michigan caselaw cited in plaintiffs' briefs clearly states that riparian rights do not attach to land abutting artificial waters. "Sanctions for bringing a frivolous action are warranted where the plaintiff, on the basis of a ruling in another case, has reason to believe that an action against the defendant lacks merit." *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 423; 668 NW2d 199 (2003), citing *Vermilya v Dunham*, 195 Mich App 79, 84; 489 NW2d 496 (1992).

When viewed in this light, this lawsuit is little more

[21] As noted, the artificial nature of the wetland-pond was also discussed by our Court in *Holton*, unpub op at 1.

than an attempt to void the DEQ's determination through other legal avenues—and also an effort to harass defendant, and perhaps wear her down, with yet another legal action. See MCL 600.2591(3)(a)(*i*). Defendant should not be placed in a position of having to spend money to defeat repeated frivolous suits or give up her valuable property rights to peaceful and exclusive possession of her property. Plaintiffs may not agree with defendant's right to exclude them from her property, but that is a right she is entitled to exercise. See *Nollan v Cal Coastal Comm*, 483 US 825, 831; 107 S Ct 3141; 97 L Ed 2d 677 (1987) ("[A]s to property reserved by its owner for private use, the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (citations and quotation marks omitted) (second alteration in original).

Therefore, we hold that plaintiffs' lawsuit is frivolous, and reverse the trial court's ruling on this issue. We hold that defendant is entitled to attorney fees and costs for frivolous litigation and we remand to the trial court for a determination of appropriate sanctions pursuant to MCR 2.114 and MCL 600.2591.

IV. CONCLUSION

We affirm the trial court's grant of summary disposition in favor of defendant, and reverse the trial court's denial of sanctions on plaintiffs. We remand to the trial court for the imposition of sanctions in an appropriate amount. We do not retain jurisdiction.

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

PEOPLE v SZABO

Docket No. 311274. Submitted November 5, 2013, at Detroit. Decided January 3, 2014, at 9:05 a.m. Leave to appeal sought.

Kevin T. Szabo was charged in the 25th District Court with one count of assault with a dangerous weapon, MCL 750.82, and one count of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, after he allegedly entered the home of his estranged wife, Michelle Szabo (Szabo), with a rifle and shot the man who was in the house with her. At the beginning of the preliminary examination, defense counsel stated his belief that Szabo intended to invoke her spousal privilege under MCL 600.2162 to avoid testifying against defendant, but the court, David J. Zelenak, J., allowed the prosecution to call Szabo to the stand and examine her before the privilege issue could be argued. After Szabo and a police detective testified, the court bound defendant over on both counts. Defendant moved in the Wayne Circuit Court to quash the information and dismiss the charges, and the court, James Callahan, J., granted the motion on the ground that Szabo could not be compelled to testify against defendant. The prosecution appealed.

The Court of Appeals *held*:

MCL 600.2162 provides that the privilege not to be examined as a witness against one's spouse in a criminal prosecution does not apply in a cause of action that grows out of a personal wrong or injury done by one to the other. Because defendant was charged with felonious assault and felony-firearm arising from criminal actions he allegedly committed against his wife, no spousal privilege existed and Szabo could be compelled to testify against defendant. Accordingly, defendant's motion to quash and dismiss should have been denied.

Reversed and remanded for reinstatement of the charges.

CRIMINAL LAW — STATUTES — WITNESSES — SPOUSAL PRIVILEGE.

The statutory privilege not to be examined as a witness against one's spouse in a criminal prosecution against the witness's consent does not apply in a cause of action that grows out of a personal

> wrong or injury done by one to the other; in such cases, a defendant's spouse may be compelled to testify against the defendant (MCL 600.2162(2), (3)(d)).

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

Michael J. McCarthy, PC (by *Michael J. McCarthy*), for defendant.

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

PER CURIAM. The prosecution appeals as of right the circuit court's order dismissing the charges against defendant, Kevin T. Szabo, of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We reverse and remand for reinstatement of the charges.

On January 30, 2011, defendant allegedly took a rifle into the home where his estranged wife, Michelle Szabo (Szabo), and her three children lived. A man named Michael was in the house with Szabo. Subsequently, the gun was fired and Michael was shot in the arm, but Szabo was not shot. The police were called and Detective Patrick Cutler from the Lincoln Park Police Department arrived at the home. Detective Cutler spoke to Szabo, who appeared visibly upset. There were bullet holes in two walls of the house. Defendant was initially charged with assault with intent to murder and felonious assault with regard to Michael, and felonious assault with regard to Szabo. He was also charged with felony-firearm.

Because defendant could not be located for about a year, the preliminary examination was conducted in the district court on February 14, 2012. At the start of the hearing, defendant's counsel stated: "It's my understanding that the, uh, government intends to call the wife of [defendant], and she—it's my understanding she's going to exercise her, uh, her spousal privilege." After the potential witnesses were sequestered, the prosecution called Szabo as its first witness. The court then asked: "You want to argue the spousal privilege, or call her first?" The prosecutor responded that he would call Szabo first. Thereafter, Szabo testified. Following her testimony, Detective Cutler testified. After Detective Cutler's testimony, the prosecution moved for a bindover on the felony-firearm and felonious assault charges with regard to Szabo. The charges arising from Michael's being shot were dismissed without prejudice.

Thereafter, defendant filed in the circuit court a "motion to quash and dismiss" and a supplemental brief in support of the motion. Defendant argued that Szabo was compelled to testify at the preliminary examination although she had asserted her spousal privilege, which constituted error requiring reversal. Further, defendant argued, without Szabo's testimony the prosecution could not proceed on the felonious assault and felony-firearm charges. And, citing MCL 600.2162, *People v Love*, 425 Mich 691; 391 NW2d 738 (1986), and *People v Sykes*, 117 Mich App 117; 323 NW2d 617 (1982), defendant argued that Szabo could not be compelled to testify at trial. Defendant attached to his motion Szabo's affidavit, which stated that she formally invoked her spousal privilege not to testify against defendant and that she did not fear him.

The prosecution responded to defendant's motion, arguing that Szabo's testimony at the preliminary

examination was voluntary and that she never asserted her spousal privilege; thus, any such privilege was waived. In any case, the prosecution argued, a spousal privilege did not exist because defendant was being prosecuted for actions growing "out of a personal wrong or injury done by one [spouse] to the other," as set forth in MCL 600.2162(3)(d). See also *People v Ellis*, 174 Mich App 139; 436 NW2d 383 (1988). Therefore, Szabo had no legal right to refuse to testify against her husband. Accordingly, the prosecution argued, defendant's motion should be denied.

On June 27, 2012, a hearing on defendant's motion was held. The circuit court concluded that Szabo could not be compelled to testify against defendant, and it therefore granted defendant's motion to quash and dismiss and entered an order dismissing the charges. This appeal followed.

The prosecution argues that, pursuant to MCL 600.2162(3)(d), no spousal privilege existed for Szabo to assert in this case because the charges against defendant arose from an alleged assault on her; therefore, her testimony could be compelled by the court and the charges should be reinstated. We agree.

The circuit court's decision to grant defendant's motion was premised on its interpretation of the spousal privilege statute, MCL 600.2162. Specifically, the circuit court held that Szabo was entitled to assert the spousal privilege established by MCL 600.2162(2) and could not be compelled to testify against defendant, her husband. We review de novo issues of statutory interpretation. *People v Plunkett*, 485 Mich 50, 58; 780 NW2d 280 (2010). Further, "[a] district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are

reviewed for an abuse of discretion." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011).

The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). The first step in ascertaining the Legislature's intent is to review the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The Legislature is presumed to have intended the meaning it plainly expressed and, therefore, clear statutory language must be enforced as written. *Dowdy*, 489 Mich at 379; *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

In Michigan, the privilege not to testify against a spouse in criminal prosecutions is statutory and is set forth at MCL 600.2162, which provides in pertinent part:

> (2) In a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent, except as provided in subsection (3).
>
> (3) The spousal privileges established in subsections (1) and (2) and the confidential communications privilege established in subsection (7) do not apply in any of the following:
>
> * * *
>
> (d) In a cause of action that grows out of a personal wrong or injury done by one to the other or that grows out of the refusal or neglect to furnish the spouse or children with suitable support.

Through the years the spousal privilege has been modified, see *Love*, 425 Mich at 700,[1] and our current statute is the result of two amendments: 2000 PA 182, effective October 1, 2000, and 2001 PA 11, effective May 29,

[1] For example, 1885 PA 211 added the "personal wrong or injury" exception. *Love*, 425 Mich at 700 n 11.

2001. Before the 2000 amendment, in criminal prosecutions, the testimonial privilege was vested in the nonwitness spouse; i.e., the criminal defendant spouse could prevent the witness spouse from providing testimony unless an exception applied. Now, this testimonial privilege is vested in the witness spouse. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). However, since these amendments, neither this Court nor our Supreme Court has addressed whether an alleged victim-spouse[2] is vested with a spousal privilege when MCL 600.2162(3)(d) is applicable ("[i]n a cause of action that grows out of a personal wrong or injury done by one [spouse] to the other [spouse]") and whether the alleged victim-spouse can be compelled to testify in the related criminal prosecution. Nevertheless, a review of previous caselaw proves helpful to our analysis of this issue.

In *Sykes*, 117 Mich App 117, this Court considered a prior version of the spousal privilege statute, which vested the privilege in the criminal defendant spouse " 'except . . . where the cause of action grows out of a personal wrong or injury done by one to the other . . . .' "[3] *Id*. at 121. In that case, the defendant husband allegedly assaulted his wife with a gun and the trial court compelled her to testify, although she did not want to testify. *Id*. at 120, 123. The *Sykes* Court held

[2] In this opinion we distinguish between a "witness-spouse" and a "victim-spouse" because a victim-spouse is always a witness, but a witness-spouse is not always a victim. When the "personal wrong or injury exception" applies, the "witness-spouse" is also the "victim-spouse."

[3] This version of the spousal privilege statute, MCL 600.2162 as enacted by 1961 PA 236, provided: "A husband shall not be examined as a witness for or against his wife without her consent; nor a wife for or against her husband without his consent, except . . . where the cause of action grows out of a personal wrong or injury done by one to the other . . . ."

that "the statutory exception to the spousal privilege is a permissive one" that "allows the victim-spouse to testify against the defendant-spouse if the victim so desires." *Id*. at 122. Further, the Court held, the statutory exception was for the benefit of the victim-spouse and it was "the victim's option to either testify or raise the spousal privilege." *Id*. at 123. Accordingly, the *Sykes* Court held, compelling the victim-wife to testify constituted error. *Id*.

In *Love*, 425 Mich 691, a plurality opinion, our Supreme Court considered whether a victim-spouse could be compelled to testify against the criminal defendant-spouse under the same prior version of MCL 600.2162 at issue in *Sykes;* i.e., when the criminal defendant-spouse was the holder of the privilege except when the cause of action grew out of a personal wrong or injury done by one to the other. *Love*, 425 Mich at 694, 696. In that case, the defendant allegedly kidnapped his estranged wife after the defendant shot and killed her friend. *Id*. at 694-695. The victim-wife did not want to testify against her husband, but the trial court compelled her to testify. *Id*. at 694, 706. Justice CAVANAGH, with Justice LEVIN concurring, held in the lead opinion that, after the defendant asserted his spousal privilege, his wife could not testify regarding the killing of her friend because the "personal wrong" exception did not apply; i.e., those crimes did not "grow out of" the personal injury inflicted upon the defendant's wife. *Id*. at 702-703. Justice CAVANAGH noted that the defendant's wife could voluntarily testify "concerning the kidnapping prosecution since it grew out of a personal wrong done to her by defendant," but she could not be compelled to testify against the defendant with regard to the kidnapping. *Id*. at 696, 706-707. Justice CAVANAGH quoted this Court's opinion in *Sykes*, 117 Mich App at 122-123, in

support of his conclusion that if the victim-spouse "did not wish to testify, and the refusal did not stem from her fear of the defendant, she should not have been compelled to testify." *Love*, 425 Mich at 707-708.

However, Justice BOYLE authored a dissenting opinion in *Love*, in which she stated that, if an exception to the spousal privilege statute is applicable, the victim-spouse may be compelled to testify. *Id*. at 714. Justice BOYLE explained that "the Legislature made the spouse *conditionally* competent, that condition being the consent of the other spouse." *Id*. at 715. Thus, "the statute is . . . a rule of incompetency which vests in the party-spouse the ability to remove the incompetency, and permits the nonconsenting party-spouse to prevent the witness from being called to the stand." *Id*. at 715-716. Justice BOYLE continued, "It follows that in the exceptions to this rule, the Legislature intended to remove the conditional disability of the witness-spouse so that the witness-spouse is as competent and compellable as any other witness. MRE 601; MCR 2.506. No other legislative intent can be so clearly established." *Id*. at 716. And Justice BOYLE disagreed with Justice CAVANAGH's adoption of the statement in *Sykes* that the exceptions were carved out for the benefit of the wife who wished to testify; rather, the exceptions were "created by the rule of necessity, 'partly for the protection of the wife in her life and liberty, and partly for the sake of public justice.' " *Id*. at 716 (citation omitted). Thus, Justice BOYLE concluded, if an exception to the spousal privilege was applicable, the victim-spouse could be compelled to testify. Chief Justice WILLIAMS, with Justice BRICKLEY concurring, agreed with Justice BOYLE "that a spouse may be compelled to testify[.]" *Love*, 425 Mich at 709. And Justice RILEY concurred with Justice BOYLE's dissenting opinion. *Id*. at 717. Thus, four

Justices held that a victim-spouse could be compelled to testify against the criminal defendant-spouse when an exception to the spousal privilege was applicable.

In *Ellis*, 174 Mich App at 139, this Court also considered the prior version of the spousal privilege at issue in *Love* and *Sykes*, which vested the privilege in the criminal defendant-spouse " 'except . . . where the cause of action grows out of a personal wrong or injury done by one to the other . . . .' " *Id*. at 144, quoting MCL 600.2162 as enacted by 1961 PA 236. In that case, the defendant allegedly kidnapped and committed first-degree criminal sexual conduct against his wife. *Id*. at 142. The defendant's wife indicated that she did not want to testify against her husband because of a threatening letter she had received from him and because she was afraid of how he would react to her testimony. *Id*. at 143. The trial court compelled her to testify. *Id*. On appeal, the defendant argued that his wife should not have been compelled to testify against him. *Id*. at 144. This Court disagreed, citing *Love*, 425 Mich at 714-717 (BOYLE, J., dissenting), and noting that "four members of the Supreme Court subscribed to the proposition stated in Justice BOYLE's dissenting opinion that, where an exception to the prohibition in [MCL 600.2162] applies, the defendant's wife could be required to testify." *Ellis*, 174 Mich App at 144-145.

In *People v Warren*, 462 Mich 415; 615 NW2d 691 (2000), our Supreme Court considered an amended version of the spousal privilege statute, which vested the privilege in the criminal defendant-spouse " 'except . . . [i]n a cause of action that grows out of a personal wrong or injury done by one to the other . . . .' "[4] *Id*. at 422, quoting MCL 600.2162 as amended by 1994 PA 67 (emphasis omitted). In that

[4] The statute provided in relevant part:

case, the defendant's wife voluntarily testified against her husband with regard to several crimes he was later convicted of perpetrating against her and her mother. *Id*. at 417. The issue in the *Warren* case, however, was whether the defendant's wife could testify about the defendant's alleged crimes against her mother. *Id*. at 430-431. The *Warren* Court held that, because the decision in *Love* lacked a majority holding with regard to the application of the "personal wrong or injury" exception as it relates to testimony regarding crimes against third parties, *Love* did not constitute binding precedent on that issue. *Warren*, 462 Mich at 426-427. The Court explained: "The 'grows out of' wording requires a connection between the cause of action and the harm or injury committed against the spouse. However, the phrase does not limit spousal testimony to those crimes of which the spouse was the direct victim." *Id*. at 428. The *Warren* Court did not consider whether the defendant's wife could have been compelled to testify against the defendant regarding the crimes he allegedly committed against her because her testimony was voluntary. *Id*. at 417.

The spousal privilege at issue in this case is not the same statute as the versions at issue in the *Sykes*, *Love*, *Ellis*, and *Warren* cases. Under the current version, the witness-spouse is the holder of the testimonial privilege and has the legal right not to be compelled to testify in

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(1) A husband shall not be examined as a witness for or against his wife without her consent or a wife for or against her husband without his consent, except as follows:

* * *

(d) In a cause of action that grows out of a personal wrong or injury done by one to the other . . . . [MCL 600.2162, as amended by 1994 PA 67.]

certain criminal prosecutions against a defendant-spouse; i.e., the witness-spouse must consent to testify. As the *Love* Court noted: " 'Testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence.' " *Love*, 425 Mich at 700, quoting *Trammel v United States*, 445 US 40, 50; 100 S Ct 906; 63 L Ed 2d 186 (1980) (quotation marks and ellipses omitted). However, the spousal privilege statute has also been amended in another significant way. The versions of the spousal privilege statute at issue in *Sykes*, *Love*, *Ellis*, and *Warren* provided an "exception" to the spousal privilege, which permitted a victim-spouse to testify without the consent of the criminal defendant-spouse when the cause of action against the defendant-spouse grew out of a personal wrong or injury committed against the victim-spouse. But that previous statute did not explicitly state that the spousal privilege does not apply in certain legal matters or litigations, as the current statute does.

More specifically, the spousal privilege statute at issue here establishes the spousal privilege—the legal right not to testify—in subsection (2), but that legal right is specifically limited by subsection (3), which states that the spousal privilege established in subsection (2) "do[es] not apply" in certain cases, including "[i]n a cause of action that grows out of a personal wrong or injury done by one [spouse] to the other . . . ." MCL 600.2162(3)(d). Thus, the previous spousal privilege statute at issue, for example, in *Sykes* was significantly different than this spousal privilege statute. As a consequence, the *Sykes* Court concluded that the "personal wrong or injury" exception to the spousal privilege was "permissive" and was for the benefit of the victim-spouse; i.e., the victim-spouse could not be prevented from testifying by the criminal defendant-

spouse when an exception applied. *Sykes*, 117 Mich App at 122-123. More significantly, the *Sykes* Court also interpreted the statute as providing that, when the exception applied, the victim-spouse became the holder of the spousal privilege. That is, the *Sykes* Court specifically held that when the exception applied, it was "the victim's option to either testify or raise the spousal privilege." *Id*. at 123. Thus, the *Sykes* Court held that the victim-spouse could not be compelled to testify because the victim-spouse became the holder of the spousal privilege when the "personal injury or wrong" exception applied. *Id*. at 122-123. And because the victim-spouse in *Sykes* "raised the marital privilege," she could not be compelled to testify. *Id*. at 123. The lead opinion in the *Love* case adopted the holding in *Sykes*. See *Love*, 425 Mich at 707.

The spousal privilege statute at issue here specifically denies the victim-spouse a testimonial privilege in a case that grew out of a personal wrong or injury done by the defendant-spouse to the victim-spouse. That is, MCL 600.2162(3) provides that the "spousal privileges established in subsections (1) and (2) . . . do not apply in any of the following" specific cases set forth in subsection (3). When such an "exception" exists the effect, then, is not that the ownership of the spousal privilege transfers from the one spouse to the other as in the *Sykes* case; rather, the effect is that no spousal privilege exists at all. The addition of the exclusionary words "do not apply" to the spousal privilege statute evinces the Legislature's intent not to abrogate the general duty a witness has to testify about matters within the witness' knowledge in certain cases involving spouses including, as in this case, when the cause of action grows out of a personal wrong or injury done by the defendant-spouse against the victim-spouse. Unambiguous statutory lan-

guage must be enforced as written. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

In this case, defendant was charged with felonious assault and felony-firearm arising from criminal actions he allegedly committed against his wife. Pursuant to MCL 600.2162(3)(d), defendant's wife was not vested with a spousal privilege; thus, her consent to testify was not required and she could be compelled to testify against defendant in this criminal prosecution. Accordingly, defendant's motion to quash and dismiss should have been denied.

Reversed and remanded for reinstatement of the criminal charges against defendant. We do not retain jurisdiction.

M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ., concurred.

BURTON v MACHA

Docket No. 311463. Submitted December 10, 2013, at Detroit. Decided January 28, 2014, at 9:00 a.m. Leave to appeal sought.

Jay Burton, personal representative of the estate of Connor Burton, brought an action in the Sanilac Circuit Court against Mohan Dass Macha, M.D.; Mohan Dass Macha, M.D., PC; and Marlette Regional Hospital, alleging medical malpractice for failing to properly diagnose Connor and refer him for appropriate treatment. Connor was admitted to the hospital on June 21, 2005, for a tonsillectomy and adenoidectomy. A preoperative EKG showed an abnormality. Macha reviewed the EKG readout, initialed it, and performed the procedures with no complications. Connor died on April 17, 2009. His autopsy revealed no signs of injury or illness. On September 11, 2009, genetic testing revealed that Connor had a mutation strongly associated with an arrhythmia-causing syndrome. On October 13, 2009, his death certificate was amended to reflect that he died of sudden cardiac death because or as a consequence of the syndrome related to the mutation. Plaintiff served a notice of intent to sue on all three defendants on December 16, 2010. Letters of authority were issued on June 17, 2011, appointing plaintiff as personal representative, and he filed this action on October 13, 2011. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that because plaintiff's claim had accrued on June 21, 2005, it was time-barred by the six-year statute of repose for medical malpractice actions in MCL 600.5838a(2). Plaintiff argued that he had not discovered the claim until after he received the results of the genetic testing, when Connor's death certificate was amended. Accordingly, plaintiff contended that the six-month discovery rule of MCL 600.5838a(2) provided the applicable period of limitations in this case, running until April 13, 2010, and that his action was timely because under the death saving provision of MCL 600.5852, he had until April 13, 2013, to file it. The court, Donald A. Teeple, J., agreed, ruling that the death saving provision applied and that plaintiff's action was therefore timely filed, but the court did not address the effect of the statute of repose on plaintiff's action. The court denied defendants' motion, and they sought leave to appeal. The Court of Appeals denied leave. In lieu of granting leave to appeal, the

Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 494 Mich 864 (2013).

The Court of Appeals *held*:

Plaintiff's complaint was time-barred, and the circuit court erred by denying defendants' motion for summary disposition. Plaintiff's claim was not discovered until after the results of the genetic testing were received, when Connor's death certificate was amended on October 13, 2009. Therefore, although plaintiff's cause of action accrued on June 21, 2005, under MCL 600.5838a(1), the specific period of limitations applicable in this case was the six-month discovery period of MCL 600.5838a(2), which ran from October 13, 2009, until April 13, 2010. The death saving provision of MCL 600.5852 provides that a personal representative may commence an action that survives by law any time within two years after letters of authority are issued even though the limitations period has run, but the action must nonetheless be brought within three years after the limitations period has expired. Relying on this provision, plaintiff contended that he had until April 13, 2013 (three years after expiration of the limitations period) to commence his action. Regardless of which period of limitations applies in a given case, however, MCL 600.5838a(2) requires a plaintiff to bring his or her medical malpractice action within six years of the date of the act or omission that is the basis for the claim. The only exceptions are those created by the minority saving provisions of MCL 600.5851(7) and (8), and the Legislature's express inclusion of these two exceptions in the text of the statute of repose necessarily implies the exclusion of any other exceptions. Thus, the death saving provision does not toll or otherwise create an exception to the running of the six-year period of repose. The filing of plaintiff's notice of intent on December 16, 2010, likewise did not toll the running of the period of repose. While under MCL 600.5856(c) a conforming notice of intent operates to toll the period of repose if it would expire during the 182-day notice period, that notice period expired on June 17, 2011, while the period of repose did not expire until June 21, 2011, four days after the notice period expired. Therefore, plaintiff's notice of intent did not toll the period of repose.

Reversed and remanded for entry of judgment in favor of defendants.

NEGLIGENCE — MEDICAL MALPRACTICE — STATUTE OF REPOSE — DEATH SAVING PROVISION — TOLLING OF PERIOD OF REPOSE.

MCL 600.5838a(2), the statute of repose for medical malpractice actions, requires a plaintiff to bring his or her action within six

> years after the date of the act or omission that is the basis for the claim; while the death saving provision of MCL 600.5852 allows a personal representative to commence an action that survives by law any time within two years after letters of authority are issued even though the limitations period has run but no later than three years after the limitations period has expired, the death saving provision does not toll or otherwise create an exception to the running of the six-year period of repose.

McKeen & Associates, PC (by *Ramona C. Howard*, *Brian J. McKeen*, and *John R. Laparl*), and *Bendure & Thomas* (by *Mark R. Bendure*), for Jay Burton.

Rutledge, Manion, Rabaut, Terry & Thomas, PC (by *Matthew J. Thomas* and *Paul J. Manion*), for Mohan Dass Macha and Mohan Dass Macha, M.D, PC..

Ramar & Paradiso, PC (by *John J. Ramar* and *Michael J. Paolucci*) for Marlette Regional Hospital.

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM. In this medical-malpractice action, defendants appeal as on leave granted[1] the circuit court's order denying their motion for summary disposition filed pursuant to MCR 2.116(C)(7). We reverse and remand for entry of judgment in favor of defendants consistent with this opinion.

I. FACTUAL BACKGROUND

On June 21, 2005, Dr. Mohan Dass Macha admitted plaintiff's decedent, Connor Burton, to Marlette Regional Hospital for a tonsillectomy and adenoidectomy. The hospital performed an EKG and the computer readout stated "prolonged QT." Macha reviewed the

[1] *Burton v Macha*, 494 Mich 864 (2013).

EKG readout and initialed it. Macha performed the scheduled procedures with no complications and saw Connor one week later for a follow-up appointment.

Tragically, Connor died suddenly on April 17, 2009. His autopsy did not reveal any signs of injury or illness. On September 11, 2009, genetic testing revealed a mutation "strongly associated with an arrhythmia-causing syndrome, such as Type 3 Long QT Syndrome." On October 13, 2009, Connor's death certificate was amended to reflect "[s]udden cardiac death due to or as a consequence of Prolonged QT Syndrome due to or as a consequence of Mutation SCN5A Thr 370 Type 3 Met (of years duration)."

On December 16, 2010, a notice of intent was served on all three defendants pursuant to MCL 600.2912b. On June 17, 2011, letters of authority were issued appointing plaintiff Jay Burton as the personal representative of Connor's estate. On October 13, 2011, plaintiff filed his complaint against defendants alleging medical malpractice for failing to diagnose Connor with prolonged QT syndrome and failing to refer him for appropriate treatment.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7). They argued that, because plaintiff's claim had accrued on June 21, 2005, it was time-barred by the six-year statute of repose for medical-malpractice actions contained in MCL 600.5838a(2). Plaintiff argued that his medical-malpractice claim had not been discovered until after the results of the genetic testing were received, when Connor's death certificate was amended on October 13, 2009. Accordingly, plaintiff contended, the six-month discovery rule of MCL 600.5838a(2) provided the applicable period of limitations in this case, running until April 13, 2010. Plaintiff argued that his medical-

malpractice claim was timely because, under the death saving provision of MCL 600.5852, he had until April 13, 2013, to file the action.

The circuit court agreed with plaintiff, ruling that the death saving provision of MCL 600.5852 applied and that plaintiff's cause of action was therefore timely filed. The circuit court did not directly address the effect of the six-year statute of repose. However, the court appeared to believe that the death saving provision of MCL 600.5852 tolled or created an exception to the running of the statute of repose.

Defendants argue that the circuit court erred. They assert that the death saving provision of MCL 600.5852 does not toll or otherwise create an exception to the six-year statute of repose, and that plaintiff's claim is time-barred because it was filed outside this six-year period.

II. STANDARDS OF REVIEW

The circuit court's grant or denial of summary disposition is reviewed de novo. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). Summary disposition is properly granted under MCR 2.116(C)(7) when the plaintiff's complaint is barred by the applicable statute of limitations or repose. *Sills v Oakland Gen Hospital*, 220 Mich App 303, 307; 559 NW2d 348 (1996). "In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor." *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). "If the facts are not in dispute, whether the statute bars the claim is a question of law for the court." *Sills*, 220 Mich App at 307.

Statutory construction is a question of law that we review de novo on appeal. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396; 605 NW2d 685 (1999).

III. DISCUSSION

We conclude that plaintiff's complaint, filed after the expiration of the six-year period of repose for medical-malpractice actions, was time-barred. Accordingly, defendants were entitled to the dismissal of plaintiff's claims under MCR 2.116(C)(7).

Plaintiff's medical-malpractice claim was not discovered until after the results of the genetic testing were received, when Connor's death certificate was amended on October 13, 2009. Therefore, although plaintiff's cause of action against defendants accrued on June 21, 2005, see MCL 600.5838a(1), the specific period of limitations applicable in this case was the six-month discovery period of MCL 600.5838a(2). This six-month discovery period ran from October 13, 2009, until April 13, 2010.

The death saving provision of former MCL 600.5852[2] provided:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be

[2] MCL 600.5852 was originally added by 1988 PA 221 and amended by 2012 PA 609. The amendment is not applicable in this case, however, because it only applies to causes of action that arose on or after March 28, 2013. Moreover, the amendment did not change the substance of the statutory section under review.

> brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

Relying on this death saving provision, plaintiff contended that he had until April 13, 2013, or three years after the running of the applicable period of limitations,[3] to commence his action.

Regardless of which period of limitations applies in a given case, however, a plaintiff must bring his or her medical-malpractice action within six years of "the date of the act or omission that is the basis for the claim." MCL 600.5838a(2). The only exceptions to the running of this six-year statute of repose are those created by the minority saving provisions of MCL 600.5851(7) and (8)—the *only* two exceptions specifically mentioned in the statute.[4] See MCL 600.5838a(2). The Legislature's express inclusion of these two exceptions in the text of the statute of repose necessarily implies the exclusion of any other exceptions. See *Revard v Johns-Manville Sales Corp*, 111 Mich App 91, 94-95; 314 NW2d 533 (1981). Thus, contrary to plaintiff's argument on appeal, the death saving provision of MCL 600.5852 does not toll or otherwise create an exception to the running of the six-year statute of repose.

Likewise, the filing of plaintiff's notice of intent on December 16, 2010, did not toll the running of the six-year statute of repose in the instant case. We fully acknowledge that the filing of a conforming notice of intent operates to toll the statute of repose if the

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[3] Our Supreme Court has held that the phrase "period of limitations" in the death saving provision of MCL 600.5852 includes the six-month discovery period of MCL 600.5838a(2), which "is itself a period of limitation." *Miller v Mercy Mem Hospital*, 466 Mich 196, 202-203; 644 NW2d 730 (2002).

[4] Neither MCL 600.5851(7) nor MCL 600.5851(8) applies in this case.

six-year period of repose would expire during the 182-day notice period. MCL 600.5856(c). In this case, the 182-day notice period expired on June 17, 2011. However, the period of repose did not expire until June 21, 2011, four days *after* the expiration of the 182-day notice period. Therefore, the filing of plaintiff's notice of intent did not toll the period of repose under MCL 600.5856(c).

In sum, the death saving provision of MCL 600.5852 did not toll or otherwise prevent the running of the six-year statute of repose contained in MCL 600.5838a(2). Nor did the filing of plaintiff's notice of intent toll the statute of repose in this case. As a consequence, the period of repose expired on June 21, 2011, six years after the date of accrual. Plaintiff's complaint was time-barred and the circuit court therefore erred by denying defendants' motion for summary disposition filed pursuant to MCR 2.116(C)(7).

We reverse and remand for entry of judgment in favor of defendants consistent with this opinion. We do not retain jurisdiction. Defendants, having prevailed on appeal, may tax their costs pursuant to MCR 7.219.

JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ., concurred.

ALBRO v DRAYER

Docket No. 309591. Submitted November 14, 2013, at Lansing. Decided January 28, 2014, at 9:05 a.m.

Lisa Albro brought an action in the Ingham Circuit Court against Steven L. Drayer, M.D., Steven L. Drayer, M.D., PLLC, and Edward W. Sparrow Hospital Association, alleging medical malpractice as a result of surgery performed by Steven Drayer (hereafter defendant). The court, Rosemarie E. Aquilina, J., entered a judgment of no cause of action consistent with the verdict of the jury. Plaintiff appealed, alleging that the court improperly refused to strike, in whole or in part, the testimony of defendant's experts.

The Court of Appeals *held*:

1. A trial court's determination of the qualifications of an expert witness is reviewed on appeal for an abuse of discretion.

2. The trial court did not abuse its discretion by finding that defendant's experts were, at a minimum, sufficiently knowledgeable, trained, or educated to form an expert opinion under MRE 702. None of the considerations under MCL 600.2169(2) required that the experts be excluded. Admission of expert testimony does not depend on an expert's being exactly as knowledgeable as a defendant in a medical malpractice action. Identical experience and expertise is not required between a party and an expert.

3. Plaintiff's objection to defendant's expert's reference to "a third" of the foot and ankle society should have been sustained because there was no factual basis in the record to support the expert's unsupported speculation. The erroneous admission of evidence is not a basis for reversal when, as in this case, allowing the lower court's judgment to stand is not inconsistent with substantial justice. The admission of the evidence was harmless.

Affirmed.

MEDICAL MALPRACTICE — EVIDENCE — EXPERT TESTIMONY.

Admission of expert testimony in a medical malpractice action does not require that an expert be exactly as knowledgeable as a

defendant in the action; identical experience and expertise is not required between a party and an expert.

Sommers Schwartz, PC (by *Ramona C. Howard*), for plaintiff.

Johnson & Wyngaarden, PC (by *Michael L. VanErp* and *Robert M. Wyngaarden*), for Steven L. Drayer, M.D., and Steven L. Drayer, M.D., PLLC.

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

PER CURIAM. In this medical malpractice action, plaintiff appeals by right a judgment of no cause of action entered by the trial court after a jury trial. Dr. Steven Drayer (hereafter defendant) performed ankle surgery on plaintiff. The surgery ultimately failed and plaintiff underwent further corrective surgeries, none of which to date has returned her ankle to full functionality. The issues at trial were not necessarily factual, but rather concerned whether defendant's actions comported with the applicable standard of care. The jury found for defendant, and this appeal followed. We affirm.

Plaintiff contended that defendant failed to evaluate plaintiff properly before the surgery and consider other treatment options, failed to correctly diagnose plaintiff's real problem with her ankle and to recognize that surgery was unwarranted, and failed to recognize that the "Chrisman-Snook" procedure employed was inappropriate and that a "Broström" procedure would have been superior. Plaintiff also contended that defendant did not perform the Chrisman-Snook procedure correctly and that defendant's postoperative care and management of her infection were inadequate. Defendant did not contest that the Chrisman-Snook procedure was performed and eventually failed and that

plaintiff suffered an infection, but argued that practicing medicine entails "risks and uncertainties" and that "a failed procedure is not malpractice."

Plaintiff's subsequent primary treating physician opined that the performance of the Chrisman-Snook procedure had been inappropriate because plaintiff had not needed surgery in the first place and the Chrisman-Snook procedure was riskier and more invasive than the Broström procedure. However, he testified that other than placing a drill hole too low, defendant had technically performed the procedure correctly. Defendant presented several expert witnesses, all of whom stated that they would have performed a Broström procedure and that they each had little or no personal experience with the Chrisman-Snook procedure. However, they stated that they were familiar with the kinds of techniques used in both procedures and that they were familiar with the Chrisman-Snook procedure even if they did not personally perform it. Defendant's experts opined that defendant's surgery, presurgery workup, and postsurgery care had not been inappropriate despite the fact that the surgery failed and plaintiff suffered a serious infection. The jury found for defendant. Plaintiff's arguments on appeal exclusively pertain to the trial court's refusal to strike defendant's experts' testimony in whole or in part.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo; it is necessarily an abuse of discretion to admit legally inadmissible evidence. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). It has been long established that a trial court's determination of the qualifications of an expert witness is reviewed for an abuse of discretion. *Woodard v Custer*, 476 Mich 545,

557; 719 NW2d 842 (2006); *People v Hawthorne*, 293 Mich 15, 23; 291 NW 205 (1940); *McEwen v Bigelow*, 40 Mich 215, 217 (1879). Plaintiff appears to imply that our review is de novo, which it is not.

Plaintiff first asserts that all three of defendant's experts should have been disqualified because of their lack of familiarity with the specific surgical procedure performed in this case. We disagree.

Admissibility of expert testimony is subject to several limitations, among them whether a witness can be qualified as an expert at all. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Furthermore, MCL 600.2169(2) provides:

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

Plaintiff generally contends that defendant's experts were unqualified to render an opinion regarding defen-

dant's compliance with the standard of care because they have little or no, or at least no recent, personal experience actually performing the specific surgical procedure defendant performed. There is no dispute that defendant's experts satisfy MCL 600.2169(1), which, in brief, essentially requires the experts to share the defendant's certifications, practice, and specialties.

Plaintiff's argument is valiant but misplaced. "Where the subject of the proffered testimony is far beyond the scope of an individual's expertise—for example, where a party offers an expert in economics to testify about biochemistry—that testimony is *inadmissible* under MRE 702. In such cases, it would be inaccurate to say that the expert's lack of expertise or experience merely relates to the weight of her testimony. An expert who lacks 'knowledge' in the field at issue cannot 'assist the trier of fact.' " *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 789; 685 NW2d 391 (2004). However, "in some circumstances, an expert's qualifications pertain to weight rather than to the admissibility of the expert's opinion." *Id*. at 788-789. Indeed, were it not for the dictates of MCL 600.2169(1), formal qualifications may not even be technically required as long as the proffered witness can establish actual expertise on a topic. See *Hawthorne*, 293 Mich at 23-25. In general, " '[g]aps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility.' " *Wischmeyer v Schanz*, 449 Mich 469, 480; 536 NW2d 760 (1995), quoting *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987).

Clearly, none of defendant's experts were *as* familiar with the Chrisman-Snook procedure as was defendant. However, all of defendant's experts performed ankle reconstructions regularly and were experts in doing so.

Significantly, though not performing it, *all of them were familiar with the Chrisman-Snook procedure*. All of them had, in addition, either authored at least one article or textbook or lectured on ankle reconstruction and had discussed the Chrisman-Snook procedure in the process. Ankle reconstructive surgeries of any sort were clearly within the general ambit of defendant's experts' fields of expertise. See *Gilbert*, 470 Mich at 789. There was no evidence that the state of the art has changed significantly since any of the experts learned or last performed the Chrisman-Snook procedure, in contrast to the situation in *Swanek v Hutzel Hosp*, 115 Mich App 254, 258; 320 NW2d 234 (1982).[1] Admission of expert testimony simply does not depend on an expert's being *exactly as knowledgeable* as a defendant in a medical malpractice action. The trial court did not abuse its discretion by finding that defendant's experts were, at a minimum, sufficiently knowledgeable, trained, or educated to form an expert opinion under MRE 702. Likewise, none of the considerations under MCL 600.2169(2) demand that the experts be excluded.

We can find no rule, statute, or binding authority requiring identical experience and expertise between a party and an expert, and we decline plaintiff's implicit

[1] In *Swanek*, this Court declined to find an abuse of discretion in the trial court's decision not to qualify a doctor as an expert in the standard of care applicable to obstetrician-gynecologists in 1972, when the alleged medical malpractice occurred but when the proposed expert doctor had yet to complete his residency training. Significantly, the standard of care in that particular specialty had been undergoing rapid change in 1972. Among the other deficiencies in the proposed expert's demonstrated knowledge, the plaintiffs had failed to show that he knew the standard of care in 1972. In that case, there was a valid reason to require a certain identity of knowledge beyond merely sharing a specialty. As noted, there is no evidence in the record suggesting that ankle reconstructive surgery has undergone any sort of radical development within any relevant time frame.

invitation to create such a rule. Such a rule would eviscerate the ability of almost any party to find an expert in almost any field, and it would not further assist triers of fact.

Plaintiff also argues that the trial court should have sustained an objection to a statement by one of defendant's experts pertaining to the applicable standard of care. The expert stated, in essence, that approximately one-third of either a particular society or a particular class of practitioners[2] would be committing malpractice if performing the Chrisman-Snook procedure constituted a violation of the standard of care.

Pursuant to MCL 600.2912a(1)(b), the standard of care required of a specialist is "the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances . . . ." M Civ JI 30.01 essentially defines the standard of care as "what the ordinary [Name profession.] of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances." It is readily apparent from reading the *entirety* of the expert's relevant testimony that he was of the view that the two surgical procedures in question both had their benefits and drawbacks, but ultimately the best procedure for a patient was usually the procedure that the physician was best at performing. The statutory and jury-instruction definitions are not inconsistent with the expert's explanation that a competent

[2] The expert made a reference to what was written in the transcript as "the Foot & Ankle Society." It is not clear whether the capitalization in the transcript should be taken as a reference to the existence of a formal organization by that name or whether the expert was speaking more generally and the transcriptionist simply capitalized certain words because doing so seemed appropriate. It is not necessary for us to resolve this ambiguity.

orthopedic surgeon would perform the surgery with which he or she was the most comfortable, because there existed no good evidence that one procedure was inherently better than the other. It is equally apparent that the expert had reviewed textbooks and was familiar with what generally was being done by other surgeons within his own specialty. We find no error in this regard.

Plaintiff's complaint about the expert's reference to "the Foot & Ankle Society" and "a third" thereof has merit, because the expert did not explicitly articulate how he came to know that particular figure. It is clear from the context within which the statement was made that the expert was familiar with the community, however, the "a third" comment represented a crude approximation and there was an objection regarding the foundation for such a statement. That objection should have been sustained because the admission of the expert's estimate lacked any factual basis in the record and the statement was not shown to be anything more than unsupported speculation. Furthermore, the number of surgeons who use any particular procedure is not determinative of the standard of care. See *Marietta v Cliffs Ridge*, *Inc*, 385 Mich 364, 369-370; 189 NW2d 208 (1971). The reference to "a third" should have been stricken. However, the erroneous admission of evidence is not a basis for reversal unless allowing the lower court's judgment to stand would be "inconsistent with substantial justice." MCR 2.613(A). On the basis of a review of the entire record, we conclude that the isolated reference was fairly obvious hyperbole and functionally cumulative of the defense experts' uniform testimony that the Chrisman-Snook procedure was neither obsolete nor obscure. Therefore, its admission was harmless. *Detroit/Wayne Co*

Stadium Auth v Drinkwater, *Taylor & Merrill, Inc*, 267 Mich App 625, 652; 705 NW2d 549 (2005).

Affirmed.

WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ., concurred.

DUNN v BENNETT

Docket No. 311357. Submitted November 13, 2013, at Detroit. Decided November 26, 2013. Approved for publication January 28, 2014, at 9:10 a.m.

Stephen J. Dunn brought an action against Timothy M. Bennett in the Oakland Circuit Court, seeking to recover attorney fees that defendant owed plaintiff for attempting to remove a tax lien placed on defendant's property by the Internal Revenue Service (IRS). Defendant had signed a representation agreement in which he agreed to pay plaintiff an initial retainer of $3,000, an hourly fee of $275, and costs to represent him in the federal tax suit. After more than two years of litigation, the suit was settled by selling defendant's property, with the IRS collecting approximately $25,000 of the proceeds and defendant receiving just over $40,000. During the course of the litigation, defendant had paid plaintiff around $20,000, but he refused to pay the remaining balance of more than $116,000. Plaintiff moved for summary disposition. Defendant also moved for summary disposition, asserting in an affidavit that he proceeded with the litigation and made periodic payments to plaintiff on the basis of plaintiff's alleged statements that plaintiff could get the IRS to refund defendant's legal fees and costs, that he would continue with the case on a contingency-fee basis, and that he would waive his fees if he could get the IRS to remove the lien. The court, Martha D. Anderson, J., granted summary disposition for plaintiff with regard to his claims for breach of contract and account stated, and granted summary disposition for defendant with regard to plaintiff's conversion claim. Defendant appealed, and plaintiff cross-appealed.

The Court of Appeals *held*:

1. The trial court properly granted summary disposition to plaintiff on his claim for account stated because there was no genuine issue of material fact regarding the existence of mutual assent to the debt at issue. It was undisputed that defendant signed an agreement to engage plaintiff's services for a fee, that defendant never objected to the bills he received, and that defendant sent plaintiff payments. Defendant's affidavit, even viewed in the light most favorable to him,

did not describe circumstances that would have excused his failure to object to plaintiff's repeated billings.

2. The trial court properly granted summary disposition to plaintiff with regard to the breach-of-contract claim. Defendant conceded that he signed a written agreement to engage plaintiff's services for a fee, and his contention that plaintiff was not a party to the arrangement was unsupported. Defendant waived the argument that the parties orally modified the arrangement by failing to raise it as an affirmative defense and, even if the argument had not been waived, it would have been without merit in light of the contractual clause requiring modifications to be in writing and the lack of admissible evidence that the alleged modifications were mutual.

3. The trial court properly granted summary disposition to defendant with regard to the conversion claim because there was no recovery to which an attorney's charging lien could have attached.

Affirmed.

Dunn Counsel PLC (by *Stephen J. Dunn*) for Stephen J. Dunn.

Hemming, Polaczyk, Cronin, Witthoff & Bennett, PC (by *Kevin L. Bennett*), for Timothy M. Bennett.

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM. In this action seeking payment of attorney fees, defendant, Timothy Bennett, appeals as of right the trial court's order granting summary disposition to plaintiff, attorney Stephen Dunn, on his claims for breach of contract and account stated. Plaintiff has filed a cross-appeal, challenging the trial court's entry of summary disposition in defendant's favor on plaintiff's conversion claim.[1] For the reasons set forth in this opinion, we affirm.

[1] Contrary to plaintiff's arguments, defendant's various briefs on appeal were timely filed as required by MCR 7.212(A)(1)(a)(iii) and MCR 7.212(A)(2)(a)(ii).

This appeal arises from defendant's engaging the services of plaintiff to represent him in actions that were brought against defendant by the Internal Revenue Service (IRS). Defendant had purchased a home from his father and had allegedly leased the property to his mother. The IRS asserted that defendant's mother had transferred her interest in the property without receiving consideration in order to avoid a federal tax lien. Thus, the IRS sent a "Notice of Tax Lien," listing defendant as a "nominee or transferee" of his mother. Defendant believed the lien to be improper and, with the aid of his brother, attorney Kevin Bennett, sought legal advice from plaintiff, a tax attorney with 26 years of practice experience. On March 27, 2009, plaintiff signed and returned a letter entitled "Re: Engagement Agreement Concerning Legal Representation." The engagement agreement confirmed that defendant had retained plaintiff's firm, Demorest Law Firm, PLLC (Demorest), to represent him concerning the lien placed by the IRS. The agreement specified the applicable rate, stating that Demorest charged an hourly rate of $275 for plaintiff's services, plus costs. The engagement agreement called for an initial retainer of $3,000, which was to be replenished as requested to pay fees and costs. Further, the agreement specified: "This Engagement Agreement sets forth the entire agreement between us. This Engagement Agreement may be modified only by a writing executed by you and the Demorest Law Firm, PLLC."

Plaintiff represented defendant for more than two years in a federal suit to remove a federal tax lien, ultimately reaching a settlement under which the property was sold. In keeping with the settlement agreement, the Internal Revenue Service collected $25,110.77 from the proceeds of the sale and defendant received $40,110.77. During the course of the litigation,

defendant paid approximately $20,000 for plaintiff's legal services, but refused payment of the remaining balance, $116,361.21. Plaintiff filed suit against defendant, alleging claims of (1) conversion, (2) account stated, and (3) breach of contract. The trial court granted summary disposition to plaintiff as to breach of contract and account stated, but granted defendant's motion for summary disposition as to conversion. This appeal then ensued.

"Appellate review of a motion for summary disposition is de novo." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) questions the factual support for the plaintiff's claim and should be granted, as a matter of law, if no genuine issue of any material fact exists to warrant a trial.[2] *Id*. In considering a motion under MCR 2.116(C)(10), the Court considers the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); MCR 2.116(G)(5).

Turning first to plaintiff's account-stated claim, we conclude that no material question of fact exists and that the trial court did not err by granting summary disposition. An "account stated" refers to a "contract based on assent to an agreed balance," which, like all contracts, must be created through mutual assent. *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 557; 837 NW2d 244 (2013) (citation and

[2] The trial court also considered plaintiff's conversion claim under MCR 2.116(C)(8); however, because the court reviewed the entire record, not simply the pleadings, we limit our review to its disposition under MCR 2.116(C)(10). See *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

quotation marks omitted). "[P]arties *assent* to a sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts." *White v Campbell*, 25 Mich 463, 468 (1872). An express contract arises when the parties expressly agree to the sum due. *Fisher Sand & Gravel Co*, 494 Mich at 558. A party's acceptance may also be inferred when the party makes payments on the amount due or receives an accounting and fails to object within a reasonable time. *Corey v Jaroch*, 229 Mich 313, 315; 200 NW 957 (1924); *Pabst Brewing Co v Lueders*, 107 Mich 41, 48; 64 NW 872 (1895); *White*, 25 Mich at 469; *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002).

In this case, plaintiff submitted documentary evidence establishing that he represented defendant for more than two years, during which time he sent defendant 33 statements detailing current monthly charges and a cumulative balance. The last statement, dated September 24, 2011, showed an amount due of $116,361.21. Plaintiff avers in an affidavit that defendant "never once objected to my statements" and in fact made payments on his account during the course of plaintiff's representation. He accompanies his affidavit of account with copies of the billing statements he sent to defendant, showing new charges, cumulative balances, and payments received from defendant. Nevertheless, defendant maintains that a genuine issue of material fact exists regarding the question of mutual assent to the debt. To support his claim, he makes the following averments in his affidavit:

> 13. . . . I sought legal advice and possible representation. I, and my brother Kevin Bennett, consulted with [plaintiff] at [Demorest]. [Plaintiff] told me that I had a very good case . . . and that he could get the IRS to pay my

> legal fees and costs. I signed the "engagement letter," and [plaintiff] initiated litigation.
>
> 14. The litigation ensued, and the amounts stated on the legal billings were becoming excessive, and seemed to approach and/or exceed the one-half value of the . . . property. Because of [plaintiff's] representation that he would recover my legal fees and costs from the IRS, I believed that it was worthwhile to proceed with the litigation, and in good faith, I paid [Demorest] approximately . . . $20,000, mostly on credit cards.
>
> 15. I did not and would not have agreed to pay any attorney a legal fee that exceeded or even approached the one-half value of the . . . property. Again, I fully relied upon [plaintiff's] representation that he would get his fees and costs from the IRS and I would be refunded the payments I had already made to [Demorest].
>
> 16. After the deposition of my father Gary Bennett, I told [plaintiff] that I could not pay him any more money, and [plaintiff] responded by telling me that the case had become a contingency fee case, meaning that he would not get paid any addition[al] fees unless he recovered them from the IRS, as he had represented he would. I relied upon [plaintiff's] representation, and continued with the case.
>
> 17. Before the trial date, [plaintiff] told me that he would "waive his fees" if he could get the IRS to remove the lien . . . . I understood that to mean that he would not ask me to pay him anything in addition to what I had already paid to [Demorest].

Even viewing his affidavit in a light most favorable to defendant, as a general matter, defendant agrees with the basic facts underlying plaintiff's claim. First, defendant's affidavit does not dispute that plaintiff completed the work or that he incurred the expenses for which he sought payment from defendant. Second, defendant does not aver that he did not receive monthly billings. Third, defendant does not state in his affidavit that he offered timely objections

to the billings; in other words, he never claims to have told plaintiff that he did not owe the amounts reported. Lastly, defendant also fully admits in his affidavit that he made payments on the amounts due, in an amount approximating $20,000. In short, defendant has not contradicted the essential facts underlying plaintiff's account-stated claim.

Rather than submit documentary evidence contradicting the material elements of plaintiff's claim, the main thrust of defendant's argument appears to be that no objection was necessary under the circumstances that he describes in his affidavit. Defendant is correct that when silence forms the basis for inferring assent to a sum owed, the circumstances involved must support an inference of assent. *Thomasma v Carpenter*, 175 Mich 428, 436-437; 141 NW 559 (1913). But, even viewing his affidavit in a light most favorable to defendant, he has failed to describe circumstances that would excuse his failure to object to plaintiff's repeated billings. On the contrary, he admits to signing an agreement to engage plaintiff's services for a fee, he never objected to the bills received, and he actually sent payments to plaintiff. Moreover, even if the "circumstances" as he describes them could explain defendant's *silence*, mutual assent to an account stated may also be established by payments on the account. *Corey*, 229 Mich at 315; *Keywell & Rosenfeld*, 254 Mich App at 331. Under the circumstances presented, the reasonable inference from defendant's inaction and partial payment was that he assented to the amount due and, thus, an account stated was established. *White*, 25 Mich at 469; *Pabst Brewing Co*, 107 Mich at 48. Accordingly, because no genuine issue of material fact existed as to plaintiff's account-stated claim, the trial court did

not err by granting summary disposition.[3]

Regarding plaintiff's breach-of-contract claim, we also conclude that the trial court did not err in granting summary disposition. A party claiming a breach of contract must establish "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). The existence and interpretation of a contract are issues of law reviewed de novo. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). In this case, defendant concedes that he signed a written "Engagement Agreement" to retain plaintiff's then law firm, Demorest Law Firm, PLLC, as legal counsel relating to the tax lien issue. Plaintiff also signed the agreement. The agreement laid out the fee arrangement, calling for an hourly rate and explaining the retainer. In keeping with this written fee arrangement, plaintiff claims an outstanding balance of $116,361.21, asserting that defendant's failure to pay constitutes a breach of contract.

In response, defendant asserts first that the fee arrangement described in the engagement agreement

[3] Aside from the "circumstances" surrounding his arrangement with plaintiff, defendant expressly denies the existence of an account stated, averring that he "did not and would not have agreed to pay any attorney a legal fee that exceeded or even approached the one-half value of the . . . property." However, "[s]ummary disposition cannot be avoided by conclusory assertions that are at odds either with prior sworn testimony of a party or, as here, *actual historical conduct of a party*." *Aetna Cas & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993) (emphasis added). Thus, although defendant makes the conclusory assertion that he did not agree and would not have agreed to the amount billed, his assertion is belied by the signed engagement agreement, his past acquiescence to the bills, and his affirmative conduct in making payments.

does not apply because plaintiff was not a party to the arrangement. However, defendant's contention in this regard is insufficiently briefed and, thus, abandoned on appeal. *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). He claims that he and the law firm were the only parties to the agreement, but he does not explain why plaintiff—a signatory to the agreement and his principal attorney—was a nonparty; nor does he offer any citation to support this position. He also insists that because plaintiff left the Demorest firm for another firm, he cannot use the written agreement to establish a breach of contract claim.[4] Again, however, defendant fails to cite any authority for this proposition. " 'An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position.' " *Id*., quoting *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). Having failed to properly brief this argument, defendant has abandoned it, and we will not address it on appeal. *Id*.

In the alternative, defendant argues that even if the written agreement covers his relationship with plaintiff, the parties orally modified their arrangement. Defendant waived his claim of modification by failing to raise it as an affirmative defense and support it with facts in his responsive pleadings. MCR 2.111(F)(3); *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). Nevertheless, were we to consider defendant's argument, we would find it to be without

[4] Also, in making these arguments, he ignores entirely the "Assignment Agreement," which assigned collection rights for defendant's account to plaintiff's new firm.

merit. Relevant to this argument, the written agreement contained a clause requiring any modifications to be in writing. The provision stated: "This Engagement Agreement sets forth the entire agreement between us. This Engagement Agreement may be modified only by a writing executed by you and [Demorest]." Notwithstanding a written modification clause, parties are free to *mutually* waive or modify their contract. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364, 372; 666 NW2d 251 (2003). However, with or without a clause restricting amendment, a party may not unilaterally alter the original contract. *Id*. "The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Id*. at 373. The party advancing amendment has the burden of establishing mutual amendment. *Id*.

To show a mutual agreement to modify the express written terms, defendant does not present evidence of a written modification; he relies instead on the averments in his affidavit as detailed earlier, which can be characterized as containing three alleged amendments: (1) plaintiff's representation that legal fees and costs would be collected from the IRS; (2) plaintiff's statement that the case had become a "contingency fee case"; and (3) plaintiff's statement that he would "waive his fees." From Paragraph 13 of defendant's affidavit, it appears he asserts that plaintiff made the representations regarding payment by the IRS before or contemporaneously with the signing of the written agreement. Consequently, the parol evidence rule bars admission of this evidence to vary the unambiguous contract terms. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998).

Defendant's averments that plaintiff stated the case was a "contingency case" or that he would "waive his fees" come closer to providing some evidence of oral modification. However, viewing defendant's affidavit in a light most favorable to him, his assertions do not show clear and convincing evidence of *mutual* modification, that is, "*express* oral or written agreement." *Quality Prods & Concepts Co*, 469 Mich at 373 (emphasis added). Defendant describes one-sided proclamations by plaintiff, never suggesting that he vocalized his agreement with these statements or that they actually reached a *mutual* verbal agreement. See *id*. at 372; *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992) ("Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract."). Further, although a course of affirmative conduct coupled with oral representations can amount to waiver, in this case it is undisputed that defendant continued to accept plaintiff's services, that plaintiff billed defendant for his services in keeping with the written agreement, and that defendant made payments on those services. This in no way suggests an affirmative agreement to waive the written contract terms. See *Quality Prods & Concepts Co*, 469 Mich at 373. In the absence of evidence of *mutual* modification, there was no genuine issue of material fact and the trial court did not err by granting summary disposition on the breach-of-contract claim.

Finally, we conclude that the trial court properly granted summary disposition to defendant on the conversion claim and denied the same to plaintiff. "[C]onversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391;

486 NW2d 600 (1992). For instance, conversion may be committed by the refusal to surrender property on demand. *Citizens Ins Co of America v Delcamp Truck Ctr, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989). Money is treated as personal property, and an action may lie in conversion of money provided that "there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified." *Garras v Bekiares*, 315 Mich 141, 149; 23 NW2d 239 (1946) (citation and quotation marks omitted); see also *Citizens Ins Co of America*, 178 Mich App at 575.

In this case, plaintiff asserts that he had an attorney's charging lien on the funds defendant received from the proceeds of the sale and that defendant's refusal to surrender these funds constituted actionable conversion. As an initial matter, the issue thus appears to be whether plaintiff in fact had a charging lien on the funds in question. "Michigan recognizes a common law attorney's lien on a judgment or fund resulting from the attorney's services." *Miller v Detroit Auto Inter-Ins Exch*, 139 Mich App 565, 568; 362 NW2d 837 (1984). A "charging lien" is "an equitable right to have the fees and costs due for services secured out of the judgment or *recovery* in a particular suit." *George v Sandor M Gelman, PC*, 201 Mich App 474, 476; 506 NW2d 583 (1993) (emphasis added). We do not view this as a "recovery" to which a charging lien may be attached. See *id.*; 93 ALR 667, 687, § 3. Without a charging lien, plaintiff had no legal interest in the funds and cannot sustain a conversion claim. See generally *Garras*, 315 Mich at 148; *Citizens Ins Co of America*, 178 Mich App at 575. Consequently, the trial court did not err by granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition.

Affirmed. Neither party having prevailed in full, we do not assign costs. MCR 7.219.

FORT HOOD, P.J., and SAAD and BORRELLO, 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 November 20, 2013:

FURR v MCLEOD, Docket No. 310652. The Court orders that a special panel will be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208; 840 NW2d 730 (2013).

The court further orders that the opinion in this case released on October 24, 2013, is vacated in its entirety. MCR 7.215(J)(5).

Appellants may file a supplemental brief within 21 days of the Clerk's certification of this order. Appellees may file a supplemental brief within 21 days of the service of appellants' brief.

GLEICHER, J., did not participate.

FURR v MCLEOD

Docket No. 310652. Released October 24, 2013, at 9:15 a.m. Vacated November 20, 2013.

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

WHITBECK, P.J. Defendants, Michael McLeod, M.D., Tara B. Mancl, M.D., Michigan State University Kalamazoo Center for Medical Studies, Inc., and Borgess Medical Center (the healthcare providers) appeal as on leave granted the trial court's denial of their motion for summary disposition under MCR 2.116(C)(7). The healthcare providers moved for summary disposition on the basis that plaintiffs, Susan and William Furr, commenced their suit before the end of the 182-day notice waiting period mandated by MCL 600.2912b(1). The trial court denied the healthcare providers' motion on the basis that this Court's decision in *Zwiers v Growney*[1] determined the outcome of this case. We conclude that this Court's decision in *Tyra v Organ Procurement Agency of Mich*,[2] which determined that this Court's decision in *Zwiers* remains good law and that a plaintiff may amend his or her prematurely filed complaint, controls our decision in this case. Therefore, we must affirm the trial court's decision.

However, we believe that *Tyra* was wrongly decided in that it fails to comport with relevant Supreme Court precedent. We therefore affirm only because MCR 7.215(J) obligates us to do so, and but for the *Tyra*

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[1] *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009).

[2] *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 840 NW2d 730 (2013).

decision, we would reverse and remand. As is appropriate under such circumstances, we therefore call for the convening of a conflict resolution panel pursuant to MCR 7.215(3).

I. FACTS

A. BACKGROUND FACTS

According to the Furr's complaint, Susan Furr suffered from Graves' disease, an autoimmune condition that affects a person's thyroid gland. After other treatments failed to adequately treat the condition, Furr's doctors recommended a total thyroidectomy. While undergoing the thyroidectomy procedure at Borgess Medical Center on April 4, 2008, Furr's left recurrent laryngeal nerve was transected. The healthcare providers reconnected the nerve during the surgery, but Furr experienced respiratory problems. On April 5, 2008, an otolaryngologist performed a laryngoscopy on Furr and discovered that she had "bilateral true vocal cord paralysis." Furr continued to suffer from respiratory problems.

B. PROCEDURAL HISTORY

The Furrs served the healthcare providers with a notice of intent to sue in April 2010. Though the notice of intent is dated April 1, 2010, the Furrs concede on appeal that the notice of intent was not actually mailed until April 4, 2010.

On September 30, 2010, the Furrs filed their complaint for medical malpractice. In November 2010, the healthcare providers filed a motion for summary disposition, contending that the Furrs had filed their complaint before the end of the notice waiting period in MCL 600.2912b(1) and, therefore, the statutory limitations period was not tolled and now barred their complaint. The Furrs responded that under this Court's holding in *Zwiers*,[3] the trial court could invoke MCL 600.2301 to ignore the defect, as long as doing so did not prejudice a substantial right of a party.

The trial court denied the healthcare providers' motion for summary disposition on the basis that *Zwiers* applied to this case. The trial court found that settlement negotiations were not ongoing when the Furrs filed their complaint and that the healthcare providers would not be prejudiced if the trial court allowed them to do so. It also found that it was not in the interests of justice to deny the Furrs their day in court. Therefore, the trial court believed that it could amend the Furrs' pleading under MCL 600.2301 to correct the Furrs' mistaken filing.

The healthcare providers appealed. After the trial court made its decision, the Michigan Supreme Court, in *Driver v Naini*, clarified the

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[3] *Zwiers*, 286 Mich App at 52-53.

continued role of *Burton v Reed City Hosp Corp*[4] in medical malpractice disputes.[5] In lieu of granting leave to appeal in this case, this Court remanded for the trial court to reconsider the healthcare providers' motion in light of the Michigan Supreme Court's decisions in *Burton* and *Driver*.

On remand, the trial court requested additional briefing from the parties, but concluded that both *Driver* and *Burton* were distinguishable. It instead applied *Zwiers* and determined that the interests of justice required it to either amend the filing date or disregard the Furrs' mistake. The trial court determined in the alternative that the healthcare providers were not entitled to summary disposition because they did not respond to the Furrs' notice of intent within 154 days, as MCL 600.2912b(7) requires. The trial court again denied the healthcare providers' motion for summary disposition.

This Court granted the healthcare providers' application for leave to appeal.[6]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition.[7] Summary disposition is proper under MCR 2.116(C)(7) when the claim is barred because of the statute of limitations. This Court also reviews de novo questions of statutory interpretation.[8]

When interpreting a statute, this Court's primary goal is to "discern the intent of the Legislature by first examining the plain language of the statute."[9] This Court reads statutory provisions in context, and gives a statute's words their plain and ordinary meanings.[10] We do not engage in judicial construction of unambiguous statues.[11]

III. LEGAL STANDARDS FOR TOLLING THE STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE ACTIONS

A. STATUTORY BACKGROUND

The limitations period for a claim of medical malpractice is two years.[12] MCL 600.2912b(1) provides that, subject to exceptions that do

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[4] *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005).

[5] *Driver v Naini*, 490 Mich 239, 257; 802 NW2d 311 (2011).

[6] *Furr v McLeod*, unpublished order of the Court of Appeals, entered June 22, 2012 (Docket No. 310652).

[7] *Driver*, 490 Mich at 246.

[8] *Id*.

[9] *Id.* at 246-247.

[10] *Id*. at 247.

[11] *Id*.

[12] MCL 600.5805(6).

not apply in this case, "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." The proper filing of a notice of intent tolls the statutory limitations period for 182 days.[13]

B. *BURTON v REED CITY HOSP CORP*

In *Burton*, the Michigan Supreme Court held that if a plaintiff files his or her complaint before the notice waiting period expires, MCL 600.2912b does not toll the limitations period.[14] It reasoned that the language of MCL 600.2912b(1)—with its use of the phrase "shall not"—is mandatory, and that MCL 600.5856(d) only tolled the limitations period if the plaintiff's notice complied with MCL 600.2912b.[15]

In *Burton*, the plaintiff had filed his medical malpractice complaint 115 days after providing his notice of the intent to the defendants.[16] Because the plaintiff did not comply with the mandatory language of MCL 600.2912b, the Michigan Supreme Court concluded that this Court erred by reversing the trial court's grant of summary disposition.[17]

C. *BUSH v SHABAHANG*

In *Bush v Shabahang*, the Michigan Supreme Court held that MCL 600.5856 allowed a defective notice of intent to toll the statutory limitations period if the notice of intent was timely.[18] The Court recognized that it had previously held that a defect in the notice of intent precluded tolling the statutory limitations period during the 182-day waiting period of MCL 600.5856(d), the predecessor of MCL 600.5856(c).[19] However, the Court recognized that the Legislature had amended the statutory language of MCL 600.5856(d).[20] It concluded that the language of MCL 600.5856(c)—the new, equivalent section—did not mandate strict compliance with the entirety of MCL 600.2912b, but instead mandated only "compliance with the applicable notice period."[21]

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[13] MCL 600.5856(c); *Driver*, 490 Mich at 249.

[14] *Burton*, 471 Mich at 747.

[15] *Id*. at 751-752. 2004 PA 87 modified MCL 600.5856; the pertinent provision is now MCL 600.5856(c).

[16] *Burton*, 471 Mich at 748.

[17] *Id*. at 750, 754.

[18] *Bush v Shabahang*, 484 Mich 156, 161; 772 NW2d 272 (2009).

[19] *Id*. at 165.

[20] *Id*. at 166.

[21] *Id*. at 170 (quotation marks omitted).

The Court then determined that MCL 600.2301, which allows the trial court to amend any process, pleading, or proceeding for the furtherance of justice, provided a mechanism by which the trial court could cure a defect in a notice of intent.[22] Reasoning that the plaintiff's service of a notice of intent is "clearly part of a medical malpractice 'process' or 'proceeding[,]' " the Court held that a trial court could use MCL 600.2301 to cure its defects as long as amending the pleading was in the furtherance of justice.[23]

In *Bush*, the plaintiff had filed his medical malpractice complaint 175 days after serving his notice of intent on the defendants.[24] The trial court denied the defendants' motion for summary disposition on the basis that they had failed to make a good-faith attempt to respond to the plaintiff's notice of intent and, therefore, the 154-day waiting period applied instead of the 182-day period.[25] However, the plaintiff's notice of intent did not comply with MCL 600.2912b because it had inadequately stated the standard of care.[26]

Applying its reasoning to the facts of the case in *Bush*, the Court remanded to allow the plaintiff to correct the errors or defects in its notice as long as those corrections were in the interest of justice.[27] It determined that the plaintiff had made a good-faith attempt to comply with MCL 600.2912b(4)'s requirement that the plaintiff notify the defendant of the manner in which it had violated the standard of care.[28] The Court also determined that the plaintiff timely filed their complaint after the 154-day waiting period.[29]

D. *ZWIERS v GROWNEY*

Shortly after the Michigan Supreme Court's decision in *Bush*, a panel of this Court held in *Zwiers* that, under MCL 600.2301 and *Bush*, the trial court could amend a complaint that was filed one day early.[30] This Court reasoned that MCL 600.2301 applies to the entire notice-of-intent process, and that the premature filing of the complaint constituted an error or defect in the proceedings.[31]

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[22] *Id*. at 176.

[23] *Bush*, 484 Mich at 176-177.

[24] *Id*. at 162.

[25] *Id*. at 163.

[26] *Id*. at 179.

[27] *Id*. at 184-185.

[28] *Id*. at 178.

[29] *Id*. at 185.

[30] *Zwiers*, 286 Mich App at 39-40.

[31] *Id*. at 50.

In *Zwiers*, the plaintiff filed her complaint one day before the end of the applicable 182-day waiting period.[32] Applying *Bush*, this Court reasoned that the trial court could modify the plaintiff's complaint without prejudicing the defendants or implicating their substantial rights.[33] This Court also reasoned that the interests of justice favored the plaintiff because she had made a good-faith attempt to comply with the medical malpractice process.[34] This Court determined that depriving the plaintiff of her day in court would be an injustice.[35]

E. *DRIVER v NAINI*

After this Court's decision in *Zwiers*, the Michigan Supreme Court in *Driver* held that the plaintiff could not amend an original notice of intent to add a nonparty defendant and have the amendment relate back to the original notice for purposes of the statute of limitations.[36] The Michigan Supreme Court reasoned in part that *Bush* was not applicable to the facts in the case before it.[37] The Court reasoned that *Bush* applied when a plaintiff "fails to meet all of the *content* requirements under MCL 600.2912b(4)[.]"[38] The Court emphasized that *Bush* only applies in cases where a defendant received a timely, but defective, notice of intent.[39] The Court also reasoned that MCL 600.2301 "only applies to actions or proceedings that are *pending*[,]" but an action cannot be pending when the plaintiff's "claim was already time-barred when he sent the [notice of intent]."[40]

In *Driver*, the plaintiff had filed a timely notice of intent against Naini, had complied with the notice waiting period, and had filed a timely complaint against him.[41] Naini subsequently notified the plaintiff that a nonparty might have been at fault for the plaintiff's injury.[42] The trial court granted the plaintiff's motion to amend his notice of intent to include the nonparty; however, the plaintiff failed to comply with the necessary waiting period to add the new defendant to his existing medical malpractice action.[43] Therefore, the statute of limitations barred the

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[32] *Id*. at 39.

[33] *Id*. at 50-51.

[34] *Id*. at 51.

[35] *Id*. at 52.

[36] *Driver*, 490 Mich at 243.

[37] *Id*. at 253.

[38] *Id*. at 252.

[39] *Id*. at 253.

[40] *Id*. at 254.

[41] *Id*. at 243-244.

[42] *Id*. at 244.

[43] *Id*.

plaintiff's complaint against the nonparty.[44]

IV. APPLYING THE STANDARDS

Clearly, the precedent concerning this issue is both complicated and specific. This case raises two major questions: (1) whether the Michigan Supreme Court's opinion in *Driver* overruled this Court's decision in *Zwiers*, and (2) if not, whether *Zwiers* allowed the trial court in this case to amend the Furrs' complaint. This Court's recent decision in *Tyra*[45] answers the first question in the negative, and the second question in the affirmative. MCR 7.215(J) requires us to follow that decision. Therefore, we must affirm, though for reasons that we will explain, but for the *Tyra* decision we would reach a different result.

A. *TYRA v ORGAN PROCUREMENT AGENCY OF MICH*

1. THE *TYRA* PANEL'S DECISION

In *Tyra*, the panel was primarily concerned with whether the defendants' responsive pleadings adequately asserted the affirmative defense that the plaintiffs did not comply with the notice waiting period in MCL 600.2912b.[46] The panel concluded that the defendants did not provide an adequate factual statement to support their defense that the plaintiff's suit was untimely and, therefore, waived that defense.[47]

The panel also considered whether the trial court could permit the plaintiff to amend her complaint on the basis of *Zwiers* and MCL 600.2301.[48] The panel considered the holdings of *Burton* and *Bush*, and concluded that the Michigan Supreme Court had not overturned its decision in *Burton*.[49] Specifically, the panel considered the *Zwiers* court's reliance on *Bush*.[50] The panel also considered the effect of *Driver* on this Court's holding in *Zwiers*.[51]

The *Tyra* panel determined that, though the application of *Zwiers* to the plaintiff's case was unclear, *Zwiers* and MCL 600.2301 might permit the plaintiff to amend her prematurely filed complaint.[52] Therefore, the

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[44] *Id*. at 265.

[45] *Tyra*, 302 Mich App 208.

[46] *Id*. at 211-214.

[47] *Id*. at 214.

[48] *Id*. at 223.

[49] *Id*. at 219-223.

[50] *Id*.

[51] *Id*. at 223-224.

[52] *Id*. at 225.

panel remanded for the trial court to "exercise its discretion by either granting or denying [the plaintiff's] amendment pursuant to MCL 600.2301 and *Zwiers*."[53]

2. *TYRA*'S EFFECT ON THIS CASE

We conclude that the first holding in *Tyra* has no effect on the result of this case. In this case, the healthcare providers' answer to the plaintiffs' complaint indicated that the Furrs had "failed to wait 182 days after serving their Notice of Intent before filing suit in contravention of MCL 600.2912b." Thus, the healthcare providers provided the factual basis that supported their affirmative defense.

However, the *Tyra* panel's second holding does control the outcome of this case. According to *Tyra*, *Zwiers* remains good law even after the Michigan Supreme Court's decision in *Driver*. If *Zwiers* remains good law, then *Zwiers* controls the outcome of this case. In *Zwiers*, the plaintiff had filed her complaint one day before the end of the applicable 182-day waiting period.[54] Also, settlement discussions were not ongoing and the plaintiff had made a good-faith attempt to comply with the notice waiting period.[55] Therefore, this Court reasoned that the trial court could modify the plaintiff's notice of intent without prejudicing the defendants or implicating their substantial rights.[56]

Similarly, here, the Furrs filed their complaint one day before the end of the applicable 182-day notice waiting period. The trial court found that the parties were not engaged in settlement discussions and that the Furrs' mistaken filing did not prejudice the healthcare providers. Therefore, if *Tyra* is correct, the trial court properly applied *Zwiers* in this case because *Zwiers* remains good law.

B. *TYRA* IS INCORRECT

For the reasons stated below, we do not agree with the *Tyra* panel's decision that *Zwiers* remains good law after the Michigan Supreme Court's decision in *Driver*. But for *Tyra*, we would conclude that a trial court may not use *Zwiers* and MCL 600.2301 to correct a plaintiff's prematurely filed complaint.

1. RECONCILING THE PRECEDENTS PRIOR TO *TYRA*

Though the precedent concerning MCL 600.2912b and the tolling of the statutory limitations period in medical malpractice actions is complicated, we will attempt to synthesize it in a cogent fashion. A plaintiff's

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[53] *Id*. at 227.

[54] *Zwiers*, 286 Mich App at 39.

[55] *Id*. at 51.

[56] *Id*. at 50-51.

medical malpractice claim accrues when the medical malpractice occurs.[57] Subject to a discovery-rule exception that does not apply in this case, the statutory limitations period for medical malpractice is two years after the action accrued.[58]

A potential plaintiff must notify a potential defendant of his or her intent to sue them before commencing a medical malpractice action.[59] "This requirement is mandatory[.]"[60] Typically, the plaintiff must then wait 182 days before filing a complaint.[61] But if the defendant does not respond to the notice, or the defendant does not respond in good faith, then the plaintiff need only wait 154 days before filing a complaint.[62] Once the claimant gives the defendant his or her notice of intent, the statutory limitations period is tolled for 182 days.[63]

To effectively toll the limitations period, the plaintiff must comply with MCL 600.2912b.[64] MCL 600.5856(c) does not mandate that the plaintiff's notice strictly comply with the entirety of MCL 600.2912b.[65] The trial court may allow a plaintiff to amend his or her notice of intent under MCL 600.2301 if (1) the error does not implicate a substantial right of a party, and (2) it would be in the interests of justice to correct the error.[66] But a plaintiff may only invoke MCL 600.2301 to correct a defective *content* requirement in the notice of intent.[67] If the plaintiff files the complaint before the statutory notice period in MCL 600.2912b expires, MCL 600.5856(c) does not toll the limitations period.[68]

2. *DRIVER* OVERRULED *ZWIERS*

In our view, the Michigan Supreme Court's decision in *Driver* overruled this Court's decision in *Zwiers*. A judicial decision is overruled if

> a later decision, rendered by the same court or by a superior court in the same system, expresses a judgment upon the same question

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[57] MCL 600.5838a(1); *Driver*, 490 Mich at 249.

[58] MCL 600.5805(6); *Burton*, 471 Mich at 748.

[59] MCL 600.2912b(1); *Driver*, 490 Mich at 247.

[60] *Driver*, 490 Mich at 247; see *Burton*, 471 Mich at 753-754.

[61] MCL 600.2912b(1); *Driver*, 490 Mich at 247.

[62] MCL 600.2912b(8); *Bush*, 484 Mich at 185.

[63] MCL 600.5856(c); *Driver*, 490 Mich at 249.

[64] MCL 600.5856(c); *Burton*, 471 Mich at 747.

[65] *Bush*, 484 Mich at 170.

[66] *Id*. at 177.

[67] *Driver*, 490 Mich at 252.

[68] *Burton*, 471 Mich at 747; *Driver*, 490 Mich at 256-257.

> of law directly opposite to that which was before given, thereby depriving the earlier opinion of all authority as a precedent.[69]

Zwiers and *Driver* both addressed the same point of law: whether a party must strictly comply with the notice waiting period in MCL 600.2912b in order to toll the period of limitations. In *Zwiers*, this Court indicated its belief that the Michigan Supreme Court's decision in *Bush* no longer mandated the trial court to dismiss an action that did not strictly comply with MCL 600.2912b(1)'s notice-waiting-period requirement because the trial court could save the plaintiff's complaint by applying MCL 600.2301.[70] It is clear that this Court believed that the Michigan Supreme Court's unequivocal holding in *Burton* was no longer controlling law.[71]

Subsequently, and to the contrary, the Michigan Supreme Court in *Driver* held that

> a plaintiff cannot commence an action that tolls the statute of limitations against a particular defendant until the plaintiff complies with the notice-waiting-period requirements of MCL 600.2912b.
>
> Nothing in *Bush* altered [the] holding in *Burton*. . . . [T]he focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b.[72]

Therefore, but for *Tyra*, we would conclude that the trial court erred when it relied on *Zwiers* to determine that it could amend the plaintiff's complaint under MCL 600.2301. After the Michigan Supreme Court's decision in *Driver* reached the opposite result on this point of law, this Court's holding in *Zwiers* was no longer controlling law.

In this case, relying on *Zwiers*, the Furrs contend that if they were required to wait 182 days to file their complaint, they filed their complaint only one day early, and the trial court could use MCL 600.2301 to correct their mistake. The healthcare providers contend that the Furrs instead filed their complaint five days early.

The parties agree that the Furrs filed their complaint prematurely, although they disagree about the exact timing. If MCL 600.2912b(1) required the Furrs to wait 182 days to file their complaint, then (1) the trial court cannot use MCL 600.2301 to correct their mistake, (2) MCL 600.5856(c) did not operate to toll the statutory limitations period in this case, and (3) the trial court must dismiss their case. But for *Tyra*, we would conclude that the trial court must grant the healthcare providers' motion for summary disposition.

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[69] *Sumner v General Motors Corp (On Remand)*, 245 Mich App 653, 664; 633 NW2d 1 (2001), quoting Black's Law Dictionary (6th ed), p 1104.

[70] *Zwiers*, 286 Mich App at 46-47.

[71] See *id*. at 46, 52-53.

[72] *Driver*, 490 Mich at 257-258.

3. APPLICATION OF MCL 600.2912b(9)

The Furrs also contend that the trial court correctly determined that, in the alternative, they only needed to wait 154 days to file their suit because, under MCL 600.2912b(9), the healthcare providers' response to their notice of intent indicated that they did not intend to settle the claim. We disagree.

At the outset, we note that this issue is unpreserved. An issue is preserved if it was raised before, addressed, or decided by the trial court.[73] The Furrs did not raise the application of MCL 600.2912b(9) before the trial court, and the trial court's alternative holding applied only MCL 600.2912b(8). Therefore, we will review this issue for plain error affecting the Furrs' substantial rights.[74] An error is plain if it is clear or obvious.[75]

We conclude that the trial court did not plainly err by failing to apply MCL 600.2912b(9) to the facts of this case. MCL 600.2912b(9) provides that a plaintiff may file his or her complaint immediately if a defendant indicates that it does not intend to settle the claim:

> If at any time during the applicable notice period under this section a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health professional or health facility, so long as the claim is not barred by the statute of limitations.

A defendant's response to a plaintiff's notice of intent must contain (1) the factual basis for the defense to the claim, (2) a statement of the applicable standard of care and whether the defendant complied with it, (3) the manner in which the defendant complied with the standard of care, and (4) the manner in which any negligence was not the proximate cause of the plaintiff's injury.[76]

In this case, the healthcare providers' response to the Furrs' notice of intent included those requirements, a statement of "general reservations of defenses," and a postscript from the health providers' attorney that provided the following:

> If necessary, please serve any summons and complaint which you may file on me instead of Dr. McLeod or Dr. Mancl. I will

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[73] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

[74] *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

[75] *Id*. at 286.

[76] MCL 600.2912b(7); *Bush*, 484 Mich at 181.

> accept service for both of them as well as for MSU-KCMS and Borgess. Thank you for your courtesy in that regard.

The Furrs contend that the healthcare providers' additional statements indicate that they did not intend to settle the claim. In our view, a list of intended or proposed defenses may give the plaintiff an idea of the strength of the defendants' claims and assist them in preparing for settlement negotiations. And the healthcare providers' postscript appears to be nothing more than a polite informational statement concerning on whom the plaintiffs should serve a summons and complaint, if necessary.

Further, MCL 600.2912b(9) applies if

> a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility does not intend to settle the claim within the applicable notice period . . . .

The primary definition of "to inform," when used as a transitive verb—as it is in MCL 600.2912b—is to "give or impart knowledge of a fact or circumstance."[77] Here, at best, the healthcare providers' additional statements were *implications* that they did not intend to settle the Furrs' claims. Were we to conclude that MCL 600.2192b applies whenever a plaintiff may *imply* a defendant's intent not to settle a claim, it would undermine the Legislature's choice of the word "inform." We conclude that nothing about the healthcare providers' response informed the Furrs that the healthcare providers did not intend to settle the claim. Therefore, the trial court did not plainly err by failing to apply MCL 600.2912b(9).

4. DISMISSAL SHOULD BE WITHOUT PREJUDICE

The healthcare providers contend that if summary disposition was appropriate, this Court should remand for the trial court to dismiss the Furrs' complaint with prejudice because the statute of limitations now bars their claim. We disagree.

The healthcare providers do not explain why they believe that this case should be dismissed with prejudice. The general rule is that when a plaintiff fails to comply with MCL 600.2912b, the trial court should dismiss the case without prejudice.[78] The trial court may grant the defendants' motion for summary disposition if the plaintiffs refile the complaint after the limitations period has run.[79] But for the fact that

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[77] *Random House Webster's College Dictionary* (1991).

[78] *Ellout v Detroit Med Ctr*, 285 Mich App 695, 698; 777 NW2d 199 (2009).

[79] *Id*. at 699 n 2.

Tyra requires us to affirm, we would conclude that the trial court should dismiss the Furrs' complaint without prejudice.

C. APPLICATION OF MCL 600.2912b(8)

The healthcare providers contend that the trial court's alternative holding, that the plaintiffs were able to file their suit after a 154-day waiting period because the healthcare providers did not timely respond to their notice, was erroneous. We agree.

If a healthcare professional does not respond to the plaintiff's notice of intent within 154 days, a claimant may commence his or her action after the expiration of the 154-day period.[80] The 154-day response period begins when the healthcare professional receives the notice of intent.[81] When counting days, we count as the first day the day after the act, event, or default that triggered the time period.[82] And if the last day of a period is a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.[83]

In this case, the healthcare providers received the notice of intent on April 5, 2010, making April 6, 2010, the first day of the 154-day period. The 154th day was Monday, September 6, 2010, which was Labor Day—a legal holiday. Therefore, the last day of the 154-day period was Tuesday, September 7, 2010. The healthcare providers sent their response to the Furrs' notice of intent by facsimile on September 7, 2010. Because the healthcare providers responded within 154 days of receiving the Furrs' notice of intent, their response was timely.

As mentioned above, the healthcare providers' response also complied with the requirements of MCL 600.2912b(7). The trial court may find that a defendant's response to a plaintiff's notice of intent was not timely if it lacked good faith.[84] Under such circumstances, the 154-day waiting period applies.[85] But here, the trial court made no such finding. We conclude that the trial court erred when it determined that the 154-day waiting period applied because the healthcare providers did not timely respond to the Furrs' notice of intent.

V. CONCLUSION

Because we conclude that the Michigan Supreme Court's opinion in *Driver* overruled this Court's interpretation of the effects of *Bush* in *Zwiers*, we believe that *Tyra v Organ Procurement Agency of Michigan* was incorrectly decided to the extent that it concluded that *Zwiers*

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[80] MCL 600.2921b(8).

[81] MCR 600.2912b(7).

[82] MCR 1.108(1).

[83] *Id*.

[84] *Bush*, 484 Mich at 163.

[85] *Id*.

continued to be valid law. We apply *Zwiers* only because MCR 7.215(J) obligates us to do so. Were we not so obligated, we would conclude that the trial court erroneously determined that, under *Zwiers*, it could amend the Furrs' notice of intent to be timely filed under MCL 600.2912b(1) because the Michigan Supreme Court's decisions in *Burton* and *Driver* preclude that result. Therefore, we invoke the conflict panel provisions of the Michigan Court Rules.[86]

We affirm. As the prevailing parties, the Furrs may tax costs under MCR 7.219.

OWENS, J. (*concurring*).

The majority opinion correctly recognizes that this case is controlled by *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 840 NW2d 730 (2013), which determined that *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), remained good law under *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), and that the trial court may amend a prematurely filed complaint. Accordingly, I concur in the majority's result that the trial court's decision must be affirmed. However, I do not agree that a conflict panel should be convened under MCR 7.215(J)(3), because I do not believe that *Tyra* was wrongly decided.

M. J. KELLY, J. (*concurring*).

I concur in the majority's view that this case is controlled by *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 840 NW2d 730 (2013), and, while I do not join the analysis of the majority, I concur in its result. Finally, I agree that a conflict panel should be convened under MCR 7.215(J)(3) for the purpose of resolving this conflict.

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[86] MCR 7.215(J)(3).